Preface

The primary purpose of this E-Learning course is to explain the General Agreement on Trade in Services to government officials with little or no prior knowledge of the agreement. However, with the detailed treatment of some subjects, such as the scheduling of specific commitments, certain modules may also serve as a more advanced training tool for practitioners already working on various service sectors. The modules have been drafted and edited by Aik Hoe Lim with sector and mode-specific inputs from members of the Trade in Services Division (Rudolf Adlung, Peter Morrison, Lee Tuthill, Dale Honeck, Pierre Latrille, Mireille Cossy, Markus Jelitto, Juan Marchetti, Antonia Carzaniga, Martin Roy and Claudia Locatelli). Special thanks are also addressed to Elizabeth Baccouche, Ludwig Ureel and other colleagues in the E-Learning Unit, as well as Clémence Moreau, Harriet de Varreux and Elizabeth Debayle, for their assistance in preparing the manuscript.

Hamid Mamdouh
Director
Trade in Services Division
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<td>ACP</td>
<td>African, Caribbean and Pacific Countries. Group of countries with preferential trading relations with the European Union (EU) under the former Lomé Treaty now replaced by the Cotonou Agreement.</td>
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<td>ALADI</td>
<td>Latin American Integration Association.</td>
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<td>AMS</td>
<td>The AMS refers to an index that measures the monetary value of the extent of government support to a sector. The AMS, as defined in the WTO Agreement on Agriculture, includes both budgetary outlays as well as revenue transfers from consumers to producers as a result of policies that distort market prices.</td>
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<td>APEC</td>
<td>Asia-Pacific Economic Cooperation. APEC was established in 1989 to further enhance economic growth and prosperity for the region and to strengthen the Asia-Pacific community. APEC has 21 members - Australia; Brunei Darussalam; Canada; Chile; People's Republic of China; Hong Kong, China; Indonesia; Japan; Republic of Korea; Malaysia; Mexico; New Zealand; Papua New Guinea; Peru; The Republic of the Philippines; The Russian Federation; Singapore; Chinese Taipei; Thailand; United States of America; Viet Nam.</td>
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<td>ASEAN</td>
<td>Association of Southeast Asian Nations. The seven ASEAN members of the WTO — Brunei, Indonesia, Malaysia, Myanmar, the Philippines, Singapore and Thailand — often speak in the WTO as one group on general issues. The other ASEAN members are Laos and Vietnam.</td>
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<td>ATC</td>
<td>The WTO Agreement on Textiles and Clothing.</td>
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<td>BSE</td>
<td>Bovine Spongiform Encephalopathy, or &quot;Mad Cow Disease&quot;.</td>
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<td>CAP</td>
<td>Common Agricultural Policy — The EU's comprehensive system of production targets and marketing mechanisms designed to manage agricultural trade within the EU and with the rest of the world.</td>
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<td>CBD</td>
<td>Convention on Biological Diversity</td>
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<tr>
<td>CLMV</td>
<td>Cambodia, Laos, Myanmar (Burma) and Vietnam.</td>
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<td>CNUCED</td>
<td>Conférence des Nations Unies sur le Commerce et le Développement.</td>
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<td>COMESA</td>
<td>Council for Mutual Economic Assistance. Established in January 1949, it was dissolved in February 1991.</td>
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<td>COMESA</td>
<td>Common Market for Eastern and Southern Africa. The treaty establishing COMESA was signed at Kampala on 5 November 1993. It is the successor to the Preferential Trade Area for Eastern and Southern African States (PTA). Its members are Angola, Burundi, Comoros, Democratic Republic of Congo, Djibouti, Egypt, Eritrea, Ethiopia, Kenya, Lesotho, Madagascar, Malawi, Mauritius, Namibia, Rwanda, Seychelles, Sudan, Swaziland, Uganda, Zambia and Zimbabwe.</td>
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<tr>
<td>CTD</td>
<td>The WTO Committee on Trade and Development.</td>
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</table>
CTE  The WTO Committee on Trade and Environment.

CTG  Council for Trade in Goods.

DSB  The Dispute Settlement Body, i.e. the WTO General Council meeting to settle trade disputes.

DSU  Dispute Settlement Understanding. The Uruguay Round Understanding on Rules and Procedures Governing the Settlement of Disputes.

EAC  East African Cooperation. A mechanism within the Common Market for Eastern and Southern Africa established in 1996. It aims to promote faster trade and investment liberalization. Its longer-term objectives are the establishment of a customs union and an East African Federation. The three partners making up the EAC are Kenya, Tanzania and Uganda.

EC  European Communities. See EU.

ECDC  Economic Cooperation between Developing Countries. A mechanism operating mainly within the United Nations system of developing countries through cooperative activities.

ECLAC  Economic Commission for Latin America and the Caribbean. One of the United Nations regional economic commissions. It was established in 1948 as the Economic Commission for Latin America (ECLA) and given its current name in 1985.

ECOSOC  United Nations Economic and Social Council. Does not make rules. Its annual high-level sessions of WTO, IBRD and IMF heads are considered to be helpful in promoting coherence of economic policy between countries.

ECOWAS  Economic Community of West African States. Established in 1975. It consists of the members of the West African Economic Community (Benin, Burkina Faso, Côte d'Ivoire, Mali, Mauritania, Niger and Senegal), the members of the Mano River Union (Guinea, Liberia and Sierra Leone), and Cape Verde, The Gambia, Ghana, Guinea-Bissau, Nigeria and Togo.

EDI  Electronic Data Interchange. The transfer of data in a standardized electronic form between companies through the use of networks such as the internet.

EFTA  European Free Trade Association. Entered into force on 3 May 1960 through the Convention of Stockholm. Founding members were Austria, Denmark, Norway, Portugal, Sweden, Switzerland and the United Kingdom. Iceland joined in 1970. Finland became a full member in 1986 after having been an associate member. Denmark and the United Kingdom left on 31 December 1972 to join the European Economic Community. They were followed by Portugal in 1985 and Austria, Finland and Sweden on 1 January 1995. EFTA now comprises Iceland, Liechtenstein, Norway and Switzerland.

ESCAP  "The Economic and Social Commission for the Asia-Pacific. One of the United Nations regional economic commissions. It was established in 1947 as the Economic Commission for Asia and the Far East (ECAFE) and given its present name in 1974.

EU  European Union. "On 1 December 2009, the Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community (done at Lisbon, 13 December 2007) entered into force. On 29 November 2009, the WTO received a Verbal Note (WT/L/779) from the Council of the European Union and the Commission of the European Communities stating that, by virtue of the Treaty of Lisbon, as of 1 December 2009, the European Union replaces and succeeds the European Community."

FAO  Food and Agricultural Organization.

FDI  Foreign direct investment.
FTAA  Free Trade Area of the Americas. Also called Western Hemisphere Free Trade Agreement.

G15  A group originally of fifteen developing countries acting as the main political organ for the Non-Aligned Movement. It was established in 1990. Its members now are: Algeria, Argentina, Brazil, Chile, Colombia, Egypt, India, Indonesia, Iran, Jamaica, Kenya, Malaysia, Mexico, Nigeria, Peru, Senegal, Sri Lanka, Venezuela and Zimbabwe.

G24  Intergovernmental Group of Twenty-Four on International Monetary Affairs, established in 1971. Members are divided into three regions. Region I (Africa) is represented by Algeria, Côte d'Ivoire, Democratic Republic of Congo, Egypt, Ethiopia, Gabon, Ghana, Nigeria and South Africa. Region II (Latin America and the Caribbean) is represented by Argentina, Brazil, Colombia, Guatemala, Mexico, Peru, Trinidad and Tobago and Venezuela. Region III (Asia and developing countries of Europe) is represented by India, Iran, Lebanon, Pakistan, Philippines, Sri Lanka and Syrian Arab Republic.

G7  Group of seven leading industrial countries: Canada, France, Germany, Italy, Japan, United Kingdom, United States.

G77  Group of developing countries set up in 1964 at the end of the first UNCTAD (originally 77, but now more than 130 countries).

G8  G7 plus Russia.

GATS  General Agreement on Trade in Services.

GATT  General Agreement on Tariffs and Trade.

GATT 1947  General Agreement on Tariffs and Trade 1947.

GATT 1994  The new version of the General Agreement, incorporated into the WTO, which governs trade in goods.

GATT Plus  An expression implying imposition or acceptance of international trade disciplines more stringent than those prescribed by the GATT or extending the GATT rules to areas beyond trade in goods. One of the most ambitious examples of "GATT plus" was the proposal by the Atlantic Council of the United States that there should be a code of trade liberalization within the GATT framework with stronger rules for the conduct of trade relations between industrialized countries willing to accept them. According to its proponents, the benefits would have been extended to all GATT members according to the most-favoured-nation clause. The code would also have been open to new members willing to accept its obligations, but only code members would have been able to initiate tariff negotiations with another code member. The proposal did not find favour with GATT members as a whole.

GRULAC  The Group of Latin American and Caribbean Countries which operates informally within the WTO.

GSP  Generalized System of Preferences. First proposed at UNCTAD II in 1968. Entered into force in 1971. It gives developing countries a margin of preference in the tariff rates their goods face in the markets of developed countries and in this way increases their competitiveness. The massive tariff reductions since 1971 as a result of multilateral trade negotiations and unilateral actions, as well as changes in productivity, have reduced the importance of the GSP to many developing country exporters, but it remains an important plank in the trade policies of many developing countries. UNCTAD is the main forum for a discussion of GSP issues.

GSTP  Global System of Trade Preferences Among Developing Countries. It entered into force in 1989. Its aim is to promote the development of economic cooperation among developing
countries through the exchange of tariff preferences. Least developed countries do not have to offer reciprocal concessions. Non-tariff preferences may also be exchanged. Membership of the GSTP is open to members of the Group of 77. Negotiations are conducted under UNCTAD auspices. 44 countries participate in the GSTP.

**ILO**

International Labour Organization. Established in 1919 as part of the Treaty of Versailles. It became a United Nations specialized agency in 1946. Its objectives are to improve working and living conditions through the adoption of international conventions and recommendations setting minimum standards for wages, hours of work, conditions of employment, social security, etc. It is located in Geneva.

**IDB or IADB**

Inter-American Development Bank. Established in 1959, the Inter-American Development Bank (IDB) supports economic and social development and regional integration in Latin America and the Caribbean. It does so mainly through lending to public institutions, but it also funds some private projects, typically in infrastructure and capital markets development. Members (46) include: Argentina, Austria, The Bahamas, Barbados, Belgium, Belize, Bolivia, Brazil, Canada, Chile, Colombia, Costa Rica, Croatia, Denmark, Dominican Republic, Ecuador, El Salvador, Finland, France, Germany, Guatemala, Guyana, Haiti, Honduras, Israel, Italy, Jamaica, Japan, Mexico, Netherlands, Nicaragua, Norway, Panama, Paraguay, Peru, Portugal, Slovenia, Spain, Suriname, Sweden, Switzerland, Trinidad and Tobago, United Kingdom, United States, Uruguay and Venezuela. http://www.iadb.org

**IEA**

International Energy Agency. An intergovernmental organization established in 1974 after the first oil shock. It consists of OECD member countries.

**ILO**

International Labour Organization.

**IMO**

International Maritime Organization.

**ISO**

International Organization for Standardization. A world-wide federation of national standards bodies established in 1947 to promote the development of standardization and related activities with a view to facilitating the international exchange of goods and services. Each country is represented by one organization only. The ISO also promotes the development of cooperation in intellectual, scientific, technological and economic activities. It is associated with the WTO especially through work concerning the Agreement on Technical Barriers to Trade which is aimed at ensuring that standards are not used as disguised barriers to trade.

**ISO 14000**

A series of environmental management standards prepared by the International Organization for Standardization (ISO) covering six areas: environmental managing systems; environmental auditing; environmental labelling; environmental performance evaluation; life cycle assessment; terms and definitions. Most of the standards are intended as guidance documents on environmental tools and systems to help companies and other organizations integrate environmental considerations into their normal business processes. Only one of the standards, ISO 14001 on environmental management systems, contains specifications for certification or registration purposes.

**ISO 9000**

A series of quality systems standards developed by the International Organization for Standardization (ISO). These are standards for evaluating the way a firm works. They should not be confused with product standards. Quality systems standards enable firms to identify the means of meeting consistently the requirements of its customers.

**IPC**

International Patent Classification.
**IPRs** Intellectual Property Rights. Ownership of ideas, including literary and artistic works (protected by copyright), inventions (protected by patents), signs for distinguishing goods of an enterprise (protected by trademarks) and other elements of industrial property.

**ITA** Information Technology Agreement, or formally the Ministerial-Declaration on Trade in Information Technology Products.

**ITA II** Negotiations aimed at expanding ITA's product coverage.

**ITC** International Trade Centre UNCTAD/WTO. Established in 1964 as the focal point in the United Nations system for technical cooperation with developing countries in trade promotion. Its work program now covers product and market development, development of trade support services, trade information, human resource development, international purchasing and supply management and trade promotion needs.

**ITU** International Telecommunication Union.

**LAFTA** Latin American Free Trade Association.

**LAIA** Latin American Integration Association.

**LDCs** Least Developed Countries.

**LLDC** Least developed of the Least Developed Countries.

**MEA** Multilateral Environmental Agreement.

**MERCOSUL** Mercado Comum do Sul. Southern Common Market. The name in Portuguese of Mercosur.

**MERCOSUR** Mercado Común del Sur (Southern Common Market). Currently a customs union covering trade in goods except sugar and automobiles. It includes Argentina, Brazil, Paraguay and Uruguay. Chile and Bolivia signed an association agreement on 1 October 1996 and 1 March 1997 respectively. Membership is open to ALADI members.

**MFA** Multi Fibre Arrangement (1974-94) under which countries whose markets are disrupted by increased imports of textiles and clothing from another country were able to negotiate quota restrictions.

**MFN** Most-favoured-nation treatment (GATT Article I, GATS Article II and TRIPS Article IV), the principle of not discriminating between one's trading partners.


**NEPAD** New Partnership for Africa's Development.

**NGBT** Negotiating Group on Basic Telecommunications.

**NGMTS** Maritime transport services.

**NGO** Non-governmental Organization.

**NTBs** Non-tariff barriers, such as quotas, import licensing systems, sanitary regulations, prohibitions, etc. Same as "non-tariff measures".

**NTMs** Non-tariff measures, such as quotas, import licensing systems, sanitary regulations, prohibitions, etc. Same as "non-tariff barriers".

**OAS** Organization of American States.

**OAU** Organization of African Unity. Superseded in July 2001 by the African Union.
OECS  Organization of Eastern Caribbean States. It superseded the East Caribbean Common Market. OECS members are Antigua and Barbuda, Dominica, Grenada, Montserrat, St Kitts and Nevis, St Lucia, St Vincent, and the Grenadines. The British Virgin Islands and Anguilla are associate members.

OECD  The Organization for Economic Cooperation and Development (OECD) groups 30 member countries. Members (30) include: Australia, Austria, Belgium, Canada, Czech Republic, Denmark, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Japan, South Korea, Luxembourg, Mexico, Netherlands, New Zealand, Norway, Poland, Portugal, Slovakia, Spain, Sweden, Switzerland, Turkey, United Kingdom and the United States. http://www.oecd.org

OPEC  Organization of Petroleum Exporting Countries. Its current members are Algeria, Indonesia, Iran, Iraq, Kuwait, Libya, Nigeria, Saudi Arabia, United Arab Emirates and Venezuela.

P-5  Short for Pacific-5. It includes Australia, Chile, New Zealand, Singapore and the United States.

PACER  Pacific Agreement on Closer Economic Relations. An agreement adopted in August 2001 by the Pacific Islands Forum which sets out the framework for the development of trade relations between the Forum members. It is not a free-trade agreement, but it allows for the establishment of free-trade areas. One of these is the Pacific Island Countries Trade Agreement. PACER entered into force on 3 October 2002.

PAFTA  Pacific Free Trade Area. An idea for a regional preferential trade arrangement that has been around since the 1960s. Some say that the formation of APEC has made PAFTA redundant.

PICTA  Pacific Island Countries Free Trade Agreement. Australia and New Zealand are eligible to join if they wish. PICTA will enter into force after six countries have ratified it.


PSI  Preshipment Inspection — the practice of employing specialized private companies to check shipment details of goods ordered overseas — i.e. price, quantity, quality, and so forth.

QRs  Quantitative restrictions — specific limits on the quantity or value of goods that can be imported (or exported) during a specific period.

RBPs  Restrictive Business Practices. Anti-competitive behaviour by private firms of the type dealt with by national competition laws and policies. These can include collusion, abuse of dominant position, refusals to deal, price discrimination, resale price maintenance, exclusive dealing, vertical and horizontal arrangements, etc.

SACU  Southern African Customs Union comprising Botswana, Lesotho, Namibia, South Africa and Swaziland.

SELA  Latin American Economic System.

SPS  Sanitary and Phytosanitary measures or regulations — implemented by governments to protect human, animal and plant life and health, and to help ensure that food is safe for consumption.

TARIC  Integrated Tariff of the European Union.

TBT  The WTO Agreement on Technical Barriers to Trade.
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<td><strong>TMB</strong></td>
<td>The Textiles Monitoring Body consists of a chairman plus 10 members and oversees the implementation of ATC commitments.</td>
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<td><strong>TPRB, TPRM</strong></td>
<td>The Trade Policy Review Body is General Council operating under special procedures for meetings to review trade policies and practices of individual WTO members under the Trade Policy Review Mechanism.</td>
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<tr>
<td><strong>TRIMS</strong></td>
<td>Trade-Related Investment Measures.</td>
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<td><strong>TRIPS</strong></td>
<td>Trade-Related Aspects of Intellectual Property Rights.</td>
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<tr>
<td><strong>UNCTAD</strong></td>
<td>The United Nations Conference on Trade and Development.</td>
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<td><strong>UPOV</strong></td>
<td>International Union for the Protection of New Varieties of Plants (Union Internationale pour la Protection des Obtentions Végétales). Concluded in 1961 in Paris and revised in 1978 in Geneva. It provides for the grant of patents or special titles of protection to breeders of new plant varieties. It is administered by the International Union for the Protection of New Varieties of Plants (UPOV), rather than by WIPO.</td>
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<td><strong>VRA, VER, OMA</strong></td>
<td>Voluntary Restraint Arrangement, Voluntary Export Restraint, Orderly Marketing Arrangement. Bilateral arrangements whereby an exporting country (government or industry) agrees to reduce or restrict exports without the importing country having to make use of quotas, tariffs or other import controls.</td>
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<td><strong>WCO</strong></td>
<td>World Customs Organization, a multilateral organization located in Brussels through which participating countries seek to simplify and rationalize customs procedures.</td>
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<td><strong>WIPO</strong></td>
<td>World Intellectual Property Organization.</td>
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The World Trade Organization

ESTIMATED TIME: 2 ½ hours

OBJECTIVES OF MODULE 1

- Present a synopsis of the historical background of the WTO;
- present the objectives and some new key WTO principles;
- explain the function and organizational structure of the WTO; and
- present the negotiations launched in the Doha Development Agenda.
I. HISTORICAL BACKGROUND OF THE WTO

IN BRIEF

From 1948 to 1994, the General Agreement on Tariffs and Trade (GATT) provided the rules for much of world trade. Although it appeared well established, for those 47 years it was a provisional agreement serviced by only a *de facto* organization.

The GATT helped to establish a multilateral trading system that became progressively liberal through successive rounds of trade negotiations. Conclusion of Uruguay Round negotiations led to the creation of new agreements, such as the General Agreement on Trade in Services (GATS), and the establishment of the World Trade Organization (WTO) in 1995.

### Rounds of trade negotiations

<table>
<thead>
<tr>
<th>Year</th>
<th>Place/name</th>
<th>Subjects covered</th>
<th>Countries</th>
</tr>
</thead>
<tbody>
<tr>
<td>1947</td>
<td>Geneva</td>
<td>Tariffs</td>
<td>23</td>
</tr>
<tr>
<td>1949</td>
<td>Annecy</td>
<td>Tariffs</td>
<td>13</td>
</tr>
<tr>
<td>1951</td>
<td>Torquay</td>
<td>Tariffs</td>
<td>38</td>
</tr>
<tr>
<td>1956</td>
<td>Geneva</td>
<td>Tariffs</td>
<td>26</td>
</tr>
<tr>
<td>1960-1961</td>
<td>Geneva, Dillon Round</td>
<td>Tariffs</td>
<td>26</td>
</tr>
<tr>
<td>1986-1994</td>
<td>Geneva, Uruguay Round</td>
<td>Tariffs, non-tariff measures, rules, services, intellectual property, dispute settlement, textiles, agriculture, creation of WTO, etc</td>
<td>123</td>
</tr>
</tbody>
</table>

Table 1: GATT Rounds of negotiations
IN DETAIL

The project to establish a multilateral trading system to negotiate lower customs duties and the reduction or elimination of other trade barriers and to stimulate the expansion of world trade originated in the 1940s.

It was supposed to go ahead on two tracks:

- the creation of the International Trade Organization (ITO); and
- the launching of multilateral tariff negotiations that involved the drafting of binding legal provisions relating to the tariffs under a "General Agreement on Tariffs and Trade" (GATT)

The GATT was drafted, but the ITO was never created. However, the Interim Commission for the International Trade Organization (ICITO) was established and served as a de facto Secretariat to the GATT Contracting Parties.

From 1947 to 1994, Contracting Parties organized eight rounds of negotiations. The major ones were:

- The Kennedy Round (1964-1967):
  - substantial reduction of tariff barriers.

- The Tokyo Round (1973-1979):
  - first negotiations on non-tariff barriers;
  - plurilateral codes; and
  - the enabling clause (the first major decision on differential treatment and non-reciprocity for developing countries).

- The Uruguay Round (1986-1994):
  - creation of the WTO;
  - transformation of Tokyo Round plurilateral codes into multilateral agreements;
  - strengthened dispute settlement system; and
  - incorporation of the new agreements on trade in services and trade-related aspects of intellectual property rights which considerably broadened the scope of the multilateral trade system.

Participants in the Uruguay Round of Multilateral Trade Negotiations concluded the Round by adopting the "Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations" (the Final Act). The Final Act included the "Marrakesh Agreement Establishing the World Trade Organization" (the WTO Agreement).

The WTO Agreement established a new organizational body, the World Trade Organization ("the WTO"), to administer the Uruguay Round agreements.
II. OBJECTIVES OF THE WTO

IN BRIEF

In the preamble to the Marrakesh Agreement establishing the WTO, the parties to the Agreement recognize certain objectives they wish to attain through the multilateral trading system:

- raise living standards;
- ensure full employment;
- ensure a large and steadily growing volume of real income and effective demand; and
- expand the production of and trade in, goods and services, while allowing for the optimal use of the world's resources in accordance with the objective of sustainable development.

The Agreement also recognizes the need for "positive efforts to ensure that developing countries, and especially the least-developed among them, secure a share in the growth in international trade commensurate with ... their economic development".

IN DETAIL

The Preamble to the WTO Agreement encapsulates its objectives. It declares:

The Parties to this Agreement,

Recognizing that their relations in the field of trade and economic endeavour should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, and expanding the production of and trade in goods and services, while allowing for the optimal use of the world's resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development,

Recognizing further that there is need for positive efforts designed to ensure that developing countries, and especially the least developed among them, secure a share in the growth in international trade commensurate with the needs of their economic development. Being desirous of contributing to these objectives by entering into reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade and to the elimination of discriminatory treatment in international trade relations...
The objectives of the WTO are not fundamentally different from the objectives contained in the preamble of the GATT 1947. However, it is important to note the following two points:

Although the WTO's objectives do not mention trade liberalization as the means to establish free-trade between Members, the drafters considered "substantial reduction of tariffs and other barriers to trade and the elimination of discriminatory treatment in international trade relations" as important steps to achieving these objectives.

A second means to achieve the noted objectives is the practice of Members of "entering into reciprocal and mutually advantageous arrangements" as mentioned in the text of the GATT 1947.

Accordingly, the WTO adds three new dimensions to the objectives in the preamble of the GATT 1947. They include:

- the expansion of "the production of and trade in goods and services" to take into consideration the extension of the coverage of the WTO subject matters. That is, while the GATT covered trade in goods, under the WTO, coverage was expanded to another subject area – trade in services (see the GATS Agreement);
- "the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so ...;"
- the "development dimension" aiming at helping "...developing countries, and especially the least developed among them, secure a share in the growth in international trade commensurate with the needs of their economic development". 
III. FUNCTIONS OF THE WTO

IN BRIEF

The WTO fulfils its objective by:

- administering trade agreements between its Members;
- serving as a forum for trade negotiations;
- settling trade disputes;
- reviewing Members trade policies;
- assisting developing countries in trade policy issues, through technical assistance and training programmes; and
- cooperating with other international organizations.

IN DETAIL

Article III of the WTO Agreement expounds the functions of the WTO. They include:

(1) "The WTO shall facilitate the implementation, administration and operation, and further the objectives of this Agreement and of the Multilateral Trade Agreements, and shall also provide the framework for the implementation, administration and operation of the Plurilateral Trade Agreements."

(2) "The WTO shall provide the forum for negotiations among its Members concerning their multilateral trade relations in matters dealt with under the agreements in the Annexes to this Agreement ... The WTO may also provide a forum for further negotiations among its Members concerning their multilateral trade relations, and a framework for the implementation of the results for such negotiations, as may be decided by the Ministerial Conference."

The preceding paragraphs refer to the role of the WTO of providing a permanent institutional forum for trade negotiations among its Members. These negotiations may be on subjects already covered under WTO agreements or in respect of "new issues" to be disciplined by WTO agreements.

(3) "The WTO shall administer the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) in Annex 2 to this Agreement."
The above paragraph refers to the role of the WTO as a forum for the settlement of disputes between its Members in accordance with the disciplines and procedures elaborated in the Dispute Settlement Understanding ("the DSU" in Annex 2 to the WTO Agreement). When Members are unable to reach a mutually acceptable solution to a dispute arising under one of the agreements covered by the DSU, they may have recourse to the Dispute Settlement Procedure.

(4) "The WTO shall administer the Trade Policy Review Mechanism (TPRM) provided for in Annex 3 to this Agreement."

This function underscores the role of the WTO in the transparency mechanism designed by Members during the Uruguay Round. The Trade Policy Review Mechanism (TPRM) was one of the few elements of the WTO Agreement that formed part of the "Early Harvest" realized before the Uruguay Round ended.

Early Harvest is an expression which describes the agreement by GATT contracting parties at the "Mid-Term Review" Ministerial Meeting of the Uruguay Round negotiations, in Montreal in 1988, that certain results of the negotiations, on which a clear consensus already existed, would enter into force immediately, although on a provisional basis. That is, their agreement that some fruits (of the negotiations) would be harvested early.

(5) "With a view to achieving greater coherence in global economic policy-making, the WTO shall cooperate, as appropriate, with the International Monetary Fund and with the International Bank for Reconstruction and Development and its affiliated agencies."

This final quote identifies one aspect that the Members need consider when they enter into negotiations to design an international regulatory framework. They should cooperate with other multilateral agencies. The quote also appears to be an implicit reference to the period when (in the context of the Havana Conference) many participants considered that an ITO could be constituted under the UN umbrella, next to the IMF and the World Bank. The ITO was envisioned as the third pillar of a system put in place to shape international economic relations in the post-war reconstruction period - the Bretton Woods system.

**EXERCISES:**

1. What is the main objective of the WTO?
2. What are the main functions of the WTO?
IV. ORGANIZATIONAL STRUCTURE OF THE WTO

With a dense network of legal provisions and procedures to govern their trade transactions, WTO Members established a working structure for the WTO to allow them to monitor the implementation and the development of the WTO.

The General Council also meets as the Trade Policy Review Body and Dispute Settlement Body. The negotiations mandated by the Doha Declaration take place in the Trade Negotiations Committee ("TNC") and its subsidiaries. This now includes the negotiations on agriculture and services begun in early 2000. The TNC operates under the authority of the General Council.

The WTO Agreement contains provisions that organize the work of the WTO. Members take their consensus-based decisions through various bodies, which are open to all Members. The "legal structure" of the WTO is shown in the diagram below:

![WTO organization chart](Figure 1)

---

**Key**
- Reporting to General Council (or a subsidiary)
- Reporting to Dispute Settlement Body
- **Plurilateral committees** inform the General Council or Goods Council of their activities, although these agreements are not signed by all WTO members
- **Trade Negotiations Committee** reports to General Council

The General Council also meets as the Trade Policy Review Body and Dispute Settlement Body.
IV.A. THE MINISTERIAL CONFERENCE

The Ministerial Conference is the highest authority in the WTO. Its sessions must take place at least once every two years. The Ministerial Conference can take decisions on all matters under all multilateral trade agreements.

IV.B. THE GENERAL COUNCIL

The General Council constitutes the second tier in the WTO Structure. It comprises representatives from all Member countries, usually Ambassadors/Permanent Representatives based in Geneva. It meets regularly (approximately once a month) to adopt decisions, mostly on behalf of the Ministerial Conference when the Conference is not in session.

The General Council also meets as:

The Trade Policy Review Body (TPRB), with a different Chairperson, to carry out trade policy reviews as mandated by the Decision on the Trade Policy Review Mechanism.

The Dispute Settlement Body (DSB), with a different Chairperson to administer the rules in the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU). The DSB has the authority to establish panels, adopt Panel and Appellate Body Reports, oversee the implementation of rulings and recommendations, and authorize the suspension of concessions and other obligations under the agreements for which disputes can be settled by the DSU - the "covered agreements".

The DSB establishes Panels on an ad hoc basis, at the request of a Member (or Members) usually with the following terms of reference:

...to "examine, in the light of the relevant provisions in the respective covered agreements, the matter referred to the DSB by the complaining Member and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided in that/those agreement(s)".

The DSB also appoints persons to serve on the Appellate Body. The Appellate Body makes recommendations to the DSB. Where adopted by the DSB, the Appellate Body and the Panel Report (as upheld, amended or reversed by the Appellate Body) becomes binding on the disputing Members.
IV.C. THE COUNCILS

The Councils can be described as subsidiary bodies to the General Council. There are three Councils:

- The Council for Trade in Goods (the Goods Council) oversees all the issues related to the Agreements on trade in goods.
- The Council for Trade in Services (the GATS Council) oversees all issues related to the GATS Agreement.
- The Council for Trade-Related Aspects of Intellectual Property Rights (the TRIPS Council) oversees issues related to the TRIPS Agreement.

These Councils are composed of all WTO Members and have subsidiary bodies (see below).

Several other bodies, which focus on specific issues, report to the General Council. They are usually called Committees, Working Groups or Working Parties; they are:

- Committee on Trade and Development (CTD);
- Committee on Trade and Environment (CTE);
- Committee on Regional Trade Agreements (CRTA);
- Committee on Balance-of-Payment Restrictions (BOP Committee); and
- Committee on Budget, Finance and Administration.
- Working Parties on Accession;
- Working Group on Trade, Debt and Finance; and
- Working Group on Trade and Technology Transfer.

IV.D. THE SUBSIDIARY BODIES

The three Councils (for Goods, Services and TRIPS) have subsidiary bodies.

The Goods Council has 11 committees working on specific subjects (such as agriculture, market access, subsidies, and anti-dumping measures). These committees are composed of all Members.

The Services Council’s subsidiary bodies deal with financial services, domestic regulations, GATS rules and specific commitments. It does not have a permanently fixed number of subsidiary bodies. For example, the Negotiating Group on Basic Telecommunications was dissolved in February 1997 when its work ended.
EXERCISES:

3. Please arrange the following WTO bodies in hierarchical order:
   - General Council;
   - Council for Trade in Services;
   - Ministerial Conference.

4. Please state the function of the following WTO bodies:
   (a) General Council;
   (b) Council for Trade in Services;
   (c) Ministerial Conference.
IV.E. DECISION-MAKING AT THE WTO

CONSENSUS VERSUS...

The WTO is a Member-driven, consensus-based organization.

Consensus is defined as a situation in which no Member, present at a meeting where a decision is taken, formally objects to the proposed decision. The definition is contained in Footnote 1 to Article IX of the WTO Agreement:

“The Body concerned shall be deemed to have decided by consensus on a matter submitted for its consideration, if no Member present at the meeting when the decision is taken, formally objects to the proposed decision.”

Consensus allows all Members to ensure their interests are properly considered.

...VOTING

Where consensus is not possible, the WTO agreement permits voting — a vote being won by a tally of the majority of votes cast, and based on the principle "one Member, one vote".

The WTO Agreement envisages voting whenever a decision cannot be arrived at by consensus. Nevertheless, voting has rather been exercised in the following four specific kinds of situations:

- a three-quarters majority of WTO Members in the Ministerial Conference or the General Council can adopt an interpretation of any of the multilateral trade agreements;
- the Ministerial Conference, by a three-quarters majority, can waive an obligation imposed on a Member by a multilateral agreement;
- all Members or a two-thirds majority (depending on the provision of the agreement) can take a decision to amend provisions of the multilateral agreements;
- a two-thirds majority in the Ministerial Conference or the General Council in between conferences, can take a decision to admit a new Member.

FORMALS AND INFORMALS

Important breakthroughs are often, but no always, made in formal meetings, or in the higher level Councils. Since decisions are generally made by consensus, without voting, WTO informal consultations play a vital role in bringing the diverse Membership to an agreement.

One tier below the formal meetings is informal meetings. Informal meetings, such as Heads of Delegations (HOD), also include the full membership. More complex issues tend to be discussed in smaller groups. A recent common practice is for the chairperson of a negotiating group to attempt to forge a compromise by
holding consultations with delegations in twos or threes, or in groups of 20-30 (of the most interested delegations).

These smaller meetings have to be handled sensitively. The key is to ensure that everyone is kept informed even if they are not in a particular consultation or meeting (the process must be "transparent"), and that they have an opportunity to participate or to provide input (it must be "inclusive").

HAVE YOU EVER HEARD OF THE "GREEN ROOM"?

The "Green Room" is an expression originated from the informal name given to the GATT Director-General's conference room, which was green. The term nowadays refers to small meetings, which are at times called by the Director-General, and can take place anywhere, even during Ministerial Conferences.

Market access negotiations also involve small groups, but for a completely different reason. The outcome is a multilateral package of individual countries' commitments, which are the result of numerous informal bilateral bargaining sessions, and in the interest of individual countries, (examples are the tariff, and market access negotiations on trade in services.)

Consequently, informal consultations play a vital role in facilitating consensus, but they do not appear in organizational charts because they are informal. However, informal consultations are not separate from formal meetings. They are necessary to facilitate formal decisions in the Councils and Committees. Nor are the formal meetings unimportant. Formal meetings are the forums for exchanging views, putting countries' positions on the record, and ultimately confirming decisions.

IV.F. ON-GOING NEGOTIATIONS: THE DOHA DEVELOPMENT AGENDA

At the Ministerial Conference in Doha, Qatar in November 2001, Members decided to launch a new round of negotiations, and pursuant to their decision, adopted the Doha Development Agenda and its accompanying work programme.

The Doha Ministerial Declaration, which sets the negotiating mandate, required WTO Members to set up a Trade Negotiations Committee (TNC). The TNC then established negotiating mechanisms and is supervising the current negotiations under the authority of the General Council.

Negotiations are taking place:

- In new negotiating groups, on:
  - Market access;
  - WTO rules (anti-dumping, subsidies, regional trade agreements); and
  - Trade Facilitation.
In existing bodies, on:

- agriculture: in special sessions of the Agriculture Committee;
- services: in special sessions of the Services Council;
- geographical indications (a multilateral registration system): in special sessions of the Council for Trade-Related Aspects of Intellectual Property Rights (TRIPS). Other TRIPS issues are addressed in regular TRIPS Council meetings;
- Dispute Settlement Understanding: in special sessions of the Dispute Settlement Body;
- Environment: in special sessions of the Trade and Environment Committee; and
- Negotiations on outstanding implementation issues: in relevant bodies according to paragraph 12 of the Doha Ministerial Declaration.

Considerable emphasis is placed on special and differential treatment for developing countries (S&D). S&D is an integral part of the WTO Agreements. All negotiations and other aspects of the Doha Agenda's work programme are to fully incorporate this principle. According to the Doha Development Declaration (paragraph 44) and the Decision on Implementation-Related Issues and Concerns, all S&D provisions are to be reviewed to make them more precise, effective and operational. These reviews are carried out in special sessions of the Trade and Development Committee.
V. SUMMARY

OBJECTIVES OF THE WTO

Improve the welfare of the peoples of the Member countries.

FUNCTIONS OF THE WTO

- Facilitate the implementation, administration and operation, and furthering of the objectives of the WTO Agreements (including the Plurilateral Agreements);
- Serve as a forum for trade negotiations;
- Administer the Dispute Settlement Understanding (DSU);
- Administer the Trade Policy Review Mechanism (TPRM); and
- Cooperate with the IMF and the IBRD (World Bank) to achieve coherence in global economic policy/making.

STRUCTURE OF THE WTO

Ministerial Conference
  | General Council (also DSB and TPRB)
  | Councils for Goods, Services, Intellectual Property
  | Committees
  | Sub-Committees
PROPOSED ANSWERS:

1. The objective of the WTO is to improve the welfare of the peoples of the Member countries (standard of living, employment, income, etc.) by expanding the production of, and trade in, goods and services. The expansion of the production and trade of goods and services is to be achieved through negotiations leading to trade liberalization.

   This objective should be attained in accordance with sustainable development and with due consideration of the development needs of developing countries.

2. The main functions of the WTO are to:
   - administer trade agreements;
   - serve as a forum for trade negotiations;
   - settle trade disputes;
   - review Member’s trade policies;
   - assist developing countries with trade policy issues, through technical assistance and training programmes; and
   - cooperate with other international organizations.

3. (a) Ministerial Conference;
   (b) General Council;
   (c) Council for Trade in Services.

4. The Ministerial Conference is the highest authority of the WTO. It meets at least once every two years.

   During the interim, the Conference is represented by the General Council. It meets regularly (approximately once a month) to adopt decisions and to carry out its functions as the Trade Policy Review Body and the Dispute Settlement Body.

   The Council for Trade in Services (CTS) is one the three Councils beneath the General Council. The CTS oversees the functioning of the General Agreement on Trade in Services and reports to the General Council. The CTS is open to all Members and meets several times a year in regular session and, for the conduct of the ongoing services negotiations in Special Session.

   All Members participate in the work of all WTO Bodies.

   The WTO continues the GATT principle of taking decision by "consensus".
Introduction to WTO basic principles and rules

ESTIMATED TIME: 6 hours

OBJECTIVES OF MODULE 2

- Explain the non-discrimination rules: Most Favoured Nation (MFN) Principle and National Treatment (NT) Principle;
- explain the market-access rules;
- present WTO rules on trade remedies: Anti-dumping measures and subsidies and countervailing measures; and
- explain the exceptions to the basic principles.
PART I: BASIC PRINCIPLES IN THE WTO

I. INTRODUCTION

As you saw in Module 1, multilateral rules and principles were agreed back in 1947 to govern trade in goods between GATT Contracting Parties. From 1947 to 1994, the GATT provided the forum for negotiating lower customs duty rates, as well as the reduction or elimination of other trade barriers. The text of the GATT contained important rules, particularly non-discrimination.

After the conclusion of the Uruguay Round and the entry into force of the WTO Agreement, the basic principles formulated in the GATT remained fundamentally unchanged. Since 1995, the updated GATT (called “GATT 1994”) has become the general agreement for trade in goods. Other agreements also cover specific sectors such as agriculture, as well as with specific issues such as technical barriers to trade and subsidies.

The WTO Agreement also incorporated new disciplines beyond trade in goods, for example, the GATS and the agreement on trade in services (GATS) and the Agreement on trade related intellectual property rights (TRIPS Agreement).

In this section, you will study the non-discrimination principles and their specific exceptions with reference to the GATT, GATS and TRIPS Agreement.
II. RULES ON TRADE IN GOODS

II.A. NON-DISCRIMINATION PRINCIPLE

Non-discrimination is a fundamental principle of the multilateral trading system and is recognized in the Preamble to the WTO Agreement as a key instrument to achieve the objectives of the WTO. In the Preamble, WTO members express their desire to eliminate discriminatory treatment in international trade relations. Non discrimination in the WTO is embodied by two principles, the most favoured nation (MFN) treatment obligation and the national treatment obligation.

The MFN principle applies to trade in goods, trade in services, and trade related aspects of intellectual property. According to the Appellate Body in the EU Tariff Preferences case (WT/DS246), the MFN obligation is a cornerstone of the GATT and one of the pillars of the WTO trading system (paragraph 101).

II.A.1. THE MFN PRINCIPLE WITH REGARD TO THE TRADE IN GOODS

IN BRIEF

Pursuant to the WTO agreements countries cannot normally discriminate between their trading partners. If a Member grants to a country a special favour (such as a lower customs duty on one of its products) it must grant the favour immediately and unconditionally to all WTO members.

IN DETAIL

Members of the WTO can be seen as members of a club. One of the fundamental rules of the club is that each member will grant any other member the best possible treatment it grants to any one else. Hence, each member of the club is guaranteed to receive the best possible treatment from each of its fellow-members.

For example, let us assume that Rauritania's MFN duty (duty applicable to all WTO Members) for tomatoes is 10%. Medatia is a big tomato producer interested in increasing its exports of tomatoes to Rauritania.

If, during a WTO negotiating round, the Government of Medatia initiates tariff negotiations on tomatoes with Rauritania. After long and difficult bilateral meetings, Rauritania agrees to give Medatia a duty free access (0%) for tomatoes. However, according to the MFN principle, Rauritania should extend the 0% duty on tomatoes to all WTO Members. This is because all WTO Members should enjoy the most favourable treatment for tomatoes granted by Rauritania.

For trade in goods, the MFN principle requires each Member to extend to all other Members, treatment no less favourable than it accords to imports from any other country.
II.A.2. GATT ARTICLE I:1

GATT Article I:1 contains the specific rules for MFN treatment for goods.

GATT Article I:1 General Most-Favoured-Nation Treatment

1. With respect to customs duties and charges of any kind imposed on or in connection with importation or exportation or imposed on the international transfer of payments for imports or exports, and with respect to the method of levying such duties and charges, and with respect to all rules and formalities in connection with importation and exportation, and with respect to all matters referred to in paragraphs 2 and 4 of Article III, any advantage, favour, privilege or immunity granted by any Member to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other Members.

The general effect of Article I.1 is to create the obligation among WTO Members to give each others' like products the best existing market access opportunities without discrimination in law or in fact.

A detailed reading of the provision reveals that the key elements of the MFN principle are:

2. Like products.
3. The immediate and unconditional grant of the advantage at issue to the like products concerned.

ANY ADVANTAGE COVERED IN ARTICLE I:1

The advantages that a WTO Member must grant to all members' like products without discrimination in fact or in law are listed in the first part of Article I.1. They are advantages in respect of the following measures:

- Customs duties;
- Any kind of charges imposed on importation or exportation;
- Any kind of charges imposed in connection with importation or exportation;
- Any charges imposed on the international transfer of payments for imports and exports;
- The method of levying such duties and charges;
- The rules and formalities in connection with importation and exportation;
- Internal taxes or other internal charges (covered in Article III.2);
- Laws, regulations and requirements affecting internal sale, offering for sale, purchase, transportation, distribution or use of any product (covered in Article III.4).

The scope of the measures covered in Article I.1 is in practice, wide enough to cover a very broad range of measures in relation to exportation and importation as well as internal measures.
LIKE PRODUCTS

The MFN obligation applies to like products. The idea of "likeness" is very relative and is not defined in the GATT, therefore WTO case law has developed four criteria that should be considered in deciding if products are alike (see for example, Japan – Taxes on Alcoholic Beverages - WT/DS8, 10 and 11; and Canada – Autos WT/DS139 and 142). Such consideration should be assessed on a case by case basis but the said factors are as follows:

1. physical characteristics of the products;
2. end use of the products;
3. consumer preferences;
4. the classification of the products in Members' tariff laws.

THE IMMEDIATE AND UNCONDITIONAL GRANT OF THE ADVANTAGE TO THE LIKE PRODUCTS CONCERNED

Once a WTO Member has granted an advantage to imports from any country, it must immediately grant that advantage to imports from all WTO members and it cannot make the granting of that advantage to imports from all WTO members conditional upon receiving something in return. This obligation applies equally to exports, therefore advantages granted by a WTO Member to exports to any country must be granted immediately and unconditionally to exports to all WTO Members.

PROVISIONS THAT ALLOW DEROGATION FROM MFN

EXCEPTIONS

There are a number of provisions that allow WTO members to derogate from non-discrimination principles as well as from other WTO disciplines. These exceptions will be covered in more detail in Part IV of the module. These provisions include:

- general exceptions;
- security exceptions;
- balance of payment exceptions;
- waivers;
- regional integration exceptions.

SPECIFIC EXCEPTIONS RELATED TO THE MFN OBLIGATION CAN BE SUMMARIZED AS FOLLOWS:

Historical Preferences (GATT Article 1.2-4):

Frontier Traffic (GATT Article XXIV:3):
ILLUSTRATION

MFN Principle (for Goods)

Let us assume that Vanin, Medatia and Tristat are WTO Members and that Rauritania is not. The MFN principle would prohibit Vanin's customs authorities from levying a customs duty of 10% for imported watches originating in Medatia, while levying a lower customs duty of 5% for imported watches originating in Tristat. The MFN principle requires that the WTO favourable treatment (5%), be granted automatically and unconditionally to imported watches originating from all WTO members (in this case, Medatia). The application of this principle would be the same if the "best treatment" had been initially granted to watches originating in Rauritania, which is not a WTO Member.

One relevant issue is whether watches from Medatia are "like products" vis-à-vis watches from Tristat. If they are not like products, then different treatment (customs duty) may be applied. However, assuming that they are like products, there would be a violation of the MFN obligation by Vanin.

However, if one of the permitted specific exceptions to the MFN or general WTO obligations applies, Vanin's conduct can be considered a permitted derogation and would therefore be consistent with its WTO obligations.

EXERCISES:

1. GATT Article I.1 says: "With respect to customs duties ... any advantage ... granted by any Member to any product originating in or destined for any other COUNTRY shall be accorded immediately and unconditionally."

   Why did the drafters of Article I.1 of the GATT 1994 refer to "any other COUNTRY" and not "any other MEMBER"?
II.B. THE MFN PRINCIPLE UNDER GATS

Under Article II of the GATS, WTO members are held to extend immediately and unconditionally to services and service suppliers of all other members "treatment no less favourable than that accorded to like services and service suppliers of any other country". Therefore, the best access conditions that have been conceded to one country must be extended to all WTO members. This amounts to a prohibition, in principle, of preferential treatment among Members, or groups of Members, in individual sectors, or of reciprocity provisions which confine access benefits to trading partners granting similar treatment.

The MFN obligation is applicable to any measure that affects trade in services in any sector falling under the Agreement, whether specific commitments have been undertaken or not.

SPECIFIC EXEMPTIONS

- Derogations are possible in the form of Article II-Exemptions. WTO members were allowed to seek exemptions under the Annex on Article I Exemptions before the GATS entered into force. New exemptions can only be granted to new members at the time of accession or, in the case of current members, by way of a waiver under Article IX:3 of the WTO Agreement. All exemptions should in principle not last longer than 10 years and are subject to periodic review in the Council for Trade in Services;

- Exemptions in Maritime transport services are still possible (Annex on Negotiations on Maritime Transport Services and doc. S/L/24).

Note that the GATS allows groups of Members to enter into economic integration agreements (Article V) and to mutually recognize regulatory standards and certificates (Article VII), subject to certain conditions.

II.C. THE MFN PRINCIPLE UNDER TRIPS

The MFN Principle under the Agreement on Trade Related Aspects of Intellectual Property ("TRIPS Agreement") is found in Article 4 of the TRIPS Agreement. It requires that "With regard to the protection of intellectual property, any advantage, favour, privilege or immunity granted by a Member to the nationals of any other country shall be accorded immediately and unconditionally to the nationals of all other Members...".

The wording of Article 4 of the TRIPS Agreement is similar to that of GATT Article I. However, unlike the GATT, in which the subject of MFN treatment is goods, or GATS in which the subjects of MFN treatment is services or service suppliers, in the context of the TRIPS Agreement, the subject of MFN treatment is "nationals". The term national includes persons, natural or legal, who are domiciled or who have a real and effective industrial or commercial establishment in that customs territory. The MFN principle under TRIPS applies to any advantage conferred to the nationals of any other country, even if the benefited country is not a WTO Member.

Article 1.3 states that "when 'nationals' are referred to in this Agreement, they shall be deemed, in the case of a separate customs territory Member of the WTO, to mean persons, natural or legal, who are domiciled or who have a real and effective industrial or commercial establishment in that customs territory". The footnote concerns only separate customs territory i.e., a minority of the Membership. For further information see the text of Article 1.3 itself.
SPECIFIC EXEMPTIONS

There are some important exemptions specifically related to the MFN Principle in the TRIPS Agreement. These are listed in Article 4 (a) - (d) of the TRIPS Agreement.

EXERCISES:

2. Most-favoured-nation treatment must be ensured for which types of services?
III. NATIONAL TREATMENT (ARTICLE III)

In this section, the National Treatment principle, which constitutes the second component of the non-discrimination pillar, will be discussed. The first component is the MFN principle, presented in the previous section.

IN BRIEF

Whilst the MFN principle seeks to ensure that a WTO Member does not discriminate between like products originating in or destined for other WTO Members the National Treatment principle addresses the treatment to be applied to imported products once they are in a Member's territory. The National Treatment principle prohibits a Member from favouring its domestic products over the imported products of other Member countries.

National Treatment principle is foreseen for trade in goods by GATT Article III; for trade in services by GATS Article XVII; and for trade-related aspects of intellectual property rights by Article 3 of the TRIPS Agreement.

III.A. THE NATIONAL TREATMENT PRINCIPLE IN RULES ON TRADE IN GOODS

According to the National Treatment principle, each trading partner should treat imports no less favourably than they treat like domestically produced goods.

The national treatment obligation for goods is provided in Article III of the GATT 1994. The relevant portions of GATT Article III are paragraphs 1, 2 and 4 as well as the explanatory Ad Note to Article III.

GATT Article III: National Treatment on Internal Taxation and Regulation

1. Members recognize that internal taxes and other internal charges, and laws, regulations and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution or use of products, and internal quantitative regulations requiring the mixture, processing or use of products in specified amounts or proportions, should not be applied to imported or domestic products so as to afford protection to domestic production.

2. The products of the territory of any Member imported into the territory of any other Member shall not be subject, directly or indirectly, to internal taxes or other internal charges of any kind in excess of those applied, directly or indirectly, to like domestic products. Moreover, no Member shall otherwise apply internal taxes or other internal charges to imported or domestic products in a manner contrary to the principles set forth in paragraph 1.

4. The products of the territory of any Member imported into the territory of any other Member shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations, transportation, and requirements affecting their internal sale, offering for
sale, purchase, transportation distribution or use. The provisions of this paragraph shall not prevent the application of differential internal transportation charges which are based exclusively on the economic operation of the means of transport and not on the nationality of the product.

**ARTICLE III:1 - THE GENERAL OBLIGATION**

Article III:1 lays out the general objective and scope of the national treatment obligation.

The stated objective is to ensure that internal measures are not applied to domestic and imported products so as to afford protection to domestic production.

With regard to the scope of this provision, the national treatment obligation applies to internal measures as opposed to border measures. Thus, before seeking to apply Article III, it is important to ensure that the measure at issue is an internal measure and not a border measure, as the latter would fall under Articles II and XI and not Article III. Distinguishing between an internal measure and border measure is assisted by the Ad Note to Article III which provides the following:

**AD NOTE: TO ARTICLE III**

"Any internal tax or other internal charge, or any law, regulation or requirement of the kind referred to in paragraph 1, which applies to an imported product and to the like domestic product and is collected or enforced in the case of the imported product at the time or point of importation, is nevertheless to be regarded as an internal tax or other internal charge, or a law, regulation or requirement of the kind referred to in paragraph 1, and is accordingly subject to the provisions of Article III."

**ARTICLE III:2 - INTERNAL TAXATION**

Article III:2 applies the general non-discrimination principle set out in paragraph 1 to internal taxation. The first sentence deals with the internal taxation of like products, while the second sentence (by cross reference with the relevant Ad Note) deals with the internal taxation of directly competitive or substitutable products.

**ARTICLE III:2 - FIRST SENTENCE**

To establish an infringement of the first sentence, one must show that 2 elements are present:

1. The imported and domestic products are like products;
2. The imported products are taxed in excess of the domestic products.
(1) The imported and domestic products are like products

The determination of likeness for the purposes of the first sentence is to be made on a case by case basis but the following 4 criteria should be used to assist in the determination:

1. The product’s end uses;
2. Consumer tastes and habits;
3. The product’s properties nature and quality;
4. Tariff classification.

(2) The imported products are taxed in excess of the domestic products

The taxes levied on imported products can not be in excess of those levied on like domestic products. The slightest margin of excessive taxing will constitute an infringement, even if the margin is de minimis.

ARTICLE III:2 - SECOND SENTENCE

If either of the elements in the first sentence can not be established, one must still consider if there is an infringement of the second sentence, which casts a wider net.

To establish an infringement of the second sentence, one must show 3 elements:

(1) The imported and domestic products are directly competitive or substitutable;
(2) The domestic and imported products are not similarly taxed;
(3) The dissimilar taxation is applied to give protection to domestic production.

(1) The imported and domestic products are directly competitive or substitutable

The second sentence of Article III:2 applies to competitive or directly substitutable products. This is a much broader concept than likeness in the first sentence because the first sentence applies only to products that are perfectly substitutable whereas the second sentence is broad enough to include products that are imperfectly substitutable.

(2) The domestic and imported products are not similarly taxed

In the first sentence, even the slightest difference in tax between imported and domestic products will lead to inconsistency with the national treatment obligation. This is not the case with regard to the second sentence where the requirement is that the product must be "similarly taxed" in that text the difference in tax must be more than de minimis to constitute an infringement of the national treatment obligation.
The dissimilar taxation is applied to give protection to domestic production

If it is established that a dissimilar taxation is applied, it must thereafter be established that this was applied so as to afford protection to domestic production [is not a matter of intent].

ARTICLE III:4 - INTERNAL LAWS, REGULATIONS AND REQUIREMENTS

As opposed to Article III:2 which deals with internal taxation, the national treatment obligation in Article III:4 is concerned with internal laws, regulations and requirements. There are three elements that must be shown to establish an infringement of Article III:4. They are:

1. The measure is a law, regulation or requirement covered in Article III:4;
2. The imported and domestic products are like products;
3. The imported products are afforded less favourable treatment.

(1) The measure is a law, regulation or requirement covered in Article III:4

Article III:4 relates to all laws, regulations, and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution or use of products.

(2) The imported and domestic products are like products

The scope of likeness in paragraph 4 is wider than in the first sentence of paragraph 2. This is because the scope of the first sentence must be read in light of its interpretive relationship with the second sentence, something that does not apply to Article III:4.

Determining if products are like for the purposes of Article III:4 should be made on a case by case basis, employing the following 4 criteria:

1. The physical properties of the products.
2. The extent to which the products are capable of serving the same or similar uses.
3. The extent to which consumers perceive and treat the goods as substitutable.
4. The international classification of the goods for tariff purposes.

(3) The imported products are afforded less favourable treatment

The national treatment obligation requires that imported and domestic products are given equal treatment in terms of competitive opportunities. Therefore, if a measure gives imported products less favourable treatment than it gives to like domestic products, the measure will be inconsistent with the national treatment obligation.

EXERCISES:

3. Member prohibits advertisements of foreign watches. Is this compatible with the GATT 1994?
III.B. EXCEPTIONS

As with MFN, there are general and specific exceptions to the principle of national treatment. General exceptions of a horizontal nature and protective measures which also constitute a derogation to other rules are examined in Part IV.

Specific exceptions only related to the National Treatment principle can be summarized as follows:

GOVERNMENT PROCUREMENT (GATT ARTICLE III:8A)

Advantages or preferences can be accorded to domestic products over imported ones if government agencies purchase such products for government purposes and not for commercial resale or use in the production of goods for commercial sale.

The Plurilateral Agreement on Government Procurement contains specific rules pertaining to the opening of the procurement process by government entities to international competition. Because of its plurilateral nature, the rights and obligations it contains only bind the members that have ratified it. The Plurilateral Agreement on Government Procurement originated among some GATT Contracting Parties in the Tokyo Round, and developed further in the Uruguay Round.

SUBSIDIES TO DOMESTIC PRODUCERS (GATT ARTICLE III:8B)

Governments can provide subsidies (including payments to domestic producers derived from the proceeds of internal taxes or charges applied consistently with the provisions of Article III) exclusively to domestic producers. GATT Contracting Parties and WTO Members considered that the practice of granting production subsidies was not necessarily illegal.

CINEMATOGRAPH FILMS (GATT ARTICLE III:10 AND ARTICLE IV)

As an exception to the National Treatment principle, negotiators of the GATT retained the possibility of giving preferences to products emanating from the national movie industry (exposed cinematograph films). National preferences are governed by the provisions of GATT Article IV, and take the form of internal quantitative regulations in "screen quotas".

This provision must now be read together with specific commitments taken by Members in the audiovisual sector in the GATS Agreement.
ILLUSTRATION

National Treatment (for Goods)

Let us assume that Vanin, Medatia and Tristat are WTO Members.

GATT Article III embodies the principle of National Treatment. It prohibits WTO members from discriminating in favour of domestically produced goods. The result is that once the applicable border duties (e.g. tariffs) have been paid, the importing Member cannot apply any further burdens on imports that are not applied to the like domestic products.

Article III applies to two types of internal measures. Article III.2 applies to "internal taxes or other internal charges", whilst Article III.4 applies to all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use.

Therefore, Vanin would be prohibited from applying a sales tax of 5% on domestically produced watches, while applying a sales tax of 10% on imported watches from Medatia or Tristat. Based on the assumption that the domestic and imported watches are "like products", this sales tax would violate Article III.2 because the measure taxes imported products "in excess" of the applicable tax on domestic like products.

III.C. NATIONAL TREATMENT IN GATS

Article XVII of the GATS governs national treatment for services:

"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. (10)

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."

National treatment under GATS Article XVII implies the absence of discriminatory measures that may modify the conditions of competition in favour of domestic services and service suppliers as compared to foreign like services and like service suppliers. Hence, WTO members are not to modify, in law or in fact, the conditions of competition in favour of their own service industry.

National treatment (as well as market access) in the GATS is not a general obligation, but is granted only in sectors which a Member lists in its national schedule of "specific commitments". To explain: each WTO Member is required to have a schedule of specific commitments that identifies the services for which the
Member guarantees market access (Article XVI) and national treatment (Article XVII), and any limitations that may be attached thereto. That is, limitations may be attached to specific commitments in order to reserve the right to apply measures inconsistent with full market access and/or national treatment.

Hence, the extension of national treatment in any sector may be made subject to conditions and qualifications. Limitations may be listed to provide cover for inconsistent measures, such as discriminatory subsidies and tax measures, residency requirements, etc. It is for the individual Member to ensure that all potentially relevant measures are listed (examples of frequently scheduled national treatment restrictions are in the Attachment 1 to document S/L/92).

This means that the GATS allows each Member to adjust the conditions of market entry and participation to its sector-specific objectives and constraints. Market access and national treatment specific commitments guarantee minimum levels of treatment, but do not prevent Members from being more open (or less discriminatory) in practice.

### Note

At a glance, it may be difficult to understand why the national treatment obligation under the GATS is of a more limited in scope — confined to scheduled services and subject to possible limitations — than under the GATT where it applies across the board.

The reason lies in the particular nature of services trade. Universal national treatment for goods does not necessarily imply free trade. Imports of foreign goods can still be controlled by tariffs which, in turn, may be bound in the country’s tariff schedule. By contrast, given the impossibility of operating tariff-type measures across intangible services transactions, regulatory distinctions are the only way to control the supply of foreign services. In these conditions, the general extension of national treatment in services would in practice be tantamount to guaranteeing free access.

### III.D. NATIONAL TREATMENT IN TRIPS

National Treatment had long been a feature of intellectual property conventions. For trade-related aspects of intellectual property rights (TRIPS), the national treatment principle prohibits treatment of foreign nationals on less favourable terms than those accorded to nationals in the context of the implementation of national or international intellectual property laws or regulations.

The obligation is found both in Article 3 of the TRIPS Agreement itself and in the provisions of the Paris Convention, the Berne Convention, the Rome Convention and the Treaty on Intellectual Property in Respect of Integrated Circuits (IPIC Treaty) which are incorporated by reference in the TRIPS Agreement. These obligations are worded somewhat differently from Article 3 of TRIPS. Naturally, such national treatment obligations are limited in scope to the intellectual property covered by the pertinent convention.
SPECIFIC EXEMPTIONS

There are some exemptions specifically related to the national treatment principle in Article 3 of TRIPS. They refer to exceptions which are provided in the:

(1) Paris Convention (1967) for the Protection of Industrial Property;
(2) Berne Convention (1971) for the Protection of Literary and Artistic Works;
(3) Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations; and the
IV. SUMMARY PART I

THE MAIN PRINCIPLES OF THE GATT

As you have seen there are two main principles of non-discrimination, the MFN and the national treatment principles.

GATT ARTICLES CONTAINING THE PRINCIPLES
- Most Favoured Nation – Article I
- National Treatment – Article III

GATS ARTICLES CONTAINING THE PRINCIPLES
- Most Favoured Nation – Article II:1
- National Treatment – Article XVII

TRIPS AGREEMENT ARTICLES CONTAINING THE PRINCIPLES
- Most Favoured Nation – Article 4
- National Treatment – Article 3 of the TRIPS Agreement

EXCEPTIONS AND DEROGATIONS TO THESE BASIC OBLIGATIONS
- Specific exceptions are included in the articles containing the principles
- There are also General Exceptions

Under the GATT, the subject of MFN treatment is goods and under the GATS the subjects are services and service providers, while in the context of the TRIPS Agreement, the subject of MFN treatment is "nationals".

For goods, the MFN principle prohibits discrimination between imports irrespective of their origin or destination while the national treatment principle prohibits discrimination between imported and locally produced like products.

The MFN Principle for services obliges WTO Members to "...accord immediately and unconditionally to services and service providers of any other Member, treatment no less favourable than that it accords to like services and service providers of any other country".

For intellectual property, any advantage, favour, privilege or immunity granted by a Member with regard to the protection of intellectual property, to the nationals of any other country shall be accorded immediately and unconditionally to the nationals of all other Members.

For goods, whilst the MFN principle seeks to ensure that a WTO Member does not discriminate between like products originating in or destined for WTO Members, the national treatment principle prohibits a Member from favouring its domestic products over the imported products of other Members.

For services, the national treatment principle (as well as the provisions on market access) commit Members to giving no less favourable treatment to foreign services and service suppliers than provided for in the
relevant columns of their respective schedule of commitments.

For intellectual property, each Member shall accord to the nationals of other Members treatment no less favourable than that it accords to its own nationals with regard to the protection of intellectual property, subject to the exceptions already provided in, respectively, the Paris Convention (1967), the Berne Convention (1971), the Rome Convention or the Treaty on Intellectual Property in Respect of Integrated Circuits.

In addition to the specific exceptions that you have seen for the principles for goods, services and intellectual property rights, there are other exceptions of a horizontal nature, which also constitute a derogation to other rules. These horizontal exceptions and protective measures include the general and security exceptions provisions in the GATT, GATS and TRIPS Agreements.

PROPOSED ANSWERS:

1. If GATT Article I.1 referred to any other MEMBER, this would mean that members need only ensure that the best treatment, given to products originating in one of the members, be extended to the other members.

   This could therefore mean that a Member could grant an advantage to products originating in a country which is not a WTO Member without having to extend this MFN treatment to the other WTO Members.

   With the present text (using COUNTRY), the advantages given to products from one country must also be extended to products from all WTO members. Consequently, WTO members get the best treatment except for derogations permitted by the WTO Agreements.

2. For all services covered by GATS.

   In the GATS, the MFN obligation (Article II) is applicable to any measure that affects trade in services in any sector falling under the Agreement, whether or not specific commitments have been made.

   Exemptions could have been sought at the time of the acceptance of the Agreement (for acceding countries: date of accession), or, in the case of current Members, by way of a waiver under Article IX:3 of the WTO Agreement. They are contained in country-specific lists, and their duration must not exceed ten years in principle.

3. The ban on advertising constitutes a measure "affecting the internal sale" of imported "like products" under GATT Article III.4.

   This measure would be a violation of Article III.4 if foreign and domestic watches are "like products" under Article III.4, because the prohibition on the advertising of foreign watches amounts to treating imported goods less favourably than "like" domestic goods.
PART II: BASIC PRINCIPLES RELATED TO MARKET ACCESS

I. INTRODUCTION

As you certainly imagine, there are many possible impediments to market access for goods, services and intellectual property. The two main categories of barriers to market access for goods are (1) tariff and (2) non-tariff barriers.

The reduction of tariff and non-tariff barriers to market access is, together with the elimination of discrimination, a key instrument to achieve the objectives of the WTO.

The various WTO agreements have rules on market access.
II. **WHAT IS A TARIFF?**

Tariffs, also called "customs duties", are the most common and widely used barrier to market access for goods. A tariff is a financial charge in the form of a tax, imposed on merchandise imports. Tariffs can also be imposed on exports.

Tariffs give a price advantage to similarly produced local goods and raise revenue for governments, as market access is conditional upon the payment of the custom duty. In addition, a tariff can be used to promote a rational allocation of scarce foreign exchange.

Tariffs can be specific, ad valorem, or mixed. A specific tariff is an amount based on the weight, volume or quantity of product, for example, US$ 7 per kilo. Ad valorem tariff refers to the tax levied as a percentage of value, for example, a 7% duty on cars. So the duty on a car worth US$ 7,000 would be £490. A mixed or compound tariff is made up of a specific and ad valorem tariff.

II.A. **NEGOTIATIONS ON TARIFF REDUCTIONS**

The WTO does not prohibit the use of tariffs, however, there is the recognition that they often constitute obstacles to trade, hence there is the obligation on members to negotiate on tariffs. Article XXVIIbis of the GATT 1947 contains the original mandate on tariff negotiations. Current negotiations under the Doha Development Agenda focus on the reduction of tariffs in agriculture and non-agricultural market access.

One result of the Uruguay Round was countries' commitments to cut tariffs and to "bind" their customs duty rates to levels, which are difficult to increase. Countries made commitments on specific categories of goods. In the Uruguay Round, there was also a significant increase in the number of "bound" tariffs, or duty rates.

II.B. **PRINCIPLES ON TARIFF NEGOTIATIONS**

Tariff negotiations are based on (1) reciprocity and mutual advantage, and (2) the most favoured nation (MFN) treatment obligation.

II.B.1. **RECIROCITY AND MUTUAL ADVANTAGE**

Article XXVIIbis of the GATT 1994 provides for reciprocity and mutual advantage with regard to tariff negotiations. According to the principle, where a Member requests another Member to reduce its tariffs on certain products, it must also be prepared to reduce its own tariffs on products of export interest to the Member to whom the request is made.

However, the reciprocity and mutual advantage does not apply to negotiations between developed and developing countries. According to the Enabling Clause, developed-country members shall not seek, neither
shall developing-country members be required to make concessions that are inconsistent with the latter’s development, financial and trade needs. Similarly, the Enabling Clause instructs developed-country members to exercise the utmost restraint in seeking concessions from least-developed country Members in return for commitments to reduce or remove tariffs.

II.B.2. MFN TREATMENT

According to the MFN treatment obligation set out in Article I:1 of the GATT 1994, any tariff reduction a Member grants to any country, as a result of tariff negotiations with that country, must be granted to all WTO members immediately and unconditionally.

II.C. NATIONAL TARIFFS

The word “tariff” also has a second meaning. It sometimes refers to a structured list of products description and their corresponding customs duties. Most national tariffs reflect the structure in the Harmonized Commodity Description and Coding System - an international commodity classification system. This comes from the International Convention on the Harmonized Commodity Description and Coding System which entered into force on 1 January 1988 and to which most WTO members are a party.

II.D. SCHEDULE OF CONCESSION (ARTICLE II)

The schedules of tariff concessions are legal instruments attached to the Marrakesh Agreement - through the "Marrakesh Protocol" - and form an integral part of the legally binding commitments made by WTO members.

A thorough reading of the Schedule - including footnotes and head notes – is necessary for one to get a precise understanding of what was agreed by the WTO Member. Specific limitations or particular conditions may be agreed during the negotiations and inscribed as part of, or as limitation to, commitments in the schedule.

Each WTO Member has a Schedule, except for members that are part of a customs union; they sometimes have a schedule together with the other members of the union. GATT Article II regulates the goods schedule of tariff concessions. (See the Online Library for an example of a schedule)

GATT Article II.1b - first sentence: Schedule of Concessions.

1.b) "The products described in Part I of the Schedule relating to any Member, which are the products of territories of other Members, shall, on their importation into the territory to which the Schedule relates, and subject to the terms, conditions or qualifications set forth in that Schedule, be exempt from ordinary customs duties in excess of those set forth and provided therein ..."
Harmonized Commodity Description and Coding System of Classification (HS). This maximum applicable customs duty represents the "bound" level of the tariff.

The tariff concessions or "bindings" of each WTO Member are set out in that particular Member's Schedule of Tariff Concession. Each WTO Member may negotiate the "bound" level of an import duty for each product in the Schedule. Members are not obliged to bind tariffs on all imports of goods. However, after more than 50 years of GATT and WTO, many tariff levels are now bound.

WHAT IS A "BOUND TARIFF"?

A "bound tariff" is a tariff for which there is a legal commitment not to raise it above the bound level. The bound level of the tariff is the maximum level of customs duty to be levied on products imported into a Member. Each Member is responsible for negotiating its "bound levels".

The "bound levels" are agreed upon during "market access negotiations", which are often bilateral. The bound levels are sometimes determined by "target levels", or reduction objectives that are to be met by "tariff cuts". Acceding countries also have to negotiate their Schedule of Tariff Concessions in the market access negotiations (usually bilaterally), which take place during the accession process.

A bound tariff can differ from an applied tariff as a Member can apply a different (lower) tariff than the one it committed to apply as a maximum. Members can apply lower customs duties ("applied tariff level") but they cannot apply customs duty at a level higher than the one indicated in their Schedule of Tariff Concession (bound tariff level).

Article II of GATT applies to imported products. Consequently, economic operators are guaranteed that the ordinary customs duty which will be levied on their imports will not be higher than the level indicated as the "bound level" in the Schedule of Tariff Concessions of the importing Member.

EXERCISES:

4. What is a tariff?

5. List three purposes of tariffs/customs duties?
II.E. RENEGOTIATION OF CONCESSIONS/MODIFICATION OF SCHEDULES

Renegotiation of concessions is governed by the rules and provisions in GATT Article XXVIII and GATT Article XXVIIIbis, GATT 1994 Understanding on the interpretation of Article XXVIII as well as the Note Ad Article XXVIII.

If a Member wishes to withdraw its previous commitment and impose a higher customs duty than the bound rate in its Schedule, two alternatives are available under GATT Article XXVIII:

1. the level of the tariff concession can be TEMPORARILY "waived" - where the Member has, under exceptional circumstances, received specific authorization from all the other Members;
2. the level of the tariff concession can be PERMANENTLY changed (decreased or increased).

The renegotiation of any tariff concession requires compensating the exporting Members.

II.F. OTHER DUTIES & CHARGES

Article II of GATT states, "The products ... shall ... be exempt from ordinary customs duties ..."

The "bound rate" of customs duty indicated in the Schedule of Tariff Concessions represents the maximum customs duty that WTO members have committed to levy on imports from other members, under general WTO rules. However, "other duties and charges (ODCs)" may be imposed in addition to the "ordinary customs duty". In such circumstances charges can exceed the "bound level" inscribed in the Schedule of Tariff Concessions. However, for ODCs to be applicable, they MUST be registered in the Schedule and they must not exceed the level indicated therein. Other duties and charges are governed by GATT Article II:1 b - second sentence.

The Understanding on the Interpretation of GATT Article II.1.b, clarifies the types of duties and charges that can be collected in addition to the "ordinary customs duties".

Examples of these ODCs are:

- Import surcharge, i.e. a duty imposed on an imported product in addition to the ordinary custom's duties;
- Security deposit to be made on the importation of goods;
- Statistical tax imposed to finance the collection of statistical information; and
- Customs fee charged for processing the goods.

EXERCISES:

6. In Tristat's Schedule of Tariff Concessions, the bound duty for pocket watches set is 15%. Can Tristat apply a tariff different from the 15% listed in its Schedule?
III. NON-TARIFF BARRIERS

III.A. INTRODUCTION

Non-tariff barriers also restrict the market access of goods. Non-tariff barriers include quantitative restrictions (such as quotas) and other barriers (for example, lack of transparency in trade regulation, unfair and arbitrary application of trade regulations, customs formalities, technical barriers to trade and government procurement practices).

III.B. QUANTITATIVE RESTRICTIONS

What is a quantitative restriction (QR)? Can Members apply QRs?

There is no explicit definition of the term "quantitative restriction" in the WTO. An implicit definition is provided by GATT Article XI:1, which proscribes any prohibition or restriction other than duties, taxes or other charges, whether made effective through quotas, import or export licences or other measures.

The Council for Trade in Goods, in a 1996 Decision (G/L/59, Annex) provides an illustrative list of quantitative restrictions. This list includes: prohibition, prohibition except under defined conditions, global quota, global quota allocated by country, bilateral quota (i.e. anything less than a global quota), automatic licensing, non-automatic licensing, quantitative restriction made effective through state-trading operations, mixing regulation, minimum price triggering a quantitative restriction, and "voluntary" export restraints.

III.C. GENERAL ELIMINATION OF QUANTITATIVE RESTRICTIONS (ARTICLE XI)

Quantitative restrictions are a ban on imports or exports after a determined quantity (the quota) has entered the territory. According to Article XI:1 of GATT, quantitative restrictions should not be maintained by WTO Members. The prohibition means that only import duties can be used to regulate goods trade at customs. The "General Elimination of Quantitative Restrictions (QRs) is regulated by GATT Article XI (for trade in goods) and GATS Article XVI (for trade in services).

Therefore, a WTO Member cannot, as a general rule, impose import or export prohibitions or restrictions in quantities or value on the goods of another Member. The only protective barriers that WTO Members can institute or maintain are "duties, taxes or other charges" compatible with the GATT rules already discussed. Consequently, quantitative restrictions, whether "quotas, import or export charges or other measures", are a violation of the rule in Article XI:1.

The list of measures in Article XI:1 is not exhaustive. Thus, if a measure would have an effect similar to those noted in Article XI, the measure might be prohibited under Article XI:1.

The general prohibition on quantitative restrictions applies equally to import and export measures. State trading enterprises (Article XVII) are also prohibited from imposing quantitative restrictions.
Finally, we must also note GATT Article XIII: Non-discriminatory Administration of Quantitative Restrictions

1. No prohibitions or restrictions shall be applied by any Member on the importation of any product of the territory of any other Member or on the exportation of any product destined for the territory of any other Member, unless the importation of the like product of all third countries or the exportation of the like product to all third countries is similarly prohibited or restricted.

Where authorized by the GATT, quantitative restrictions must be imposed on a non-discriminatory basis. In other words, the Member imposing the quantitative restrictions is not allowed to favour any country over another. The Member is expected to impose them across the board.

2. In applying import restrictions to any product, Members shall aim at a distribution of trade in such product approaching as closely as possible the shares which the various Members might be expected to obtain in the absence of such restrictions.

This provision focuses on the allocation of quotas between exporting Members and aims to ensure that when imposed, quantitative restrictions do not distort ordinary trade flows. In other words, quotas should be applied equally to goods from all origins and their allocations should correspond as closely as possible to the expected market shares that would have existed in the absence of quotas. Nevertheless, agreements between the importing Member and its principal suppliers are possible.

**SPECIFIC EXCEPTIONS**

The specific exceptions to the general prohibition against the use of QRs are to:

1. Prevent critical shortage of foodstuffs or other essential products (GATT Article XI:2a);
2. Remove temporary surpluses of a domestic like product for which the imported product is a direct substitute (GATT Article XI:2(c)(i));
3. Uphold import restrictions on agricultural and fisheries products (GATT Article XI:2c).

The drafters of the GATT realized that in specific circumstances (shortages or surplus of goods domestically produced) one could derogate from the "no Quantitative Restrictions" rules to prevent or deal with critical situations.

The exception contained in GATT Article XI:2(c) created a quasi-general derogation for agricultural policies and measures relating to fishery products and constituted the essential provision which led to the "special treatment" for agriculture before the Uruguay Round. The "agricultural exception" ended when the WTO Agreement on Agriculture entered into force. The WTO Agreement on Agriculture superseded GATT Article XI:2(c). Article 4 of the Agreement on Agriculture provides, among other things, that quotas must be transformed into tariffs (in a process called "tariffication").

Consequently, under the WTO agreements, quantitative restrictions remain possible only on fishery products.
III.D. TARIFF-QUOTA

One must distinguish between quotas, which are generally prohibited, and tariff-rate quotas (TRQs). TRQs are predetermined quantities of goods which can be imported at a “preferential” rate of customs duty (“in quota Tariff Rate”). Once the TRQ has been filled, one can continue to import the product without limitation – so it is not a quantitative restriction in the sense of GATT Article XI – but at a higher tariff rate (“out-of-quota Tariff Rate”). The “out-of-quota Tariff Rate” is generally the MFN rate. In a tariff-rate quota, specific quantities of goods may be imported at different tariff levels.

The allocation of the TRQ should follow the disciplines in GATT Article XIII (Non discriminatory Administration of Quantitative Restrictions) which provides that TRQs should be applied similarly to products from all origins, but allocations should also respond as closely as possible to the expected markets share that would have existed in the absence of TRQs. Agreements with principal suppliers are also possible. The following diagram shows how a tariff-quota might look like:

Figure 1: Tariff-Quota

Imports entering under the tariff-rate quota (up to 1,000 tons) are generally charged 10%. Imports entering outside the tariff-rate quota are charged 80%. After the Uruguay Round, the 1,000 tons would be based on actual imports in the base period or an agreed “minimum access” formula.
IV. OTHER NON–TARIFF BARRIERS

In addition to customs duties and other charges, as well as quantitative restrictions, trade in goods is also impeded by other non-tariff barriers that restrict market access.

Lack of transparency, unfair and arbitrary application of trade measures, customs formalities and procedures, and other measures or actions such as pre-shipment inspection, marks of origin, and measures relating to transit shipments, as well as other forms of inaction (failure to inform about applicable trade laws, regulations, procedures and practices, timely and accurately) may constitute a barrier to trade.

The main non-tariff barriers in the multilateral trade system are:

- Technical Regulations and Standards: The Agreement on Technical Barriers to Trade (TBT Agreement),
- Sanitary and Phytosanitary Measures: The Agreement on Sanitary and Phytosanitary Measures (or the "SPS Agreement"),
- Lack of Transparency, unfair and arbitrary Application of Trade Measures: GATT Article X:3(a)
- Customs Formalities and Procedures: Article VIII:1(c) AND Article VIII:3
- Pre-shipment Inspection: The Pre-shipment Inspection Agreement (PSI), Marks of Origin, Measures Relating to Transit Shipments
- Import Licensing Procedures: The Agreement on Import Licensing Procedures
V. MARKET ACCESS FOR SERVICES

In the case of trade in services, GATS Article XX contains a similar concept on market access to the GATT schedules for goods with some variations.

As with national treatment, market access for services is not a general obligation but a series of commitments made in national schedules. Thus, in the case of market access, each party "shall accord services and service providers of other Members, treatment no less favourable than that provided for under the terms, limitations and conditions agreed and specified in its schedule". Commitments are undertaken with respect to each of the four different modes of service supply.

Market access is a negotiated commitment in specified sectors. The provisions of GATS, laid down in Article XVI, cover six types of restrictions that must not be maintained in the absence of limitations. The restrictions relate to the:

1. Limitations on the number of service suppliers;
2. On the total value of service transactions or assets;
3. Number of operations or quantity of output;
4. Number of natural persons supplying a service;
5. Type of legal entity or joint venture through which a service is provided;
6. Any foreign capital limitations relating to maximum levels of foreign participation are to be progressively eliminated.

The intention of the market-access provision is to progressively eliminate the following six types of measures mentioned above. These measures, except for (5) and (6), are not necessarily discriminatory, i.e. they may affect national as well as foreign services or service suppliers.

Part IV of GATS establishes the basis for progressive liberalization in the services area through successive rounds of negotiations and the development of national schedules. It also permits, after a period of three years, parties to withdraw or modify commitments made in their schedules. Where commitments are modified or withdrawn, negotiations should be undertaken with interested parties to agree on compensatory adjustments. Where agreement cannot be reached, compensation would be decided by arbitration.

They may assume additional commitments in the Schedule, for example, regarding, the implementation of specified standards or regulatory principles. Commitments are undertaken with respect to each of the four different modes of service supply.

The purpose of commitments is similar to tariff concessions under GATT and aims to ensure stability and predictability of trading conditions. However, commitments are not a straitjacket. They may be renegotiated against compensation of affected trading partners (Article XXI); and there are special provisions that allow for flexible responses, despite existing commitments, in specified circumstances (developed later in the course).

Therefore, commitments must not necessarily be complied with from the date of entry into force of a schedule. Rather, Members may specify in relevant part(s) of their schedule a timeframe for implementation. Such "pre commitments" are as legally valid as any other commitment.
VI. BARRIERS TO TRADE IN SERVICES

Since domestic regulations, not border measures, influence services trade, the GATS contains provisions mandating that such measures of general application should be administered in a reasonable, objective and impartial manner. Also, there is a requirement that parties establish the means for prompt reviews of administrative decisions relating to the supply of services.

The GATS also contains transparency requirements, among them the publication of all relevant laws and regulations. Furthermore, the provisions to facilitate the increased participation of developing countries in world services trade envisage negotiated commitments on access to technology, improvements in access to distribution channels and information networks and the liberalization of market access in sectors and modes of supply of export interest. The GATS contains obligations with respect to recognition requirements (educational background, for instance) for the purpose of securing authorizations, licenses or certification in the services area.

The GATS encourages recognition requirements achieved through harmonization and internationally-agreed criteria. Further provisions state that parties are required to ensure that monopolies and exclusive service providers do not abuse their positions. Restrictive business practices should be subject to consultations between parties with a view to their elimination.

While parties are normally obliged not to restrict international transfers and payments for current transactions relating to commitments under the Agreement, there are provisions allowing limited restrictions in the event of balance of payments difficulties. However, where such restrictions are imposed they would be subject to conditions; including that they are non-discriminatory, that they avoid unnecessary commercial damage to other parties and that they are of a temporary nature.

EXERCISES:

7. List the six types of restrictions that Members shall not maintain or adopt in sectors where market-access commitments are undertaken, unless otherwise specified in its Schedule as per GATS Article XVI?

8. Why are domestic regulation important to market access for services?
VII. SUMMARY PART II

Tariffs are the most common and widely used barrier to market access for goods. A tariff is a financial charge in the form of a tax, imposed on merchandise imports.

Tariff rates are listed in the Schedules of Tariff Concessions. WTO members are obliged to adhere to the bound tariff rates in their Schedules. However, WTO members can modify the concessions in the Schedules of Tariff Concessions by using the renegotiation procedures outlined in GATT Article XXVIII for trade in goods. Obligations on the bound tariff level can be found in GATT Article II, XXVIII, XXVIIIbis and the Understanding on Article XXVIII.

Non-tariff barriers also restrict market access. Hence, WTO rules prohibit the introduction or maintenance of quantitative restrictions. The rules on quantitative restrictions are governed by Articles XI and XIII. The only restrictions on free trade that the WTO permits are duties, taxes or other charges, and safeguards or emergency actions in limited circumstances.

They are also rules for other non-tariff barriers. For example, on SPS measures, or TBT measures.

For trade in services, each WTO member is required to have a Schedule of Specific Commitments that identifies the services for which the Member guarantees market access, national treatment, and any limitations that may be attached.

GATS Article XVI (Market Access) and XVII (national treatment) commit Members to giving no less favourable treatment to foreign services and service suppliers than provided for in the relevant columns of their Schedule. Commitments thus guarantee minimum levels of treatment, but do not prevent Members from being more open (or less discriminatory) in practice. Members may also modify pursuant to the provision in Article XXI of the GATS Agreement.

There are many rules, which allow derogations to these basic obligations on market access. In this Part, you studied the specific exemptions; you will see the general exemptions in Part IV.
PROPOSED ANSWERS:

1. A tariff is a financial charge in the form of a tax, imposed on merchandise imports. Tariffs can also be imposed on exports.

   The word "tariff" also refers to a structured list (the Harmonized Commodity Description) of products description and their corresponding customs duties.

2. (1) To give a price advantage to similarly produced local goods

   (2) To raise revenue for governments

   (3) To promote a rational allocation of scarce foreign resource.

3. Yes. Tristat can apply a tariff different than the one listed in its Schedule of Tariff Concessions in two circumstances.

   (1) Tristat may have an applied tariff lower than the bound tariff in its Schedule. However, if Tristat offers a lower rate to Vanin for example, it must apply this rate to all Members.

   (2) Tristat may charge a higher tariff that the bound rate in its Schedule to any non-Member, such as Rauritania, since WTO obligations do not extend to non-Members.

4. Limitations on:

   - the number of service suppliers;
   - the total value of service transactions or assets;
   - the number of operations or quantity of output;
   - the number of natural persons supplying a service;
   - the type of legal entity or joint venture through which a service is provided;
   - any foreign capital limitations relating to maximum levels of foreign participation are to be progressively eliminated.

5. In contrast to goods which is mostly imported in its physical form services cannot always be easily subjected to border measures. Hence, domestic regulations has a significant influence on trade in services.
PART III: TRADE REMEDIES

People sometimes refer to the two concepts studied in this Part at the same time — i.e. anti-dumping (AD) measures and countervailing duties (CVD) — but there are fundamental differences.

Dumping and subsidies share a number of similarities. Many countries handle the two under a single law, apply a similar process to deal with them and give a single authority responsibility for investigations. Occasionally, the two WTO committees responsible for these issues meet jointly.

The reaction to dumping and subsidies is often a special offsetting import tax (countervailing duty in the case of a subsidy). This is charged on products from specific countries and therefore it breaks the GATT principles of binding a tariff and treating trading partners equally (MFN). The agreements provide an escape clause, but they both also say that before imposing a duty, the importing country must conduct a detailed investigation that shows properly that domestic industry is being hurt.

Nevertheless, there are also fundamental differences, and these are reflected in the agreements.

Dumping is an action by private firms and it is not actually prohibited by the WTO provisions. With subsidies, it is the government or a government agency that acts, either by paying out subsidies directly or by requiring companies to subsidize certain customers.

Anti-dumping measures are the conditional right to take action to correct the effects caused by distorting practice of private firms called "dumping". The provisions regulate the right of the importing WTO Member to protect its domestic market against "unfairly" priced imports. The WTO is an organization of countries and their governments. The WTO does not deal with companies and cannot regulate companies' actions such as dumping. Therefore the Anti-dumping Agreement only concerns the actions governments may take against dumping.

Anti-dumping measures are disciplined by GATT Article VI and the Anti-dumping Agreement. Dumping takes place when a product of one firm is introduced into the commerce of another country at less than the normal value of the product. Investigations have to be conducted to determine the margin of dumping and to define the level of the anti-dumping duty.

With regard to subsidies, governments act on both sides: they subsidize and they act against each others' subsidies. Therefore the subsidies SCM Agreement disciplines both the subsidies and the reactions.

Subsidies are governed by the SCM Agreement. Subsidies on Agricultural products are governed by the Agreement on Agriculture. The SCM Agreement defines two categories of subsidies: prohibited and actionable. It originally contained a third category - non-actionable subsidies. This category existed for five years and ended on 31 December 1999.

The SCM Agreement regulates the actions countries can take to counter the effects of subsidies. The SCM Agreement further elaborated the basic principles in Article VI governing the investigation, determination and application of countervailing duties. A Member can also use a countervailing measure if it determines that its imports are subsidized, that the subsidized imports are causing injury to a domestic industry and there is a causal link between the subsidies and the injury to the domestic industry. The disciplines set out in the SCM Agreement govern only specific subsidies.

The SCM Agreement also allows Members to challenge – through the WTO dispute settlement mechanism – the consistency of any subsidy programme with the WTO rules.
PART IV: EXCEPTIONS TO THE BASIC PRINCIPLES

I. INTRODUCTION

This section illustrate the circumstances under which a WTO Member can invoke the general and security exceptions.

WTO members are obliged not to discriminate (MFN and national treatment) among themselves, to follow certain rules on market access, like for example, they cannot withdraw "liberalization commitments/concessions" that they made without following pre-determined rules, and there is a prohibition on the use of quantitative restrictions by Members.

Nevertheless, in certain circumstances, WTO members may derogate from these obligations, provided they comply with certain requirements. The category of exceptions discussed in this Part is horizontal in nature, i.e. they allow a Member to derogate from any of the GATT, GATS and TRIPS obligations.
II. GENERAL EXCEPTIONS

II.A. IN THE GATT

Article XX (General Exceptions) of GATT 1994 recognizes that governments may need to apply and enforce measures for purposes such as the protection of public morals; human animal or plant life and health; and the protection of national treasures.

The GATT 1994 does not prevent governments from adopting and enforcing such measures. However, any measure adopted under the general exceptions provisions must not constitute a means of arbitrary or unjustifiable discrimination nor should it be a disguised restrictions on international trade.

GATT Article XX provides the use of the General Exception for trade in goods:

GATT Article XX: General Exceptions

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 the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any Member of measures:

(a) necessary to protect public morals;

(b) necessary to protect human, animal or plant life or health;

(c) relating to the importations or exportations of gold or silver;

(d) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement, including those relating to customs enforcement, the enforcement of monopolies operated under paragraph 4 of Article II and Article XVII, the protection of patents, trade marks and copyrights, and the prevention of deceptive practices;

(e) relating to the products of prison labour;

(f) imposed for the protection of national treasures or artistic, historic or archaeological value;

(g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption;

(h) undertaken in pursuance of obligations under any intergovernmental commodity agreement which conforms to criteria submitted to Members and not disapproved by them or which is itself so submitted and not so disapproved;

(i) involving restrictions on exports of domestic materials necessary to ensure essential quantities of such materials to a domestic processing industry during periods when the domestic price of such materials is held below the world price as part of a governmental stabilization plan; Provided that such restrictions shall not operate to increase the exports of or the protection afforded to such
domestic industry, and shall not depart from the provisions of this Agreement relating to non-
discrimination;

(j) essential to the acquisition or distribution of products in general or local short supply; Provided that
any such measures shall be consistent with the principle that all Members are entitled to an
equitable share of the international supply of such products, and that any such measures, which are
inconsistent with the other provisions of the Agreement shall be discontinued as soon as the
conditions giving rise to them have ceased to exist. The Members shall review the need for this sub
paragraph no later than 30 June 1960.

GATT Article XX permits Members to take certain measures, otherwise prohibited by GATT provisions, subject
to stipulated conditions.

1) The first condition is that the contemplated measure must fit under one of the 10 categories in sub
paragraphs (a) - (j) of Article XX. For example, sub-paragraphs (a), (b), and (d) indicate that the measures
sought to be taken by Members must be necessary either to, protect public morals; human, animal or plant
life or health; or to secure compliance with certain laws or regulations.

For those three categories, there is an imperative "necessity" test that must be satisfied for the measures to be
consistent with Article XX. The determination of whether a measure, though not indispensable, may
nevertheless be considered "necessary", involves a weighing and balancing of factors, such as:

- The importance of the common interests or values protected by the measure;
- The efficacy of the measure in achieving the intended policies;
- The impact of the measure on imports especially vis-à-vis its like domestic products.

Specific case of WTO members invoking Article XX include reference to paragraph (a) (public morals) to justify
import bans on religious grounds. Frequent references are also made to the exception governing measures
aimed at protecting the environment in paragraphs (b) and (g).

Over the years, WTO jurisprudence has established that members have the right to determine the level of
health or environmental protection they deem appropriate. This principle is reiterated in the TBT and SPS
agreements for the measures covered by those agreements. Furthermore, there is no requirement in
Article XX of the GATT 1994 to quantify the risk to human life or health. A risk may be evaluated in either
quantitative or qualitative terms.

2) The second condition refers to the opening paragraph of Article XX (commonly referred to as the
"chapeau of Article XX"). Measures covered under the General Exceptions must not be applied in a manner
that would constitute a means of arbitrary or unjustifiable discrimination between countries where the same
conditions prevail, or a disguised restriction on international trade.

Consequently, before certain measures are used to derogate from GATT rules, they must meet the
requirements of the chapeau i.e. they have to be "applied" in a manner that does not create "arbitrary or
unjustifiable discrimination". The chapeau of Article XX of GATT aims to prevent the use of derogation
measures to unjustifiably impede the market access rights of other WTO members.
The combined effect of the chapeau and the enumerated provisions of Article XX are to set out a two-level test that a proposed measure must pass before it is deemed consistent with Article XX, and therefore qualify as an exception to the obligations in the GATT:

- The first test is whether the policy fulfils the criteria in Article XX (a) (j);
- The second test is whether, when it fulfils those criteria, it satisfies the "Chapeau test". That is, if the measure is being applied "arbitrarily", "unjustifiably", or as a "disguised restriction on trade".

These provisions attempt to strike a "balance" between the market access rights of WTO members and the need to ensure that other members' right to invoke these exceptions are not rendered illusory. While members have a prima facie right to maintain measures necessary to enforce health policies for example, criteria have been developed to ensure that Members demonstrate their good faith and not apply measures in a discriminatory manner or as a disguised restriction on trade.

II.B. IN GATS

Article XIV of the GATS permits members to maintain restrictions on services and service suppliers if the measure satisfies one of the policy purposes in sub-paragraphs (a) - (e). Furthermore, Article XIV GATS recognizes that members need to maintain a balance between trade measures and other legitimate policies and interests, such as the protection of the health of its citizens.

GATS Article XIV is very similar to GATT Article XX, which governs trade in goods. Certain measures, which would otherwise be prohibited by other provisions of the GATS, can still be taken provided two conditions are met:

1) **The first condition** is that the measure taken must fall into one of the five categories in sub-paragraphs (a) to (e). For example, sub-paragraphs (a), (b) and (c) indicate that the measures must, in similar terms to GATT Article XX, be "necessary" either to protect public morals, or to maintain public order (a specific definition of this latter term is in the accompanying footnote); to protect human health, animal or plant life or health; or to secure compliance with certain laws or regulations.

For these three categories, as in GATT, a "necessity" test must be passed.

The categories in letters (d) and (e) are specific to trade in services. Paragraph (d) mandates that members can still take measures, otherwise inconsistent with the National Treatment Principle (GATS Article XVII), if the measure facilitates the collection of direct taxes. Such differential treatment, which appear to be less favourable for foreign services or foreign service providers than for national ones, are authorized only where their purpose is to ensure that the imposition of direct taxes is "equitable and effective". According to paragraph (e), measures that do not conform with the MFN Principle (GATS Article II) can still be taken if their purpose is to put into effect agreements to avoid double-taxation, for example.

2) **As with GATT Article XX governing trade in goods, the second condition** is that the measure must satisfy the chapeau of Article XIV. Measures covered by the GATS General Exceptions provisions must not be "applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where like conditions prevails, or a disguised restriction on trade in services...".

These provisions are because Members recognized that certain measures might be applied even if they derogate from some of the major GATS principles.
II.C. IN TRIPS

There are no general exceptions as such under the TRIPS Agreement. However, some provisions may apply to specify situations where protection is not required. See for example Arts. 27.2, 27.3, 30 and 31 (patents), Article 17 (trademarks), and Article 13 (copyrights and related rights).

ILLUSTRATION

Let us assume that Alba and Vanin are WTO Members and that Alba imposed market access restrictions on imports.

Alba, a WTO Member, has a prima facie right to impose market access restrictions on imports provided the criteria in GATT Article XX are satisfied. If Vanin challenges these measures, Alba may need to justify them. Assuming that Alba's measures violate a GATT market access provision (Articles I, II, III or XI), Alba would need to demonstrate that its measure is justified by one or more of the general exceptions in Article XX.

In order to demonstrate this, it is necessary for Alba to demonstrate, firstly that the measures fall within one of the exceptions in Article XX sub-paragraphs (a) – (j). If it is able to show that the measures are, for example, "necessary" to protect human health or the environment, then the measures are provisionally justified. The "necessity test" will often call for an examination of whether any other measure, reasonably available for Alba, would provide the same level of (or better) protection for the environment or human health but with less trade distortion (less trade restrictive alternative measure).

Secondly, Alba must fulfil the requirements in the introductory paragraph/chapeau of Article XX. Alba will need to show that the measure is not applied in an arbitrary manner, does not result in "arbitrary or unjustifiable discrimination between countries where the same conditions exist", and that the measure is not a disguised restriction on international trade. For instance, if the measure is applied in an inflexible and rigid manner, without taking into account the specific conditions of the exporting Members, this could constitute arbitrary or unjustifiable discrimination. The objective of the measures must be to protect health or the environment, and so forth, and not to discriminate between "like products".

If Alba fails to satisfy any of the requirements of Article XX (sub-paragraphs or chapeau), it cannot invoke the "General Exception" contained in Article XX to justify inconsistencies with other GATT provisions. In such circumstances, the Dispute Settlement Body will require Alba to eliminate the measures because they would be deemed a violation of GATT Articles I, II, III or XI and not "covered" by the General Exception provisions. Now let us examine how general exceptions are interpreted in the WTO dispute settlement procedure by studying a famous case. This case involved a measure that was applied to imports of shrimp and shrimp products, and the protection of sea turtles. The US - Shrimp Case illustrates the interaction between trade related measures and non-trade related concerns within the multilateral trade system.

EXERCISES:

1. Can Vanin maintain an environmental measure banning the imports from some, but not all WTO Members?
III. SECURITY EXCEPTIONS

III.A. IN THE GATT

IN BRIEF

A WTO Member is allowed to take any action which it considers necessary for the protection of its essential security interests or in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security. Members are not required to furnish information the disclosure of which would be contrary to their essential security interests.

IN DETAIL

For trade in goods, GATT Article XXI governs the use of the "Security Exceptions".

GATT Article XXI: Security Exceptions

Nothing in this Agreement shall be construed: to require any Member to furnish any information the disclosure of which it considers contrary to its essential security interests; or to prevent any Member from taking any action which it considers necessary for the protection of its essential security interests

(i) relating to fissionable materials or the materials from which they are derived;

(ii) relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment;

(iii) taken in time of war or other emergency in international relations; or 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.

GATT Article XXI allows certain security measures, which would otherwise be prohibited by GATT provisions, to be taken in two specific circumstances:

1) Sub-paragraph (a) refers to the disclosure of information that the WTO Member would consider contrary to its essential security interests. Sub-paragraph (b) prescribes the condition under which a Member may take action that it determines to be "necessary for the protection of its essential security interests" including those relating to either:

- the trade in fissionable materials; or
- traffic in arms, ammunition and other war-related trade.
Sub-paragraph (b)(iii) refers to measures taken not only in time of war, but also to measures taken in time of "other emergency in international relations". The term "emergency in international relations" is not defined in Article XXI.

2) Second, Members are allowed to implement measures, which are taken in pursuance of their obligations under the United Nations Charter (for the maintenance of international peace and security). This is a reference to economic sanctions.

Article XXI does not contain an obligation for Members to notify measures taken pursuant to the Security Exception. However, a Decision adopted by the GATT Contracting Parties in 1982 states that "subject to the exception in Article XXI(a), Contracting Parties (now WTO Members) should be informed to the fullest extent possible of trade measures taken under Article XXI".

III.B. IN GATS

For trade in services, GATS Article XIVbis governs the use of the "Security Exception". The wording of GATS Article XIVbis is almost identical to the security exception for trade in goods (GATT Article XXI) and the concepts do not differ in both instances. However, unlike in GATT Article XXI, there is a notification obligation in the security exception for trade in services (see paragraph 2). It is instructive to note that in the 1982 Decision (relating to GATT Article XXI) the wording used is "should", while in paragraph 2 of GATS Article XIVbis, the wording used is "shall", which implies an obligation.

III.C. IN TRIPS

For trade-related intellectual property rights, Article 73 of the TRIPS Agreement governs the use of the "Security Exception". The wording of Article 73 of the TRIPS Agreement is identical to the provision governing trade in goods (GATT Article XXI) and the application of the concept is the same as for trade in goods and trade in services. There is no explicit obligation in Article 73 to notify measures taken pursuant to the Security Exception.

EXERCISES:

2. What is a security exception?
IV. SAFEGUARD MEASURES

The WTO obligations not to discriminate, not to withdraw commitments and/or concessions may appear to restrict the sovereign rights of WTO members to exercise full autonomy in trade and economic matters. However, numerous exceptions allow members to derogate from these market access disciplines, either because:

1. Specific provisions within these disciplines permit them to do so; or
2. The horizontal exception enables them to do so.

There are general as well as security exceptions relating to goods, services and intellectual property. For example, Article XIV of the GATS Agreement allows members to take measures necessary for overriding policy concerns, including the protection of public morals or the protection of human, animal or plant life or health. However, such measures must not lead to arbitrary or unjustifiable discrimination or constitute a disguised restriction to trade. If essential security interests are at stake, Article XIVbis of the GATS Agreement provides cover.

GATT Contracting Parties and likewise WTO members have kept the possibility for members to take measures to safeguard their economic interest. Safeguard measures are taken to confront unforeseen circumstances. GATT rules on safeguards are in Article XIX (general safeguards) and XII (BOP provisions) of the GATT. Article XII of the GATT Agreement allows for the introduction of temporary restrictions to safeguard the balance-of-payments; and a so-called “prudential carve-out” in financial services permits Members to take measures in order, inter alia, to ensure the integrity and stability of their financial system (Annex on Financial Services, paragraph 2). However, the disciplines are not as developed as in the GATT. Members are currently negotiating to define rules on safeguards for trade in services.
V. WAIVERS

A WTO Member may be authorized by the other Members to derogate for a specific time and under certain conditions, from any provision contained in the WTO Agreements. These derogations are called "waivers". A waiver is a permission granted by WTO Membership allowing a particular WTO Member to not comply with its normal commitments.

Waivers are governed by Article IX of the Marrakesh Agreement (Establishing the WTO) and are applicable to trade in goods, trade in services and trade-related aspects of intellectual property rights.

In "exceptional circumstances", waivers are granted by the whole WTO Membership, through a decision of the Ministerial Conference or the General Council.

Waivers are time-bound. A definite time-period is set for termination of a waiver. Waivers have time limits and extensions have to be justified. They can be renewed annually by the Membership if the exceptional circumstances warranting its grant still exist.
VI. REGIONAL INTEGRATION

When a WTO Member enters into a RTA through which it grants more favourable conditions to its trade with other parties to that arrangement than to other WTO members’ trade, it departs from the guiding principle of non-discrimination defined in Article I of GATT, Article II of GATS, and elsewhere.

WTO members are however permitted to enter into RTAs under specific conditions which are spelled out in three sets of rules:

1. Paragraphs 4 to 10 of Article XXIV of GATT (as clarified in the Understanding on the Interpretation of Article XXIV of the GATT 1994) provide for the formation and operation of customs unions and free trade areas covering trade in goods;

2. the Enabling Clause (the 1979 Decision on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries)

3. Article V of GATS governs the conclusion of RTAs in the area of trade in services, for both developed and developing countries.
VII. S&D FOR DEVELOPING COUNTRIES

Part 4 of the GATT includes provisions on the concept of non reciprocity in trade negotiations between developed and developing countries, i.e. when developed countries grant trade concessions to developing countries they should not expect the developing countries to make matching offers in return.

The Enabling Clause is an exception to the MFN obligation that allows developed countries to offer more favourable tariff treatment to imports from developing and least developed countries without the obligation to extend that favourable treatment to other WTO members. It creates a permanent derogation from one of the key principles contained in GATT Article I, and is a concrete contribution to S&D treatment for developing countries.

The WTO agreements include numerous provisions giving developing and least-developed countries special rights or extra leniency — "special and differential treatment". Among these are provisions that allow developed countries to treat developing countries more favourably than other WTO members. Both GATT and the GATS allow developing countries some preferential treatment.

Other measures concerning developing countries in the WTO agreements include:

- extra time for developing countries to fulfil their commitments (in many of the WTO agreements);
- provisions designed to increase developing countries' trading opportunities through greater market access (e.g. in services, technical barriers to trade);
- provisions requiring WTO members to safeguard the interests of developing countries when adopting some domestic or international measures (e.g. in anti-dumping, safeguards, technical barriers to trade);
- provisions for various means of helping developing countries (e.g. to deal with commitments on animal and plant health standards, technical standards, and in strengthening their domestic telecommunications sectors).
**PROPOSED ANSWERS:**

1. Vanin can, if the measure does not violate GATT Article I and/or XIII (MFN for quotas). Additionally in some circumstances and pursuant to Article XX a Member is able to maintain measures that otherwise violate provisions of the GATT.

   However, the Member would first need to show that the goal of the measure is recognized by one of the exceptions listed in sub-paragraphs (a) - (j) of Article XX.

   Provided the measure fulfils the criteria in sub-paragraphs (a) - (j) the Member would need to show, in addition, that the measure is applied in such a way that it does not violate the requirements of the opening paragraph/chapeau to Article XX. Namely, that the measure is not applied to cause arbitrary or unjustified discrimination between Members where the same conditions exist and is not applied to constitute a disguised restriction on trade.

2. A security exception allows a WTO Member to take any action which it considers necessary for the protection of its essential security interests or in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.

   When Members utilize the exception they are not required to furnish any information, the disclosure of which would be contrary to their essential security interests.
Trade in Services and Economic Development

ESTIMATED TIME: 2 hours

OBJECTIVES OF MODULE 3

- Explain the contribution of services to the overall economy; and
- explain the importance of trade in services and the GATS to fostering development.
I. INTRODUCTION

The General Agreement on Trade in Services (GATS), which entered into force in January 1995, was one of the major achievements of the Uruguay Round. With the GATS, the rules and disciplines of the multilateral trading system were extended to cover trade in services. The provisions of the GATS apply to all Members of the World Trade Organization (WTO). In this module we will examine the main concepts and objectives underpinning the GATS. We will explain some of the reasons for an agreement on trade in services as well as the potential benefits of services liberalization. This will hopefully contribute to a better understanding of the legal provisions of the Agreement as well as the challenges and opportunities of the ongoing Doha negotiations.
II. WHAT IS THE CONTRIBUTION OF SERVICES TO THE OVERALL ECONOMY?

Services account for a large share of the economy at all levels of development. The majority of both production and employment in most economies around the world depend on services. In 2002, services were estimated to account for 44% of gross domestic product (GDP) in least-developed countries, 57% in middle income economies, and 71% in high income economies.¹

Services’ share of total employment is also comparable or in some cases even slightly higher than its share of GDP. This is due to the labour-intensive nature of many traditional services, including distribution, construction, education, health and social services, as well as the rapid expansion of the sector overall. Productivity gains in services can thus be vitally important for job creation.

Today, more than half of annual world foreign direct investment flows are in services. Services trade, as estimated from balance of payments statistics, was greater than $1.3 trillion in 1999, representing over one fifth of world trade in goods and services. Services have also been among the fastest growing component of world trade over the last decade and a half. Leading the way are telecommunications, finance, health and a variety of business-related services.

These figures are a good reminder of the vital role that services play in facilitating all aspects of economic activity. Transportation, communications and financial services provide the support necessary for any type of business. Educational, health, and recreational services influence the quality of labour available to firms. Professional services provide specialized expertise to increase firms' competitiveness. Increasingly, the major portion of value-added (up to 70 percent) comes from services inputs: upstream (such as feasibility studies and research and development activities); on stream (such as accounting, engineering, and administrative services); and downstream (such as advertising, warehousing, and distribution).²

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<th>Why are services important to the well being of the overall economy?</th>
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<td>Services hold a vital position in the production of goods and services. Telecommunications, banking, insurance, construction and transportation are not only consumed in their own right but they are strategically important inputs for all sectors, goods and services. No company can function without a telephone, nor can it grow without finance or sell its goods to a market without transportation. No service supplier can efficiently provide services without access to telecommunications, legal, accounting, computing and other business services. In short, no economy can prosper without an efficient services infrastructure.</td>
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¹ World Bank
III. WHAT ARE THE POTENTIAL BENEFITS OF SERVICES LIBERALIZATION?

Trade, when allowed to flow freely, helps generate economic growth by creating bigger markets. A more open world trading system means a global market place of some (6 billion customers). Large markets in turn encourage specialization, which leads to greater gains in productivity and efficiency. It means countries can concentrate their resources and talents on producing goods and services they make best and on importing those that are more efficiently produced elsewhere.

A larger marketplace also stimulates technology and encourages lower cost. For consumers, it means a wider range of personal choice. For producers, it can help bring technology, materials and know-how for production. This logic applies to services just as it does to goods, but there are some important points which distinguishes trade in services from trade in goods.

- ‘Producer services’ such as telecommunications, banking, insurance, construction and transport help to shape overall economic performance. An inefficient and costly service infrastructure is comparable to a tax on production and exports. Exporters and producers of both goods and services need access to world-class services if they are to compete effectively. If not, agricultural producers will suffer due to poor transportation and storage facilities. Companies will face multiple delays and obstacles to doing business due to sub-standard communication networks. Manufacturers will also not be price competitive if they have to pay higher shipping rates due to flag discrimination and cargo preference policies, and have no access to cheap finance due to protected financial systems. A study on the Indian economy suggests that, in tandem with liberalization policies in services, the use of services as inputs in manufacturing production expanded at an annual rate of some 16 per cent, at constant prices, over the 1990s. The contribution of services to the growth of Indian manufacturing output is estimated to have increased concurrently from about 1 per cent to 25 per cent.

- Consumer savings and choice improves dramatically. Restricting access to foreign services and service suppliers is also a tax on domestic consumers. The primary effect of protection is to reduce the supply of certain services, thereby constraining domestic demand to domestically produced services. If the policies protect inefficient suppliers, such protection becomes similar to a tax on domestic consumers, who cannot access cheaper foreign suppliers. This, in turn, leads to a redistribution of income from consumers to domestic producers. There is strong evidence, not least in telecoms, that liberalization leads to lower prices, better quality and wider choice for consumers.

- Services liberalization is strategically important for technology transfer and development. Making it easier for foreign companies to establish branches and subsidiaries can help encourage foreign direct investment (FDI). Such FDI typically brings with it new skills and technologies that spill over into the wider economy in various ways. New skills and techniques are acquired by domestic employees and gradually get adopted by domestic firms. A number of developing countries have been able to build on FDI to advance in international services markets in sectors such as software development and health.

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3 For an overview of research on the importance of infrastructure for trade and development, see WTO World Trade Report 2004.

In some sectors, such as finance, telecommunications and transport, the benefits of liberalization can have widespread effects. There is substantial evidence that policies that reduce competition in these services can be very costly. Conversely, the removal of restrictions can lead to big gains.

- **Financial services** are the lifeblood of commercial activity. Product innovation, international regulatory cooperation, and new communication technologies have multiplied the opportunities for financial innovation. There is strong evidence in this sector that competition helps to improve the quality and efficiency of the products offered, and the resilience of markets to external shocks. A study using a sample of 60 countries found that between 1990-99 those with fully liberalized financial services grew, on average, about one percentage point faster than other countries.\(^5\)

- **Telecommunications** are the new fast-speed highways of modern commerce. Studies concur on the beneficial impact of a packet of measures that includes privatization of state-owned monopolies, introduction of competition, and establishment of independent regulators. Countries that embarked on comprehensive reforms in this sector did systematically better than others that confined themselves to partial change. It has been found that countries which fully liberalized financial and telecommunication services performed better with 1.5 percentage points stronger economic growth than those that did not\(^6\). Competition has proven a crucial factor in restructuring and modernizing the sector, with trade liberalization and the subsequent entry of foreign operators as core elements.

- **Transport** is ultimately what makes trade possible. Over centuries, transport service hubs have been the major centres of trade. Transport costs can also be a major factor determining a country's comparative advantage and competitiveness. For instance, an economy with relatively low air fares has a competitive edge in supplying perishable goods such as flowers or vegetables. While for producers of bulk non-perishable goods the availability of reliable, efficient and low-cost port services can be the key factor in their logistics and distribution chain. Overall, the experience of many countries have been that the liberalization of transport services has a positive impact on their overall trade. By reducing the costs of shipping dramatically, small and medium sized firms that would otherwise be marginal, have been able to expand their export activities. A study on the likely economic effects of the Doha Round negotiations also found that with a 50% reduction of barriers to services trade, a 12% increase in transport and logistics trade can be expected.\(^7\)

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\(^6\) Id.

\(^7\) Francois, Joseph, Hans van Meijl and Frank van Tongeren (2005), Gauging the WTO negotiation’s potential gains, Economic Policy, April.
IV. CAN THE LIBERALIZATION OF TRADE IN SERVICES HELP DEVELOPMENT?

In heavily protected markets, services are often inaccessible, prohibitively expensive and/or of low quality, and unsuited to the needs of consumers and producers. Remedying these problems often requires large investments to be made to improve the services infrastructure. It also requires some degree of regulatory reform to remove cumbersome red-tape, to make it easier for service suppliers to operate and ultimately to encourage greater investment.

In such cases, the economic benefits of liberalizing services accrue predominantly to the liberalizing country itself and independently of its capacity to export services. This stands to reason since protection often acts as a tax on domestic consumers and producers. Economic gains thus flow from lifting the implicit tax of protectionist policies. Whatever market access is obtained to foreign services markets is an important bonus but it does not replace the major benefits from domestic reform. While there may be differences in the estimated size of the gains, various studies on services liberalization all share the same conclusion that countries with the highest barriers to trade in services stand to benefit the most from liberalization (see below).

In brief, the development gains from the liberalization of services trade have both internal and external dimensions.

- **The internal dimension: improving the domestic services market.** Liberalization can help increase the supply of services by offering an environment conducive to attracting foreign investment and by lowering cost through competition. In a competitive environment, firms are forced to innovate, to introduce new products, and to improve quality constantly. Although experiences may vary considerably across countries and sectors, the introduction of competition has generally led to improvements in performance, increases in infrastructure investment, improvements in service quality and coverage, and prices more closely aligned to underlying costs. The size of such changes, however, depends enormously on the extent to which the market is liberalized, the effectiveness of regulation and on the sequence of reform.\(^8\)

- **The external dimension: stronger domestic markets equals greater export competitiveness.** The gains from more investment and greater domestic competition also go hand in hand with building greater export competitiveness in both goods and services. Inefficient and costly services infrastructure hampers overall economic growth. Agricultural producers will suffer if they do not have access to efficient logistic and transport services. Companies will face multiple delays and obstacles if communication networks and services are sub-standard. Manufacturers will also not be competitive if they have no access to the best and cheapest available finance. A study on the Indian economy found that when many services sectors were gradually opened during the 1990s, their contribution to the growth of Indian manufacturing output increased from about 1% to 25%.\(^9\) Another study using a sample of 60 countries found that those with fully open financial services sectors grew on average one percentage point faster than other countries over the past decade.

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\(^8\) see Marchetti, Juan (2004), Developing countries in the WTO services negotiations, Staff Working Paper ERSD-2004-06, for examples of gains from services liberalization.

Efficient services help get goods to export markets

Travel and transport services are key to international economic integration. It has been estimated that the travel time for merchandise exports from factory gate to ship loading is 49 days in Sub-Saharan Africa and 34 days in South Asia, as compared to 13 days in high-income OECD countries. The days lost due to poor logistics means that exports from Sub-Saharan Africa face an implicit tariff of about 40% even before the goods leave the country. The experience of many countries has been that the opening of trade in services has a positive impact on their overall trade. Opening the market of port services in Chile, for instance, led to a 50% reduction in operating cost over two years. The same occurred in Mexico. In Africa, once markets in telecommunications were opened, there was an explosion of mobile phones. In 2004 alone, Africa added 15 million new mobile phone subscribers — a number equal to the total number of subscribers in the whole continent in 1996. Today, almost 75% of all African telephone subscribers use mobile phones.

Another important development feature of services trade is the labour-intensive nature of many traditional services, including distribution, construction, education, health and other social services. With large labour markets, developing countries are typically well suited to take advantage of this factor of production. Productivity gains in services can in turn be vitally important for job creation. It is also worth keeping in mind that developing countries stand to make huge gains if other countries open up their markets to allow foreign natural persons to provide services in their market. It has been estimated, for example, that an increase in industrial countries’ quotas on the inward movement of skilled and unskilled temporary workers to 3 per cent of their work force would generate an increase in world welfare of more than US$150 billion each year.10

What does the research on services trade liberalization tell us?

A broad range of studies employing a wide variety of research techniques have found that the benefits expected to flow from further trade liberalization far exceed those from goods liberalization. This is due to several factors:

(i). barriers in many services markets are higher than existing impediments in goods trade (apart from those in agriculture).

(ii). barriers normally consist of opaque and less efficient measures - quotas and other non-revenue generating interventions – instead of tariffs as in merchandise trade.

(iii). the costs of services protection, in particular of infrastructure-related services, are borne by a wide array of downstream user industries and serve as a tax on consumption and production.

Numerous studies on the impact of services liberalization have found that:

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Welfare gains flowing from a 50% cut in services protection can be five times larger than those from non-services trade liberalization.\textsuperscript{11} 

The total global gain from liberalising all post-Uruguay Round trade restrictions on services is US$130 billion, which is more the US $80 billion estimated for liberalising goods trade.\textsuperscript{12} 

A 33% reduction of access barriers in service sectors may lead to a rise in global welfare of about US$413 billion. Although developed countries are the main beneficiaries in this study, with some US$330 billion, the gains to be expected by developing countries are still very significant. Again, services liberalization has been found to yield larger gains than trade liberalization in agriculture and manufacturing.\textsuperscript{13} 

A 40% cut in protection of business and construction services would translate into a US$22 billion increase in income. The corresponding estimates for the trade and transport sectors are US$332 billion. With few exceptions, all developed and developing countries are expected to benefit.\textsuperscript{14} 

Gains from liberalizing financial services and telecommunication services have been estimated at US$24 billion. In both sectors, the major contribution comes from removing restrictions that discriminate against foreign firms.\textsuperscript{15} 

Developing countries have witnessed particularly rapid growth in services and have much to gain from further liberalization of world services markets. Between 1990 and 2003, the sector’s share in GDP increased by 9 percentage points in low and middle income countries as compared to seven percentage points in high income countries.

\textsuperscript{11} These are the projected increases in real income about 10 years after the liberalisation has occurred, which include the gains from increased trade and more efficient resource allocation. See Robinson, S., Z. Wang and W. Martin (1999), Capturing the Implications of Services Trade Liberalization, Invited Paper at the Second Annual Conference on Global Economic Analysis, Ebberuk, Denmark, June 20-22.

\textsuperscript{12} Dee, Philippa and K. Hanslow, 2000, Multilateral Liberalisation of Services Trade, Productivity Commission Staff Research Paper, Ausinfo, Canberra.


\textsuperscript{15} Verikios, G. and X-G. Zhang (2001), Global Gains from Liberalising Trade in Telecommunications and Financial Services, Productivity Commission Staff Research Paper, AusInfo, Canberra, October.
CASE STUDY 1: THE FISHERMEN OF NORTHERN KERALA

The way services underpin economic growth in the case of telecommunications is illustrated by the story of the fishermen in northern Kerala (the south of India). Without access to market information, fishermen used to sell their daily catch only on the local beach market. This meant that some markets among the coastline could be oversupplied while on others would be unable to satisfy the demand.

Starting in 1997, mobile telephony towers were installed near the coastline, making coverage available at sea. Fishermen started calling coastal markets while at sea, in order to find the best price. Soon, many of them were venturing to nearby markets when prices were higher. No more fish were wasted, consumer prices fell, and the fishermen’s increased profits permitted them to pay off their mobile phones in two months. These improvements also led to better resource utilization, an important factor given the fact that fish is the largest source of protein for people in the region. Although simple, this is an excellent example of how telecom services can provide access to the information necessary for improved market performance and welfare.


CASE STUDY 2: TOURISM AND KENYAN HORTICULTURAL EXPORTS

As you have just read, an efficient services infrastructure is vitally important for the prosperity of any economy. An increase in trade in services is therefore not only important in its own right but also in terms of the benefits which spill over into the wider economy.

One good illustration of such impacts can be found by looking at Kenya's experience in horticultural exports. In 1980, Kenya became the most important African tourist destination after South Africa. Kenya was receiving 372,000 international tourists per year. The surplus cargo capacity of passenger jets provided a means of airfreighting fresh produce to Europe when volumes were too small to justify a charter cargo jet.

The growth in the tourism industry also increased local demand for high-quality fruits and vegetables by hotels and restaurants, boosting production. As production grew, increased export volumes started to allow for the use of cargo jets. And so, during the period between 1974 and 2000, Kenya's horticultural exports increased fourfold, reaching US$167 million and becoming the third largest source of foreign exchange. The industry also diversified, expanding its responsiveness to increased competition by other countries. This success story is a good illustration because one can easily observe how increased trade in services (tourism) triggered a cost decrease in transport, thus providing a vital boost to trade in goods.

V. WHY AN AGREEMENT ON TRADE IN SERVICES?

The GATS is the first and only multilateral trade agreement to cover trade in services. Its creation was one of the landmark achievements of the Uruguay Round, whose results entered into force in January 1995. The GATS was inspired by essentially the same objectives as its counterpart in merchandise trade, the General Agreement on Tariffs and Trade (GATT): creating a credible and reliable system of international trade rules; ensuring fair and equitable treatment of all participants (principle of non-discrimination); stimulating economic activity through guaranteed policy bindings; and promoting trade and development through progressive liberalization.

When initially faced with the task of negotiating an agreement on trade in services in the Uruguay Round, some Members were hesitant. Large segments of the services economy have traditionally been considered as domestic activities that are not tradeable across borders. Other sectors, from rail transport to telecommunications were often perceived to be natural monopolies best left under government ownership and control. Similarly, a third group of sectors, including health and education, were considered to be too sensitive to be exposed to the rough and tumble of markets.

However, given the continued rise of world services trade, the need for internationally recognized rules became increasingly pressing. Over the last decades, new trading opportunities, as well as new services, were being created by the rapid improvement in communications and large reductions in costs. Distance-related barriers that had previously disadvantaged suppliers and users in remote locations were becoming less relevant. Attitudes of governments and expectations of citizens were also changing. The traditional framework of public service increasingly proved inappropriate for operating some of the most dynamic and innovative segments of the economy. In many parts of the world, infrastructure services were being opened-up to private commercial participation. The combination of technological and regulatory innovations enhanced the “tradability” of services and, thus, created a need for multilateral disciplines.

Today, services represent the fastest growing sector of the global economy, accounting for about 60% of world production and employment and nearly 20% of world trade. Not surprisingly, the world’s largest and most advanced economies, including the United States, Japan and most EU Member States, are among the most important suppliers and importers of services. However, an increasing number of developing countries have also built up export-oriented services industries, capitalizing for example on their comparative advantage on tourism or on growing demand in adjacent countries for financial and other infrastructural services.

India has emerged as an important provider of offshore services. But India is not alone. Brazil with its large investments in IT, telecom infrastructure and a large skilled labour pool is attracting attention as an outsourcing centre, just as some other Latin American countries. AOL Time Warner, for instance, serves its Spanish-speaking customers from a call centre in Mexico with a reported cost savings of 25-40%. The Philippines, China and Vietnam are also tapping into this service export possibility, just as Central European countries are using cultural and linguistic similarities to enter the European market.
World services exports have grown faster than goods

Services have recently become the most dynamic segment of international trade. Since 1980, world services trade has grown faster, albeit from a relatively modest basis, than merchandise flows. Developing countries have strongly participated in that growth. Between 1990 and 2000 their services exports, consisting mainly of tourism and travel services, grew 3 per cent more rapidly per annum, on a balance-of-payments basis, than developed countries’ exports.

IN BRIEF

Why couldn’t the GATT just be extended to cover trade in services?

To a considerable degree, the GATS contains terms and concepts that had already been tested for decades in the GATT. These include the principles of most-favoured-nation (MFN) treatment and national treatment. Comparable to its status under the GATT, MFN treatment - i.e. the obligation not to discriminate between fellow WTO Members - is an unconditional obligation, which applies across all services covered by GATS. The tariff schedules under the GATT, in which countries bind their tariff concessions on merchandise imports, find their equivalent in schedules of specific commitments for services.

However, there are important differences in services trade that would make the GATT framework incompatible. Trade in goods is based on only one mode of supply, namely the cross-border flow of goods. In services, the definition of services trade covers not only cross-border supply, but three additional forms of transaction (“modes of supply”) - consumption abroad, the establishment of a commercial presence within a market, or the temporary presence of the individual service provider. The GATT only covers measures affecting the product, while the GATS due to the particularities of services trade covers measures affecting both the product (service) and the supplier.
VI. WHAT ARE THE CHALLENGES POSED BY MORE OPEN SERVICES MARKETS?

Opening services markets lead to long term gains but it is neither adjustment nor risk free in the short term. Moving towards a more competitive environment may take time and may impose significant burdens as the adjustment takes place. While costs go down overall, in sectors that previously enjoyed heavy protection, a period of adjustment may see the prices of some individual products become temporarily more expensive as markets adjust. There may also be labour market adjustments as the economy reorganises and resources are reallocated. Experience shows that such changes are outweighed by price reductions and job gains elsewhere but it does call for carefully designed reforms complemented by well-conceived assistance and capacity-building programmes.

Badly designed reforms may unnecessarily complicate the adjustment process, or even more seriously, may undermine the viability and credibility of the new environment. For example, privatization of state monopolies without ensuring effective competition may simply lead to monopoly rents being transferred to private, perhaps foreign, owners. The absence of clear and predictable market conditions may prompt potential investors to demand risk premiums that are not politically or socially acceptable. Instability might ensue if liberalization of the financial sector is not accompanied by adequate prudential supervision and regulation. The absence of well-designed universal service requirements on new private actors in the market could also result in reduced access to services for vulnerable groups or geographically remote regions.

The pace, content and sequencing of liberalisation programmes is thus key to avoiding unnecessary frictions and ensuring the efficiency and viability of more open, market-oriented service regimes. The GATS offers a number of ways to help governments ensure proper sequencing of reforms and to take adequate regulatory safeguards.

Firstly, the GATS is remarkably flexible as it allows governments to a very great extent to determine how much to commit and what level of obligation to assume.

- Governments are not obliged to make commitments on the whole universe of service sectors all at once. Governments retain the full flexibility to specify the sectors on which they will take commitments. There is no minimum requirement as to the number of sectors to be covered.
- Even when commitments are made on particular service sectors, the GATS allows governments to exercise a great deal of control over the operation of foreign suppliers in the domestic market. These take the form of limitations to market access and national treatment. In other words, governments specify the level of market access and the degree of national treatment they are prepared to guarantee.
- Commitments may be limited to one or more of the four recognized “modes of supply” through which services are traded. They may also withdraw and renegotiate commitments.
- In addition to scheduling limitations, time-frames for implementation can also be specified. Commitments taken in the GATS do not need to be implemented with immediate effect, but can be phased in over pre-defined periods. Such phase-in commitments played a particularly prominent role in the extended negotiations on basic telecommunications. Governments in countries that were still in the process of regulatory reform and institution building, used this opportunity to signal their intent to reform and to mobilize the domestic and international business community.
In financial services, governments are given very wide latitude to take prudential measures, such as those for the protection of investors, depositors and insurance policy holders, and to ensure the integrity and stability of the financial system. The Annex on Financial Services also excludes from the agreement services provided when a government is exercising its authority over the financial system, for example central banks’ services.

Secondly, apart from granting flexibility for progressive liberalisation, the GATS as a forum for negotiating trade in services also provides a platform for sharing expertise to develop common regulatory principles. The Reference Paper in telecommunications which was developed during the extended negotiations on basic telecommunications is a good case in point. The Reference Paper provided members with a set of principles covering issues that are critical to a liberal telecoms sector such as universal service obligations, independent regulation, interconnection and anti-competitive safeguards. Negotiating trade in services also provides an opportunity to develop a national vision for services reform that is shared by all ministries and agencies with competencies for individual sub-sectors. In many countries, it is the pressure of having to negotiate trade in services with trading partners which brings about a concerted overview of existing legislation and regulations affecting the services sector. It may also have beneficial spin-offs of bringing together the private sector which may help counterbalance perceptions of risks associated with changes with the promise of market access benefits for exporters.  

**EXERCISES**

1. Explain, in your opinion, why was it necessary to have a multilateral agreement on trade in services?
2. How does services contribute to the overall economy?
3. How can services liberalization help an economy?
4. Why was it necessary to extend the concept of trade in services to cover more than just the conventional idea of a product (service) crossing the border?

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See, for example, Stuart, Ian and Rashid Cassim (2005), Opportunities and Risks of Liberalising Trade in Services – Country Study on South Africa, ICTSD Issue Paper No.2, Geneva.
VII. SUMMARY

This module has discussed some of the main economic concepts and objectives underpinning the GATS. It has sought to explain some of the reasons for an agreement on trade in services as well as the potential benefits of services liberalization. This will hopefully contribute to a better understanding of the legal provisions of the Agreement as you work through the other modules of this course as well as the challenges and opportunities of the ongoing Doha negotiations.
PROPOSED ANSWERS:

1. With the continued rise of world services trade, the need for internationally recognized rules became increasingly pressing. New trading opportunities, as well as new services, were being created by the rapid improvement in communications and large reductions in costs. Distance-related barriers that had previously disadvantaged suppliers and users in remote locations were becoming less relevant. Attitudes of governments and expectations of citizens were also changing. The traditional framework of public service increasingly proved inappropriate for operating some of the most dynamic and innovative segments of the economy. In many parts of the world, infrastructure services were being opened-up to private commercial participation. The combination of technological and regulatory innovations enhanced the “tradability” of services and, thus, created a need for multilateral disciplines. The GATS is the first and only multilateral trade agreement to cover trade in services. Its creation was one of the landmark achievements of the Uruguay Round, whose results entered into force in January 1995.

2. Services hold a vital position in the production of goods and services. Telecommunications, banking, insurance, construction and transportation are not only consumed in their own right but they are strategically important inputs for all sectors, goods and services. No company can function without a telephone, nor can it grow without finance or sell its goods to a market without transportation. No service supplier can efficiently provide services without access to telecommunications, legal, accounting, computing and other business services. In short, no economy can prosper without an efficient services infrastructure.

- **The internal dimension: improving the domestic services market.** Liberalization can help increase the supply of services by offering an environment conducive to attracting foreign investment and by lowering cost through competition. In a competitive environment, firms are forced to innovate, to introduce new products, and to improve quality constantly.

- **The external dimension: stronger domestic markets equals greater export competitiveness.** The gains from more investment and greater domestic competition also go hand in hand with building greater export competitiveness in both goods and services. Inefficient and costly services infrastructure hampers overall economic growth.

3. A more open world trading system means a global market place of some (6 billion customers). Large markets in turn encourage specialization, which leads to greater gains in productivity and efficiency. It means countries can concentrate their resources and talents on producing goods and services they make best and on importing those that are more efficiently produced elsewhere.

A larger marketplace also stimulates technology and encourages lower cost. For consumers, it means a wider range of personal choice. For producers, it can help bring technology, materials and know-how for production. This logic applies to services just as it does to goods, but there are some important points which distinguishes trade in services from trade in goods.

- **“Producer services”** such as telecommunications, banking, insurance, construction and transport help to shape overall economic performance. An inefficient and costly service infrastructure is comparable to a tax on production and exports. Exporters and producers of both goods and services need access to efficient services if they are to compete effectively.

- **Consumer savings and choice improves.** Restricting access to foreign services and service suppliers is also a tax on domestic consumers. The primary effect of protection is to reduce the supply of certain services, thereby constraining domestic demand to domestically produced services.
If the policies protect inefficient suppliers, such protection becomes similar to a tax on domestic consumers, who cannot access cheaper foreign suppliers.

- **Services liberalization is strategically important for technology transfer and development.** Making it easier for foreign companies to establish branches and subsidiaries can help encourage foreign direct investment (FDI). Such FDI typically brings with it new skills and technologies that spill over into the wider economy in various ways.

4. There are important differences in services trade that would make the GATT framework incompatible. Trade in goods is based on only one mode of supply, namely the cross-border flow of goods. In services, the definition of services trade covers not only cross-border supply, but three additional forms of transaction (“modes of supply”) - consumption abroad, the establishment of a commercial presence within a market, or the temporary presence of the individual service provider. The GATT only covers measures affecting the product, while the GATS due to the particularities of services trade covers measures affecting both the product (service) and the supplier.
The General Agreement on Trade in Services

ESTIMATED TIME: 3 hours

OBJECTIVES OF MODULE 4

- Provide an overview of the General Agreement on Trade in Services; and
- Introduce the main concepts and provisions contained in the Agreement.
I. INTRODUCTION

This module provides an overview of the General Agreement on Trade in Services (GATS), its scope, key concepts and disciplines. To a considerable degree, the drafters of the GATS took inspiration from the General Agreement on Tariffs and Trade (GATT) and used similar terms and concepts but reflecting the peculiarities of services trade, there are some important differences in terms of their application.

Firstly, the GATS is more comprehensive in coverage than the GATT. Trade in services is defined as covering more than the cross-border exchange of a service and includes also consumer movements and factors flows (investment and labour). In addition, the scope of relevant disciplines is not confined to measures affecting the product (i.e. the service), but extend to those affecting service suppliers (i.e. producers, traders and distributors). Moreover, all service sectors fall under the remit of the agreement with the exception of "governmental services" and measures affecting air traffic rights.

Secondly, the extensive coverage of the GATS is balanced by flexibility. Obligations on market access and national treatment are assumed only in sectors that a Member has listed in its schedule of specific commitments. Even in this case, the Member is free to impose limitations. Unlike the GATT, there is no wholesale ban on using quantitative restrictions nor on qualifying the Agreement's national treatment obligation. Moreover, Members are permitted upon accession, to take "one-off" exemptions on MFN inconsistent measures. No such possibility exists in the GATT. Indeed, the flexibility provided by the GATS gives considerable scope to accommodate virtually any policy regime affecting trade in services.

RECALL

As seen in Module 1, The GATS forms part of the Marrakesh Agreement Establishing the World Trade Organization. It establishes a rules-based framework for international trade in services and specifies the obligations of Members within that framework. The GATS seeks to accommodate the diversity of sector/policy-related objectives and concerns among WTO Members, whilst establishing at the same time a comprehensive framework of rules and disciplines that help ensure increased transparency and predictability, and promote progressive liberalization through successive rounds of negotiations.

The Marrakesh Agreement includes two other multilateral agreements — GATT 1994, and the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS Agreement) — as well as a few plurilateral agreements. Of these, the Agreement on Government Procurement is also of relevance to services trade.
II. BUILDING BLOCKS OF THE AGREEMENT

The GATS consists of two main parts: (i) the text of the Agreement (a Preamble, 29 articles arranged in six Parts and various Annexes); (ii) and a schedule of specific commitments for each WTO Member. The text provides a framework of disciplines and obligations that apply to all Members, while a schedule contains Member-specific commitments on individual sectors (together with a list of any MFN exemptions).

![Two main parts of the GATS](image)

**Figure 1:** Two main parts of the GATS

II.A. FRAMEWORK OF RULES AND SCHEDULES OF SPECIFIC COMMITMENTS

**PREAMBLE**

The Preamble states the main intentions that inspired the drafting of the Agreement. These include the concept of trade expansion as a means of promoting growth and development and the objective of progressive trade liberalization through successive rounds of negotiations. Further, the Preamble explicitly confirms Members’ right to regulate, and to introduce new regulations, to meet national policy objectives. The two final considerations refer to the objective of facilitating the increasing participation of developing countries in world services trade as well as to the special economic situation of least-developed countries and their development, trade and financial needs.

**TEXT**

The main body of the Agreement outlines Members’ obligations concerning their use of measures (i.e. which may be in the form of laws, rules, regulations, procedures, decisions or administrative actions) affecting trade in services. These obligations essentially fall into two main groups:

(i) "unconditional obligations" that must be adhered to by all Members in all sectors covered by the GATS; and
“conditional obligations” whose scope is confined to those sectors and modes for which a Member has undertaken specific commitments.

Most of this module will be devoted to explaining the implications of these two types of obligations. The box below provides a quick summary of the provisions contained in each of the six parts of the GATS.

BRIEF OVERVIEW OF INDIVIDUAL PROVISIONS OF THE GATS

<table>
<thead>
<tr>
<th>Part I (Article I):</th>
<th>Outlines the scope of the Agreement, its sectoral coverage and defines trade in services in terms of four modes of supply.</th>
</tr>
</thead>
<tbody>
<tr>
<td>Part II (Articles II to XV):</td>
<td>Sets out Members’ general obligations which apply either unconditionally to all sectors or conditionally (i.e. contingent on the existence of specific commitments).</td>
</tr>
<tr>
<td>Part III (Articles XVI to XVIII):</td>
<td>Specifies the scope of specific commitments governing market access and national treatment and of any additional commitments, which Members may undertake in scheduled sectors.</td>
</tr>
<tr>
<td>Part IV (Articles XIX to XXI):</td>
<td>Provides a framework for future services rounds, specifies the structure of schedules, and the procedures governing modification or withdrawal of commitments.</td>
</tr>
<tr>
<td>Part V (Articles XXII to XXVI):</td>
<td>Clarifies institutional and procedural issues, including the mandate of the GATS Council for Trade in Services, and recourse to dispute settlement.</td>
</tr>
<tr>
<td>Part VI (Articles XXVII to XXIX):</td>
<td>Includes final provisions and definitions.</td>
</tr>
</tbody>
</table>

ANNEXES

The main provisions of the Agreement are complemented by eight annexes dealing with sector, mode or policy-related issues. The Annexes form an integral part of the GATS and cover exemptions from MFN treatment, movement of persons, financial services, telecommunications and air transport services. Further explanation of each Annex is provided in the latter sections of this module.
SCHEDULES OF SPECIFIC COMMITMENTS

Each Member is required under the Agreement to submit a schedule of specific commitments. **Schedules are an integral part of the GATS as all the access conditions (market access, national treatment and any additional commitments) guaranteed by a Member, for the sectors committed, are specified in it.** In this module, the main requirements of the provisions on specific commitments (Articles XVI to XVIII), and underlying concepts, are explained.
III. SCOPE AND COVERAGE

In the following sub-sections, we take a closer look at the scope and coverage of the GATS as defined in Article I.

IN BRIEF

Scope and Definition: Universal Coverage

- Includes all services except
  Services supplied in the exercise of government authority (but only if supplied neither on a commercial basis nor in competition with other service suppliers)
- Covers all measures
  Including those of local and regional governments and non-governmental bodies exercising delegated authority

III.A. MODES OF SUPPLY

In Article I.1 it is stipulated that the Agreement applies to "measures by Members affecting trade in services". However, the term "services" is not defined, though in practice, WTO Members have tended to rely on the Services Sectoral Classification List, developed during the Uruguay Round (see box below).

Classification of services

Unlike in goods trade where the Harmonized System is used for tariff concessions under the GATT, there is no uniform classification of service sectors. Nevertheless, for purposes of structuring their commitments, WTO Member have generally used a classification system comprised of 12 core service sectors, known as the Services Sectoral Classification List (MTN.GNS/W/120), which is largely based on the United Nations Central Product Classification System. The 12 sectors are further divided into some 160 sub-sectors. The sub-sectors concord to a considerable degree to categories contained and described in the provisional UN Central Product Classification.
Whilst there is no definition of "services", Article I.2 defines "trade in services" as the supply of a service through four possible modes of supply (see box below). This approach ensures **near universal coverage of the GATS**, since virtually all internationally-transacted services are included. It extends the traditional concept of trade where a product moves across the border (such as in mode 1) to three other types of transactions. For modes 2, 3 and 4, since direct interaction between the producer and consumer of the service is required, either the producer has to move to the consumer, or the consumer to the producer. In mode 2, this is achieved by the consumer moving into another territory to consume a service. While in modes 3 and 4, the service supplier, either a commercial entity or a natural person, supplies its services whilst physically present in the territory of the consumer.

**The Four “Modes of Supply” in the GATS (see Article I.2)**

**Mode 1 (Cross-Border Supply): from the territory of one Member into the territory of any other Member**

A service is transacted across a border without either the producer or consumer moving. The service supplier is not present within the territory of the Member where the service is supplied. Such a transaction is conceptually similar to the movement of a good across a border. Examples include distance learning, e-banking, telemedicine, as well as many other services conveyed across a border.

**Mode 2 (Consumption Abroad): in the territory of one Member to the service consumer of any other Member**

This mode of supply is often referred to as the "movement of the consumer". The service consumer crosses
the border to where the supplier is located to obtain services. Examples include holidays abroad, foreign education, and overseas health care. The essential feature of this mode is that the service is delivered outside the territory of the Member making the commitment. Although the actual movement of the consumer is often necessary, activities such as ship repair abroad, where only the property of the consumer “moves”, or is situated abroad, are also covered.

Mode 3 (Commercial Presence): supply of a service by a service supplier of one Member, through commercial presence in the territory of any other Member

The service supplier establishes a commercial presence through a foreign owned affiliate, subsidiary, representative office or branch in the country where the consumer is located. Examples might be foreign banks or telecommunications companies established in host countries. In many cases, investment flows are involved.

Mode 4 (Presence of Natural Persons): supply of a service by a service supplier of one Member, through presence of natural persons of a Member in the territory of any other Member

This mode covers natural persons who are themselves service suppliers, as well as natural persons who are employees of foreign service suppliers in the host country. In schedules, Members have taken commitments based on the following categories of persons: independent professionals; intra-corporate transferees; business visitors; and contractual service suppliers.

Which mode of supply accounts for most of trade in services?

Overall, in terms of commercial value, the share of individual modes in world services trade has been estimated at: 25-30% for mode 1; 10-15% for mode 2; 55-60% for mode 3; and 2-3% for mode 4. Mode 3 trade, mostly combined with foreign direct investment (FDI), has been the most dynamic component in recent years. However, conventional trade statistics, using the Balance of Payments (BOP) concepts, do not capture mode 3 transactions. While the BOP focuses on residency rather than nationality (i.e., a product is being exported if it is traded between residents and non-residents) mode 3 transactions, typically involve only residents of the country concerned. Current BOP statistics would therefore under represent the value of mode 3 services trade.

III.B. MEASURES COVERED

According to Article I.1, the Agreement applies to measures by Members affecting trade in services. In Article I.3, “measures by Members” are defined as those taken by central, regional or local governments; and non-governmental bodies in the exercise of powers delegated by central, regional or local government or authorities. In other words, measures by all levels of government are covered, as well as those of
'non-governmental bodies' acting with delegated powers. Purely private measures are outside the scope of the Agreement.

In Article XXVIII(a), a "measure" is defined as taking any form including that of a law, regulation, rule, procedure, decision or administrative action. But when does a measure "affect" trade in services? The Appellate Body, in EC – Bananas held that the term "affecting" indicates a broad scope of application, wider in scope than such terms as "regulating" or "governing".

III.C. EXCLUSIONS

While the Agreement has broad coverage, there are two specific policy/sector-related exclusions. Firstly, there is the so-called "governmental services" carve-out. In accordance with Article I:3(b), all services supplied in the exercise of governmental authority are outside the scope of the Agreement. Such services are further defined in Article I:3(c) as those that have been supplied neither on a commercial basis nor in competition with one or more service suppliers. Both conditions have to be fulfilled for the service to be exempted. While Article I:3(c) does not specify a list of services, it would be normal to expect a range of key governmental functions such as fire protection, basic health, police and security services, to fall under the carve-out in the economies of virtually all Members.

Secondly, in accordance with the Annex on Air Transport Services, the GATS does not apply to measures affecting air traffic rights and services directly related to the exercise of these rights. What is included are three sub-sectors, namely: aircraft maintenance and repair; selling and marketing of air transport services; and computer reservation system services. Notwithstanding the carve-out, the Council for Trade in Services is mandated to review developments in the air transport sector at least every five years with a view to considering further application of the Agreement. The last review was launched in 2007 with a proposal made to consider airport management and ground handling services to be covered as well.

At first glance, it may seem that the GATS severely constrains government's scope for action, since its coverage of services and relevant trade measures is near universal. However, all we will see in the next few sections the very broad scope of the Agreement is conditioned by considerable flexibility in application.

REMEMBER

GATS: Scope and coverage

- Measures affecting trade in services at all government levels
- All services (except governmental services and measures affecting air traffic rights)
- "Trade in services" based on four modes of supply
  - Cross-border supply
  - Consumption abroad
  - Commercial presence
  - Presence of natural persons
Part III on "Specific Commitments", which contains Articles XVI-XVIII, sets out the provisions governing the main access obligations (market access, national treatment and additional commitments) undertaken by individual Members. Since Module 5 explains the scheduling of specific commitments in detail, the following sub-sections only provide a broad overview.

Article XX requires each Member to submit a schedule of specific commitments but it does not prescribe the sector scope or level of liberalization. It is up to each Member to decide which sector it wishes to commit as well as any corresponding limitations. It may also choose to undertake additional commitments on issues not falling under market access or national treatment provisions of the GATS.

Specific Commitments Listed in Schedules

*Defined in GATS Part III (Arts. XVI, XVII & XVIII)*

- Market Access
- National Treatment
- Additional Commitments

Listed in Schedules by service sector and mode of supply.

Specifies each Member’s legal obligations to extend at least the scheduled conditions of access.

Each schedule has a common format of 4 columns. The first column is used to indicate the sector covered. The GATS does not prescribe any particular sector focus and it is up to each Member to make that choice. The scheduling method used by the GATS is often called a "bottom-up" or "positive-list" approach since market access and national treatment commitments are undertaken only for sectors that have been included.

The second and third columns are used to specify the market access and national treatment conditions for each mode of supply. This is done by listing any relevant limitations to the requirements specified in Articles XVI and XVII of the GATS. If there are no limitations, the term "none" is inscribed to indicate that full market access and/or national treatment is being granted. On the other hand, should a Member wish to retain full flexibility to introduce any limitation, for any particular mode, it would inscribe the term "unbound". This indicates that no commitment has been taken for that mode.
TIP

It should be kept in mind that Article XVI (Market Access) and XVII (National Treatment) commit Members to giving no less favourable treatment to foreign services and service suppliers than provided for in the relevant columns of their Schedule. **Commitments thus guarantee minimum levels of treatment**, but do not prevent Members from being more open (or less discriminatory) in practice. For example, a Member may schedule a market access limitation on foreign capital participation of 49%. Since this specifies a minimum condition, it means that the Member remains free at any time to allow higher capital participation, but not to reduce it below that limit.

Any **additional commitments** that do not fall under the market access and national treatment provisions of the Agreement are undertaken in the fourth column. These additional commitments, which often relate to the adherence by the government to certain regulatory standards or competition-related disciplines, such as in telecommunications.

The format of a schedule and the type of entries that are typically entered are illustrated below.

<table>
<thead>
<tr>
<th>Sector or sub sector</th>
<th>Limitations on market access</th>
<th>Limitations on national treatment</th>
<th>Additional commitments</th>
</tr>
</thead>
<tbody>
<tr>
<td>&quot;Positive&quot; or &quot;Bottom-up&quot; approach.</td>
<td>Inscription of any market access limitations according to modes of supply. (1)....... (2)....... (3)....... (4).......</td>
<td>Inscription of any national treatment limitations according to modes of supply. (1)....... (2)....... (3)....... (4).......</td>
<td>Can inscribe in this column any additional commitments that are not subject to market access and national treatment provisions.</td>
</tr>
<tr>
<td>Selection of sectors or sub-sectors where market access and/or national treatment is granted. Members typically use the Services Sectoral Classification List to describe the sector but may also use their own definitions and descriptions.</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

REMINDER

Members have the flexibility to choose what sectors to commit and the level of access to guarantee. Since schedules are legal instruments, the specified access conditions are enforceable via dispute settlement. They thus promote transparency and predictability in international services trade. In non-scheduled sectors, governments remain free at any time to grant or withdraw market access and national treatment.
IV.A. CURRENT PATTERN OF COMMITMENTS

Since the GATS does not prescribe any particular sector focus or level of commitment, there are vast differences in the extent to which individual sectors have been committed. Thus, while sectors of general infrastructural importance, such as finance or communication have drawn many commitments, other sectors such as health and education have been scheduled by less than one-third of the membership. See figure below.

![Figure 2: Current Pattern of Commitments](image)

The diversity of sector commitments reflects in large part the scheduling decisions of developing countries, given their share (some 80 per cent) in the WTO membership. Table 1 shows that the number of commitments per Member tends to rise with the level of economic development, and the date of accession to the WTO. Commitments undertaken by new WTO Members, i.e. developing and transition economies that have joined since 1995, are comparable in number to those undertaken by developed Members. Also, these commitments tend to be deeper, i.e. subject to fewer limitations, than those undertaken by other Members.

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17 The EC Member States are counted individually. Tourism (i.e. hotel and restaurant services) is a special case in so far as virtually all countries in the world have traditionally been open at least for up-market operators.

18 Such comparisons need to be interpreted with care. For example, they do not take into account differences in economic importance between sectors, nor the restrictiveness of the limitations that may have been attached in individual cases.

The averages for groups of Members may mask wide variations among the countries covered. This is particularly the case for least-developed and for developing economies. For example, some least-developed Members committed as many sectors as the group of developed Members on average (see third column in table below).

<table>
<thead>
<tr>
<th>Members</th>
<th>Average number of sectors committed per Member</th>
<th>Range (Lowest/highest number of scheduled sectors)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Least-developed economies</td>
<td>24</td>
<td>1 – 111</td>
</tr>
<tr>
<td>Developing &amp; transition economies</td>
<td>52 (104)*</td>
<td>1 – 147 (58-147)*</td>
</tr>
<tr>
<td>Developed countries</td>
<td>105</td>
<td>86 – 115</td>
</tr>
<tr>
<td>Accessions since 1995</td>
<td>102</td>
<td>37 – 147</td>
</tr>
<tr>
<td>ALL MEMBERS</td>
<td>50</td>
<td>1 – 147</td>
</tr>
</tbody>
</table>

Table 1: Commitments of different groups of Members

* Transition economies only (including recent accession).

Total number of sectors: ~160.

Source: WTO Secretariat

Many current schedules offer scope for significant improvements. While the Uruguay Round helped to establish a set of multilateral rules for services trade and the architecture for future negotiations, it did not contribute to significant cuts in actual trade barriers. Possible exceptions are the extended negotiations in basic telecommunications (concluded in February 1997) and financial services (December 1997), in which over 70 Members participated. These negotiations produced far more economically significant results than those that had initially emerged from the Uruguay Round.
IV.B. MARKET ACCESS

For a scheduled sector, Article XVI:2 provides an exhaustive list of six categories of restrictions that must not be maintained, unless scheduled as a market access limitation (see table below for the full provision). The restrictions relate to:

a. the number of service suppliers;
b. the value of service transactions or assets;
c. the number of operations or quantity of output;
d. the number of natural persons supplying a service;
e. the type of legal entity or joint venture;
f. the participation of foreign capital.

The first four restrictions (a to d) are quantitative as they deal with quota-type limits. These limits may be expressed either as an absolute number or in the form of an economic needs test. If it takes the form of the latter, Members should specify the approval criteria that are being applied to such tests. It is interesting to note that in Article XVI(a) to (e) no distinction is made between measures that are targeted only at foreign services or service suppliers, and those that are applied to nationals as well. In other words, both discriminatory and non-discriminatory measures are covered. For example, a measure may state that in the banking sector licenses will be issued for a maximum of six banks with no nationality criteria specified. Although this measure is non-discriminatory, it remains a restriction in the sense of Article XVI and would need to be scheduled if it is to be maintained.

The other two restrictions, the second element of (e) and (f), are by their very nature discriminatory. One relates to measures requiring joint ventures, while the other refers to limits on foreign capital participation. Since both restrictions apply only to foreign service suppliers, they are also limitations on national treatment.

Earlier it was mentioned that the six types of restrictions under Article XVI are exhaustive. Only measures that fall under these categories are subject to scheduling. Other measures, although may be deemed to have an economic effect on access, are outside the scope of Article XVI. For instance, a high non-discriminatory tax on a particular service may act as a barrier to entry, but it is not a restriction which falls under any of the categories listed under Article XVI:2.

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**Article XVI: Market Access**

1. 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.
2. In sectors where market-access commitments are undertaken, the measures which a Member shall not maintain or adopt either on the basis of a regional subdivision or on the basis of its entire territory, unless otherwise specified in its Schedule\(^{20}\), are defined as:

(a) limitations on the number of service suppliers whether in the form of numerical quotas, monopolies, exclusive service suppliers or the requirements of an economic needs test;

(b) limitations on the total value of service transactions or assets in the form of numerical quotas or the requirement of an economic needs test;

(c) limitations on the total number of service operations or on the total quantity of service output expressed in terms of designated numerical units in the form of quotas or the requirement of an economic needs test;

(d) limitations on the total number of natural persons that may be employed in a particular service sector or that a service supplier may employ and who are necessary for, and directly related to, the supply of a specific service in the form of numerical quotas or the requirement of an economic needs test;

(e) measures which restrict or require specific types of legal entity or joint venture through which a service supplier may supply a service; and

(f) limitations on the participation of foreign capital in terms of maximum percentage limit on foreign shareholding or the total value of individual or aggregate foreign investment.

IV.C. NATURAL TREATMENT

As explained earlier, national treatment under the GATS applies only to the sectors committed in a Members’ schedule and is subject to the conditions inscribed therein. Unlike Article XVI on market access, Article XVII does not provide an exhaustive list of discriminatory measures that would be inconsistent with full national treatment. The Article simply requires a Member to 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”.

Treatment that is “no less favourable” is in turn defined in Article XVII:3 to mean that treatment which ensures that conditions of competition are not biased in favour of domestic services and service suppliers. Typical examples of discriminatory measures include restrictions on foreign land ownership, tax benefits only for nationals, training requirements imposed only on foreign suppliers, or language requirements that are not directly relevant to the exercise of a profession. Examples of frequently scheduled national treatment restrictions are further discussed in Module 5.

\(^{20}\) Emphasis added
Article XVII

National Treatment

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. (10)


(footnote original) 10 Specific commitments assumed under this article shall not be construed to require any Member to compensate for any inherent competitive disadvantages which result from the foreign character of the relevant services or 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.

In some cases while a measure applies irrespective of the national origin of the service or service suppliers, it is possible that the domestic provider is nevertheless favoured. For instance, a measure may require a services supplier to have prior residency in order to apply for a licence. Although the measure applies to both domestic and foreign service suppliers, de facto foreign service suppliers are treated less favourably because they are less likely to have prior residency than like service suppliers of national origin. The benchmark for national treatment is not whether there has been formally identical or different treatment of domestic and foreign services and service suppliers, but if conditions of competition have been modified as a result of the measure (see Article XVII:2).

At first sight, it may be difficult to understand why the national treatment principle under the GATS is far more limited in scope — confined to scheduled services and subject to possible limitations — than under the GATT where it applies across the board. The reason lies in the particular nature of services trade. Universal national treatment for goods does not necessarily imply free trade. Imports can still be controlled by tariffs which, in turn, may be bound in the country’s tariff schedule. By contrast, given the impossibility of operating tariff-type measures across large segments of services trade, the general extension of national treatment in services could in practice be tantamount to guaranteeing free access.

IV.D. ADDITIONAL COMMITMENTS

As mentioned earlier, Members may also undertake additional commitments with respect to measures not falling under the market access and national treatment provisions of the Agreement. Such commitments may relate to the use of standards, qualifications or licenses (Article XVIII). Additional commitments are particularly frequent in the telecommunication sector where they have been used by many Members to incorporate into their schedules certain competition-related "self"-disciplines. These disciplines are laid
out in a so-called Reference Paper, which an informal grouping of Members had developed during the extended negotiations in this sector.

REMINDER

The GATS is a very flexible agreement that allows each Member to adjust the conditions of market entry and participation to its sector-specific objectives and constraints. As already noted, Members are free to designate the sectors in which they assume access obligations with regard to the four modes of supply. Moreover, limitations may be attached to commitments in order to reserve the right to operate measures inconsistent with full market access and/or national treatment. The relevant sectors as well as any departures from the obligations of Articles XVI and XVII, as well any additional commitments, are to be specified in a Member’s Schedule of Specific Commitments.

IV.E. MODIFICATION OF SCHEDULES

Article XXI outlines the procedures for modifying or withdrawing specific commitments. The relevant provisions may be invoked at any time after three years have lapsed from the date of entry into force of a commitment. In the absence of emergency safeguard measures, which are still under negotiation, this waiting period is reduced to one year under certain conditions. It is thus possible for Members, subject to compensation, to adjust their commitments to new circumstances or policy considerations. At least three months’ notice must be given of the proposed change. The compensation to be negotiated with affected Members consists of more liberal bindings elsewhere that “endeavour to maintain a general level of mutually advantageous commitments not less favourable to trade” than what existed before. Application must be on an MFN basis.

If the negotiations fail, Article XXI allows for arbitration. If the arbitrator finds that compensation is due, the proposed changes in commitments must not be put into effect until the compensatory adjustments are made. Should the modifying country ignore the arbitrator’s findings, affected countries have the right to retaliate by withdrawing commitments. In 1999, the Council for Trade in Services enacted detailed provisions for the modification of schedules pursuant to Article XXI (document S/L/80). These have been invoked only four times to date, twice by the European Union in the wake of the latest enlargements, by the United States following a dispute on Internet gambling with Antigua and Barbuda, and by Bolivia, regarding the removal of its commitments on Hospital Services. Improvements to schedules, i.e. inscription of new sectors or removal of existing limitations, are subject to more streamlined procedures, laid down in document S/L/84.
V. GENERAL OBLIGATIONS AND DISCIPLINES

To complete our introductory review of the GATS, it is necessary to return to the framework text which lays down a number of general obligations and disciplines. These disciplines fall into two categories: (i) general obligations, such as MFN treatment, which are applied across the board (i.e., "unconditional"); and (ii) some further obligations that only apply (i.e., "conditional") in sectors where individual Members have undertaken specific commitments.

IN BRIEF

<table>
<thead>
<tr>
<th>Two types of general obligations</th>
</tr>
</thead>
<tbody>
<tr>
<td>All services (unconditional)</td>
</tr>
<tr>
<td>▪ Article II (MFN)</td>
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<td>▪ Article III:1 (Transparency – general publication)</td>
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<td>▪ Article VI:2 (Domestic regulation – availability of legal remedies)</td>
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<td>▪ Article VIII:1 (Monopolies – MFN compatibility)</td>
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<td>▪ Article IX (Business Practices – consultations)</td>
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<td>▪ Article XV:2 (Subsidies – consultations )</td>
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Only those scheduled (conditional)

▪ Article III:3 (Transparency – notification)
▪ Article VI:1, 3, 4, 5 and 6 (Domestic regulation – administration of measures of general application, due process, and regulatory disciplines)
▪ Article VIII:2 (Monopolies – respect specific commitments)
▪ Article XI (Payments and Transfers - unrestricted)

V.A. UNCONDITIONAL OBLIGATIONS

Each Member has to respect certain general obligations. These consists of MFN treatment (Article II), some basic transparency provisions (Article III), the availability of legal remedies (Article VI:2), compliance of monopolies and exclusive providers with the MFN obligation (Article VIII:1), and readiness to consult, on request consultations on business practices (Article IX), and on subsidies that are deemed to affect trade (Article XV:2).
V.A.1. MOST-FAVoured NATION TREATMENT

As you know, the most-favoured-nation (MFN) principle is a cornerstone of the multilateral trading system. MFN treatment is a powerful obligation, as it requires all WTO Members to be treated equally. From the perspective of small economies, it ensures the access conditions that may have been negotiated between the "big" players in the system are automatically extended to them without discrimination.

In the context of the GATS, the MFN obligation (Article II) is applicable to any measure that affects trade in services in any sector falling under the Agreement, irrespective of whether specific commitments have been taken or not. For instance, a Member may have chosen not to commit its private education sector since it wishes to keep the sector closed to foreign services and service suppliers. In such a case, in order to be consistent with Article II, it cannot subsequently decide to open the market to providers of some Members but not to others.

However, the GATS offers some flexibility. Under the Annex on Article II Exemptions, there is a possibility for Members, at the time of entry into force of the Agreement (or date of accession), to seek exemptions not exceeding a period of ten years in principle. Exemptions are to be reviewed every 5 years (the last was launched in 2005) and are subject to negotiations in subsequent trade rounds. More than 90 Members (counting the EU 12 as one) currently maintain such exemptions for close to 500 measures. The sectors predominantly concerned are road transport and audiovisual services, followed by maritime transport and banking services. For sectors and measures which have been listed, the MFN obligation is suspended.

You might ask, why does the GATS allow MFN exemptions to be taken? There are several reasons, most of which reflect the peculiarities of trade in services and what may have been seen as a pragmatic response. First, the Agreement's broad scope includes bilateral accords which predate the GATS. These were not designed with the multilateral system in mind and the Agreement had to be adapted to allow for a period of adjustment to take place. Secondly, in some sectors, such as transport and professional services, access is traditionally negotiated through reciprocity arrangements, which are by definition MFN-inconsistent. By allowing MFN exemptions, Members were able to "grandfather" such arrangements. However, while such exemptions might have been considered by the drafters to be mostly transitory, there have, so far, been few moves towards their removal.

Apart from the "one-off" listing of exemptions, it is also possible for WTO Members to depart from MFN treatment due to certain specified circumstances. These are namely, in the event of the conclusion of economic integration agreements (Article V), labour market integration agreements (Article V bis) and recognition agreements (Article VII). There are also provisions covering general exceptions (Article XIV), security exceptions (Article XIV bis), and the prudential carve-out as contained in the Annex on Financial Services. These are discussed later in this module.

21 A fuller explanation of why MFN exemptions were used in the GATS is provided in Rudolf Adlung and Aaditya Mattoo, The GATS, in Mattoo, et.al (2008), A Handbook of International Trade in Services, Oxford University Press, p.64.
**GATS Article II: Most-Favoured Nation Treatment**

1. 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 it accords to like services and service suppliers of any other country.

2. 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.

(...)

**V.A.2. TRANSPARENCY**

A very important aspect of trade in services, which is sometimes underappreciated, is the need for transparency. Sufficient information about potentially relevant rules and regulations is critical to service suppliers and to the effective implementation of the Agreement. Transparency obligations are thus particularly relevant in the services area where the role of regulation — as a trade protective instrument and/or as a domestic policy tool — tends to feature more prominently than in most other segments of the economy.

In the GATS, **several provisions are targeted at improving transparency in Members’ use of measures and services regimes.** Some of these are unconditional, since they apply irrespective of whether the sector has been committed. Under Article III each Member is required to publish promptly all measures pertaining to or affecting the operation of the GATS. All Members also have a general obligation to establish an enquiry point to respond to requests for information from other Members (Article III:4). Moreover, pursuant to Article IV:2 developed countries (and other Members to the extent possible) are to establish contact points to which developing country service suppliers can turn for relevant information related to trade in services.

**GATS Article III: Transparency**

1. 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.

2. Where publication as referred to in paragraph 1 is not practicable, such information shall be made otherwise publicly available.

(...)

4. Each Member shall respond promptly to all requests by any other Member for specific information on any of its measures of general application or international agreements within the meaning of paragraph 1. Each Member shall also establish one or more enquiry points to provide specific information to other Members, upon request, on all such matters as well as those subject to the notification requirement in paragraph 3. Such enquiry points shall be established within two years from the date of entry into force of the Agreement Establishing the WTO (referred to in this Agreement as the "WTO Agreement").
Appropriate flexibility with respect to the time-limit within which such enquiry points are to be established may be agreed upon for individual developing country Members. Enquiry points need not be depositories of laws and regulations.

5. Any Member may notify to the Council for Trade in Services any measure, taken by any other Member, which it considers affects the operation of this Agreement.

V.A.3. DOMESTIC REGULATION - AVAILABILITY OF LEGAL REDRESS

Article VI:2 requires Members to operate domestic mechanisms ("judicial, arbitral or administrative tribunals or procedures") where individual service suppliers may seek legal redress. At the request of an affected supplier, these mechanisms should provide for the "prompt review of, and where justifies, appropriate remedies for, administrative decisions affecting trade in service".

V.A.4. MONOPOLIES AND EXCLUSIVE SERVICE SUPPLIERS

The GATS does not forbid monopolies and exclusive service suppliers (established or enabled by government legislation) but sets out a number of conditions where these exist. In particular under Article VIII:1, Members are required to ensure that monopoly suppliers do not act in a manner inconsistent with the MFN obligation. Essentially, what this means is that monopoly suppliers must not discriminate between Members, whether in the provision of its own services or in its actions.

V.A.5. BUSINESS PRACTICES

Article IX refers to business practices other than those falling under the monopoly-related provisions of Article VIII that restrain competition and thereby restrict trade. The Article requires each Member to consult with any other Member, upon request, with a view to eliminating such practices.

V.A.6. SUBSIDIES

While possible disciplines on trade-distortive subsidies are still under negotiation (see Module 7), under Article XV:2, Members that consider themselves adversely affected by subsidies granted by another Member may request consultations. Such requests are to be given "sympathetic consideration". Keep in mind that subsidies affecting trade in services are already covered by the MFN requirement in Article II as well as in scheduled sectors, the national treatment obligation of Article XVII.
V.B. CONDITIONAL OBLIGATIONS

The second category of general obligations are those that are triggered when a sector is inscribed in a Member’s schedule of commitments. These conditional obligations are additional to those that were reviewed in the last section and are intended to preserve the commercial value of the specific commitments that have been undertaken. Articles containing conditional obligations are those relating to: transparency (Article III:3); domestic regulation (Article VI:1,3,4,5 and 6); monopolies (Article VIII:2); and payments and transfers (Article XI). You may have noted that some of these articles are the same as those that were discussed under the section above on unconditional obligations. This is because, in several cases, the same article may contain both sets of obligations.

V.B.1. TRANSPARENCY

Where specific commitments have been made, there is an additional obligation to notify the Council for Trade in Services at least annually of all legal or regulatory changes that significantly affect trade (Article III:3). Notifications are circulated as WTO documents and are also made available on the website.

Article III

(...)

3. Each Member shall promptly and at least annually inform the Council for Trade in Services of the introduction of any new, or any changes to existing, laws, regulations or administrative guidelines which significantly affect trade in services covered by its specific commitments under this Agreement.

(...)

V.B.2. DOMESTIC REGULATION

In addition to measures falling under Article XVI (Market Access) and XVII (National Treatment), governments typically exercise a wide range of other, non-discriminatory, and non-quantitative measures that may affect services industries. The Agreement explicitly recognizes the continued right (and, possibly, the need) of Members to enforce domestic policy objectives through regulation.

Regulatory measures that do not constitute limitations in the sense of Article XVI or XVII may nevertheless have restrictive effects on trade. Several conditional and unconditional obligations hence seek to mitigate the restrictive effects of such regulation.

Firstly, under Article VI.1 measures of general application are to be administered “in a reasonable, objective and impartial manner” in sectors where specific commitments are undertaken. Since trade in services may be affected by a wide range of measures, this could potentially cover virtually all types of economy-wide legislation (eg. building regulations, zoning laws, labour legislation, etc). Secondly, in keeping with Article VI.3, if the supply of a scheduled service is subject to authorization, Members are required to decide on applications within a reasonable period of time. Thirdly, Article VI:6 specifically requires Members that have undertaken commitments on professional services to establish adequate procedures to verify the competence of professionals of other Members.
Negotiating Article VI:4 disciplines

Because of the importance of the domestic regulatory environment as a context for trade, the Council for Trade in Services has been given a particular negotiating mandate in Article VI:4. It calls on the Council to develop, in appropriate bodies, any necessary disciplines to prevent qualification requirements and procedures, technical standards, and licensing requirements and procedures from constituting unnecessary barriers to trade. The Working Party on Domestic Regulation (WPDR) has been established for that purpose. See Module 7 for an update on these negotiations.

While it is difficult to predict the outcome of these negotiations, there is already some sort of precedent which may provide guidance: The Disciplines on Domestic Regulation in the Accountancy Sector (S/L/64), approved by the Services Council in December 1998. The relevant Council Decision (S/L/63) provides that the “accountancy disciplines” are applicable only to Members who have scheduled specific commitments on accountancy. The disciplines are to be integrated into the GATS, together with any new results the WPDR may achieve in the interim, at the end of the current round. A core feature of the disciplines is their focus on (non-discriminatory) regulations that are not subject to scheduling under Articles XVI and XVII. Measures relating to licensing, qualifications and technical standards which discriminate between foreign and domestic services or service suppliers, whether formally or in fact, would need to be scheduled as national treatment limitations in the sectors where GATS commitments have been made.

Pending the results of the negotiations on Article VI:4 disciplines, there is the general obligation in Article VI:5 to ensure that specific commitments are not nullified or impaired through regulatory requirements (licensing and qualification requirements, and technical standards) that do not comply with the envisaged disciplines, and could not reasonably have been expected of them at the time when it made the commitment.

Article VI: Domestic Regulation

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.

   (...)  

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.

V.B.3. MONOPOLIES

Earlier, we noted that the MFN obligation applied unconditionally to monopolies and exclusive service suppliers. Where a sector is scheduled, a few additional conditions apply. Under Article VIII:2, Members are required to prevent monopoly suppliers, if these are active in sectors outside the scope of their monopoly rights which are covered by specific commitments, from abusing their position and acting inconsistently with these commitments. In addition, Article VIII:4 requires Members to report the formation of new monopolies to the Council for Trade in Services if the relevant sector is subject to specific commitments. Should a Member need to modify its schedule to accommodate such a case, it will have to abide by the modification and compensation procedures laid out in Article XXI.

V.B.4. PAYMENTS AND TRANSFERS

Article XI of the GATS requires that Members allow international transfers and payments for current transactions relating to specific commitments. It also provides that the rights and obligations of IMF Members, under the Articles of Agreement of the Fund, shall not be affected. However, capital transactions must not be restricted inconsistently with any relevant commitments. Footnote 8 to Article XVI further circumscribes Members’ ability to restrict capital movements in sectors where they have undertaken specific commitments on cross-border trade and commercial presence, and where such movements are an essential part of the service itself (bank lending and deposit taking activities are cases in point).
VI. EXCEPTIONS AND DEPARTURES

Like the GATT, the GATS contains general exceptions which allow a Member to override all its obligations under the Agreement in view of certain policy objectives such as the protection, *inter alia*, of public morals; human, animal and plant life or health; or of its essential security interests. These general and security exceptions are set out in Articles XIV and XIV bis. In addition to such exceptions, certain provisions of the GATS allow Members to depart from their obligations in order to participate in economic integration (Article V) or labour market (Article V bis) agreements, or in conferring recognition (Article VII). Members seeking recourse to these provisions will have to meet the conditions specified.

VI.A. GENERAL AND SECURITY EXCEPTIONS

Article XIV of the GATS is similar in structure to Article XX of the GATT 1994s. Both articles affirm the right of Members to adopt measures which would otherwise be inconsistent with WTO obligations set out in other provisions, provided that certain conditions are met. In the GATS, the policy purposes for which a Member may invoke a general exception are specified in Article XIV (a) - (e).

Sub-paragraphs (a), (b) and (c) of Article XIV of the GATS indicate that the measure must, in similar terms to Article XX of the GATT, be "necessary" either to protect public morals, or to maintain public order (a specific definition of this term is in the accompanying footnote); to protect human health, animal or plant life or health; or to secure compliance with certain laws or regulations. Thus, for these three categories, which are virtually identical to some of those in Article XX of the GATT, a "necessity" test applies.

The GATS also contains exceptions in paragraphs (d) and (e), which are specific to trade in services. Paragraph (d) mandates that Members can still take measures, otherwise inconsistent with the national treatment principle (Article XVII of the GATS), if the measure facilitates the collection of direct taxes. Following paragraph (e), measures that do not conform with the MFN principle (Article II of the GATS) can still be taken if their purpose is to put into effect agreements to avoid double-taxation.

Finally, the security exception in Article XIV bis, based on Article XXI of the GATT, allows for measures to be taken which are considered necessary for the "protection of its essential security interests".

VI.B. ECONOMIC INTEGRATION AND LABOUR MARKET AGREEMENTS

Like GATT (Article XXIV) in merchandise trade, the GATS also has special provisions which permit countries to depart from their MFN obligation when participating in a preferential trade agreement. Note that the GATS does not refer to Free Trade Areas or Custom Unions but to the wider concept of economic integration. This is because trade in services covers more than cross-border supply and includes three other modes of supply.

Article V of the GATS permits any WTO Member to enter into agreements to further liberalize trade in services on a bilateral or plurilateral basis, provided that three conditions are met. The EIA must have substantial sectoral coverage; provide for the absence or elimination of substantially all discrimination in the sense of national treatment; and not result in raising barriers against non-Members.
While the Article does not define "substantial sectoral coverage", a footnote states that this should be understood in terms of the number of sectors, volume of trade affected, and modes of supply. It further specifies that there should not be any a priori exclusion of any mode of supply. In other words, all four modes of supply should be covered by the agreement. It further specifies that the absence or elimination of "substantially all discrimination" must be achieved through either the elimination of existing discriminatory measures and/or the prohibition of new or more discriminatory measures. In addition, Article V:1 (b) states that this is to be done either at the entry into force of the agreement or on the basis of a reasonable time frame.

By insisting on "substantial sectoral coverage" and removal of "substantially all discrimination", the GATS is essentially indicating that such discriminatory agreements will be permitted only if they contribute to further lowering trade barriers by making a substantial contribution to the integration of participants service economies. At the same time, the overall level of barriers to trade in services must not be raised vis-à-vis non-participants in the sectors covered. Should an agreement lead to the withdrawal of commitments, appropriate compensation must be negotiated with the Members affected.

**Rules of Origin and Developing-Country Flexibilities**

Also contained in Article V is a fairly "liberal" clause on what might be considered as rules of origin. A service supplier from a third country incorporated in one of the parties to the agreement must be allowed to utilise the preferential treatment extended by that agreement as long as it engages in substantive business operations within the territory of the parties.

Developing countries have more flexibility in fulfilling the conditions of substantial sectoral coverage and eliminating discriminatory measures. In agreements consisting entirely of developing countries, more favourable treatment may continue to be given to firms owned or controlled by their own nationals.

WTO Members concluding a preferential trade agreement involving services must notify these agreements, and any subsequent enlargements or significant changes, to the WTO Council for Trade in Services. While the Council is mandated to examine these notifications for their conformity to Article V it has, to date, not launched any such examinations. Under current practice, notified agreements are forwarded by the Council to the Committee on Regional Trade Agreements (CRTA) for any examination. With the adoption of a new Transparency Mechanism for Regional Trade Agreements by the General Council on 14 December 2006, the WTO Secretariat is mandated to submit a factual report for discussion by WTO Members in the CRTA.

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22 It should be noted that so far, it is not clear how the "overall level of barriers" to trade in services would be established.

23 The transparency mechanism is implemented provisionally. Members are to review, and if necessary modify, the decision, and replace it with a permanent mechanism adopted as part of the overall results of the Doha Round. The decision is available at http://www.wto.org/english/news_e/news06_e/job06_59rev5_e.doc
Article V bis of the GATS relates to, and provides legal cover for, agreements on labour markets integration. These are agreements that grant a right of free access to the employment markets of the parties and include measures concerning conditions of pay, other conditions of employment and social benefits. The main condition is that citizens of the countries involved are exempt from residency and work permit requirements. Only one agreement has been notified to date under these provisions, concerning the operation of a common Nordic Labour Market between Denmark, Iceland, Finland, Norway and Sweden.

VI.C. RECOGNITION

Article VII on recognition allows Members to recognise the standards, educational degrees and other qualifications obtained in another country. Recognition can be conferred autonomously or on the basis of a bilateral or plurilateral agreement/arrangement. The Article exempts Members from their MFN treatment obligation for the purposes of recognition.

Members that have recognition agreements/arrangements are required to afford adequate opportunity to other interested Members to negotiate their accession to the agreement or to negotiate a comparable one. In the event of autonomous recognition, it should give “adequate opportunity” for other Members to show that its standards, educational degrees, etc. should be recognized.

Article VII:3 states that recognition is not be applied as a means of discrimination between trading partners or as a disguised trade restriction. Members are required to notify the Council for Trade in Services of existing recognition measures, as well as far in advance as possible, the opening of negotiations on an recognition agreement or arrangement. There is also a requirement to notify the adoption of new recognition measures or significant modification of existing ones. So far, though, there have been only a few notifications under Article VII.
VII. ANNEXES

Completing the GATS framework are a series of annexes addressing special issues relating to particular sectors and modes. These are examined in greater depth in Module 6 where the application of the GATS to individual sectors and modes is taken up. The following sections describes the main annexes in brief.

VII.A. ANNEX ON ARTICLE II (MFN) EXEMPTIONS

As was explained earlier, the Annex on Article II Exemptions lays downs the conditions under which Members could have been exempted, at the entry into force of the Agreement (for newly acceding Members: date of accession), from the basic obligation to MFN treatment. Such exemptions should not exceed ten years in principle. The Council for Trade in Services is expected to review existing exemptions, the first review to be conducted not more than five years after entry into force of the Agreement. The Annex also contains a mandate to negotiate exemptions in trade rounds.

VII.B. ANNEX ON MOVEMENT OF NATURAL PERSONS

The Annex on Movement of Natural Persons clarifies that the scope of the GATS does not extend to measures affecting persons seeking access to the employment market nor to measures governing citizenship, residence or permanent employment. The right of Members to control entry or temporary stay through visa requirements etc. remains unaffected.

VII.C. ANNEX ON AIR TRANSPORT SERVICES

International air transport services are for the most part governed by arrangements negotiated under the Chicago Convention. The Annex on Air Transport Services thus excludes measures affecting air traffic rights and services directly related to their exercise from the scope of GATS. By the same token, it provides that measures affecting aircraft repair and maintenance services, the selling and marketing of air transport services, and computer reservation systems (CRS) services are covered. Further, there is a clause requiring the Council for Trade in Services to review at least every five years developments in air transport with a view to considering the possible extension of GATS to this sector.

VII.D. ANNEX ON FINANCIAL SERVICES

Given the crucial role of the financial sector, governments throughout the world closely regulate banks, insurance companies and other financial service providers. The Annex on Financial Services is intended mainly to clarify some core GATS provisions as they apply to financial services. One of the central elements is the so-called "prudential carve-out". In essence, it confirms "notwithstanding any other provisions of the Agreement" that WTO Members are free to take prudential measures to protect investors, depositors, policy holders or persons to whom a fiduciary duty is owed by a financial service supplier, or to ensure the integrity and stability of the financial system. The Annex also specifies the scope of the governmental-service carve-out
in Article I:3 (b) in financial services, contains various definitions relevant to the sector and proposes a classification system for structuring commitments.

VII.E. ANNEX ON TELECOMMUNICATIONS

The Annex on Telecommunications takes into account the particular role of telecommunications as a transport medium in virtually all sectors, and delineates the conditions governing access to and use of public telecommunications networks and services. Whenever a sector is listed in a Member’s schedule, all foreign suppliers in that sector must be treated on a “reasonable and non-discriminatory” basis in their access to and use of all public telecom services, such as telephone, leased lines and data transmission.

Among other things, the Annex spells out the rights of foreign telecommunication users in whatever committed sector. These include the right to buy or lease the equipment needed to connect to the public network, to connect private circuits with the public system or with other circuits, and to use the public network to transmit information. The Annex also allows Members to place reasonable conditions on access and use in specific circumstances. Developing countries may depart from Annex obligations if necessary to strengthen the domestic infrastructure and service capacity, so long as such conditions are specified in the GATS schedule. Other provisions seek to promote technical cooperation with and between developing countries and lend support to international standardization to ensure compatibility and interoperability of networks and services.

VII.F. ANNEX ON NEGOTIATIONS ON MARITIME TRANSPORT SERVICES

The Annex on Negotiations on Maritime Transport Services provided for the continued non-application of the MFN obligation in maritime transport for those Members that have not undertaken specific commitments in this sector, pending the conclusion of negotiations in this sector. Following the suspension of the negotiations on maritime transport in 1996, the Council for Trade in Services took a decision to the same effect (S/L/24).

EXERCISES

1. What is the main difference between "unconditional" and "conditional" obligations within the GATS framework?

2. How is the GATS more flexible than the GATT when it comes to the application of the MFN and national treatment obligations?

3. What provisions in the GATS are targeted at improving transparency in Members use of measures affecting trade in services?
VIII. SUMMARY

The GATS consists of:

- A framework of general rules and disciplines (including annexes addressing individual sectors and modes)
- Commitments on access conditions for specific sectors and modes of supply listed in each Members' schedule.

Trade in services is defined through four modes of supply, which extend the traditional concept of cross-border trade to include movements of consumers as well as factor flows of investment and labour. All measures undertaken by governments, as well non-governmental bodies acting under delegated authority, which have an effect on trade in services fall within the scope of the GATS. While comprehensive in its coverage, Members have the flexibility to accommodate virtually any regulatory or policy situation since the main access obligations are contained in Member-specific schedules. In this connection, market access and national treatment obligations only apply to scheduled sectors and are subject to any accompanying limitations. Unlike the GATT, it is possible for Members to take "one-off" MFN exemptions (in principle for a duration of 10 years), to impose conditions on national treatment and to use quantitative restrictions to limit market access. The Agreement also foresees future rounds of negotiations to progressively liberalise trade in services, and contains negotiating mandates to complete the framework of rules.
1. The main body of the Agreement outlines Members’ obligations concerning their use of measures (i.e. which may be in the form of laws, rules, regulations, procedures, decisions or administrative actions) affecting trade in services. These obligations essentially fall into two main groups:

(i) "unconditional obligations" that must be adhered to by all Members in all sectors covered by the GATS. These obligations are found in:

- Article II (MFN)
- Article III:1 (Transparency – general publication)
- Article VI:2 (Domestic regulation - availability of legal remedies)
- Article VIII:1 (Monopolies – MFN compatibility)
- Article IX (Business Practices - consultations)
- Article XV:2 (Subsidies – consultations)

and

(ii) "conditional obligations" whose scope is confined to those sectors and modes for which a Member has undertaken specific commitments. These obligations are found in:

- Article III:3 (Transparency – notification)
- Article VI:1, 3, 4, 5 and 6 (Domestic regulation - administration of measures of general application, due process, and regulatory disciplines)
- Article VIII:2 (Monopolies – respect specific commitments)
- Article XI (Payments and Transfers - unrestricted)

1. In the context of the GATS, the MFN obligation (Article II) is applicable to any measure that affects trade in services in any sector falling under the Agreement, irrespective of whether specific commitments have been taken or not. However, the GATS offers some flexibility. Under the Annex on Article II Exemptions, there is a possibility for Members, at the time of entry into force of the Agreement (or date of accession), to seek exemptions not exceeding a period of ten years in principle. Exemptions are to be reviewed every 5 years (the last was launched in 2005) and are subject to negotiations in subsequent trade rounds. Apart from the "one-off" listing of exemptions, it is also possible for WTO Members to depart from MFN treatment due to certain specified circumstances. These are namely, in the event of the conclusion of economic integration agreements (Article V), labour market integration agreements (Article V bis) and recognition agreements (Article VII). There are also provisions covering general exceptions (Article XIV), security exceptions (Article XIV bis), and the prudential carve-out as contained in the Annex on Financial Services.

National treatment under the GATS applies only to the sectors committed in a Members' schedule and is subject to the conditions inscribed therein. Unlike Article XVI on market access, Article XVII does not provide an exhaustive list of discriminatory measures that would be inconsistent with full national treatment. The Article simply requires a Member to 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". Treatment that is
"no less favourable" is in turn defined in Article XVII:3 to mean that treatment which ensures that conditions of competition are not biased in favour of domestic services and service suppliers. Typical examples of discriminatory measures include restrictions on foreign land ownership, tax benefits only for nationals, training requirements imposed only on foreign suppliers, or language requirements that are not directly relevant to the exercise of a profession.

2. **Several provisions are targeted at improving transparency in Members' use of measures and services regimes.** Some of these are unconditional, since they apply irrespective of whether the sector has been committed. Under Article III each Member is required to publish promptly all measures pertaining to or affecting the operation of the GATS. All Members also have a general obligation to establish an enquiry point to respond to requests for information from other Members (Article III:4). Moreover, pursuant to Article IV:2 developed countries (and other Members to the extent possible) are to establish contact points to which developing country service suppliers can turn for relevant information related to trade in services. Where specific commitments have been made, there is an additional obligation to notify the Council for Trade in Services at least annually of all legal or regulatory changes that significantly affect trade (Article III:3). Notifications are circulated as WTO documents and are also made available on the website.
Scheduling Specific Commitments

ESTIMATED TIME: 3 hours

OBJECTIVES OF MODULE 5

- Explain how a schedule of specific commitments is constructed, what it contains and their implications; and

- explain the main principles and concepts involved in scheduling and provides a basis for working with services schedules.
I. INTRODUCTION

As explained in the previous module, in addition to respecting the general obligations of the GATS each WTO Member is required to have its own schedule of specific commitments. A services schedule is a relatively complex document, possibly more difficult to read than a goods schedule under the GATT. For a start, a goods schedule, in its simplest form, lists only one tariff rate per product. A services schedule, on the other hand, contains at least eight entries per sector. The commitments on any scheduled service sector are recorded with respect to four modes of supply and two possible types of restrictions: "limitations on market access" and "limitations on national treatment." The schedule may also be used to undertake additional commitments regarding, for example, the implementation of specified standards or regulatory principles.

This module will explain how a schedule of specific commitments is constructed. In doing so, some key questions will be examined such as: What is contained in a schedule? What measures need to be scheduled? How should commitments be recorded? And what are their implications? The module cannot pretend to answer every question that might arise when scheduling specific commitments but it does attempt to provide a basis for working with services schedules. It is highly recommended that this module be read in conjunction with the Guidelines for the Scheduling of Specific Commitments under the General Agreement on Trade in Services (S/L/92). This document was prepared to assist Members in drafting schedules of specific commitments, and is a vital reference for anyone interested in finding out more.

24 To avoid repetition, the term "schedule of specific commitments" will be used interchangeably with either "services schedule" or "schedule".

25 The term "limitation" will be used throughout this module to refer to the "terms", "conditions", "limitations" and "qualifications" used in Article XVI and XVII of the GATS.

26 Hereafter, this document will be referred to as the "Scheduling Guidelines".
II. WHAT IS A SCHEDULE OF SPECIFIC COMMITMENTS?

Schedules are legally binding documents, which record the specific commitments taken by each Member, and form an integral part of the GATS. In a schedule, a Member specifies the sectors committed together with any corresponding limitations on market access and national treatment. A Member may also undertake additional commitments that do not fall under the market access or national treatment provisions of the GATS, but which nevertheless affect market conditions faced by service suppliers.

A schedule contains four columns: sector or sub-sector; limitations on market access; limitations on national treatment; and additional commitments, if any. The numbers in the market access and national treatment columns refer to the various modes of supply, since commitments are mode-specific. Below is an example of an empty schedule.

**EXAMPLE OF A BLANK SCHEDULE OF COMMITMENTS**

Modes of supply: (1) Cross-border supply; (2) Consumption supply; (3) Commercial presence; (4) Presence of natural persons

<table>
<thead>
<tr>
<th>Sector or sub-sector</th>
<th>Limitations on market access</th>
<th>Limitations on national treatment</th>
<th>Additional commitments</th>
</tr>
</thead>
<tbody>
<tr>
<td>I. HORIZONTAL SECTION</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>ALL SECTORS INCLUDED IN THIS SCHEDULE</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>II. SECTOR-SPECIFIC COMMITMENTS</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>(1)</td>
<td>(1)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>(2)</td>
<td>(2)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>(3)</td>
<td>(3)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>(4)</td>
<td>(4)</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

In the rest of the module, we will be examining more closely what items can be entered under each of sections (i.e., horizontal section and sector-specific commitments) and columns. We will also take a look at how sectors are described, what type of market access and national treatment limitations need to be scheduled, and how they should be recorded.
Before going further, it is useful to keep several main points in mind. Firstly, while there is an obligation for each Member to submit a schedule, GATS does not specify the services sectors or levels of access that should be committed. In other words, it is ultimately up to the Member concerned to decide what services to commit and how much market access and/or national treatment to bind. This self-selection of sectors is sometimes referred to as the GATS "positive-list" approach. Thus, while some Members have limited their commitments to less than a handful of sectors, others have listed some 100 or more sub-sectors. Moreover, as will be explained later in this module, relevant GATS articles provide a high degree of flexibility in terms of how limitations are formulated. This allows Members to customize their commitments according to national policy choices and constraints.

Secondly, in light of the "positive-list" approach adopted by the GATS, sectors that are not included in the schedule are automatically outside the scope of market access (Article XVI) and national treatment (Article XVII) provisions. For unscheduled sectors, only unconditional obligations apply, including in particular the most-favoured nation treatment principle and certain transparency-related obligations. See Module 4 for a detailed explanation of such unconditional general obligations.

Thirdly, commitments in schedules guarantee minimum levels of treatment. Amongst trade practitioners, these guarantees are known as "bindings" since they secure a certain level of market access and national treatment. A Member has the choice of either: (i) liberalizing access by taking bindings that require it to lower its applied regime; (ii) maintaining the status quo by binding the applied services regime; or (iii) take bindings that are more restrictive than those measures currently in force. If it chooses the latter option, it creates a margin between the bound conditions and the applied regime, thus giving itself some room for manoeuvre.

As a schedule records the specific commitments undertaken by a Member, considerable attention must be paid to interpreting the entries inscribed. Comprehending a schedule is central to your understanding of how the GATS operates.

IN DETAIL

**Article XX**

**Schedules of Specific Commitments**

1. 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 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.
REMEMBER

It is up to Members to decide what sector they wish to include into their schedules as well as on what corresponding limitations they wish to take. While the scope and content of specific commitments vary from one schedule to another, their legal nature remains the same. They constitute an integral part of the GATS. Specific commitments guarantee a minimum level of treatment and are legally enforceable via the WTO dispute settlement system. Therefore, nothing should appear in them which a Member does not intend to be legally binding. The clarity of all scheduled entries is thus vital.
III. WHAT SHOULD BE SCHEDULED?

As indicated before, a schedule contains the following information: a description of the sector or sub sector committed; any limitations on market access; any limitations on national treatment; and additional commitments other than market access and national treatment. Limitations on market access and national treatment are, in turn, specified according to the four modes of supply in the GATS.

The starting point of the scheduling exercise lies in the choice of sectors to commit and the extent of coverage to provide. In other words, will all possible services be included in the schedule or only certain sectors, or sub-sectors? Once that choice has been made, the Member has to decide for each mode of supply:

- what limitations, if any, it wishes to maintain on market access (Article XVI);
- what limitations, if any, it wishes to maintain on national treatment (Article XVII); and
- what additional commitments, relating to measures affecting trade in services not subject to scheduling under Articles XVI and XVII, it wishes to undertake under Article XVIII.

Using that sequence of decisions, let us look at the types of entries that can be made in each of the four columns and the relevant GATS provisions.

III.A. SECTOR COVERAGE

The greatest possible degree of clarity is needed in the description of the sector coverage. This is important since market access and national treatment commitments apply only to the sectors or sub-sectors committed in the schedule. If you are familiar with trade in goods, you will have heard of the Harmonized System, which Members are obliged to use. The GATS, however, does not have an agreed nomenclature for classifying service sectors and Members are permitted to use their own definitions. A great deal of flexibility can thus be exercised over the sector coverage of a commitment. On the other hand, this also means that interpreting the scope of a commitment can be more difficult than for goods, especially if descriptions are unclear. In practice, most Members have found it useful to draw on a widely used Services Sectoral Classification List, which frequently refers to classification numbers contained in the UN Provisional Central Product Classification (CPC). For some other sectors, such as telecommunications, financial services and maritime transport, alternative classification systems have also been developed. These are explained in Module 7.

The classification list groups together 12 main service sectors which in turn are sub-divided into a total of some 160 sub sectors. The sub-sectors are identified by a corresponding CPC number which gives an explanation of the type of services covered under that reference. The table below provides a summary of how sectors are typically classified.

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There is no mandatory nomenclature of service sectors and Members have the flexibility to use their own definitions when describing committed sectors. In practice, most Members have used the **Services Sectoral Classification List** as contained in document MTN.GNS/W/120 which consists of 12 main sectors which are in turn sub-divided into 160 sub-sectors (see column on the right for an illustrative list of sub-sectors).

The classification list is based on the **United Nations Provisional Central Product Classification system (CPC)** which provides a description of the services covered.

Should a Member wish use its own definition, it should provide sufficient level of detail so as to avoid any ambiguity. In this connection, the Scheduling Guidelines encourages Members to provide concordance with the CPC or other internationally recognised classifications when describing the service that is committed.

**A precise definition of sectors or sub-sectors** is critical as it defines the scope of a commitment.

<table>
<thead>
<tr>
<th>CLASSIFICATION OF SERVICE SECTORS (MTN.GNS/W/120)</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. <strong>Business Services</strong> — Professional, computer and related, research and development, real estate, rental/leasing without operators and other business services;</td>
</tr>
<tr>
<td>2. <strong>Communication Services</strong> — Postal, courier, telecommunication, audiovisual and other communication services;</td>
</tr>
<tr>
<td>3. <strong>Construction and related Engineering Services</strong> — General construction for buildings and civil engineering, installation, assembly building completion and finishing work;</td>
</tr>
<tr>
<td>4. <strong>Distribution Services</strong> — Commission agents', wholesale trade and retailing services, franchising;</td>
</tr>
<tr>
<td>5. <strong>Educational Services</strong> — Primary, secondary, higher and adult education;</td>
</tr>
<tr>
<td>6. <strong>Environmental Services</strong> — Sewage, refuse disposal, sanitation and similar services;</td>
</tr>
<tr>
<td>7. <strong>Financial Services</strong> — Insurance, banking and other financial services;</td>
</tr>
<tr>
<td>8. <strong>Health-related and Social Services</strong> — Hospital, other human health and social services;</td>
</tr>
<tr>
<td>9. <strong>Tourism and Travel-related Services</strong> — Hotel and restaurants, travel agencies and tour operators, and tourist guides services;</td>
</tr>
<tr>
<td>10. <strong>Recreational, Cultural, and Sporting Services</strong> — Entertainment, news agency, libraries, archives, museums, sporting services;</td>
</tr>
<tr>
<td>11. <strong>Transport Services</strong> — Maritime, internal waterways, air, space, rail, road, pipeline and auxiliary transport services;</td>
</tr>
<tr>
<td>12. <strong>Other Services</strong>.</td>
</tr>
</tbody>
</table>
ILLUSTRATION

A Member wishes to make a commitment in the sub-sector of "Accounting, auditing and bookkeeping services". In the Classification List, this service falls within "Professional Services" which is a sub-sector under "Business Services". The Classification List also contains the relevant CPC number, 862, where a more detailed description can be found. In its Schedule, the Member could thus make the following entry in the "Business Services"/"Professional Services" section:

**Accounting, auditing and bookkeeping services (CPC 862)**

**TIP**

Commitments in the GATS can be limited to specified geographical regions of the Member concerned. Should this be the case, the geographical scope of the relevant measures should be indicated in the schedule.

III.B. MODES OF SUPPLY

In light of the special features of services trade, the GATS defines four modes of supply based on the nature of the transaction, the origin (or nationality) of the service supplier and/or consumer, and their geographical location at the time when the service is supplied. See Module 4 and 6 for a fuller explanation of modes of supply. In terms of scheduling, one of the advantages of distinguishing between various modes of supply is that it gives flexibility to Members to vary their commitments or even completely exempt individual modes from bindings.

**Illustration**

For instance, a Member may have taken a full commitment for architectural services under mode 1. This commitment covers the cross border provision of services by foreign architects to their clients. However, should some foreign architects subsequently find it more efficient to establish and operate a local office so that they can have face-to-face contact with their clients, can they rely on the mode 1 commitment to establish such an office? The answer would be no, as specific commitments are mode-specific and commercial establishment is covered by mode 3. A separate commitment under that mode would be required.

III.C. LIMITATIONS ON MARKET ACCESS

In the second column of the schedule, a Member indicates for each mode of supply what limitations, if any, it intends to maintain on market access. In order to understand what limitations may be scheduled in this column it is necessary to refer back to the obligation contained in Article XVI. In Article XVI.1, Members are obliged to accord to "services and services 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 XVI.2 goes on to lists six types of limitations that must not be maintained unless included into the schedule.
III.C.1. WHAT MARKET ACCESS LIMITATIONS NEED TO BE SCHEDULED?

The six categories of measures, which may not be adopted or maintained unless they are specified in the schedule include: four types of quantitative restrictions (sub paragraphs a–d), which limit numbers of service suppliers, values of transactions or assets, numbers of services operations or quantity of output, or total number of natural persons; and two other types of limitations — one on the form of legal entity (sub paragraph e) and the other on foreign equity participation (sub paragraph f).

The list is exhaustive as Members are required, in order to preserve the right to operate any of the measures covered, to inscribe them in the market access column of their schedule under the relevant mode. It should be noted that this even applies to non-discriminatory measures such as quantitative restrictions that affect foreign and domestic suppliers alike. If there are no limitations scheduled, full market access must be provided for that sector and mode.

Illustration

For instance, a limitation on foreign equity participation (Article XVI.2 (e)) is a discriminatory measure as it applies only to foreign service suppliers. On the other hand, quantitative restrictions such as on the total number of service suppliers (Article XVI.2 (a)) may be non-discriminatory as they could apply to both national and foreign service suppliers equally. In both cases, the measures in question would need to be scheduled as limitations on market access. Otherwise, the Member concerned would not be able to maintain or to use them.

It is important to keep in mind that, while many factors can potentially affect “market access” in the broad sense of the term, in the context of the GATS, only restrictions that fall under the six categories listed in Article XVI.2 are subject to scheduling.

Below are some examples of actual limitations that are found in Members’ schedules. This list is taken from the Scheduling Guidelines:

<table>
<thead>
<tr>
<th>Article XVI.2 limitations</th>
<th>Examples</th>
</tr>
</thead>
<tbody>
<tr>
<td>a) Number of service suppliers (i.e. numerical quotas, monopolies, exclusive service suppliers or an economics needs test)</td>
<td>Annually established quotas for foreign medical practitioners.</td>
</tr>
<tr>
<td></td>
<td>Licence for a new restaurant based on an economic needs test.</td>
</tr>
<tr>
<td></td>
<td>Nationality requirements for suppliers of services (equivalent to zero quota for foreigners).</td>
</tr>
<tr>
<td>b) Value of service transactions or assets (i.e. numerical quotas or economics needs test)</td>
<td>Foreign bank subsidiaries limited to x percent of total domestic assets of all banks.</td>
</tr>
</tbody>
</table>
As can be seen from the table above, limitations (a) – (d) are to be expressed numerically, such as in the form of a quota, or as an economic needs test. The entry should describe each measure concisely indicating the elements which make it inconsistent with Article XVI. Numerical ceilings should be expressed in definite quantities in either absolute numbers or percentages. For economic needs tests, the entry should indicate the main criteria on which the test is based, e.g., if the authorisation to establish a facility is based on a population criterion, the criterion should be described concisely.

**IN BRIEF**

**What is an "economic needs test" (ENT)?**

The concept of ENTs arise in the GATS only in Article XVI but it is not further explained. Nor does the term have a well defined meaning in standard dictionaries or in economic literature. In Members' schedules ENTs appear to respond to a variety of different objectives. Relevant limitations include references to "needs test", "labour market tests", "market tests", "local unavailability" of a service; or "needs-based quantitative limits". These examples illustrate the difficulty in attaching a precise meaning to the concept of "economic needs". For that reason, ENTs may be regarded above all as "tests" that condition market access. With that reading in mind, the Scheduling Guidelines confirm that such tests "should indicate the main criteria on which the test is based, e.g. if the authority to establish a facility is based on a population criterion, the criterion should be described concisely". This stands to reason since, otherwise, the legal certainty and predictability necessary for Members to negotiate scheduled commitments and secure market access would be undermined.
III.C.2. WHAT NEED NOT BE ENTERED INTO THE MARKET ACCESS COLUMN?

Since a schedule records legal commitments it is important to focus entries on exactly the requirements of the relevant provisions of the GATS. Inscribing more information, than that required by these provisions may simply create confusion and produce legal uncertainties as to the scope and content of a commitment. Sometimes there may be doubt about whether certain measures should be scheduled since they are considered to affect "market access" in the broad sense of the term. However, for scheduling purposes, the golden rule is that entries should be confined to measures that fall under one or more of the six categories of limitations listed in Article XVI.2.

This means that, while approval procedures or licensing and qualification requirements, such as financial soundness or membership in a professional organization, are frequently stipulated as conditions to obtain a licence, they do not need to be scheduled under market access. Why, because they are neither a quantitative restriction of the type referred to in Article XVI.2 (a) to (d), nor do they restrict the form of legal entity (e), or limit foreign equity capital (f) participation. It is only if approval procedures or licensing requirements are used to operate any of the restrictions specified in Article XVI.2 that these restrictions - but not the implementing licensing mechanisms - should be scheduled as market access limitations.

It should also be noted that the quantitative restrictions specified in sub-paragraphs (a) to (d) refer to maximum limitations. Minimum requirements such as those common to licensing criteria (e.g. minimum capital requirements for the establishment of a corporate entity) do not fall within the scope of Article XVI. Whether the measure conforms with other provisions of the GATS, such as national treatment as defined by Article XVII, or the obligations on domestic regulation of Article VI, is a separate matter. It should not be confused with the scheduling requirements that are derived from the market access obligation under Article XVI.

REMINDER

It is important to keep in mind that the market access column must be confined to scheduling measures that fall within the scope of Article XVI.2 and nothing else. The best approach is to be precise and clear on the exact terms and conditions of that limitation. For example, a Member scheduling a limitation on the number of service suppliers, would need to specify the exact number of suppliers, and not merely state that a numerical limitation exists. Likewise, a Member scheduling a limitation on foreign equity participation would need to specify the exact percentage of foreign share-holding allowed. If it wishes to express the limitation in terms of an economic needs test, then it should specify what criteria are being used. Mere references to applicable laws or to the existence of licensing requirements do not indicate what the restriction actually is, and therefore should not be scheduled. Similarly, approval procedures or licensing and qualification requirements that do not contain any of the limitations under Article XVI.2 do not need to be scheduled, nor do licensing criteria such as minimum capital requirements.
III.D. LIMITATIONS ON NATIONAL TREATMENT

In the third column of a schedule, a Member indicates for each mode of supply what national treatment limitations, if any, it intends to maintain in the sector concerned. The relevant provision is contained in Article XVII, which provides that a 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". Any departure from that standard of treatment "no less favourable" would have to be scheduled as a limitation. There are some important differences in scheduling national treatment limitations as compared to market access.

Under Article XVII, there is no exhaustive list of measures that would constitute national treatment limitations. Rather, it has to be decided on a case-by-case basis using the particular benchmark contained in Article XVII. However, this benchmark does not depend on whether or not a Member formally accords foreign services and service suppliers the same treatment as it gives to its own like services and service suppliers. The benchmark is whether "conditions of competition" have been modified. Article XVII.3 provides that "formally identical or formally different treatment shall be considered less favourable if it modifies the conditions of competition" in favour of own services or service suppliers as compared to those of other Members.

The focus is on "conditions of competition" because Members felt the need to distinguish between de jure and de facto discrimination. De jure discrimination refers to a situation where the measure, as contained in a law or regulation, explicitly discriminates. De facto discrimination, on the other hand, refers to a situation where there is formally no difference in terms of how foreign and domestic services and service suppliers are treated. However, foreign services and service suppliers might still end up being treated less favourably. What is thus important is not whether there has been identical treatment but whether all services and service suppliers are given the opportunity to compete on a level playing field irrespective of national origin. Therefore, in the sense of Article XVII, a Member grants full national treatment in a given sector or mode when conditions of competition are not modified in favour of its own like services and service suppliers.

**Illustration**

**De jure discrimination:** A law explicitly provides that domestically-owned suppliers of audiovisual services are given preference in the allocation of frequencies for transmission within the national territory. Such a measure discriminates explicitly on the basis of the national origin of the service supplier and thus constitutes formal or de jure denial of national treatment.

**De facto discrimination:** A measure stipulates that prior residency is required for the issuing of a licence to supply a service. The measure does not formally distinguish service suppliers on the basis of national origin and applies equally to domestic suppliers. However, de facto foreign service suppliers are treated less favourably because the prior residency requirement adversely affects their conditions of competition compared to like service suppliers of national origin. Other examples might include the requirement to ensure that a majority of directors are nationals of the host country, or that the company uses a local name.

Those familiar with the national treatment obligation under the GATT, where it applies across the board on duty-paid imports, may at first sight find it difficult to understand why national treatment under the GATS is confined to scheduled services and subject to possible limitations. The reason lies in the particular nature of services trade. Universal national treatment for goods does not necessarily imply free trade. Imports can still
be controlled by tariffs which, in turn, may be bound in the country's tariff schedule. By contrast, given the impossibility of operating tariff-type measures across large segments of services trade, the general extension of national treatment in services could in practice be tantamount to guaranteeing free access.

III.D.1. WHAT ARE SOME EXAMPLES OF NATIONAL TREATMENT LIMITATIONS?

Since Article XVII does not contain an exhaustive listing of all national treatment limitations, it is useful to recall some frequently recurring cases as drawn from existing schedules of specific commitments. While these examples are by no means exhaustive, they typically relate to discriminatory subsidies, taxes or other financial measures; nationality and residency requirements; licensing and qualification requirements; registration requirements; authorisation requirements; technology transfer requirements; local content requirements; and prohibitions on owning land or real estate. The table below provides a few examples. For more examples, take a look at Attachment 1 of the Scheduling Guidelines.

<table>
<thead>
<tr>
<th>Types of limitation</th>
<th>Examples</th>
</tr>
</thead>
<tbody>
<tr>
<td>Subsidies</td>
<td>Eligibility for subsidies reserved to nationals.</td>
</tr>
<tr>
<td>Tax measures</td>
<td>A 4% federal excise tax is imposed on insurance premiums paid to non-domestically incorporated companies.</td>
</tr>
<tr>
<td>Discriminatory fees, charges, etc.</td>
<td>Charges taken for port services may be higher for foreign than for national-flag vessels.</td>
</tr>
<tr>
<td>Nationality and/or residency requirements</td>
<td>The majority of board members must be citizens (permanent residents) of the country concerned. Five-years of prior residency required for all lawyers applying for a licence.</td>
</tr>
<tr>
<td>Licensing and qualification requirements</td>
<td>Barristers and commercial lawyers in national law are required to be graduates of national universities.</td>
</tr>
<tr>
<td>Technology transfer/training requirements</td>
<td>Foreign service suppliers must train a certain number (percentage) of nationals.</td>
</tr>
<tr>
<td>Local content requirements</td>
<td>Preferential use of local services that are available at competitive prices and levels of quality.</td>
</tr>
<tr>
<td>Ownership of property/land</td>
<td>Foreign land ownership not permitted.</td>
</tr>
</tbody>
</table>
III.D.2. HOW TO ASSESS WHAT MEASURES CONSTITUTE NATIONAL TREATMENT LIMITATION?

In the section above, we saw that a wide range of measures could potentially fall under the scope of Article XVII. It is therefore important to keep in mind that the benchmark is whether a particular measure modifies conditions of competition in favour of domestic services or service suppliers as compared to their foreign counterparts. If they do not, the measure would not have to be scheduled.

It is for the individual Member to assess whether such effects exist – the GATS itself does not list any relevant cases. In a module such as this it is not possible to cover all the eventualities that might arise. However, for illustrative purposes, some commonly recurring issues are considered below:

- Whether residency requirements constitute a de facto national treatment limitation has to be determined on a case-by-case basis. Consideration needs to be given to how the requirement relates to the type of activity concerned and whether its ultimate effect is to discriminate against foreign services and/or service suppliers. If it is discriminatory it has to be scheduled under Article XVII unless justifiable under the general exceptions of Article XIV. If the residency requirement does not have discriminatory effects, it would be subject to the disciplines on domestic regulation of Article VI. If it is not consistent with these disciplines and if it cannot be justified as a general exception, it must be brought into conformity.

- Article XVII applies to subsidies in the same way that it applies to all other measures affecting trade in services. It is true that Article XV only contains a negotiating mandate obliging Members to "enter into negotiations with a view to developing the necessary multilateral disciplines" to counter the distortive effects that may be caused by subsidies. However, the Article does not alter the scope and coverage of existing disciplines. Therefore, any subsidy, which is a discriminatory measure within the meaning of Article XVII, would have to be either scheduled as a limitation on national treatment or brought into conformity with that Article. Subsidies are also not excluded from the scope of most-favoured nation treatment (Article II). In other words, a subsidy cannot be granted to some Members but not to others unless it is under the cover of an MFN exemption.

- There is no obligation in the GATS which requires a Member to take measures outside its territorial jurisdiction. It therefore follows that the national treatment obligation in Article XVII does not oblige a Member to extend such treatment to a service supplier located in the territory of another Member.

- Restrictions on the purchase, lease or use of real estate, connected with the supply of a service inscribed in a schedule, are national treatment limitations to the extent that conditions of competition are altered in favour of service suppliers of the Member as compared to like service suppliers of any other Member.

TIP

Overlap between Market Access and National Treatment restrictions

A Member may wish to maintain measures which are inconsistent with both Articles XVI (Market Access) and XVII (National Treatment). Article XX:2 stipulates that such measures shall be inscribed in the column relating to Article XVI on market access. Thus, while there may be no limitation entered in the national treatment column, in accordance with Article XX:2, any such measure is also to be regarded as scheduled under Article XVII and subject to the provisions of that Article.
III.D.3. ADDITIONAL COMMITMENTS

The fourth column in a schedule refers to additional commitments. Under Article XVII, a Member may, in a given sector, make additional commitments with respect to measures not subject to scheduling under the market access and national treatment provisions of the GATS. Unlike market access and national treatment, entries in the additional commitments column are not limitations but are undertakings to abide by certain regulatory standards or practices. Such commitments can include, but are not limited to, undertakings with respect to qualifications, technical standards, licensing requirements or procedures, competition disciplines, and other domestic regulations or institutional arrangements (for more information on additional commitments see S/CSC/W/34 and Corr.1).

Additional commitments are particularly frequent in telecommunications where they have been used by some sixty Members to incorporate into their schedules certain competition and regulatory disciplines. For example, a Member undertaking additional commitments in the telecommunications sector would undertake to subscribe by the regulatory disciplines laid out in a so-called Reference Paper, which an informal grouping of Members had developed during the extended negotiations in this sector.

III.D.4. SPECIFIC COMMITMENTS AND MFN EXEMPTIONS

In Module 4, the concept and scope of MFN exemptions were explained. To reiterate, upon the entry into force of the GATS in 1995, each Member had a one-off opportunity to seek MFN exemptions. The same opportunity was given to those Members acceding after 1995. With an MFN exemption, a Member may accord to some Members, with respect to a specified sector and measure, more favourable treatment than it gives to others. Keep in mind that while the exemption would allow that Member to deviate from its MFN obligation under Article II, it must still meet the obligations arising from its market access and national treatment commitments. Therefore, a Member may accord treatment more favourable than the minimum standard to some Members, as long as all other Members receive at least that minimum standard of market access and national treatment appearing in its schedule.

Example

A Member limits the participation of foreign capital to not more than 49% in the banking sector. An exemption from MFN in that case would only allow that Member to extend more favourable treatment to certain countries (e.g. waive the limitation and allow 100% foreign ownership), but not less favourable treatment (e.g. a limitation of foreign capital participation to 20%).

Each WTO Member has its own list of MFN Exemptions. Overall, over 90 WTO Members (counting the EU as one) have listed MFN exemptions for close to 500 measures in total. There are five entries which are necessary for the complete and precise listing of an exemption. Below is a brief explanation of what should be entered under each heading:

**1) Description of the sector or sectors in which the exemption applies.**

As with specific commitments, a Member wishing to take an exemption for a measure would have to specify the service activities to which that measure would apply. A clear description of the sector of sub-sector would
have to be entered. If the measure is "horizontal", i.e. applicable to all sectors, the term "all sectors" should be entered.

(2) **Description of the measure, indicating why it is inconsistent with Article II.**

The entry in the exemption list should contain a description of the measure for which exemption is sought and how it is inconsistent with Article II.

(3) **The country or countries to which the measure applies.**

MFN exemptions by definition discriminate between countries, whether by extending certain benefits to some and not others or by extending less favourable treatment to certain countries. An indication of the countries to which the measure applies is an essential element in defining the scope of an exemption.

(4) **The intended duration of the exemption.**

This entry should indicate the date at which the Member seeking the exemption intends to bring the measure into conformity with its obligation under Article. In the Annex on Article II it is stated that, "in principle, such exemptions should not exceed a period of 10 years". Every five years, the Council for Trade in Services is expected to review all exemptions granted for a period of more than five years. MFN exemptions are also within the scope of the negotiations.

(5) **The conditions creating the need for the exemption.**

The entry should contain a description of the policy objective in pursuance of which the measure is taken – for example, the desire to maintain certain regional preferences, to ensure certain levels of market openness by other countries, or simply to provide for sufficient time to bring a certain law into conformity with MFN.

**SOME EXAMPLES OF HOW MFN EXEMPTIONS WOULD BE LISTED ARE PROVIDED BELOW:**

<table>
<thead>
<tr>
<th>Sector or Sub-Sector (1)</th>
<th>Description of Measure Indicating its Inconsistency with Article II (2)</th>
<th>Countries to which the Measure Applies (3)</th>
<th>Intended Duration (4)</th>
<th>Conditions Creating the Need for the Exemption (5)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Life Insurance</td>
<td>Licences for branch offices are to be granted on the basis of reciprocity</td>
<td>All countries</td>
<td>Date of expiry of the exemption</td>
<td></td>
</tr>
<tr>
<td>Sector or Sub-Sector (1)</td>
<td>Description of Measure Indicating its Inconsistency with Article II (2)</td>
<td>Countries to which the Measure Applies (3)</td>
<td>Intended Duration (4)</td>
<td>Conditions Creating the Need for the Exemption (5)</td>
</tr>
<tr>
<td>-------------------------</td>
<td>------------------------------------------------------------------------</td>
<td>------------------------------------------</td>
<td>----------------------</td>
<td>-----------------------------------------------</td>
</tr>
<tr>
<td>Road transport (passenger and freight)</td>
<td>The supply of road transport services by foreign suppliers into and across the territory of (X) is limited to vehicles registered in the countries indicated in column (3)</td>
<td>List of countries</td>
<td>Date of expiry of the exemption</td>
<td></td>
</tr>
<tr>
<td>All Sectors</td>
<td>Requirement of a labour market test is waived for the citizens of the countries indicated in column (3)</td>
<td>List of countries</td>
<td>Date of expiry of the exemption</td>
<td></td>
</tr>
</tbody>
</table>
IV. HOW ARE SPECIFIC COMMITMENTS RECORDED?

Apart from the four columns (i.e. Sector or Sub-sector; Limitations on market access; Limitations on national treatment; and Additional Commitments), a schedule has two parts. Part I records horizontal commitments which affect all sectors or sub-sectors scheduled unless stated otherwise and Part II records the sector-specific commitments. Examples of the entries in the horizontal and sector specific sections of a schedule are provided below.

IV.A. COMMITMENTS IN THE HORIZONTAL SECTION

There is sometimes considerable confusion about the status of horizontal commitments in a schedule. To clarify, entries in the horizontal section bind all sectors included in the schedule unless stated otherwise and is essentially a formatting convention that was developed to avoid having to repeat the same limitations in all the following sectors. In terms of good practice, only commitments or reservations that are truly horizontal, in the sense that they bind all sectors, should be included in this section. The relevant provisions of the market access, national treatment and domestic regulation provisions of the GATS continue to apply.

SAMPLE SCHEDULE OF COMMITMENTS: ARCADIA

Modes of supply: (1) Cross-border supply; (2) Consumption supply; (3) Commercial presence; (4) Presence of natural persons

<table>
<thead>
<tr>
<th>Sector or sub-sector</th>
<th>Limitations on market access</th>
<th>Limitations on national treatment</th>
<th>Additional commitments</th>
</tr>
</thead>
<tbody>
<tr>
<td>ALL SECTORS INCLUDED IN THIS SCHEDULE</td>
<td>(4) Unbound, other than for (a) temporary presence, as intra-corporate transferees, of essential senior executives and specialists and (b) presence for up to 90 days of representatives of a service provider to negotiate sales of services.</td>
<td>(3) Authorization is required for acquisition of land by foreigners.</td>
<td>Within four years from entry into force of this schedule, Arcadia will set up an independent competition authority with supervisory competencies in all service sectors.</td>
</tr>
</tbody>
</table>
II. SECTOR-SPECIFIC COMMITMENTS

4. DISTRIBUTION SERVICES
   C. Retailing services (CPC 631, 632)

<table>
<thead>
<tr>
<th>Sector or sub-sector</th>
<th>Limitations on market access</th>
<th>Limitations on national treatment</th>
<th>Additional commitments</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>(1) None.</td>
<td>(1) None.</td>
<td></td>
</tr>
<tr>
<td></td>
<td>(2) None.</td>
<td>(2) None.</td>
<td></td>
</tr>
<tr>
<td></td>
<td>(3) Foreign equity participation limited to 51 per cent.</td>
<td>(3) Investment grants are available only to companies controlled by Arcadian nationals.</td>
<td></td>
</tr>
<tr>
<td></td>
<td>(4) Unbound, except as indicated in horizontal section.</td>
<td>(4) Unbound.</td>
<td></td>
</tr>
</tbody>
</table>

In this example, Arcadia, an imaginary Member, has scheduled horizontal national treatment limitations on mode 3 and market access undertakings on mode 4. For mode 3, the limitation is that all acquisition of land by foreigners needs to be authorised. In other words, Arcadia can deny foreign land ownership. It is a limitation entered into the horizontal section, since it applies across all the sectors in the schedule. Unlike other modes, on mode 4, the entry is an undertaking to provide market access for the entry and temporary stay of intra-corporate transferees and business visitors. Mode 4 commitments are mainly made in the horizontal section since they are undertakings that are normally applied on an economy-wide basis.

While the examples given are mode-specific, a horizontal limitation could also be crafted to cover all modes of supply at the same time. For instance, a limitation might exclude the granting of subsidies or preferential tax measures to foreign services and service suppliers in any mode of supply.

REMINDER

Since horizontal limitations condition all other entries in the schedule, a sector-specific restriction must be read in conjunction with the entry contained in the horizontal section unless explicitly provided otherwise. Just reading the sector specific commitment and not the horizontal section runs the risk of missing out on an important limitation. For instance, in a given sector there might be no limitations entered in the sectoral section of the schedule but it is still necessary to check whether there are any horizontal restrictions. It is only if the sectoral entry of "None" is matched by no horizontal restrictions can one conclude that there are no limitations whatsoever. In some cases, although there are horizontal restrictions, the Member may have made clear that this does not apply to a particular sector and/or mode. This is an acceptable practice.
IV.B. SECTOR-SPECIFIC COMMITMENTS

As its name implies, all sectors committed by a Member are found in the sector-specific section of a schedule. In the example above, Arcadia has committed retailing services. For that sub-sector, Arcadia has included differentiated market access and national treatment limitations for the four modes of supply. To understand sectoral entries in a schedule, it is necessary to be familiar with the terminology used to describe market access and national treatment commitments.

IV.C. TYPES OF COMMITMENTS

For each commitment, four types of entries are possible and they are described in the following way:

IV.C.1. FULL COMMITMENT

"None" - If a Member decides not to seek in any way to limit market access or national treatment in a given sector and mode of supply it would enter the term: "None". This means that there are no limitations for the sector and mode of supply concerned. However, any relevant limitations listed in the horizontal section of the schedule will still apply. In the example of Arcadia, as above, "none" is entered for both modes 1 and 2 retailing services. Since there are no horizontal restrictions for both modes, full market access and national treatment is provided.

IV.C.2. NO COMMITMENT

"Unbound" - The opposite situation to "none", is the one where a Member chooses to remain free, in a given sector and mode of supply, to introduce or maintain whatever limitations on market access or national treatment. No guarantee of any minimum level of treatment is provided. In this situation, the Member must record the term: "Unbound". This case is only relevant where a commitment has been made in a sector with respect to at least one mode of supply. Where all modes of supply are "unbound", and no additional commitments have been undertaken in the sector, the sector should not appear on the schedule.

A variation of "Unbound", is "Unbound due to the lack of technical feasibility". In some situations, it may not be technically feasible to deliver a service under a particular mode of supply. An example might be the cross border supply of hair dressing services. In this cases the term "Unbound*" can be used. The asterisk should refer to a footnote which explains that the "unbound" is due to the technical infeasibility of that mode of supply. Where the mode of supply is in fact technically possible, or becomes so in the future, the entry is still to be read as "unbound".
Why are Mode 4 commitments in the horizontal section?

Mode 4 commitments are normally determined by generally applicable legislation, governing immigration, work permits and so forth, that do not vary across sectors. The convention has thus been for Members to schedule mode 4 commitments differently from other modes of supply. Instead of limitations, Members typically use the horizontal section to specify undertakings with respect to various categories of mode 4 suppliers. For example, a Member may bind measures affecting the entry and temporary stay for only some categories of natural persons, while leaving all other categories unbound. This may be achieved through an indication in the horizontal section such as "Unbound except for measures affecting the entry and temporary stay of natural persons in the following categories...". In such cases, the corresponding sectoral entry under mode 4 should be "Unbound except as indicated in the horizontal section". In the schedule of Arcadia, as above, the market access commitment for mode 4 is confined to intra-corporate transferees and business visitors. National treatment is unbound, meaning that there is no commitment whatsoever.

IV.C.3. COMMITMENT WITH LIMITATIONS

More often than not, entries in schedules provide for commitments that are conditioned by measures which limit market access and/or national treatment. In such cases, no standard terminology is used as the measure itself has to be inscribed into the schedule. The entry should describe each limitation concisely, indicating the elements which make a measure inconsistent with full market access or national treatment. In the example above, Arcadia has a mode 3 foreign equity limitation of 51% and a national treatment exclusion on investment grants to companies not controlled by Arcadian nationals. The measure limiting national treatment is inscribed.

Are commitments the same as actual market access and national treatment conditions?

As was noted earlier in the module, commitments guarantee a certain level of market access and national treatment but this may not always be the same as the conditions that are in place. When a Member chooses to bind its applied services regime, there will be no difference between conditions inscribed in its schedule and those that are actually in force. In such a situation, it has chosen to bind the status quo. However, it may not always do this. Often, Members choose to give themselves some room for manoeuvre and schedule conditions that are more restrictive than those imposed in reality. In some limited cases, Members have chosen to "phase-in commitments". Since commitments need not necessarily be complied with from the date of entry into force of a schedule, it is possible to specify a time frame for the entry of more liberal conditions. In the schedules of some recently acceded Members over one-half of all sub-sectors have been subjected to phase-in commitments.
Article XX:3 provides that the schedules are an “integral part” of the GATS. As such, the WTO Appellate Body has confirmed that the task of identifying the meaning of a concession in a GATS Schedule, like the task of interpreting any other treaty text, requires the identification of the common intention of all Members. The general rules of treaty interpretation, as set out in Article 31 and 32 of the Vienna Convention on the Law of Treaties, apply to the interpretation of schedules. This means that specific commitments have to be interpreted “in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.” [31:1]

Context for the interpretation of a treaty can be “(a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty; and (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.” [31:2]

The AB decided that context for the interpretation of services commitments can be (i) the remainder of the same schedule, (ii) the substantive provisions of the GATS; (iii) the provisions of covered agreements other than the GATS; and (iv) the GATS Schedules of other Members.

The AB also decided that the 1993 Scheduling Guidelines [MTN.GNS/W/164 and Add.1] and the Service Classification List [MTN.GNS/W/120] do not constitute context in the sense of Article 31:2, as these documents do not constitute an agreement made between all the parties, or between some parties and accepted by the others as such. The AB further stated that there was neither an agreement by Members to use the above documents as interpretative tools in the interpretation and application of Members’ scheduled commitments.

The AB decided that the Scheduling Guidelines and the Services Classification list were “preparatory work,” as such these documents constitute merely supplementary means of interpretation, recourse to which an interpreter of a schedule may have only to confirm the meaning of a term resulting from the application of Article 31, or to determine such meaning when interpretation according to Article 31 either leaves the meaning ambiguous or obscure; or leads to a result which is manifestly absurd or unreasonable.”
V. MODIFICATION OR WITHDRAWAL OF COMMITMENTS

Article XXI provides a framework of rules for modifying or withdrawing specific commitments. The relevant provisions may be invoked at any time after three years have lapsed from the date of entry into force of a commitment. In the absence of emergency safeguard measures, which are subject to a negotiating mandate in Article X, the three-year period is reduced to one year. It is thus possible for Members, subject to compensation, to adjust their commitments to new circumstances or policy considerations. At least three months’ notice must be given of the proposed change. The compensation to be negotiated with affected Members consists of more ambitious bindings elsewhere that “endeavour to maintain a general level of mutually advantageous commitments not less favourable to trade” than what existed before.

Application must be on an MFN basis. If the negotiations fail, Article XXI allows for arbitration. If the arbitrator finds that compensation is due, the proposed changes in commitments must not be put into effect until the compensatory adjustments are made. Should the modifying Member ignore the arbitrator’s findings, affected Members have the right to retaliate by withdrawing equivalent commitments.

In 1999, the Council for Trade in Services enacted detailed procedures for the modification of schedules pursuant to Article XXI (document S/L/80). Improvements to schedules, i.e. inscription of new sectors or removal of existing limitations, are subject to more streamlined procedures, laid down in document S/L/84.

The provisions under Article XXI have, to date, been invoked in three cases. In the context of EU enlargements, the "gambling dispute" between the United States and Antigua and Barbuda, and the withdrawal of commitments by Bolivia.

Apart from Article XXI, there are special provisions that allow for departures from existing obligations and commitments in specified circumstances (see Module 4). Under Article XIV, for example, Members may take measures necessary for certain overriding policy concerns, including the protection of public morals or the protection of human, animal or plant life or health. However, such measures must not lead to arbitrary or unjustifiable discrimination or constitute a disguised restriction on trade. If essential security interests are at stake, Article XIV bis provides cover. Further Article XII allows for the introduction of temporary restrictions to safeguard the balance-of-payments; and a so-called prudential carve-out in financial services permits Members to take measures in order, inter alia, to ensure the integrity and stability of their financial system (Annex on Financial Services, paragraph 2).

It is also important to keep in mind that commitments in existing GATS schedules often do not bind the current market access and national treatment conditions, which in the case of many Members are already more liberal. In such a situation, a Member has no need to seek an Article XXI modification or withdrawal procedure since it can already change its current practice down to the level of its binding. It is only if the modification affects its binding that it would need to resort to Article XXI procedures.
VI. SUMMARY

Article XX requires each Member to submit a schedule of commitments, which form "an integral part" of the GATS itself, but does not prescribe the sector scope or level of liberalization. Entries into schedules should remain confined to measures incompatible with either the market access or national treatment provisions of the GATS, and include any additional commitments a Member may want to undertake under Article XVIII.

Schedules would not provide legal cover for measures inconsistent with other provisions of the Agreement such the MFN requirement of Article II or the disciplines on domestic regulation of Article VI. Only measures that constitute limitations in the sense of Article XVI and Article XVII fall within the scope of scheduling. Any other trade-impeding measures do not call for scheduling per se. By the same token, there is no need to schedule access restrictions, such as sales bans on arms or pornographic material and the like, that fall under the General Exceptions of Article XIV or prudential measures aimed to ensure the stability and integrity of the financial services sector.

While this module has sought to cover the main principles and techniques involved in constructing a schedule of specific commitments it cannot substitute for a thorough reading of the relevant provisions of the Agreement in conjunction with the Scheduling Guidelines.

EXERCISES

1. What are the six limitations on market access that need to be scheduled, if a Member wishes to maintain or use such measures for a committed sector?

2. Does Article XVII on national treatment require identical treatment be granted to both foreign and domestic services and service suppliers?

3. What do the entries "unbound" and "none", as found in schedules, mean?

4. Can a WTO Member grant in reality better market access or national treatment than what has been committed in its schedule?
1. The six categories of measures, which may not be adopted or maintained unless they are specified in the schedule include: four types of quantitative restrictions (sub paragraphs a to d), which limit numbers of service suppliers, values of transactions or assets, numbers of services operations or quantity of output, or total number of natural persons; and two other types of limitations - one on the form of legal entity (sub paragraph e) and the other on foreign equity participation (sub paragraph f).

The list is exhaustive as Members are required, in order to preserve the right to operate any of the measures covered, to inscribe them in the market access column of their schedule under the relevant mode. It should be noted that this even applies to non-discriminatory measures such as quantitative restrictions that affect foreign and domestic suppliers alike. If there are no limitations scheduled, full market access must be provided for that sector and mode.

2. Article XVII provides that a 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". Any departure from treatment "no less favourable" would have to be scheduled as a limitation. Article XVII.3 provides that "formally identical or formally different treatment shall be considered less favourable if it modifies the conditions of competition" in favour of own services or service suppliers as compared to those of other Members.

The focus is on "conditions of competition" because Members felt the need to distinguish between de jure and de facto discrimination. De jure discrimination refers to a situation where the measure, as contained in a law or regulation, explicitly discriminates. De facto discrimination, on the other hand, refers to a situation where there is formally no difference in terms of how foreign and domestic services and service suppliers are treated. However, foreign services and service suppliers might still end up being treated less favourably. What is thus important is not whether there has been identical treatment but whether all services and service suppliers are given the opportunity to compete on a level playing field irrespective of national origin. Therefore, in the sense of Article XVII, a Member grants full national treatment in a given sector or mode when conditions of competition are not modified in favour of its own like services and service suppliers.

3. "None" is entered under the columns on market access and/or national treatment, if a Member decides not to seek in any way to limit market access or national treatment in a given sector and mode of supply. Where "none" appears it means that there are no limitations for the sector and mode of supply concerned. However, any relevant limitations listed in the horizontal section of the schedule will still apply.

The opposite situation to "none", is the one where a Member chooses to remain free, in a given sector and mode of supply, to introduce or maintain whatever limitations on market access or national treatment. No guarantee of any minimum level of treatment is provided. In this situation, the Member must record the term: "unbound". This case is only relevant where a commitment has been made in a sector with respect to at least one mode of supply. Where all modes of supply are "unbound", and no additional commitments have been undertaken in the sector, the sector should not appear on the schedule.

A variation of "unbound", is "unbound due to the lack of technical feasibility". In some situations, it may not be technically feasible to deliver a service under a particular mode of supply. An example might be the cross border supply of hair dressing services. In this cases the term "unbound*" can be used.
The asterisk should refer to a footnote which explains that the "unbound" is due to the technical infeasibility of that mode of supply. Where the mode of supply is in fact technically possible, or becomes so in the future, the entry is still to be read as "unbound".

4. A Member can always grant better market access or national treatment than what has been committed in its schedule. Commitments only guarantee a minimum level of market access and national treatment and need not reflect actual conditions. When a Member chooses to bind its applied services regime, there will be no difference between conditions inscribed in its schedule and those that are actually in force. In such a situation, it has chosen to bind the status quo. However, there is no requirement in the GATS to bind the status quo. Often, Members choose to give themselves some room for manoeuvre and commitments undertaken in schedules tend to be restrictive than those imposed in reality.
Modal Structure of the GATS

ESTIMATED TIME: 3 hours

OBJECTIVES OF MODULE 6

- Provide more information on the GATS framework for defining "trade in services";

- Discuss some of the challenges that are faced when determining which modes are actually involved in a service transaction; and

- Highlight the underlying rationale and economic importance of the four modes of supply of the GATS.
I. INTRODUCTION

The GATS covers all measures by governments affecting "trade in services". Examining this simple phrase, how should we understand the term "services"? And when will there be "trade" in these services? Although the term "services" is not specifically defined in the Agreement, it is understood to include the full range of intangible transactions commonly found in international service classifications. The notion of "trade in services", on the other hand, is specifically defined in the Agreement, and covers four different "modes" by which services are supplied to a consumer. The basic concept of modes of supply was explained in Module 4. In this module, a more detailed explanation is given of each mode of supply as well as of its economic importance in services trade.
II. MODES OF SUPPLY

In some cases, a service can be transacted across a border without either the supplier or consumer being in the same place. Examples are the use of the Internet to provide online services like distance learning, e-banking, hotel reservations, telemedicine, as well as many other services conveyed electronically. Such transactions are conceptually similar to trade in goods under the GATT, where the exporter and importer are typically not located in the same country. However, in other instances, for technical reasons or simply out of convenience, the supplier and the consumer of a service may have to be present in the same place in order for the transaction to be conducted. An example of such a situation might be a haircut. Even with technological advances, it is today simply impossible to provide or obtain an on-line haircut. For that transaction to take place, the producer of the service has to move to the consumer, or the consumer to the producer.

In light of this special feature of services trade, the GATS defines four modes of supply. The first covers trade in services in which the supplier is not present in the same WTO Member’s territory as the consumer. The other three cover trade in services in which the producer and the consumer of the service are present together within the same WTO Member. Module 4 has already explained modes of supply, but for a reminder see the box below:

Reminder

How Services Are Traded—The Four "Modes of Supply" in the GATS

The GATS does not define what "services" are, but specifies instead the four modes by which services may be supplied:

Mode 1 (Cross-Border Supply): from the territory of one Member into the territory of any other Member

This mode requires that only the "service" crosses the border from one Member to another. Neither the supplier nor the consumer of the service moves from their respective territories. Examples include services provided via the post or the Internet.

Mode 2 (Consumption Abroad): in the territory of one Member to the service consumer of any other Member

Under this mode, the service consumer of one Member will typically cross the border to where the supplier is located to purchase and consume a service. Examples include holidays abroad, foreign education, and overseas health care. Although the presence abroad of the consumer is often necessary, activities such as ship repair, where only the property of the consumer moves or is situated abroad, are also covered.

Mode 3 (Commercial Presence): by a service supplier of one Member, through commercial presence in the territory of any other Member

This mode covers any type of business or professional establishment including an affiliate, subsidiary, representative office or branch. Examples are foreign banks or telecommunications companies with subsidiaries in another territory. Typically, investment flows are involved.
Mode 4 (Presence of Natural Persons): by a service supplier of one Member, through presence of natural persons of a Member in the territory of any other Member.

This mode covers natural persons who are themselves service suppliers, as well as natural persons who are employees of service suppliers who are present in the host country. Schedules indicate that Members have generally used the following categories of mode 4 service suppliers: independent professionals; intra-corporate transferees; business visitors; and contractual service suppliers.

The above definitions of the four modes of supply are significantly broader than the balance of payments (BOP) concept of services trade. While the BOP focuses on residency rather than nationality (i.e., a service is being exported if it is traded between residents and non-residents) certain transactions falling under the GATS, in particular in the case of mode 3, typically involve only residents of the country concerned. Current BOP statistics would therefore not capture the value of the activities of mode 3 service suppliers (see section below on mode 3).

Which mode of supply accounts for most of trade in services?

Overall, in terms of commercial value, the share of individual modes in world services trade has been estimated at: 25-30 per cent for mode 1; 10-15 per cent for mode 2; 55-60 per cent for mode 3; and less than 5 per cent for mode 4 (Measuring GATS Mode 4 Trade Flows). Mode 3 trade, mostly combined with foreign direct investment (FDI), has been the most dynamic component in recent years. Even then current statistic significantly underestimate mode 3 trade since it does not appear in BOP statistics for the reasons explained above.

Sometimes a service transaction may, for practical or commercial reasons, require the use of more than one mode of supply. Relevant linkages may exist among all four modes of supply. For example, a foreign bank established under mode 3 in country A may employ nationals from country B (mode 4) and import advertising services from C (mode 1) to operate in its host market. Similarly, business visits into A (mode 4) may prove necessary to complement cross-border supplies into that country (mode 1) or to upgrade the capacity of a locally established office (mode 3). During the time spent in the country the business visitor consumes services (mode 2), such as staying at a hotel. However, it is important to keep in mind that commitments are mode-specific and, despite close economic linkages, cover only the transactions for which they have been inscribed. They do not imply a right for the supplier of a committed service to supply uncommitted services.
III. MODES 1 AND 2 (CROSS-BORDER TRADE AND CONSUMPTION ABROAD)

Until recently, mode 1, or “cross-border trade”, has attracted little attention, in part because its practical and economic importance was rather limited. Attention focused principally on modes 3 and 4. However, as a result of technological developments, mode 1 has gained increasing importance. A number of services whose provision once required physical proximity between the consumer and the supplier can now be traded via the Internet or other networks. This includes, for example, e-banking, computer and IT services, many forms of professional and consultancy services, travel agency services, hotel bookings, and sales of air tickets, as well as many other consumer and producer services. Electronic delivery has thus added a new dimension to cross-border trade in services. It has created many business opportunities, in particular for developing countries, and has also opened new perspectives for small and medium-sized suppliers in all countries.

Over the last ten years and, more recently, the emergence of offshoring activities have fuelled additional interest. Several developing countries host offshoring centres which offer new employment and important business prospects (see box below).

### What is business process outsourcing?

One of the fastest growing offshoring activities has been Business Process Outsourcing (BPO), which includes a variety of business support functions, sometimes referred to as back office services. Using electronic means, such services can be obtained from locations in a different territory far from the head office or the final consumer. Many developing countries have realized success in BPO in recent years.

BPO services may include customer support or sales and marketing support and customer servicing (e.g. by means of call centres) for insurance, airline and many other industries. It also can include accounts, bookkeeping, payroll management, bill collection, and records transcription, to name a few examples. They often require language aptitudes and a degree of skills and training, but not necessarily at sophisticated levels, and can offer advantages such as lower costs and a 24 hour-service.

Offshore activities, such as BPO, often use the Internet, Internet-enabled technologies (such as VOIP networks for call centres), private corporate networks, satellite links or a combination of these to send and receive services.

While cross-border supply (mode 1) is most relevant, consumption abroad (mode 2) may also be involved in a service transaction using the Internet. There is uncertainty about how GATS modes of supply may apply to electronic delivery and, more generally, about how to distinguish between supply under modes 1 and 2 (see following section). As a result, commitments for both modes might prove relevant and should be consulted for such services.

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28 There is no commonly agreed definition of “offshoring”. In this module, it will be used to describe a situation in which a firm transfers certain of its activities to a firm abroad. “Outsourcing” refers more generally to the transfer of some of a firm’s activities to outside providers, whether in the same market or abroad. Both “offshoring” and “outsourcing” are said to be “captive” when the activities are transferred to an affiliated firm.
III.A. HOW TO DISTINGUISH BETWEEN MODE 1 AND 2?

As mentioned above, the "cross-border supply" of services (or "mode 1") is defined as "the supply of a service from the territory of one Member into the territory of any other Member" (Art. I:2(a)). Examples of cross-border supply include international transport as well as services supplied through telecommunication or mail. Electronic transactions also fall under mode 1 (see explanation on technological neutrality). Mode 2, or so-called "consumption abroad", on the other hand, is defined as the supply of a service "in the territory of one Member to the service consumer of any other Member" (Art. I:2(b)).

![Figure 1: "Cross-border supply" of services (or "mode 1")](image1)

![Figure 2: "Consumption abroad" (or "mode 2")](image2)

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Technological neutrality

The Uruguay Round agreements were concluded at a time when the Internet was just beginning and not used on a large scale by the business community. A few years later, the question arose among WTO Members whether electronic deliveries were covered by existing GATS modes of supply. In the discussions on electronic commerce which started in 1998 under the aegis of the General Council, there was a generally shared view among Members that the GATS was technologically neutral, in the sense that "it does not contain any provisions that distinguish between the different technological means through which a service may be supplied." This principle, referred to as "technological neutrality", means that specific commitments undertaken under mode 1 during the Uruguay Round, do cover Internet transactions. However, it must be pointed out that the WTO discussions on electronic commerce did not result in any formal conclusions by Members.

Nevertheless, the principle of technological neutrality has been endorsed by a panel ruling. In the United States – Gambling dispute, the Panel considered that the definition of mode 1 in Article I:2 (a) "does not contain any indication as to the means that can be used to supply services cross-border. This indicates [...] that the GATS does not limit the various technologically neutral possible means of delivery under mode 1. [...] a market access commitment for mode 1 implies the right for other Members' suppliers to supply a service through all means of delivery, whether by mail, telephone, Internet, etc., unless otherwise specified in a Member's Schedule."

In theory, the main distinction between modes 1 and 2 is that for mode 1 the service is delivered within the territory of the Member taking the commitment concerned, while for mode 2 it is delivered and consumed outside its territory. However, electronic delivery blurs this distinction, with the two modes operating in tandem and the physical presence of the consumer is not necessarily a relevant criterion for determining the place of delivery or consumption of a service. The issue has arisen particularly in relation to financial services (see box below for some examples).

When is a financial service mode 1, and when is it mode 2?

**Deposits:** A bank account is opened abroad by a consumer of a Member. If the consumer travelled abroad to open the account, this may be mode 2 supply, while the absence of travel (opening of the account through mail order and bank transfer, or through electronic means) may imply mode 1. However, the services directly associated with this account (payment of interest, debiting and crediting of payments and transfers, offsetting of balances, etc.) can be delivered either abroad or in the consumer's home country at the request of the consumer.

**Loan:** A loan is made by a bank established abroad to a consumer of another Member. The loan can be delivered either within or outside the territory of the consumer's home country.

**Insurance:** The consumer of a Member concludes a property insurance contract with an insurer established abroad. It can be argued that if the insured property is located abroad, the service is also delivered abroad, since the protection provided by the insurance contract is "delivered" with respect to the property; therefore this belongs to mode 2. However, it can equally be argued that the insurance provides protection to the consumer in his or her home country, as the premiums are paid by the consumer, and in the event of an accident, the indemnity will be paid to the consumer in the home country; therefore this would come under mode 1.
Given the diversity and complexity of financial services, there may be an infinite number of such examples. For more information on modes 1 and 2 in financial services see S/L/92, Attachments 2 and 3.

So far, Members have not reached a clear understanding on how to make a clear distinction. The same problem potentially arises in all sectors where services can be supplied electronically and with the development of the Internet, the scope for controversial situations may have expanded as well. It has been suggested, as a practical matter, that mode 2 may relate to restrictions placed on the consumer, regardless of where the consumer is situated, and that mode 1 may relate to restrictions placed on the supplier. Of course, in practice an interpretative difficulty may only arise when, for a given sector, the levels of commitment are different for mode 1 and mode 2 (for instance, there is an "Unbound" for mode 1 and a "None" for mode 2). Pending an agreed solution, one approach may be for Members to inscribe similar commitments for both modes 1 and 2 in sectors.

III.B. HOW IMPORTANT ARE MODE 1/2 SERVICES TRADE?

The estimated share of cross border transactions in world trade is between 25-30 per cent. In developed economies, cross-border trade of services represented US$591 billion in 1995 and grew to US$1,119 billion in 2004. In developing countries, its share jumped from US$163 billion in 1995 to some US$302 billion in 2004. Worldwide, the annual average growth of cross-border transactions has been close to 8 per cent between 1995 and 2004. Sixty-nine per cent of the "export" transactions comes from developed countries (this figure does not take into account intra-EU 15 trade), 26 per cent comes from developing countries and 5 per cent from transition economies. Transportation represents 33 per cent of services "export" transactions, followed by "Other business" with 35 per cent, financial services (8 per cent), royalties and licence fees (8 per cent), computer and information (6 per cent), communications (4 per cent), insurance (4 per cent) and cultural and recreational services (2 per cent).

However, it is unclear how much of cross border transactions on a BOP basis may represent cross border trade as defined by GATS, and data on on-line supply and offshoring are extremely difficult to track. Not only are current statistical methods believed to underestimate cross border trade in many sectors, but, in addition, on-line cross border trade in services largely escapes most statistical gathering efforts. It should also be noted that none of the extensive intra-firm offshoring activities in developing economies, for example, BPO services, are reflected in the BOP figures.

III.C. WHAT HAS BEEN COMMITTED?

Overall, mode 1 has attracted far fewer commitments than mode 3, for instance. Mode 1 has the largest share of "Unbound" of all modes of supply: more than 30 per cent, as compared to less than 10 per cent for mode 2 and less than 5 per cent for mode 3. However, such general patterns need to be interpreted with care since, for a given mode, there may be big variations from one sector to another.

Reasons for not binding cross border supply may vary. In general, commercial presence was a main focus of the Uruguay Round negotiations, at a time when many developing countries were favourable to seeking investors to enhance and develop national services industries. Also, in some sectors, Members did not
consider it to be technically feasible for given sectors (which they sometimes explicitly indicated with an "Unbound*", see Module 5 for more information on entries in schedules). Indeed, cross-border supply is irrelevant – and will remain so – for a number of activities which, by their very nature, require physical proximity between the consumer and the supplier (construction and hotel services, for instance), although firms in many sectors draw upon Internet or similar technologies for ancillary services or administrative support, such as reservations systems and tracking, or related consulting activities. However, one should note that for services that are or have become information-oriented, the assumptions concerning the "technical feasibility" of trading services cross-border may have changed since the end of the Uruguay Round as a result of technological advances. For example, with technologies available today, a computer repair can be effected by remote techniques. A number of activities for which mode 1 was not feasible or was commercially insignificant (such as health and education services, but also gambling) can now be traded remotely on a large scale thanks to the Internet. Uncertainties with regard to how to enforce regulatory measures with respect to suppliers situated abroad may also have contributed to a reticence of governments to make binding commitments on cross-border supply.

Specific commitments undertaken with respect to mode 2 are significantly more liberal than those for the other three modes of supply. Most of the time, limitations scheduled for mode 1 have not been repeated under mode 2. This may be a potential source of problem given the discussions surrounding the status of electronic transactions (see box above). The more generous commitments on mode 2 may, in part, stem from a perception on the part of Members that the service consumer and supplier concerned are outside the (territorial) legal jurisdiction of the committing Member, hence, few, if any national measures may apply.

It should be borne in mind that the absence of specific commitments in a given sector does not mean absence of trading opportunities. In fact, actual access conditions for services supplied electronically, in particular information technology services and business process outsourcing, tend to be rather liberal. Of course, scheduling commitments in relevant sub-sectors would add transparency and predictability for business operators, and could prevent protectionist backlashes.

III.D. WHAT CHALLENGES ARE FACED IN MODE 1 AND 2 LIBERALISATION?

Conditional offers received in the services negotiations, so far, do not substantially alter the pattern described with respect to existing commitments. The share of "unbound" remains large, accounting for more than 40 per cent of the new sectoral entries. Moreover, less than 30 per cent of improvements are made with respect to mode 1, which is comparatively low, especially when one takes into account the high number of non-bindings in existing commitments.

Unsurprisingly, the offshoring phenomenon on world services markets has had repercussions on the ongoing services negotiations. Several developing countries have called for mode 1 to be given more attention in the negotiations. In the negotiations, Members in favour of a "cross-border supply agenda" call for broad commitments under modes 1 and 2 in a wide variety of business services and auxiliary services to other sectors in order to lock in existing liberal regimes for electronic transactions. Annex C of the Hong Kong Ministerial Declaration called for commitments to be made "at existing levels of market access on a non-discriminatory basis across sectors of interest to Members; and the removal of existing requirements of commercial presence". These objectives were also reflected in the subsequent plurilateral request on cross-border supply.
Several factors may pose important challenges to mode 1 and 2 liberalisation. On classification, the question is whether the instruments currently used by WTO Members to schedule their commitments, adequately reflect the range of often discreet activities involved in outsourcing. The GATS does not require Members to follow any specific classification system to describe committed sectors and sub-sectors. So far, most Members have based their schedules on W/120, which is, however, considered to be outdated in a number of sectors. As a result, it is not always clear where many IT and BPO activities are covered, because potentially related services listed in W/120 are not detailed enough or may contain outdated terminology. "Photocopying" services in W/120 is an example of the former. It requires an extension of the notion of "photocopying" to assume that the scanning of medical records now performed in many developing countries is covered by the sub-sector. "Telephone answering services" is an example of the latter, in which the CPC definition seems to imply a remote "receptionist" services, rather than the full suite of services now available through call centres. Moreover, it is unclear where many so-called information services fit within the classification system, for example, a firm may supply information on stock quotes to its customers, and yet not be a "financial services" firm in its own right.

The relationship between mode 1 and mode 2 and the question of how to determine when electronic transactions would fall under one or the other mode, or both, has been raised, but not resolved. However, Members seeking commitments for these modes seem to be willing to avoid a lengthy conceptual discussion on this issue and have advocated that Members should undertake the same level of commitments for both modes 1 and 2 whenever electronic transactions are relevant.

Applying regulatory measures to cross-border trade has raised a number of questions. For instance, does the electronic supply of services call for different types of regulatory approaches? How are qualification and licensing requirements enforced with respect to suppliers situated outside the territory of the "importing" Member?

Many Members have limited experience with regulating electronic transactions. In many instances, the market has developed rapidly and new forms of regulation may need to be devised. In services, unlike in good trade, regulation is normally framed with respect to the supplier, rather than the product. The question of which country’s legal jurisdiction applies in mode 1 and 2 transactions remains important. It relates not only to certification and authorization issues but also to regimes regarding consumer protection. It is likely that there will not be a "one size fits all" solution, but rather concerns and priorities may vary depending on the sector concerned.

Two trends are promising, however. In some sectors, such as finance and telecommunications, regulators are showing a willingness to cooperate closely with regard to cross border, interjurisdictional issues. Also, more sophisticated technologies are becoming available which can permit more effective control of Internet, including commercial transactions. The websites of many retail distribution service suppliers, for example, now include software that can identify the country from which a consumer is accessing the site.
IV. MODE 3 (COMMERCIAL PRESENCE)

IV.A. WHAT IS MODE 3?

The GATS defines Mode 3 as "the supply of a service by a service supplier of one [WTO] Member, through commercial presence in the territory of any other [WTO] Member". (GATS Article I: 2 (c))

![Diagram of commercial presence](image)

**Figure 3:** "Commercial presence" (or "mode 3")

The form that commercial presence may take is further defined in GATS Article XXVIII (d) as encompassing "any type of business or professional establishment, including through: (i) the constitution, acquisition or maintenance of a juridical person, or (ii) the creation or maintenance of a branch or a representative office, within the territory of a [WTO ] Member for the purpose of supplying a service".

The scope of this definition is very wide as made clear by the use of "including", which indicates an open, non-exhaustive list. The drafters of the GATS, back in the early 1990s, wanted to ensure that the Agreement can accommodate the many types of business or professional establishment permitted by WTO Members. The GATS thus covers all fully-fledged subsidiaries, branches, (equity or contractual) joint venture companies, sole proprietorships, partnerships, or representative offices. The box below provides examples of the three most widespread types of commercial presence:
- **Subsidiary**: a legal entity with a juridical personality that is separate and distinct from that of its parent company. A subsidiary needs to be incorporated under the laws of the country in question;

- **Branch or branch office**: unlike a domestic subsidiary, a branch (or branch office) does not normally have a separate juridical personality. A branch is the property of the parent company and is not legally distinct from it;

- **Representative office**: an office established by a company to conduct marketing and other non-transactional operations, generally in a foreign country where a branch office or subsidiary is not established. Representative offices are not normally used for the actual service supply.

The most important GATS obligations and disciplines – such as Most-Favoured-Nation treatment, Market Access or National Treatment (Articles II, XVI and XVII respectively) – apply to the treatment of “services and service suppliers” of other Members. In turn, these are defined as any person, either a natural or a juridical person, that supplies a service (GATS Article XXVIII (g) and (j)). A juridical person is further defined in GATS Article XXVIII (l) as "any legal entity duly constituted or otherwise organized under applicable law, whether privately-owned or governmentally-owned, including any corporation, trust, partnership, joint venture, sole proprietorship or association".

GATS obligations are owed not to one’s own service suppliers but to those of another WTO Member. The GATS therefore needs rules to determine the foreign origin of a service supplier. This is determined in general either by nationality (in the case of natural persons) or by the place of constitution (for juridical persons) as set out in Article XXVIII (k) and (m).

However, in the case of commercial presence, the “place of constitution” by itself is not sufficient. To understand why, imagine a subsidiary in a WTO Member that has been set up by a parent firm from another WTO Member. If the “place of constitution” is the only rule followed, the subsidiary will have the origin of the host WTO Member in which it is established, and not the foreign origin of the WTO Member in which the parent firm is located. In order to capture the foreign nature of such a subsidiary (or other juridical person), and ensure that its activities are covered by the Agreement, the GATS requires that the entity be either "owned" or "controlled" by persons of another WTO Member.

According to Article XXVIII (n): a juridical person is "owned" by persons of another Member if they have more than 50% of the equity interest, or "controlled" if they have the power to name a majority of its directors or otherwise to direct its actions.

It should be recalled that, while the GATS is very wide in scope, it remains very flexible in its application. Each WTO Member is free, in its Schedule of Specific Commitments, to limit the application of its mode 3 commitments to certain types of commercial presence, including forms of legal incorporation – either on a horizontal basis or in any given services sector.
IV.B. HOW IMPORTANT IS MODE 3 TRADE?

It is estimated that about half of world trade in services takes place through commercial presence (mode 3) in the export market. In recent years, progress in computer, communications, and transportation technologies has often reduced the need for a supplier to establish commercial presence in foreign markets, permitting services to be provided cross-border (mode 1) or through the temporary movement of service suppliers (mode 4) or service consumers (mode 2). But in many service sectors, the only commercially meaningful way of serving foreign markets is by setting up a business or professional establishment under mode 3.

Non-equity forms of commercial participation are also important in several service sectors. Such forms include licensing, management contracts, concessions, partnerships, turnkey projects, build-operate-and-transfer (BOT) and build-transfer-and-operate (BTO) projects. Non-equity participation is particularly common in sectors such as hotels, restaurants, car rentals, retailing, construction, and a number of professional and business consultancy services.

In its 2008 World Investment Report, UNCTAD highlighted the remarkable and continued shift in the composition of FDI from commodities and goods to services (emphasis added):

Despite a significant increase in recent years of FDI flows to the primary sector, mainly the extractive industries, the services sector still accounts for the largest share of global FDI stocks and flows, while the share of manufacturing continued to decline. In 2006 the services sector accounted for 62% of estimated world inward FDI stock, up from 49% in 1990 (UNCTAD, World Investment Report 2008, p.9.). While financial and business services continue to account for the lion’s share of FDI in the sector, other services – including those that are infrastructure-related – have begun to attract increasing shares of FDI since the 1990s.

FDI in services can bring benefits, notably by injecting capital and foreign-exchange resources into the host economy. FDI can also contribute to growth and development through the transfer of technology – both in terms of equipment and industrial processes, as well as the diffusion of skills, knowledge and expertise. FDI can thus spur local service providers to become more competitive and help them to improve efficiency.

Some developing countries increasingly have an offensive interest in FDI. Developing countries’ share in world outward FDI stock in services grew from 1% in 1990 to 14% in 2006, much faster than in other sectors. (Calculations based on UNCTAD, World Investment Report 2008, Annex table A.I.6, p. 208.)

IV.C. WHAT HAS BEEN COMMITTED?

The economic importance of mode 3 is reflected in the virtual absence of non-bindings under this mode. Whenever a sector is scheduled, the relevant entry tends to include at least some commitments, however limited, on commercial presence. Commercial presence is also the mode of supply which has attracted the most GATS commitments to date (Rudolf Adlung and Martin Roy, Turning Hills into Mountains? Current Commitments under the General Agreement on Trade in Services and Prospects for Change, Journal of World Trade, Vol. 39, No. 6, December 2005). Typical market access and/or national treatment limitations under mode 3 include exclusivity provisions, restrictions on foreign equity participation, economic needs tests (ENTs), and joint-venture or other requirements regarding the type of legal entity allowed to supply a service.
Unsurprisingly, given the multitude of political, economic and institutional factors at work, the conditions for commercial establishment differ significantly between service sectors. Typically, limitations are particularly frequent in key infrastructural sectors such as telecommunications and financial services – which have traditionally been subject to significant government intervention. The same holds for politically sensitive sectors such as health, education, environmental, energy-related or audiovisual, in which private commercial and public service suppliers often coexist.

On the other hand, commitments under mode 3 may have been facilitated by the fact that significant parts of this trade are covered by the approximately 2500 bilateral investment treaties (BITs) currently in force (UNCTAD, World Investment Report 2008, p.14 ff.). Virtually all WTO members have signed such treaties. In many cases these are not covered by MFN exemptions in the GATS. In such a situation, the mode 3-related elements in BITs would need to be applied on an MFN basis.⁴⁰

IV.D. WHAT IS BEING SOUGHT IN THE ONGOING NEGOTIATIONS ON MODE 3?

In the run-up to the Hong Kong Ministerial Conference in December 2005, several WTO Members presented, individually or in groups, non-papers which underscored the key importance of Mode 3 and proposed benchmarks for the ongoing negotiations. They also urged Members to improve the quality of existing Mode 3 commitments.

IN DETAIL

Annex C of The Hong Kong Ministerial Declaration in its first paragraph states that: “In order to achieve a progressively higher level of liberalization of trade in services, with appropriate flexibility for individual developing country Members, we agree that Members should be guided, to the maximum extent possible, by the following objectives in making their new and improved commitments”.

For mode 3, the following objectives are stipulated:

"Mode 3

(i) commitments on enhanced levels of foreign equity participation
(ii) removal or substantial reduction of economic needs tests
(iii) commitments allowing greater flexibility on the types of legal entity permitted”.

Following the Hong Kong Ministerial, a group of Members co-sponsored a collective request on mode 3. As a complement to requests in individual sectors, the collective request sought the removal of Mode 3 limitations such as horizontal foreign equity participation restrictions, economic needs tests, limitations on the type of commercial presence for foreign suppliers, joint venture requirements, and restrictions on foreign exchange and profit repatriation.
IV.E. WHAT CHALLENGES ARE FACED IN MODE 3 LIBERALISATION?

Apart from "technical issues" related to classification and scheduling, there are a number of policy-related concerns that may constrain mode 3 liberalisation. In a variety of WTO Members, sectors that provide important infrastructure such as telecommunications or insurance services are still subject to exclusivity provisions or strict limitations. Also, in quite a number of instances, governments have been keen to retain a high degree of discretion when granting a licence or concession. More generally, given that mode 3 often accounts for the bulk of the local services economy, there are often concerns about how domestic operators will fare in the face of new competition.

One way to facilitate adjustment is to undertake "phase-in" commitments. Many acceding countries have specified dates by which their commitments will be fully implemented. By establishing a binding timetable, some "breathing space" is given for the government concerned to develop the necessary legal and institutional frameworks for liberalisation. By the same token, established operators are given time to prepare for the new competitive environment.

V. MODE 4 (PRESENCE OF NATURAL PERSONS)

V.A. WHAT IS MODE 4?

Mode 4 relates to the entry and stay of natural persons of one WTO Member in the territory of another in relation to the supply of a service. The GATS defines mode 4 as "the supply of a service by a service supplier of one Member, through presence of natural persons of a Member in the territory of any other Member". (GATS Article 1.2 (d))

Figure 4: "Presence of natural persons" (or "mode 4")

Further elaboration is provided in the Annex on the Movement of Natural Persons Supplying Services under the Agreement. The Annex specifies that mode 4 covers two types of natural persons: (1) those who are themselves service suppliers; and (2) those who are employed by service suppliers. In both cases, it is important to keep in mind that since the GATS is an international trade agreement, obligations under it apply not to one's own service suppliers but to those of another Member.

In the case of self-employed persons, by virtue of their foreign origin, it is evident that they are service suppliers of another Member. When included in schedules, they are often referred to as "independent professionals" (IP). The term is somewhat misleading, since these persons are not supplying only "professional services" as defined in the W/120 classification, but, at least in principle, many other services.

In terms of the second case, persons employed by a service supplier, the following categories of mode 4 persons could occur: intra-corporate transferees; business visitors; contractual services suppliers; employees of foreign service suppliers established domestically. 31

31 For a description of the main characteristics usually associated with each category, for instance, see JOB(03)/195
Aside from the latter grouping, which is usually not explicitly accounted for in schedules, the characteristics typically associated with the three others categories are as follows (Member A being the Member of the supplier, B that of the consumer):

a) Contractual service suppliers: a service supplier of A without a commercial presence in B sends one of its employees to B to supply a service, pursuant to a service contract it has concluded with a consumer there;

b) Intra-corporate transferees: a service supplier of A transfers one of its employees to the commercial presence it has established in B;

c) Business visitors and services salespersons: a service supplier of A sends one of its employees to B for the purpose of either setting up a commercial presence or negotiating the sale of a service on its behalf. Business visitors are not directly engaged in the delivery of the service, but are just facilitating future trade, which may take place through a variety of modes of supply.

V.B. WHAT IS NOT MODE 4?

As stated in the relevant Annex, mode 4 does not cover measures affecting persons seeking access to the employment market of the host country, nor does it include measures regarding citizenship, residence or employment on a permanent basis. The latter exclusion explains why mode 4 is often referred to as the "temporary" presence of natural persons.

There is no specified timeframe in the Agreement of what constitutes non-permanent presence. Each Member should specify in its schedule of commitments the permitted duration of stay, which may be different for the various categories of natural persons included therein. (See also the "Scheduling Guidelines", document S/L/92 of 2001, page 10.)

The Annex also explicitly states that Members remain free to apply measures to regulate the entry and temporary stay of natural persons in their territory (including by applying differential visa requirements), provided that these measures do not nullify or impair the benefits accruing under the terms of the commitments.

Finally, as mode 4 involves the cross-border movement of people, the GATS is concerned, although only tangentially, with "international migration". However, the GATS is not a migration agreement. Migration under the GATS is not an end in itself, but only a means to the end of trading services.

V.C. WHAT IS THE ECONOMIC IMPORTANCE OF MODE 4 TRADE?

As with trade in services generally, the measurement of mode 4 flows poses formidable challenges. No clear statistical framework is currently in place to assess the size of mode 4 trade, even if conceptual work on the issue is under way in the inter-agency Task Force on Statistics of International Trade in Services.

The items "compensation of employees" and "workers remittances" in the Balance of Payments have been used on occasion as statistical indicators to measure mode 4 flows. However, they provide information on income
flows originating from the movement of people across borders and, as such, they are not measures of mode 4 trade. 32

Relative to the other three modes of supply, available estimates suggest that trade through mode 4 remains a very small component of overall trade in services, accounting for less than 5 percent of total services trade. At least two possible explanations can be advanced for this very modest share: first, the value of trade generated through the movement of a natural person is likely to be smaller than, for instance, through the establishment of a commercial presence; second, barriers to mode 4 trade are significantly more important than those affecting other modes of supply, as will be discussed below.

V.D. WHAT HAS BEEN COMMITTED UNDER MODE 4?

Overall, the level of mode 4 access that has been bound in GATS schedules so far is quite shallow. In comparison to other modes, mode 4 has attracted the lowest amount of full bindings (i.e. "none" inscriptions in schedules). In most instances, under mode 4 Members have scheduled an initial "unbound" (i.e. no binding of access conditions) and then qualified it by granting admission to selected categories of persons, with a discernible bias towards persons whose movement is linked to commercial presence (e.g. intra-corporate transferees) as well as towards the highly skilled (managers, executives and specialists).

Most Members' mode 4 commitments have been undertaken on a horizontal basis, i.e. applicable without distinctions to all sectors inscribed in a Members schedule of commitments. The lack of differentiation may be because immigration regimes often do not differ across sectors. On the other hand, the absence of any sectoral differentiation may also imply that only the lowest conditions access conditions are being provided across the committed sectors.

In addition to limiting access to certain categories of persons, other restrictions frequently inscribed in schedules include: defined duration of stay (ranging between 3 months for business visitors to 5 years for intra-corporate transferees); quotas, including on the number or proportion of foreigners employed; "economic needs tests" or "labour market tests", generally inscribed without any indication of the criteria of application; pre-employment conditions; and residency and training requirements.

V.E. WHAT IS BEING SOUGHT IN THE ON-GOING NEGOTIATIONS ON MODE 4?

Various Members, and developing countries in particular, have put significant emphasis on securing better mode 4 commitments in the on-going negotiations. A number of the offers submitted propose upgrading access for natural persons. However, improvements on mode 4 have been relatively modest. Services talks were given fresh impetus by the Hong Kong Ministerial Conference of December 2005. In Hong Kong, Members agreed to intensify the negotiations in accordance with a set of modal objectives, including on mode 4.

IN DETAIL

Annex C of The Hong Kong Ministerial Declaration in its first paragraph states that: “In order to achieve a progressively higher level of liberalization of trade in services, with appropriate flexibility for individual developing country Members, we agree that Members should be guided, to the maximum extent possible, by the following objectives in making their new and improved commitments”.

For mode 4, the following objectives are stipulated:

**Mode 4**

(i) new or improved commitments on the categories of Contractual Services Suppliers, Independent Professionals and Others, de-linked from commercial presence, to reflect *inter alia*:
- removal or substantial reduction of economic needs tests
- indication of prescribed duration of stay and possibility of renewal, if any

(ii) new or improved commitments on the categories of Intra-corporate Transferees and Business Visitors, to reflect *inter alia*:
- removal or substantial reduction of economic needs tests
- indication of prescribed duration of stay and possibility of renewal, if any

Following the Hong Kong Ministerial, a group of Members submitted a collective request on mode 4. The focus of the request is on better commitments for categories of natural persons whose movement is not linked to a commercial establishment abroad. As the negotiations are on-going, it will only be possible to assess the impact of the collective request on the negotiations once the final offers have been presented.

**V.F. WHAT CHALLENGES ARE FACED IN MODE 4 LIBERALISATION?**

Several factors may explain the modest level of commitments undertaken in mode 4. First and foremost, there are high political sensitivities surrounding what is effectively an immigration-related issue, in developed and developing countries alike.

Then, as with many services sectors, coordinating the different ministries involved (in this case, mainly immigration and trade) proves challenging. Firstly, immigration is traditionally considered an area where governments retain exclusive sovereignty, and immigration officials are consequently not accustomed to "sharing" policy-making, particularly with their trade colleagues. Secondly, as mode 4 is essentially a trade-policy construct, its implementation may require changes to immigration procedures and regimes, which are likely to draw resistance from affected stakeholders.

The temporary nature of mode 4 movements may also generate concerns related to enforcement, the traditional perception being that there is nothing more permanent than a temporary migrant. Further, apprehensions are likely to surround the potential implications of mode 4 on the domestic job market, both in terms of displaced workers and/or depressed wages. Finally, bilateral labour mobility agreements may be seen as preferable to multilateral mode 4 commitments, as they allow for greater flexibility in dealing with immigration issues as these evolve over time.
VI. SUMMARY

This module has discussed the four modes of supply used in the GATS to define trade in services. Based on this framework, the scope of the GATS is much broader than that of the GATT in merchandise trade. The GATS covers not only traditional trade flows across borders, but also three additional types of transactions where suppliers and consumer directly interact. In some cases, it may prove challenging to determine precisely which modes are actually involved in a service transaction. This particularly so in the case of modes 1 and 2, where the introduction of new technology has transformed the way that services are produced, distributed, sold and delivered across borders.

EXERCISES

1. What are the four modes of supply of the GATS and explain the differences between them?
2. How does Article XXVIII of the GATS define commercial presence?
3. What is meant by the statement that the GATS is “technologically neutral”?
4. What mode or modes apply to the following situations:
   a) temporary presence of professional architects providing architectural services.
   b) establishment of a foreign campus by a private university.
   c) services consumed by a tourist while travelling abroad.
   d) opening a bank account while visiting a foreign country and using it upon return home.
5. Which of the following are limitations on market access, national treatment, both or neither?
   a) A limit on foreign equity participation in a local telephone company.
   b) A special subsidy for domestic construction companies.
   c) A geographical limitation on where foreign banks may establish banks in the host country.
   d) A non-discriminatory limit on the number of new licenses to operate supermarkets.
PROPOSED ANSWERS:

1. **Mode 1 (Cross-Border Supply):** from the territory of one Member into the territory of any other Member. This mode requires that only the "service" crosses the border from one Member to another. Neither the supplier nor the consumer of the service moves from their respective territories. Examples include services provided via the post or the Internet.

2. **Mode 2 (Consumption Abroad):** in the territory of one Member to the service consumer of any other Member. Under this mode, the service consumer of one Member will typically cross the border to where the supplier is located to purchase and consume a service. Examples include holidays abroad, foreign education, and overseas health care. Although the presence abroad of the consumer is often necessary, activities such as ship repair, where only the property of the consumer moves or is situated abroad, are also covered.

3. **Mode 3 (Commercial Presence):** by a service supplier of one Member, through commercial presence in the territory of any other Member. This mode covers any type of business or professional establishment including an affiliate, subsidiary, representative office or branch. Examples are foreign banks or telecommunications companies with subsidiaries in another territory. Typically, investment flows are involved.

4. **Mode 4 (Presence of Natural Persons):** by a service supplier of one Member, through presence of natural persons of a Member in the territory of any other Member. This mode covers natural persons who are themselves service suppliers, as well as natural persons who are employees of service suppliers who are present in the host country. Schedules indicate that Members have generally used the following categories of mode 4 service suppliers: independent professionals; intra-corporate transferees; business visitors; and contractual service suppliers.

"Commercial presence" in Article XVIII of the GATS is defined to mean "any type of business or professional establishment, including through (i) the constitution, acquisition or maintenance of a juridical person, or (ii) the creation or maintenance of a branch or a representative office, within the territory of a Member for the purpose of supplying a service". A juridical person is further defined in GATS Article XXVIII (l) as "any legal entity duly constituted or otherwise organized under applicable law, whether privately-owned or governmentally-owned, including any corporation, trust, partnership, joint venture, sole proprietorship or association". Furthermore, Article XVIII (m) (ii) provides that a "juridical person of another Member" means a juridical person which is either in the case of the supply of a service through commercial presence, owned or controlled by: "1. natural persons of that Member; or 2. juridical persons of that other Member identified under subparagraph (i)".

Since, GATS obligations are owed not to one's own service suppliers but to those of another WTO Member. The GATS therefore needs rules to determine the foreign origin of a service supplier. This is determined in general either by nationality (in the case of natural persons) or by the place of constitution (for juridical persons) as set out in Article XXVIII (k) and (m).

However, in the case of commercial presence, the "place of constitution" by itself is not sufficient. To understand why, imagine a subsidiary in a WTO Member that has been set up by a parent firm from another WTO Member. If the "place of constitution" is the only rule followed, the subsidiary will have the origin of the host WTO Member in which it is established, and not the foreign origin of the WTO Member in
which the parent firm is located. In order to capture the foreign nature of such a subsidiary (or other juridical person), and ensure that its activities are covered by the Agreement, the GATS requires that the entity be either "owned" or "controlled" by persons of another WTO Member.

According to Article XXVIII (n): a juridical person is "owned" by persons of another Member if they have more than 50% of the equity interest, or "controlled" if they have the power to name a majority of its directors or otherwise to direct its actions.

3. The Uruguay Round agreements were concluded at a time when the Internet was just beginning and not used on a large scale by the business community. A few years later, the question arose among WTO Members whether electronic deliveries were covered by existing GATS modes of supply. In the discussions on electronic commerce which started in 1998 under the aegis of the General Council, there was a generally shared view among Members that the GATS was technologically neutral, in the sense that "it does not contain any provisions that distinguish between the different technological means through which a service may be supplied." This principle, referred to as "technological neutrality", means that specific commitments undertaken under mode 1 during the Uruguay Round, do cover Internet transactions. However, it must be pointed out that the WTO discussions on electronic commerce did not result in any formal conclusions by Members.

Nevertheless, the principle of technological neutrality has been endorsed by a panel ruling. In the United States – Gambling dispute, the Panel considered that the definition of mode 1 in Article I:2 (a) "does not contain any indication as to the means that can be used to supply services cross-border. This indicates [...] that the GATS does not limit the various technologically neutral possible means of delivery under mode 1. [...] a market access commitment for mode 1 implies the right for other Members' suppliers to supply a service through all means of delivery, whether by mail, telephone, Internet, etc., unless otherwise specified in a Member's Schedule."

4. a) temporary presence of professional architects providing architectural services. Mode 4
   b) establishment of a foreign campus by a private university. Mode 3
   c) services consumed by a tourist while travelling abroad. Mode 2
   d) opening a bank account while visiting a foreign country and using it upon return home. Mode 1/ Mode 2 (refer to discussion in the module on instances where there might be ambiguity about mode 1 and 2)

5. a) A limit on foreign equity participation in a local telephone company.
   Market access (although the measure is also discriminatory, it is a market access limitation under Article XVI.2 (f))
   b) A special subsidy for domestic construction companies.
   National treatment (see Article XVII)
   c) A geographical limitation on where foreign banks may establish banks in the host country.
   Market access (see Article XVI.2, "...measures which a Member shall not maintain or adopt either on the basis of a regional subdivision or on the basis of its entire territory, unless otherwise specified in its Schedule...")
   d) A non-discriminatory limit on the number of new licenses to operate supermarkets.
   Market access (see Article XVI.2 (a)).
Application of the GATS to individual service sectors

ESTIMATED TIME: 7 hours

OBJECTIVES OF MODULE 7

- Explain some of the main features of individual service sectors, including their economic importance and trade-related policy challenges; and

- provide background information on scheduling and classification issues, including those that have arisen in the context of negotiations.
I. INTRODUCTION

One of the most interesting and complex aspect of the GATS is its application to individual service sectors. While the framework of the GATS applies to all services, it is important to appreciate that there may be other and/or additional sector-specific considerations that could have a bearing on how the sector relates to the GATS. Each service sector also has its own characteristics and ways in which it is regulated, thus making it useful to have a broad understanding of the industry. Moreover, in some cases, such as in financial, telecommunication and transport services, there are certain sector-specific GATS decisions which need to be taken into account.

The purpose of this module is to provide some background information on how the sector is classified (as well as any particularly relevant scheduling issues), its economic importance and main features, the type of commitments taken and treatment in the negotiations, and any policy challenges that have a bearing on trade in services.

The following sectors are covered in this module:

- Professional services
- Computer and related services
- Postal and courier services including express delivery
- Telecommunications
- Audiovisual
- Distribution
- Education
- Energy
- Environmental services
- Financial services
- Health
- Tourism
- Transport
II. SECTOR-SPECIFIC ISSUES

II.A. PROFESSIONAL SERVICES

II.A.1. CLASSIFICATION AND SCHEDULING ISSUES

Professional services are a very wide-ranging and heterogeneous category. Though specific characteristics of each sub-sector of professional services differ markedly from one to another, they form an economically important group of services, which is experiencing increasingly dynamic growth.

Under the Services Sectoral Classification List (MTN.GNS/W/120)\textsuperscript{33}, “Professional Services,” is a sub-category of "Business Services". "Professional Services" is further divided into 11 areas, all except the last of which have associated listings under the United Nations' " Provisional Central Product Classification" (CPC).

IN DETAIL

<table>
<thead>
<tr>
<th>A. Professional Services</th>
<th>CPC</th>
</tr>
</thead>
<tbody>
<tr>
<td>a. Legal Services</td>
<td>861</td>
</tr>
<tr>
<td>b. Accounting, auditing and bookkeeping services</td>
<td>862</td>
</tr>
<tr>
<td>c. Taxation Services</td>
<td>863</td>
</tr>
<tr>
<td>d. Architectural services</td>
<td>8671</td>
</tr>
<tr>
<td>e. Engineering services</td>
<td>8672</td>
</tr>
<tr>
<td>f. Integrated engineering services</td>
<td>8673</td>
</tr>
<tr>
<td>g. Urban planning and landscape architectural services</td>
<td>8674</td>
</tr>
<tr>
<td>h. Medical and dental services</td>
<td>9312</td>
</tr>
<tr>
<td>i. Veterinary services</td>
<td>932</td>
</tr>
<tr>
<td>j. Services provided by midwives, nurses, physiotherapists and para-medical personnel</td>
<td>93191</td>
</tr>
<tr>
<td>k. Other</td>
<td></td>
</tr>
</tbody>
</table>

\textsuperscript{33} Hereafter, the Services Sectoral Classification List will be referred to as "W/120".
II.A.2. ECONOMIC IMPORTANCE AND MAIN FEATURES

Governments generally recognize the role of professional services for economic development, and prospects for further growth in this sector are considered to be strong. The development of the Internet, in particular, has opened new opportunities and made the cross-border provision of certain professional services more viable than before. Nevertheless, professional service providers continue to face many obstacles, particularly due to the high number and variation of regulatory measures.

While specific statistics are often difficult to obtain, the WTO's International Trade Statistics for 2008 (available on the WTO website) reports that the category of "Business, professional and technical services" is among the most thriving service sector in developed countries. In 2005 there were 3.7 million enterprises engaged in the production of such services in the European Union (EU), employing over 18 million people and generating US$1,628 billion in turnover and US$842 billion in value added, representing more than 6 per cent of GDP. With around US$257 billion worth of exports in 2006, the EU was the leading world exporter of business, professional and technical services. Extra-EU exports represented US$121 billion. Architectural engineering and other technical consultancy services (19 per cent), legal, accounting, management, consulting and public relations services (18 per cent) and research and development services (16 per cent) were the largest services sectors exported to extra-EU countries. The United States and Switzerland were the main export markets, absorbing more than half of the exports bound for non-EU states.

The United States is the second-largest exporter of business, professional and technical services, with US$61 billion worth of exports. In 2006, over 16 million people were employed in this sector in the United States, more than in manufacturing, generating US$1,414 billion in value added, around 11 per cent of GDP. Also, in certain developing economies, such as India and Brazil, business, professional and technical services have become one of the main export sectors. In 2007, they accounted for 45 per cent of Brazil's total commercial services exports, totalling US$10 billion. Architectural, engineering and other technical consultancy services were the largest sectors, followed by legal services.

II.A.3. SPECIFIC COMMITMENTS AND NEGOTIATIONS

a. COMMITMENTS

In professional services, broad commitments have been taken in respect of market access (Article XVI) and national treatment (Article XVII). Depending on the activity, the number of Members with commitments typically varies between 60 and 90. This implies that approximately 90 per cent of world trade in professional services is covered by specific commitments (S/CSS/W/75). As reflected in the Table below, engineering services currently accounts for the highest number of GATS commitments, followed by accounting and architectural services.

34 Throughout this module commitments are counted on the basis of EC members being counted as one, unless specified otherwise. Keep in mind though that the schedule for the EC currently covers 12 members (with the exception of telecommunications and financial services, where commitments are for EC15), as the consolidation of the EC schedule to include new members following enlargement has not been completed.
IN DETAIL

<table>
<thead>
<tr>
<th>Current GATS commitments - professional services</th>
<th>(No. of members)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Engineering services</td>
<td>74</td>
</tr>
<tr>
<td>Accounting, auditing and bookkeeping services</td>
<td>73</td>
</tr>
<tr>
<td>Architectural services</td>
<td>66</td>
</tr>
<tr>
<td>Legal services</td>
<td>62</td>
</tr>
<tr>
<td>Medical and dental services</td>
<td>53</td>
</tr>
<tr>
<td>Taxation services</td>
<td>49</td>
</tr>
<tr>
<td>Urban planning and landscape architectural services</td>
<td>49</td>
</tr>
<tr>
<td>Integrated engineering services</td>
<td>46</td>
</tr>
<tr>
<td>Veterinary services</td>
<td>39</td>
</tr>
<tr>
<td>Services provided by midwives, nurses, Physiotherapists and para-medical personnel</td>
<td>23</td>
</tr>
<tr>
<td>Other</td>
<td>8</td>
</tr>
</tbody>
</table>

Source: WTO Secretariat, EC-12 counted as one.

b. PROFESSIONAL SERVICES IN THE DDA

In the DDA, relatively modest attention has been given to professional services, with about 35 offers (EU counted as one) including one or mode sub-sectors. For the most part, the offers represent modest improvements to existing commitments, with only a limited number of Members including new sub-sectors.

Addressing restrictive nationality and residency requirements are among the prime negotiating priorities for Members with an interest in professional services (See, for example, WTO documents S/CSS/W/33, S/CSS/W/52, S/CSS/W/75, and S/CSS/W/98). While recognizing the importance of consumer protection and accountability, improvements are sought in the quantity and quality of commitments across modes 1, 2 and 3. Requests have been made for either eliminating overtly discriminatory requirements or replacing them with other less restrictive means. Where elimination or replacement is not feasible, the reduction of such requirements to a minimum, and the use of the least trade restrictive forms, is proposed. In addition to the elimination and/or replacement of restrictive nationality and residency requirements, adjustment to requirements concerning membership of local professional associations, forms of partnership and establishment are also proposed (S/CSS/W/33, S/CSS/W/75).

Facilitating the coverage, entry and stay of foreign professional service providers under mode 4 has also been highlighted as other key objectives (S/CSS/W/33, S/CSS/W/52, S/CSS/W/75, and S/CSS/W/98). In this connection, further discussions on how to improve and facilitate the temporary movement of professional
service providers are recommended. One proposal has also called for provisions allowing the temporary admission of professional equipment necessary to carry out the service in a foreign market.

c. POLICY CHALLENGES

Given the highly regulated nature of most professions, domestic regulation is important to securing effective market access. Of particular concern are licensing and qualification requirements and regimes. Greater transparency of such regimes is a key objective, but not sufficient in itself. In addition to the regulatory requirements of GATS Article VI, work on sectoral disciplines, similar to those created for accountancy services, was proposed in order to accommodate specific characteristics of individual professions (S/CSS/W/52, S/CSS/W/75). In this context, one proposal specifically referred to engineering, architecture, legal, urban planning, real estate appraisal and land surveying services.

Mutual recognition of qualifications, academic certifications and experience gained is another area where improvements are sought. One negotiating proposal highlights that qualifications should be checked within a reasonable period of time, and that procedures for presenting and processing a request for authorization should not in themselves be a restriction on the supply of the service (S/CSS/W/98). Full compliance with, and the effective implementation of, Article IV.2 (b) and Article VII of the GATS is stressed by several proposals. The possibility of extending the WTO Guidelines for Mutual Recognition Agreements or Arrangements in the Accountancy Sector to professional services was suggested as a starting point for encouraging the development of mutual recognition agreements between professional regulators (S/CSS/W/52).

II.B. COMPUTER AND RELATED SERVICES

II.B.1. CLASSIFICATION AND SCHEDULING ISSUES

W/120 includes "Computer and Related Services", which is divided into 5 areas, is a sub-sector of "Business Services".

IN DETAIL

<table>
<thead>
<tr>
<th>B. Computer and Related Services</th>
<th>CPC</th>
</tr>
</thead>
<tbody>
<tr>
<td>a. Consultancy services related to the installation of computer hardware</td>
<td>841</td>
</tr>
<tr>
<td></td>
<td>842</td>
</tr>
<tr>
<td>b. Software implementation services</td>
<td>843</td>
</tr>
<tr>
<td>c. Data processing services</td>
<td>844</td>
</tr>
<tr>
<td>d. Data base services</td>
<td>845+849</td>
</tr>
<tr>
<td>e. Other</td>
<td></td>
</tr>
</tbody>
</table>
The IT industry has grown out of a convergence of telecommunications, computer technology and software as well as more content-oriented industries such as broadcasting and publishing. The blend can yield hybrid IT services difficult to categorize into a particular service sector. For instance, there may be a fine line between certain on-line computer services and value-added telecommunications services.

In most respects, considerations related to modes of supply for computer services are similar to any other service sector. However, computer services have a longer history of foreign outsourcing than most, which gives cross border supply (mode 1) and consumption abroad (mode 2) a notable importance.

To illustrate this point, consider the following example. Company A is interested in supplying long-distance data processing or programming services to company B in Arcadia. To see if there are any commitments by the government of Arcadia on this type of supply, it would check the mode 1 (cross-border supply) commitments of Arcadia. At the same time, it should also check whether Arcadia has made any commitments on mode 2 to allow its companies to consume abroad. This is because the company's right to supply the service from abroad is covered by mode 1, but government restrictions, if any, on its clients right to purchase abroad may relate to mode 2. In effect, the transaction as a whole consists of a combination of the two modes (see Module 6 for more information on the potential overlap between modes 1 and 2).

In addition, when computer services are supplied on-line across national borders, telecommunications (e.g. internet, dedicated leased circuits, satellite transmission) is typically used as a "means of supply". In other words, telecommunications is used an input in the provision of the service. In such a situation, what is important are not the telecom commitments that have been taken, but whether there is access to the use a telecom operator. This is why the GATS Annex on Telecom guarantees reasonable and non-discriminatory access to the telecom services. The commitments on telecom services may be more relevant in the case where a company owns or operates the communications networks used to supply the computer services, but only to the telecom-related aspect of the business.

II.B.2. ECONOMIC IMPORTANCE AND MAIN FEATURES

Strong demand for computer services stems from a number of factors. To improve their global competitiveness, business are continually seeking more efficient and productive ways to improve customer service, process transactions, and obtain access to financial and other commercial information. Demand is also generated by the increasing availability of reasonably priced personal computers (PCs) for businesses and residential consumers in some markets, as well as improved network connectivity both at home and in the workplace. The industry also includes companies which not only use, but, more importantly, design, build and supply the means for electronic commerce.

II.B.3. SPECIFIC COMMITMENTS AND NEGOTIATIONS

A total of 94 governments (counting EU Member States individually) have taken commitments on computer and related services. Most developed countries have made GATS commitments on market access for computer services that are usually quite liberal. Some developing countries have commitments, but often do not open up cross border supply and impose limitations on commercial presence as well.

Reflecting the unregulated nature of the industry, sector-specific limitations in schedules are fairly rare, although limitations in the horizontal section of schedules may apply. Limitations are typically scheduled under
commercial presence (mode 3) and most often, they concern the type of legal entity required or limits on foreign equity participation. In some instances, quantitative limits are listed under presence of natural persons (mode 4), which must be read together with horizontal limits on the same mode. For cross-border supply (mode 1) and consumption abroad (mode 2), scheduled limitations are much less common, thus confirming opportunities for off-shoring of, for example, data processing and programming services. However, bear in mind that a significant number of developing countries with commitments on these services have entered "unbound" for modes 1 and 2, meaning they do not yet guarantee market access in these respects.

As a result, efforts to improve global market access for computer and related services may depend more on dealing with a diverse range of government policies, than on addressing traditional trade barriers.

II.B.4. POLICY CHALLENGES

As in any other sector, regulations on committed computer services must be implemented in a way that is reasonable, objective and impartial (Art. VI). Whether or not there are commitments, the regulations must not discriminate among the services or suppliers of different WTO Members – the MFN principle.

Computer and related services face little or no sector-specific regulation. Nevertheless, government policies, measures and practices can have an important impact on growth and development of these services. Relevant regulations include labour policies (work permits, education and training), research and development support, protection of intellectual property rights to address software piracy, technical standards, tariffs on computer equipment, and government procurement of information services. Moreover, as on-line supply of computer services becomes increasingly commonplace, issues of legal jurisdiction, copyright and patent piracy and many of the internet/e-commerce related concerns (such as data protection, privacy, and consumer protection) assume ever greater importance for the computer industry.

II.C. POSTAL AND COURIER SERVICES, INCLUDING EXPRESS DELIVERY

II.C.1. CLASSIFICATION AND SCHEDULING ISSUES

Both the postal and courier sectors generally comprise of the pick-up, transport and delivery of letters, parcels, packages and other printed matter, as well as other related activities such as counter services and mailbox rental. The CPC linked to the W/120 classification distinguishes between the two sectors on the basis of the nature of the supplier, rather than the services themselves. It defines postal delivery as services "rendered by the national postal administrations" and courier services as those rendered "other than by the national postal administrations". No other service sectors are defined in this manner.

Express delivery operators provide expedited movement of documents and parcels. The operators maintain control of the goods throughout the delivery process - often using tracking technologies - and offer additional services, such as collection from a point designated by the sender, guarantee of delivery within a specific timeframe, delivery confirmation, and customs clearance.
II.C.2. ECONOMIC IMPORTANCE AND MAIN FEATURES

The distinction based on public vs. private ownership in postal delivery is seen as increasingly out of step with commercial developments and with the GATS. Increasingly, both private companies and postal administrations offer a wide array of traditional and non-traditional services. Operating revenue of postal administrations worldwide reached US$330 billion in 2007, an increase of 18 per cent compared with 2005. Developed countries account for most of revenues and growth. Postal administrations employ 5.5 million people worldwide, and operate 657'000 post offices.

The largest proportion of postal revenue still comes from traffic in letter post, although there has been little growth since 2000. In developed economies, volumes have declined in recent years - especially as regards international traffic - in light of competition from electronic messaging and other communication networks. As a result of these developments, postal administrations have expanded into such areas as express, logistics, and financial services. Overall, market trends are moving towards increased competition and higher-end, more profitable products.

In contrast to letter post and parcel delivery, the express segment is growing strongly. This growth results from such trends as the expansion of electronic commerce (home shopping); business-to-business developments favouring just-in-time systems that use small frequent deliveries rather than bulk transport; and globalization of supply chains that place a premium on information management and speed of delivery. The top four global express delivery companies (UPS, FedEx, DHL and TNT) account for about 60 per cent of the global market. National post operators, especially in developed economies, are increasingly providing services that compete directly with those of express delivery operators. In many instances, postal administrations have expanded into express delivery services, through purchase of private firms, the establishment of subsidiaries, or joint-ventures.

Another key trend in postal markets worldwide has been increased competition. According to the Universal Postal Union (UPU), the vast majority of public postal operators now face some form of competition from private companies. Already, more than 80 per cent of public postal operators face competition in domestic markets for letter post and parcel delivery. Competition is even more pronounced in international services. The situation varies widely, however, by product and region. For example, in the eight largest EU markets, 36 per cent of mail is not delivered by the incumbent post.

II.C.3. SPECIFIC COMMITMENTS AND NEGOTIATIONS

a. COMMITMENTS

A total of 54 WTO Members (EU counted as one) have commitments on courier services and/or postal services. In view of shortcomings of the existing classification, most schedules provide their own definitions of the committed services, based usually on weight, size or speed of delivery. Many schedules further specify the courier sector commitments as "land-based" in deference to the current carve-out of air transport services from GATS.

The main formal trade restriction in the postal and courier arena are monopoly rights. However, while most governments allow private, competitive supply of some delivery services, the nature and scope of the services reserved to the postal monopoly vary widely from one country to the next.
For the services that are open to competition, regulatory impediments appear more pressing than formal market access barriers. The main regulatory concerns raised in the negotiations relate, inter alia, to licensing and regulation (i.e. postal entities often license and regulate, or even tax their private competitors), competition safeguards (the need to prevent anti-competitive practices), and a variety of more discreet measures by which governments have maintained special treatment of national or domestic operators (e.g. price controls and surcharges, customs treatment, etc).

A number of negotiating proposals have been submitted by both developed and developing countries on either postal, courier and/or express delivery. Overall, these proposals tend to have a greater focus on classification issues and regulatory barriers than in other sectors. On the one hand, all submissions recognize the inadequacy of the Services Sectoral Classification List, and proposals have been made for improved classifications, including in TN/S/W/30. On the other hand, some delegations have encouraged the undertaking of additional commitments to address certain regulatory issues. Anti-competitive practices, cross-subsidies, universal service obligations, and the need for independent regulators and licensing procedures are some of the issues mentioned in this regard. Regarding universal service, the right of Members to define the kind of universal service they wish to maintain was not questioned, as suggestions focused on such aspects as transparent, non-discriminatory and competitively neutral implementation.

Following the Hong Kong Ministerial Conference, a plurilateral request on postal and courier services, including express delivery, was circulated. The request encouraged targeted Members to provide substantially unrestricted market access, as well as effective national treatment, for services carried out under competitive conditions. It also urged the undertaking of additional commitments, where possible, so as to have measures in place to address unreasonable practices by dominant suppliers, so as to ensure that any licensing requirements are transparent and reasonable, and guarantee that the regulator is independent from any supplier.

The request also proposed a model definition, setting out a series of objectives which any classification of the sector should meet, e.g., clarify that all competitive service suppliers are covered, including holders of monopoly rights if these operate in competitive conditions outside their exclusive rights; clarify the parameters of covered postal services to ensure that express delivery or other high-value services are distinguished from universal postal services.

The request recognized that government intervention may be necessary to ensure the universal supply of quality basic postal services, including through direct government-supplied services and the designation of exclusive suppliers.

**II.C.4. POLICY CHALLENGES**

Even though postal reform appears to result from challenges posed by developments in information and communication technologies rather than trade negotiations, a key issue facing governments is how best to regulate the sector in the face of liberalization. One such issue relates to the provision of universal service. The general evolution of the telecommunications sector in recent decades has shown that the concept of universal service can be de-linked from the question of ownership and legal form. In postal services, monopolies are no longer regarded as the only way to support universal service, especially in developed economies. On the other hand, many countries, especially developing ones, still choose to grant universal
service providers, usually state-owned postal operators, certain exclusive rights. That said, in light of the experience in the telecommunications sector, where monopolies are no longer the norm, some countries are considering establishing funding mechanisms. These would serve as an alternative or complement to reserved areas to support universal services in liberalized markets.

**Particular challenges faced by developing countries**

World Bank studies on postal services in developing economies argue that postal reform can result in the delivery of more post with greater efficiency and reliability, while reducing the need for financial transfers (i.e. subsidies). This is expected to lead to improvements in overall economic performance, income generation, and the quality of life. Moreover, like other communication infrastructures, postal networks allow for the flow of goods, services, and payments between economic agents. Therefore, an efficient network can reduce transaction costs across an economy (particularly for billing and advertising), create new markets, and support the knowledge transfer that facilitates innovation and growth.

**II.D. TELECOMMUNICATIONS**

**II.D.1. CLASSIFICATION AND SCHEDULING ISSUES**

The GATS Annex on Telecommunications defines telecommunications, in general, as "the transmission and reception of signals by any electromagnetic means". The Annex also defines public telecommunications transport networks and services (these services are commonly referred to as "basic" telecom services).

W/120 designates 14 types of services. These range from voice telephony and raw data transmission to computer-enhanced services such as e-mail, and on-line data processing, access and retrieval services. Services (a) – (g) in the classification list are considered to be basic services (telecom transport networks and services) and services (h) – (n) are regarded as "value-added" or "enhanced" services. The services listed have a corresponding CPC definition, but the match is far from exact due to the many recent commercial, regulatory, and technological developments. Therefore, Members use a set of categories that enable them to more clearly define the telecom services committed.

These categories, identified in a Chairman's Note, are used to further define the service committed. Members may specify when the commitment concerns local, long distance, or international markets, wired-based or wireless technologies, facilities-based or non-facilities based supply, or public or non-public (i.e. private or corporate) use. According to the Note, if a commitment does not clearly indicate that it is limited to one or more of these categories, then the commitment is made on all of them. This is commonly referred to as the "technology neutral" approach, in reference to one of the categories, but other of the categories include geographic and regulatory distinctions as well.
Importance of various modes of supply to telecommunications

For commercial presence (mode 3) and presence of natural persons (mode 4) the supply of telecom is generally similar to that for any other sectors. However, cross-border supply (mode 1) and consumption abroad (mode 2) merit further attention, in large part because telecom by its very nature consists of networks and because of telecom’s dual role as a service, in itself, and as a means of delivery.

For cross-border supply, the first thing to recall is that the GATS defines this mode in geographic terms (from the territory of one Member to the territory of another), rather than according to where a paying customer resides or the place and direction of payments. So when a service that does not require commercial presence is supplied into a market, it can relate not only to telecom services sold to paying customers in that market (e.g. mobile satellite services, some internet-based services), but also to services that cross the border into that market for which a local resident may be the recipient, rather than the paying party (e.g. an incoming international telephone call or incoming transmission of data). Bear in mind that this "calling party pays" tradition in fixed telephony policy has not fully carried over into the newer mobile services, wherein both the originating and receiving customers pay for the call in many countries.

For consumption abroad, it may be possible for a customer to consume abroad without moving physically. For example, the customer's data can be sent abroad for processing similar to the way a consumer might send a watch abroad for repair. While such activities would be more common in business-to-business transactions, examples involving ordinary customers can include mobile roaming, calling card services, and internet telephony. Bear in mind, however, that such transactions often culminate in, or combine with, cross-border supply. This means that commitments on both modes are necessary to fully cover the supply of services concerned.

II.D.2. ECONOMIC IMPORTANCE AND MAIN FEATURES

Dramatic growth has followed telecoms liberalization in most markets around the world. By 2006, the number of world telephone subscribers had reached nearly 4 billion (fixed and mobile), a level which brought global teledensity to 60 per cent, compared with only 23 per cent in 1999. Global telecom services revenue had reached more than US$1.4 trillion by 2005, more than double the global revenue generated a decade earlier. Also between 1996-2006, the number of mobile subscribers increased nearly twenty-fold and Internet users by a 1500%.

Adoption of new technologies has also accelerated due to reforms that have unleashed innovation. Mobile telephony, in particular, witnessed exponential growth in developing countries, once governments issued more mobile licenses and the operators discovered more user-friendly prepaid payment options to bring mobile telephony to the masses. By the turn of the century, just about every country in the world had access to Internet. In Africa, for example, where reform began more recently, average annual mobile growth rates are now at over 50 per cent and internet access grew at 30 per cent from 2005-2006.

II.D.3. SPECIFIC COMMITMENTS AND NEGOTIATIONS

As of 2009, a total of 109 governments (counting EU Member States individually) had committed on telecommunications services in their GATS schedules. They have taken GATS commitments on a broad array
of telecom services. So, whether a firm is a mobile or fixed-line operator, a reseller of services or of capacity, a provider of internet access or of corporate data services, there may be market access guarantees in the economies where it wishes to do business.

The appeal of making commitments on this sector can be credited in large part to an acceptance by governments that competitive frameworks can achieve many traditional and new communications policy objectives. Telecom is now widely recognized by policymakers to play a key role in trade and economic growth. Indeed, the highest telecom growth rates and some of the most remarkable success stories are found in the developing world.

Overall, three types of market access restrictions are most commonly listed in telecom commitments: 1) limitations on the number of suppliers, 2) limits on foreign equity participation, and 3) restrictions on type of legal entity. Such limitations are usually listed under commercial presence (mode 3).

Also fairly common are certain types of market access limitations used to clarify the level of liberalization committed. For example, "routing restrictions" are sometimes listed under cross-border supply (mode 1) to cover restrictions against bypass of the networks that are still under monopoly. Also, in partially liberalized telecom regimes, market access restrictions will sometimes be used to indicate that a certain category or sub-activity of a committed service is not allowed. Examples may include "resale not allowed" or "call back services not allowed". In these examples, the entries can equate to a "zero quota" in trade terms.

Restrictions listed in the national treatment column are relatively uncommon in this sector. In some instances, however, nationality restrictions on the composition or control of the board directors of a firm may be found.

II.D.4. POLICY CHALLENGES

Domestic regulations such as licensing requirements and technical standards are common in the telecom sector. These are addressed in certain provisions of Article VI on Domestic Regulation (see box below for further information on how domestic regulation relates to specific commitments). Also widespread are the use of competition policies (both general and sectoral, e.g. interconnection regulation), universal service/access requirements and public service obligations. Measures to safeguard competition or promote universal service may also include price or tariff controls. Policies to regulate competition, universal service/access or public service are not mentioned explicitly in the GATS, but form part of the body of laws and regulations considered to be domestic regulation within the scope of Article VI.

Some aspects of competition policy are covered by GATS provisions on monopolies and exclusive providers (Art. VIII) (see Module 3 for an explanation of these obligations). However, these do not extend to dominant suppliers who no longer retain formal monopoly rights over particular services. The GATS Annex on Telecommunications contains access and use guarantees that apply to the regulation of all public service operators, and can be particularly relevant when operators are monopolies or dominant. In addition, core provisions of the Reference Paper (see box below) relate specifically to the regulation of dominant suppliers (referred to in the Reference Paper as "major" suppliers).

As in any other sector, regulations on committed telecom services must be implemented in a way that is reasonable, objective and impartial (Art. VI). Irrespective of the existence of commitments, the regulations must not discriminate among the services or suppliers of different GATS Members – the MFN principle.
The Reference Paper

More than 80 governments have attached the Reference Paper on telecom regulatory principles to their schedules as "additional commitments" and an additional seven governments have inscribed certain of its principles. For Members that have done so, the Reference Paper adds obligations related to the domestic telecom regulatory framework. The implications for the government concerned is that it is obliged to provide competition safeguards, interconnection guarantees (including cost-oriented rates with dominant operators), licensing disciplines, competition neutral universal service mechanisms, and ensure fairness in the allocation of scarce resources, such as the radio spectrum. Although most Members added the standard template Reference Paper, departures were possible, so the schedule's additional commitments should be checked and confirmed for each market in which a supplier wishes to do business.

Domestic Regulation vs. Schedules of Commitments

Domestic regulations, such as licensing and technical standards, are common in the telecom sector and do not generally fall within the types of measures GATS defines as restrictions on market access. Therefore, such regulations will not usually be listed in the schedules. Exceptions, where such policies might overlap with restrictions can arise if, for example, 1) foreign companies are subject to particular licensing or authorization procedures in addition to domestic ones (national treatment limitation) or 2) a limit is imposed on the number of suppliers (e.g. monopoly or duopoly) or if an economic needs test (tied to issuance of new licenses) is still employed. Sometimes such tests were justified in the past as a means to promote network expansion and, hence, increase access.

II.E. AUDIOVISUAL SERVICES

II.E.1. CLASSIFICATION AND SCHEDULING ISSUES

Audiovisual services typically comprise services relating to the production, distribution, broadcasting, and/or projection of audiovisual content, such as motion pictures, television and radio programming, and sound recordings. In W/120, the sector is composed of the following sub-sectors, which are further defined through corresponding references to the CPC.
### A. Audiovisual Services

<table>
<thead>
<tr>
<th>Service</th>
<th>CPC</th>
</tr>
</thead>
<tbody>
<tr>
<td>a. Motion picture and video tape production and distribution services</td>
<td>9611</td>
</tr>
<tr>
<td>b. Motion picture projection service</td>
<td>9612</td>
</tr>
<tr>
<td>c. Radio and television services</td>
<td>9613</td>
</tr>
<tr>
<td>d. Radio and television transmission services</td>
<td>7524</td>
</tr>
<tr>
<td>e. Sound recording</td>
<td>n/a</td>
</tr>
<tr>
<td>f. Other</td>
<td></td>
</tr>
</tbody>
</table>

### II.E.2. ECONOMIC IMPORTANCE AND MAIN FEATURES

The sector has experienced dynamic growth in the last years and is intensive in both human capital and technology. While, balance-of-payments data significantly underestimates total trade in this sector, some key trends may be highlighted.

For one, trade in audiovisual services has grown quite rapidly in recent years, when compared with the growth of trade in services more generally. Second, the United States is the biggest exporter. For example, with respect to motion pictures, despite the variety of producing countries, the main companies in terms of box office revenue are located in the US. Third, developing countries are playing an increasingly larger role in the global audiovisual market and some have become regional and even global exporters of audiovisual products. For example, India's film industry, the world's biggest in terms of films produced, gets a significant share of its earnings from foreign sales. India is also a growing producer of television and musical content. Regarding television content, countries such as Egypt, as well as others in Latin America, are increasingly successful regional exporters.

Trade in audiovisual services essentially takes place through mode 1 (cross-border trade), such as the transmission of television programming from the territory of one Member to that of another, and mode 3 (commercial presence) if, for example, production companies are established abroad. Mode 4 is also relevant and can involve the movement of crews for the shooting of a movie abroad.

### II.E.3. SPECIFIC COMMITMENTS AND NEGOTIATIONS

#### a. COMMITMENTS

Audiovisual services are characterized by a very low number of specific commitments, as well as by a high number of MFN exemptions. Only 30 WTO Members have commitments in audiovisual services, three of which are developed economies. Commitments in the sector tend to focus on movie-related services rather than TV-
or radio-related ones. The relatively low level of commitments may be due to divergences of views during the Uruguay Round on the relationship between cultural and trade objectives.

While the number of Members with commitments is small, it includes many key markets that are home to important suppliers. WTO accessions have greatly contributed to the number and quality of commitments in the sector. Indeed, the number of Members with commitments went from 18 to 30 as a result of the accessions.

For sub-sectors committed, limitations inscribed mostly relate to mode 3. These often consist of limitations on foreign capital participation and restrictions on the form of legal entity, or of joint venture requirements. Few limitations pertain to content restrictions, even though they are largely applied in the sector, especially as regards television.

Another feature of the sector is that subsidies in various forms represent, in some markets, a significant share of the value of production of audiovisual products. Subsidies are a key feature of the film industry around the world, particularly in OECD countries. Significant subsidies are also provided in support of the production of other forms of audiovisual content (e.g., television programming) and often have some discriminatory element, e.g., focusing on domestic content.

Audiovisual services account for a very high number of MFN exemptions. Many of these belong to European countries and typically pertain to co-production agreements, support programmes, the Council of Europe Convention on Transfrontier Television, or reserve a right to retaliate in the event of unfair conditions abroad.

b. AUDIOVISUAL SERVICES IN THE DDA

Negotiating proposals and ensuing discussions on audiovisual services have focused mostly on market access, but touched as well on a number of classification and regulatory issues. Delegations calling for further liberalization have lamented the low number of Members with commitments in the sector and have highlighted the key barriers they wished to see reduced, e.g. content quotas, economic needs tests, ownership restrictions, and nationality/residency requirements. The issue of MFN exemptions has also been raised. In related discussions, delegations generally recognized that audiovisual services have both commercial and cultural components. Several delegations considered that governments' economic and cultural considerations could be reconciled in the GATS, in particular given the flexibility at the time of scheduling commitments, although others felt otherwise.

The pluriateral request on audiovisual services focused on services related to motion pictures and sound recording. Essentially, it sought commitments on mode 1 (cross-border supply) and mode 2 (consumption abroad), reflecting the level of *de facto* openness. For mode 3 (commercial presence), the request sought commitments that, to the greatest extent possible, would eliminate a number of limitations, including content quotas, foreign equity restrictions, limits to the number of suppliers, and discriminatory taxes and requirements. The request also sought to reduce the scope and content of MFN exemptions in the sector, and indicated that certain flexibilities - for example, for subsidies - would be discussed during the negotiations.
II.E.4. POLICY CHALLENGES

Technological advances have many implications for the type and quantity of audiovisual services that can be produced, and delivered in foreign markets. In the face of a changing environment, policy-makers need to assess whether policy objectives and the ways to attain them require modification. For one, technological developments make it easier to carry audiovisual products across distance and allow for greater amounts of content to be made available to consumers, with increasing shelf-space for audiovisual products presenting market opportunities for foreign providers of such services. For example, with respect to television, digitalization and the growth of new delivery platform systems, such as cable or satellite, have increased the number of channels that can be received by consumers in comparison with free-to-air broadcasting.

Technological developments have further transformed the audiovisual market. A greater range of products are available. Services offered are also more interactive and easily customised. These developments give a greater say to audiences and provide wider choice. Consumers also have greater options regarding how they want to consume products (movies can be seen by going to the theatre, renting to watch home, video-on-demand through the television set, etc.), and when they want to watch them. This may gradually alter the traditional notions of "prime-time", as consumers have greater capacity to decide to watch what is of special interest to them, which in turn encourages greater specialisation of content producers.

Other important consequences of these technological developments may be that restrictions affecting competition between carriers/distributors of content, by raising prices and discouraging investment and innovation, limit the development of networks and technology and, hence, reduce the amount of content that can be accessed (i.e., shelf-space). Such restrictions on carriers of content may thus have implications for the pursuit of non-economic objectives, in addition to economic ones. Another implication is that technological advances, in particular developments in electronic commerce, can turn transactions that previously were not profitable into profitable ones. By overcoming limitations of geography and scale, it can foster the development of niche markets and encourage consumers to explore beyond mainstream tastes. Expanding "electronic" shelf-space means that distributors no longer need to just focus on best-selling products so as to not use scarce space for products which may have limited appeal for their local clientele.
II.F. DISTRIBUTION SERVICES

II.F.1. CLASSIFICATION AND SCHEDULING ISSUES

Distribution is a key infrastructural service, with significant impact on goods trade and consumer welfare.

**IN DETAIL**

<table>
<thead>
<tr>
<th>A. Distribution Services</th>
<th>CPC</th>
</tr>
</thead>
<tbody>
<tr>
<td>a. Commission agents’ services</td>
<td>621</td>
</tr>
<tr>
<td>b. Wholesale trade services</td>
<td>622</td>
</tr>
<tr>
<td>c. Retailing services</td>
<td>631+632+6111+6113+6121</td>
</tr>
<tr>
<td>d. Franchising</td>
<td>8929</td>
</tr>
</tbody>
</table>

According to the CPC, wholesale trade consists of selling merchandise to retailers, to other wholesalers, or to other business users. Retailing services, in turn, consist of selling merchandise for personal or household consumption, while commission agents’ services are distinguished from other categories in that they are traded on behalf of others. The activities of retailers, wholesalers and agents are defined on the basis of the different categories of goods distributed, with cross-references to the goods categories of the CPC classification.

The CPC also indicates that retailing and wholesale trade services comprise, in addition to selling merchandise, a variety of subordinated services such as maintaining inventories, physically assembling and sorting goods, breaking bulk and redistribution in smaller slots, delivery services, sales promotion, refrigeration services, and warehousing. Distribution services in the GATS relate to the distribution of goods and not to the distribution of services.

Franchising is qualitatively different from the other three sub-sectors of distribution services. It corresponds to CPC 8929, "other non-financial intangible assets", which is a broadly defined residual category. Typically, franchisers sell rights and privileges, such as the right to use a particular retail format or a trademark.

II.F.2. ECONOMIC IMPORTANCE AND MAIN FEATURES

Distribution companies provide the necessary link between producers and consumers, within and across borders, and are vital to the functioning of a market economy. The efficiency of the sector is crucial to ensure that consumer welfare is maximised, i.e., that they get access to a wide variety of goods at competitive prices. Efficient distribution services provide producers with the necessary information to tailor their products to consumer demand. Failure of the distribution sector to perform its role well can lead to significant misallocation of resources and economic costs. Costs and margins of distribution services represent a significant portion of final price of products. Moreover, an inefficient distribution sector can act as an import barrier by making it more difficult for foreign producers to get their goods to domestic consumers and by
limiting the extent to which potential gains from liberalization of goods trade make themselves apparent to consumers in terms of lower prices and greater choice.

In most countries, the sector ranks second only to manufacturing in contribution to GDP (10-20 per cent range) and employment (15-30 per cent range). In some countries, the sector can account for up to 40 per cent of all enterprises. Developed country suppliers (especially of US, Japanese, and European origin) dominate the list of global retailers. According to Deloitte, out of the world’s top 250 retailers, twenty come from developing countries, including five from South America and five from Mexico. Other retailers from developing countries, even if of smaller size, have expanded in neighbouring countries, such as Chile’s Cencosud, which is the top retailer in Argentina along with Carrefour. While not yet large exporters, a number of distributors from developing countries enjoy an important position in their domestic market, despite competition from large developed-country firms.

International sales have become important to many retailers’ growth strategies. On average, the top 250 retailers conducted business in six countries. However, the level of internationalization varies among top retailers; foreign operations account for only 14 percent of the top 250 companies’ total sales. Overall, the sector is far from fully ‘globalized’.

Trade in distribution services largely takes place through mode 3 (commercial presence), for example wholesalers and retailers acquiring enterprises or establishing a subsidiary abroad and setting up outlets. Nevertheless, the importance of cross-border supply (mode 1) is increasing in view of the development of e-commerce. Cross-border supply in the sector occurs when a supplier in the territory of one Members sells a good to a consumer abroad. For example, the sale can take place by phone or Internet, and the goods are subsequently shipped across the border (see Module 6 for discussion of uncertainties concerning modes 1 and 2 when electronic transmissions are used).

Technological advances, have played a key role in improving retailers’ inventory management and streamlining of supply chains. Further, while online retail sales remain small relative to total sales, they have grown rapidly and are very important for such popular products as computers, books, CDs and DVDs, pharmaceuticals, used cars, etc. Internet both enhances the suppliers provided by, and competes with, the “bricks-and-mortar” retailers, which are establishing websites to add online sales to their activities and compete with pure online retailers such as Amazon.

Apart from online retailing, other forms of non-store retailing are also significant for certain types of products. These include direct selling (door to door), mail order such as through catalogues, vending machines, or sales through portable stalls. These, along with franchising, have been used as modes of market entry in various countries.

II.F.3. SPECIFIC COMMITMENTS AND NEGOTIATIONS

a. COMMITMENTS

As of January 2009, a relatively low number of WTO Members had commitments in distribution services (57 schedules of commitments). All developed-country Members have commitments in the sector. This contrasts with the economic importance of the sector.
Where commitments are undertaken, typical sector-specific limitations on mode 3 include economic needs tests relating to large retail stores, as well as nationality or residency requirements. A number of Members also exclude certain sensitive products from their commitments on wholesale or retail services, e.g., certain agricultural products, pharmaceutical products. MFN exemptions are not an issue in distribution services, with only two Members having taken such exemptions.

b. DISTRIBUTION SERVICES IN THE DDA

Various negotiating proposals have been submitted - by both developed and developing countries - on distribution services. The proposals mentioned a number of prevailing restrictions that significantly affected trade in the sector and should be addressed in the course of negotiations. Often, these were specific to mode 3, although some related to mode 1 and mode 4. Barriers mentioned included:

- foreign equity limitations; economic needs tests on establishment and expansion of stores (a government screening for the purpose of deciding whether the entry into the market of a foreign firm is needed);
- limitations on the type of legal entity, including joint-venture requirements;
- limitations on the scope of operations (e.g. number of outlets, geographical areas);
- discrimination against franchises or direct selling as opposed to other forms of business;
- discriminatory taxes and subsidies;
- discriminatory limitations on the purchase or rental of specific assets, such as real estate and land (often listed in the horizontal section of schedules);
- citizenship/residency requirements; and
- performance requirements on the marketing of domestically produced goods.

Furthermore, several of the negotiating proposals sought a reduction or elimination of the product exclusions found in the schedules of several Members.

Following the Hong Kong Ministerial Declaration, a plurilateral request on distribution services was submitted to targeted Members. The request essentially sought full commitments for modes 1 to 3 throughout the sector, although sponsors of the request indicate that flexibilities regarding such issues as the exclusion of a limited number of sensitive products, transition periods, or certain non-discriminatory economic needs tests could be discussed.

II.F.4. POLICY CHALLENGES

Despite the overall benefits of liberalization, especially if progressive and accompanied by proper regulatory frameworks, the incidence of some adjustment costs resulting from increased international competition, especially with regard to traditional small retailers, has been a factor constraining liberalization. Often liberalization has to be accompanied by regulatory efforts, for example non-discriminatory zoning regulations, appropriate competition rules, and government programmes to increase competitiveness of small retailers through training on modern managerial skills and marketing techniques.
II.G. EDUCATIONAL SERVICES

II.G.1. CLASSIFICATION AND SCHEDULING ISSUES

W/120 divided education services into five sub-sectors. These include the following:

- **Primary education** (CPC 921), comprises pre-school education and other primary education. Not included are child-care services (classified as social services in CPC) and services related to literacy programmes for adults, which are part of adult education.

- **Secondary education** (CPC 922), consists of general secondary education, higher secondary education, technical and vocational secondary education, and technical and vocational secondary education for handicapped students.

- **Higher education** (CPC 923), covers post-secondary technical and vocational education as well as other higher education, i.e., education leading to a university degree or equivalent.

- **Adult education** (CPC 924), covers adults outside the regular education system.

- **Other education** (CPC 929), covers all other education services not elsewhere classified (but not education services for recreational purposes, which fall under sporting and other recreation services).

During the course of the current round of negotiations, there has been some discussion on the need to update the above definitions so as to be consistent with current realities of the sector (see section on negotiations below).

One of the most controversial issues in relation to GATS and education services has been the potential impact of commitments on publicly provided education services. The words "public services" are not found in the GATS. Instead paragraph 3(b) of GATS Article I states: "services" includes any service in any sector except services supplied in the exercise of governmental authority" (see discussion of this article in Module 4). This is followed by paragraph 3(c) which says "a service supplied in the exercise of governmental authority" means any service which is supplied neither on a commercial basis, nor in competition with one or more service suppliers". This definition would exclude education services that are provided under governmental authority but, given the emergence of new education providers and forms of delivery, questions have been raised as to whether the carve-out is sufficiently broad to cover all types of government-provided education services. Given the many different education systems globally, this question is best answered on a case-by-case basis.

It should also be kept in mind that in the absence of specific commitments, no obligations are taken on market access and national treatment, and the impact of the GATS is only limited to those unconditional obligations that apply across the board (see Module 4 for an explanation of unconditional obligations). Moreover, for WTO Members that have commitments, it is possible to introduce definitions in the relevant sections of their GATS schedules and offers, which clarify the scope of their sectoral commitment. Examples for education include, for example, specifying in the sectoral entry that the commitment is limited to privately funded education services, or that it excludes national compulsory education. As a market access limitation (for mode 3), one WTO Member has scheduled, "Primary and secondary education are public service functions. Authorization may be given to foundations and other legal entities to offer additional parallel or specialized education on a commercial or non-commercial basis. Financial assistance to educational institutions or to students available only for studies at certified establishments".

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II.G.2. ECONOMIC/SOCIAL IMPORTANCE AND MAIN FEATURES

The crucial role of education in fostering economic growth, personal and social development, as well as reducing inequality is well recognized. Countries seek to ensure that their populations are well equipped to contribute to, and participate in, the process of social and economic development. Education enables them to face the challenges of technological change and global commercial integration. Through its capacity to provide skills and enable effective participation in the work force, education is crucial to social and economic development.

International trade in education services has experienced important growth. This is demonstrated by the increasing number of students going abroad for study, exchanges and linkages among faculties and researchers, increased international marketing of curricula and academic programmes, the establishment of “branch campuses”, and development of international mechanisms for educational cooperation between academic institutions in different countries.

According to the OECD, the worldwide market for education services is rising faster than over past decades. A range of factors are combining to drive the growth of cross-border education. These include the need for greater linguistic skills, recognition of the economic role of education in the context of the emerging "knowledge economy", and public policies that foster the internationalisation of higher education. Closer economic integration and falling costs in communication and transport has also helped to increase the mobility of students and workers, as well as education providers.

Higher education and other education services are two segments of the educational sector where international trade is rapidly growing. The OECD estimated that export revenue related to international student mobility (mode 2), which is the largest segment of the international education market, amounted to some US$30 billion in 1998. The Global Student Mobility 2025 Report foresees that the demand for international education will increase by 300 per cent from 1.8 million students in 2000 to 7.2 million in 2025.

There is, however, heavy concentration of mode 2 trade in certain regions. OECD countries receive around 85 per cent of the world’s foreign students, with a heavy concentration in just six countries (i.e US, UK, Germany, France, Australia and Japan). Asia, on the other hand, accounts for almost half (43 per cent) of all students in higher education in the OECD.

Distance learning in higher education (mode 1) has also been growing but there is very little data available on programmes delivered across borders. An important innovation that has taken place in distance learning is the introduction of programme mobility. This relatively new form of learning normally occurs mainly through either franchise or twinning arrangements. Franchises can take many forms, but one common arrangement is one where a local provider is licensed by a foreign institution to offer whole or part of a foreign educational programme. Twinning combines student and programme mobility. Students are enrolled with a foreign provider, but are permitted to undertake part of their course locally through a local institution but then complete the programme in the home country of the foreign institution.

Commercial presence (mode 3) is also expanding while most trade in education services is conducted through programme or student mobility. A typical example of commercial presence in education services would be the opening up of foreign campuses or foreign learning centres by overseas providers. An important feature of trade in education services is the convergence and combination of modes 1, 2 and 3 in the provision of cross-border higher education.
II.G.3. SPECIFIC COMMITMENTS AND NEGOTIATIONS

a. COMMITMENTS

Education services, together with health services, account for the fewest number of commitments. In education services, currently only 51 WTO Members have undertaken commitments with a fairly even spread across the five education sub-sectors, with a slight concentration to be found in the categories of secondary, higher and adult education (see table below).

<table>
<thead>
<tr>
<th>Sub-sector</th>
<th>Current GATS commitments (No. of members)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Primary education</td>
<td>36</td>
</tr>
<tr>
<td>Secondary education</td>
<td>41</td>
</tr>
<tr>
<td>Higher education</td>
<td>42</td>
</tr>
<tr>
<td>Adult education</td>
<td>41</td>
</tr>
<tr>
<td>Other education</td>
<td>26</td>
</tr>
<tr>
<td>Total number of commitments</td>
<td>186</td>
</tr>
</tbody>
</table>

*Source: WTO Secretariat Services Database*

As in other sectors, mode 1 is mostly consolidated as "unbound" or "none". Primary and secondary education have been fully committed in approximately half of the schedules. The corresponding share for "higher" and "other education" is higher, where over three quarters of all existing commitments are without limitations. Limitations on mode 1 typically include restrictions on the granting of financial assistance for studies abroad and other forms of public assistance, restrictions on the supply of the service only to foreign students in the country, and nationality requirements. Mode 2 commitments are generally liberal. Where there are limitations, these are similar to those found on mode 1.

Limitations are more prevalent on mode 3 commitments. This tend to be similar to those found in other sectors and include economic needs tests, nationality requirements, equity ceilings, and joint venture requirements. Examples of restrictions that seem to be more specific to education include financial assistance for studies at non-certified/recognised institutions; student population to be targeted (e.g. foreign institutions are only to enrol foreign students); establishment of commercial or for-profit juridical persons; and the granting of state recognised diplomas/degrees by private institutions. Commitments regarding Mode 4 are largely similar to those for other sectors, guaranteeing entry, subject to qualifications, only to certain categories of persons.
The accessions process has greatly contributed to the number and quality of commitments in the sector. Of the 51 Members (EU counted as one) currently with commitments in education services, 23 of them are newly acceded Members. The bindings taken by newly acceded Members are also relatively free of limitations. In higher education, for instance, 18 of the 23 newly acceded Members with commitments in education services took full bindings on market access and national treatment for both modes 1 and 3.

b. EDUCATION SERVICES IN THE DDA

In the negotiations, there have been relatively few proposals on education services. The proposals that have been submitted have focused on classification issues including: the delineation between "higher" and "adult" education; and the inclusion of additional activities to the W/120 definition such as training, testing, educational community services, teaching of sport and recreational activities, and education agency services. The importance of scheduling additional commitments which specify the conditions under which degrees and other qualifications obtained abroad would be recognized has also been raised.

In the plurilateral request that was addressed to targeted Members, new or improved commitments were sought in relation to private higher education (CPC 923**) and or private "other" education (CPC 929**). Full commitments were sought for modes 1 and 2. While on mode 3, targeted Members were urged to take a full commitment but if this was not possible, to make any limitations on foreign equity participation, time bound. On mode 4, a specific request was made for the inclusion of education providers as a separate category. The request also dealt with the controversial issue of whether public education is covered by the GATS (see explanation above). It was suggested that Members use their own definitions of public and private education. In this connection, the request underscored that the GATS gave Members flexibility to schedule limitations excluding any public funding to foreign private education institutions.

During the Services Signalling Conference (see Module 8), some indications were given by a number of participants of their readiness to undertake new commitments in private education services and to remove a number of existing limitations, which discriminate against foreign education providers. New commitments were envisaged for private primary, secondary and tertiary education, as well as for language, corporate, technical and vocational training. In one case, it was indicated that all limitations on cross-border supply and commercial presence for (non-public) higher education services would be removed. In another case, the national treatment restrictions for private higher and other education would be eliminated.

II.G.4. POLICY CHALLENGES

Over the last few decades, while demand for education, especially higher education, has been growing globally, the size of public budgets at the disposal of the tertiary education sector has been shrinking. In some developing countries, the private sector already accounts for the majority of students in tertiary education. The demand for education is one of the main reasons why academic programmes and education providers/institutions are becoming ever more mobile.

Thus, trade in education services can provide opportunities to build or strengthen capacity in the sector as well as to meet growing demand. However, cross-border education brings into play many different policy spheres and goals. Regulatory conditions will need to ensure that the commercial provision of education does enhance quality and efficiency of the services, and that access-related objectives are not undermined. Coherence (as with other sectors that perform both an economic and social function) is also required between trade and
several other policy agendas such as: education; quality assurance and recognition; consumer protection; and development.

II.H. ENVIRONMENTAL SERVICES

II.H.1. CLASSIFICATION AND SCHEDULING ISSUES

IN DETAIL

<table>
<thead>
<tr>
<th>A. Environmental Services</th>
<th>CPC</th>
</tr>
</thead>
<tbody>
<tr>
<td>a. Sewage services</td>
<td>9401</td>
</tr>
<tr>
<td>b. Refuse disposal services</td>
<td>9402</td>
</tr>
<tr>
<td>c. Sanitation and similar services</td>
<td>9403</td>
</tr>
<tr>
<td>d. Other</td>
<td></td>
</tr>
</tbody>
</table>

Although the "other" category does not refer to any CPC item, it is generally considered to include the remaining elements of the CPC environmental services category, i.e. cleaning of exhaust gases (CPC 9404), noise abatement services (CPC 9405), nature and landscape protection services (CPC 9406), and other environmental protection services not included elsewhere (CPC 9409).

Thus, the current definition in the W/120 essentially refers to infrastructure services. This focus has been criticized as being too narrow and not corresponding to today's environmental industry. In recent years, "non-infrastructure" services, such as air pollution control or environmental consulting, have become important, both from an environmental and economic point of view. They are mainly supplied from business to business, which means that they are less politically sensitive. Contrary to infrastructure services, they offer niches for small and medium size enterprises.

II.H.2. ECONOMIC/SOCIAL IMPORTANCE AND MAIN FEATURES

The public function of some environmental services, such as collection and treatment of waste and waste water, and the predominant role maintained by public authorities have meant that, until recently, there was a limited role for private operators. The sector was thus not really trade-oriented and thus accounted for a low number of commitments. However, the situation is changing. Shrinking public budgets and the need for more sophisticated technologies prompt governments to delegate some of their traditional tasks to the private sector. In addition, growing environmental awareness and increasingly stringent regulation have triggered the creation of new environmental products, both goods and services, beyond traditional infrastructure services. These "non-infrastructure" services (air pollution control, environmental consulting, for instance) have also contributed to expanding trade opportunities.
This sector offers a potential for "win-win" situations: liberalizing environmental services could help to improve environmental protection; lead to innovation and better quality services; and create trading opportunities. However, appropriate domestic environmental regulations and policies must be in place. The Doha Declaration reaffirmed the importance of the "win-win" dimension of open trade and its relationship with environmental protection, human health and economic development.

**Paragraph 31(iii) of the Doha Ministerial Declaration**

A specific reference to environmental services appears in the Doha Ministerial Declaration, under paragraph 31, dealing with "Trade and Environment". Ministers agreed to negotiations on "the reduction, or as appropriate, elimination of tariff and non-tariff barriers to environmental goods and services". The Special Session of the Committee on Trade and Environment (SSCTE) has been tasked to conduct these negotiations. With a view to avoiding duplication, the negotiations on environmental services have so far remained the responsibility of the Special Session of the Council for Trade in Services, as decided by the SSCTE. The SSCTE has focused on the definition of environmental goods.

Environmental services is a sector where most trade takes place through commercial presence (mode 3), with the accompanying presence of natural persons (mode 4). Cross-border supply (mode 1) and consumption abroad (mode 2) have been traditionally considered of limited interest in this sector; recently, however, Members have started to examine the relevance of these modes for various non-infrastructure and support services. Various Members are of the view that modes 1 and 2 may also be relevant for infrastructure services to the extent that consultancy related to such services can be provided through the Internet.

**II.H.3. SPECIFIC COMMITMENTS AND NEGOTIATIONS**

**a. COMMITMENTS**

To date, around 50 Members (EU counted as one) have undertaken specific commitments in at least one sub-sector of environmental services. This is significantly less than in other sectors, such as tourism, financial services or telecommunications and can be explained, in part, by the prevailing role played by public entities. Nevertheless, the Members concerned account for more than 80 per cent of GDP of all Members. Moreover, actual policies may be more liberal in practice than what is reflected in their schedules.

Commitments on market access and national treatment follow a similar pattern across schedules. Cross-border supply is generally "Unbound" for both market access and national treatment; however, Members have different views of the technical feasibility of mode 1 for infrastructure environmental services. Consumption abroad is generally fully bound, although the practical relevance of this mode is not clear for activities related to infrastructure environmental services. Establishing a commercial presence is the most important mode of delivery for this sector and commitments under mode 3 are generally liberal. Few countries have listed sectoral market access and national treatment limitations, although some horizontal limitations may apply. Commitments on the movement of natural persons follow the usual pattern found in most Members’ schedules for this mode.
The main restrictions in the environmental services relate to the types of activities covered by specific commitments. For instance, some Members restricted their commitments to consultancy, which means that the actual supply of the service is not covered.

b. ENVIRONMENTAL SERVICES IN THE DDA

In the negotiations, classification remains an important issue for environmental services. In this connection, one proposal has called for the creation of seven sub-sectors based on the environmental media (air, water, soil, waste, noise, etc.); this is intended to reflect the way services providers tend to specialize, and aims to ensure a comprehensive coverage of the industry.

The main – and most controversial – novelty of this proposal is to include a specific reference to "water collection, purification and distribution" services in the W/120. An explicit reference to water distribution would have no legal consequences, though. The coverage of the GATS is not determined by the W/120, but by Article I:1, which states that "[T]he Agreement applies to measures affecting trade in services". It is generally agreed that the various operations necessary to bring fresh water to the tap are services activities. Water services, whether or not they are listed in the W/120, fall under the GATS, subject to the carve-out in Article I:3 (b).

No consensus has been reached so far to formally modify the current classification of environmental services. Nevertheless, some Members are using the proposed classification, referred to above, in their DDA offers (which they are perfectly entitled to do under the GATS since the W/120 is not a compulsory instrument).

Some 25 offers (EU counted as one) propose new or revised commitments on environmental services. These offers vary greatly in terms of sectoral coverage, but also with respect to the degree of market access and national treatment envisaged. No Member is proposing to undertake specific commitments on water distribution services.

During the 2008 Services Signalling Conference, many indications of improvements were given across the range of environmental services, including: sewage services; sanitation services; refuse and solid waste disposal services; waste water management services; soil remediation and clean-up; environmental laboratory services; and other services related to air pollution control and noise abatement. In addition to expanding sectoral coverage, several participants were willing to expand the modal scope of their commitments, and to reduce or eliminate restrictions such as joint venture requirements and foreign equity limitations. Several participants expressed aspirations for new commitments on all modes of supply across the range of environmental services. A specific request was made for commitments on advisory services under mode 1.

II.H.4. POLICY/REGULATORY CHALLENGES

When the public sector objectives are pursued through partnership with the private sector, as may be the case for environmental infrastructure services, various forms of contractual relationships may be used. So-called "public-private partnership" (PPP) make use of instruments such as management, Build-Operate-Transfer (BOT) or concession contracts, the main difference lying in the degree of responsibilities delegated by a public authority and in the financial arrangements agreed between the parties concerned.
The scheduling of commitments for services provided through PPP raises several technical and legal issues. For instance, it is likely that some contractual forms of PPP (such as management contracts and, in some cases, BOT) fall under the Article XIII definition of government procurement. This means that they would not be covered by the MFN obligation and specific commitments. Concession contracts, which confer certain monopoly rights, are likely to fall outside the definition of government procurement and thus be subject to GATS provisions.

II.I. ENERGY

II.I.1. CLASSIFICATION AND SCHEDULING ISSUES

W/120 does not include a distinct section for energy services. However, two separate sub-sectors, which are directly related to energy activities, can be found under "Business Services" and one under "Transport Services".

- "Services incidental to mining", which is one of the sub-sectors of "Other business services" of W/120, consists of: (i) "services rendered on a fee or contact basis at oil and gas fields, e.g. drilling services, derrick building, repair and dismantling services, oil and gas well casings cementing services" (CPC 883); and (ii) "site preparation work for mining" (CPC 5115).

- "Services incidental to energy distribution" is defined as "transmission and distribution services on a fee or contract basis of electricity, gaseous fuels and steam and hot water to household, industrial, commercial and other users" (CPC 887).

- "Transportation of fuels" is one of the two sub-sectors in the "Pipeline transport" category and is defined as "transportation via pipeline of crude or refined petroleum and petroleum products and of natural gas" (CPC 7131).

In addition to these three sub-sectors, a number of energy-related activities, which are not exclusive to the energy sector, such as transport and storage, distribution, construction, consulting, engineering, etc., are covered by other sectors and sub-sectors of the W/120.

Members consider that mode 3 – establishment of commercial presence – is the most important mode of supply for energy services. Mode 3 commitments allow to address measures affecting energy services providers, such as nationality and residency requirements, economic needs tests, discriminatory licensing procedures or limitations on foreign equity and on the legal forms of doing business.

With the growing use of Internet transactions, cross-border supply has become commercially relevant in the energy sector. For instance, a service provider can carry out analysis of geological data in country A for a customer in country B. Mode 1 commitments could thus facilitate the provision of cross-border electronic information and transactions.

The movement of natural person has also been flagged as important for the energy sector. Mode 4 commitments could, for instance, contribute to easing intra-corporate transfers of specialists and professionals working for energy services companies. However, as noted before, mode 4 commitments are in principle undertaken horizontally, rather than on a sectoral basis: Members tend to apply the same level of access to all services sectors.
For the time being, energy services are subject to standard GATS disciplines. At the beginning of the negotiations, some Members noted similarities between the telecommunication and the energy sectors, and proposed to negotiate additional disciplines which would address, for instance, regulatory transparency, non-discriminatory third-party access to networks and grids, the need for an independent regulator, and requirements preventing certain anti-competitive practices. However, such disciplines are unlikely to materialize during the DDA.

II.I.2. ECONOMIC/SOCIAL IMPORTANCE AND MAIN FEATURES

Energy underpins virtually all human activities and is a prerequisite for economic and social development. The energy industry is highly capital intensive as huge investments are needed to find, produce and transport energy in order to meet increasing energy needs arising from population growth and economic development. The threats induced by climate change will require the promotion of clean energy sources and the implementation of measures aiming at favouring energy efficiency.

Energy services were almost absent from the Uruguay Round negotiations. At the beginning of the nineties, the energy sector – in particular the gas and electricity industries - were largely dominated by vertically integrated state-owned utilities, which left little room to private operators. As in other infrastructure services, the situation has changed over the last 15 years. The trend is now towards unbundling these utilities, which has contributed to the emergence of new services, thus opening commercial opportunities to private suppliers. The process can be compared to what we saw in telecommunications, although it is slower and more complex.

Improved market access for energy services and services suppliers can contribute inter alia to attracting investments and technologies, increasing reliability of supply, improving efficiency in production, diversifying supply sources (including renewable ones), and developing local work force skills.

II.I.3. SPECIFIC COMMITMENTS AND NEGOTIATIONS

a. COMMITMENTS

The number of specific commitments in the three energy sectors described above is very low. No more than 45 Members have undertaken specific commitments with respect to "Services incidental to mining"; 10 of them (mainly developed countries) have limited these commitments to related advisory and consulting activities. Several other Members have scheduled sectoral limitations with respect to the types of activities covered. Eighteen Members have undertaken specific commitments on "Services incidental to energy distribution". Again, some are limited to consultancy and advisory services. Otherwise, market access and national treatment for these two sub-sectors are generally fully bound; very few limitations have been scheduled. Only 12 Members have commitments with respect to transportation of fuels.

b. ENERGY SERVICES IN THE DDA

The first difficulty when it comes to negotiating energy services is to define them, as the W/120 does not contain a separate section for energy. Over the last years, WTO Members have been discussing various options for improving the identification of relevant activities in this sector. The main conclusion we can draw
from these debates is that the classification of energy services is a problem of visibility more than of substance. Most services along the energy chain, from drilling to marketing, are already covered under other sectors, but, as there are not necessarily energy-specific, they are subsumed under more general headings (such as business services, construction, distribution or transport). On the other hand, a few activities, such as wholesale and retailing of electricity, appear not to have a specific entry in the W/120 or in the CPC.

The market access negotiations on energy services cover a broad range of activities relevant for energy companies. Commitments are sought on activities such as drilling; engineering; technical testing and analysis services; construction work for long distance and local pipelines, and for mining; wholesale trade services of solid, liquid and gaseous fuels; retailing services of fuel oil, bottled gas, coal, and woods.

Offers tabled so far in the DDA services market access negotiations are very limited. Eight Members are proposing new commitments or improvements upon existing commitments with respect to services incidental to mining. Four Members have made offers with respect to services incidental to energy distribution and four Members with respect to pipeline transportation of fuels. A further eight Members have offered commitments focusing on a specific energy end-use in various other sectors (professional services, construction, distribution, transport, etc.). These offers are often subject to significant limitations as to the scope of the activities concerned (for instance, they do not apply to all energy sources).

During the July 2008 Signalling Conference, many participants indicated that they would be expanding the sectoral and modal coverage of their commitments on energy services. In a few cases, this would include commitments on services incidental to energy distribution, management consulting services, technical testing and analysis services, construction of long distance pipelines and local pipelines, as well the distribution of petroleum and natural gas. Several indications of improvements on mode 3, and other modes were also given. These included the full or partial removal of limitations on services incidental to mining and drilling; site preparation work for mining; related scientific and technical consulting services; and technical testing and analysis. On the other hand, several participants indicated their interest in further commitments on energy services, including activities such as mining, drilling, technical testing and analysis, and related scientific and technical consulting services. They also sought more meaningful market access commitments, particularly in mode 3.

II.I.4. POLICY CHALLENGES

a. OWNERSHIP OF NATURAL RESOURCES AND OTHER POLICY ISSUES

In many countries, governments hold natural resources in trust for their citizens. Hence, there is a broad consensus among Members that the ownership of natural resources is excluded from the scope of the negotiations. Moreover, Members insist on the importance of maintaining appropriate regulatory flexibility to ensure security of supply, protection of the environment and the possibility to impose public service obligations.
b. THE PUBLIC / PRIVATE DIVIDE AND ENTANGLEMENT

As noted above, unbundling of state-owned vertically integrated utilities and the introduction of competition in some segments of the market is relatively new in the energy sector. In practice, the dividing line between private and public entities and activities may be blurred.

Enterprises engaged in energy activities may still belong to the government, or even take the form of a governmental agency, while behaving like commercial entities with respect to some transactions. The difficulty will be to qualify these entities and the nature of their activities with respect to the GATS. For instance, depending on the status of the entity, a purchasing decision may be considered as government procurement, and, thus, fall outside the scope of specific commitments.

II.J. FINANCIAL SERVICES

II.J.1. CLASSIFICATION AND SCHEDULING ISSUES

The GATS Annex on Financial Services defines a "financial service" as "any service of a financial nature offered by a financial service supplier of a Member", including two broad categories of services: insurance and insurance-related services and banking and other financial services. These two categories are further broken down into the following:

- Insurance and insurance-related services, cover life and non-life insurance, reinsurance, insurance intermediation such as brokerage and agency services, and services auxiliary to insurance such as consultancy and actuarial services.
- Banking and other financial services, include all banking and other financial services, such as the acceptance of deposits and other repayable funds from the public, lending of all types (e.g. consumer credit, mortgage credit, factoring and financing of commercial transaction), financial leasing, all payment and money transmission services (e.g. credit, charge and debit cards, travellers’ cheques and bankers’ drafts), guarantees and commitments, securities trading, underwriting, money broking, asset management, settlement and clearing services, provision and transfer of financial information, and advisory, intermediation and other auxiliary financial services.

Unlike other sectors under the GATS, there are two classifications for the financial sector: one contained in the said Annex; and another in the W/120. Although both classifications are very similar, there are some differences, the most apparent being the use of CPC numbers in the W/120 classification to complement the literal headings, and the higher disaggregation of activities in the Annex.

While a large majority of Members have based their commitments on the classification in the W/120 or the Annex on Financial Services; a few others have either complemented the classification in the Annex with the CPC codes, or have either used original national classifications complemented with CPC codes, or original national classifications with no reference to CPC codes whatsoever.

In terms of scheduling, some Members have made their commitments on financial services on the basis of the "Understanding on Commitments in Financial Services". The "Understanding" is a unique legal instrument in the WTO that was included in the Final Act, but is not formally part of the GATS. As stated in the introduction to the Understanding, Members “have been enabled to take on specific commitments with respect to financial
services under the GATS on the basis of an alternative approach to that covered by the provisions of Part III of the Agreement”. Despite being a sort of formula approach, and an alternative to Part III of the GATS, it remains possible for Members scheduling on the basis of the Understanding to introduce market access and national treatment limitations. Specific commitments undertaken pursuant to the Understanding apply on an MFN basis.

The GATS Annex on Financial Services complements, or elaborates on, the basic rules of the GATS with regard to trade in financial services. The most important provision – the so-called "prudential carve-out“ – is to be found in section 2, under the heading "Domestic Regulation." It is recognized that notwithstanding any other provisions of the GATS, Members may take "measures for prudential reasons, including for the protection of investors, depositors, policy holders or persons to whom a fiduciary duty is owed by a financial service supplier, or to ensure the integrity and stability of the financial system.” The same paragraph goes on to say that where prudential measures do not conform with other provisions of the GATS, they must not be used as a means of avoiding commitments or obligations under the Agreement.

As explained in the scheduling guidelines (document S/L/92), prudential measures need not be inscribed in Members’ schedules of specific commitments, as they are not regarded as limitations on market access or national treatment (see also Module 5). The main purpose of the carve-out is to ensure that GATS commitments and disciplines do not curtail countries’ ability to regulate the financial sector for prudential reasons.

II.J.2. ECONOMIC IMPORTANCE AND MAIN FEATURES

The financial services sector plays a critical role in any modern economy. The institutions that make up an economy’s financial system can be seen as "the brain of the economy", performing many key economic functions. These include:

- facilitating transactions (exchange of goods and services);
- mobilizing savings (for which the outlets would otherwise be much more limited);
- allocating capital funds (notably to finance productive investment);
- monitoring managers (so that the funds allocated will be spent as envisaged); and
- transforming risk (reducing it through aggregation and enabling it to be carried by those more willing to bear it).

In any country, the financial services sector is typically made up of banks, trust and loan companies, credit unions, life and health insurance companies, property and casualty insurance companies, securities traders and exchanges, investment fund companies, pension funds, finance and leasing companies, insurance agents and brokers, and a myriad of auxiliary service providers, such as independent financial advisors, actuaries, and intermediaries. Apart from its participation in GDP, the sector is usually a significant contributor to employment.
II.J.3. SPECIFIC COMMITMENTS AND NEGOTIATIONS

a. COMMITMENTS

Governments have made more commitments in financial services than in any other sector except tourism. Virtually all Members making commitments in financial services included undertakings on the core banking activities (acceptance of deposits and lending). The sectoral coverage is more comprehensive in developed countries than in developing ones. Generally speaking, both in terms of services covered and quality of commitments, securities activities are less well covered than insurance activities, which are in turn less covered than banking.

The number of limitations maintained on market access and national treatment is higher than in several other sectors and the level of commitments undertaken varies considerably, both between Members and different sub-sectors. In fact, there appears to be a lower share of “full commitments” in the financial services sector as compared to some other sectors, probably reflecting highly sensitive regulatory issues.

To complete the picture of current commitments, some 27 Members (EU counted as one) have taken MFN exemptions for specific measures affecting trade in financial services. Additional commitments on regulatory issues have been made only by a small number of Members in the context of the extended negotiations concluded in 1997.

b. FINANCIAL SERVICES IN THE DDA

In the course of the Doha negotiations, less than half of the offers formally circulated (both initial and revised) include improvements to previous commitments on financial services. Those improvements are, however, not impressive and seem to fall short of capturing the openness carried out in recent years by most Members.

Contrary to other sectors under negotiation within the DDA, so-called technical issues (e.g. classification or scheduling of commitments) have not attracted much attention. Rather, negotiations have concentrated on the elimination of limitations on market access and national treatment. Improved commitments on mode 3 (supply through commercial presence) has been identified as the priority by the main demandeurs. Their objective is to eliminate the key restrictions affecting the supply of all financial services through establishments abroad, including the following:

- restrictions on the form of commercial presence (subsidiaries, branches);
- limitations on foreign equity participation;
- quantitative limitations on the number of service suppliers;
- mandatory cession requirements to state-owned reinsurance companies;
- monopolies in insurance (particularly in reinsurance);
- economic needs tests;
- restrictions on geographical expansion;
- restrictions on the types of activities that can be carried out in different geographical areas;
- prohibition on new entry; and
- discrimination between domestic and foreign suppliers regarding the application of laws and regulations.
II.J.4. POLICY CHALLENGES

Significant benefits are likely to arise from the liberalization of financial services trade. First, enhanced competition improves sectoral efficiency, leading to lower costs, better quality, and more choice of financial services. Second, liberalization improves financial intermediation and investment opportunities through better resource allocation across sectors, countries and time, and through better means of managing risks and absorbing shocks. Third, the opening of the economy may induce governments to improve macroeconomic policy, as well as financial sector regulation and supervision.

However, a number of challenges must be met if countries are to reap the full benefits from trade liberalization. Macroeconomic stability, structural policies which minimize distortionary interventions in the financial sector and prudential regulation and supervision are key, otherwise liberalization may exacerbate problems in the financial sector or the economy. There is no universally applicable liberalization strategy, and individual country circumstances should determine the specific timing and sequencing of reform.

The GATS provides a valuable opportunity to commit to liberalization in the multilateral context. Through the MFN principle, commitments made under the GATS have the particular advantage of guaranteeing non-discriminatory treatment to all WTO Members. Commitments which tie in current levels of market access and future liberalization create security and predictability. Finally, it should be borne in mind that the GATS permits Members to take additional prudential measures and measures to protect the balance-of-payments should these become necessary, notwithstanding the binding nature of market access and national treatment commitments.

II.K. HEALTH SERVICES

II.K.1. CLASSIFICATION AND SCHEDULING ISSUES

In W/120, the health sector is comprised of two main segments: (i) "Health Related and Social Services", which include hospital services, social services and other human health services; and (ii) various professional services, including medical and dental services, the services provided by midwives, nurses, physiotherapists and para-medical services. Moreover, other services, such as life, accident and health insurance, found in the financial services section, are also directly relevant to the health sector.

Health services is one of the few sectors where no (re-)classification proposals have been made in the current negotiations.

The GATS applies to health services as to any other sector, except for those services that are provided "in the exercise of governmental authority" (GATS Art. I:3). In the absence of specific commitments, the impact of the GATS is thus limited to those unconditional obligations that apply across the board, first and foremost Most-Favoured-Nation treatment.

All four modes of supply are relevant for health services.

- Cross-border supply (mode 1): As in other sectors, new communication technologies have opened possibilities for providing health services across borders. Tele-health (or tele-medicine), which was
virtually inexistent at the time of entry into force of the GATS, is now gaining increasing importance. It may be used as a substitute or a complement for the local provision of medical or hospital services.

- Consumption abroad (mode 2) appears to be of growing importance. Several countries view health tourism as a development opportunity and are deliberately promoting and marketing their health services in order to attract foreign patients.

- Commercial presence (mode 3) refers to the establishment of a foreign supplier in the territory of the Member concerned, generally through foreign direct investment (FDI). In the health sector, this can take the form of a hospital. Technology transfer is often associated with such investment.

- Presence of natural persons (mode 4) covers the movement of health professionals (doctors, nurses, etc.) to provide services in a host country on a temporary basis. This mode can potentially play a significant role in health services. In practice, in health, as in all other service sectors, it accounts for a very limited share of trade flows under the GATS.

II.K.2. ECONOMIC IMPORTANCE (SOCIAL IMPORTANCE) AND MAIN FEATURES

Trade-related considerations have not proved a dominant policy concern for national health administrations, apart from issues related to international migration of staff. Even in the most advanced countries, where the health services sector is an economic giant (for instance, health spending accounted for more than 15 per cent of GDP in the United States in 2006), it has remained a minor contributor to trade.

Health is a sector where genuine policy objectives – relating to equity, quality and distributional justice – are potentially difficult to reconcile. The provision of health services may be organised very differently across countries. While some countries provide for the free provision of services through public facilities, others allow for cooperation between private and public providers, combined with insurance schemes, whether mandatory or not. Different institutional arrangements reflect the wide range of ethical, cultural and social values involved, and these may vary widely across countries and societies.
II.K.3. SPECIFIC COMMITMENTS AND NEGOTIATIONS

a. COMMITMENTS

The health services sector records one of the lowest levels of specific commitments under the GATS.

<table>
<thead>
<tr>
<th>Sub-sector</th>
<th>Current GATS commitments (No. of members)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Medical and dental services</td>
<td>56</td>
</tr>
<tr>
<td>Services provided by midwives, nurses, and physiotherapists</td>
<td>24</td>
</tr>
<tr>
<td>Hospital services</td>
<td>47</td>
</tr>
<tr>
<td>Other human health services</td>
<td>24</td>
</tr>
<tr>
<td>Social services</td>
<td>17</td>
</tr>
<tr>
<td>Other</td>
<td>7</td>
</tr>
</tbody>
</table>

*Source: WTO Secretariat, EU 12 counted as one.*

As in other sectors, mode 1 is mostly consolidated as “unbound” or “none” (with a slight majority for the latter); few limitations have been listed. Mode 2 commitments are generally liberal; a few Members have listed restrictions concerning the portability of insurance schemes. Limitations are more frequent on mode 3 commitments; they refer, *inter alia*, to economic needs tests, nationality requirements, equity ceilings, or joint venture requirements. As noted before, most Members define their mode 4 commitments horizontally, which means that they are the same for all committed services.

The main concern which is being raised in relation to mode 4 liberalization in this sector is the so-called “brain drain”, i.e. the fear that services liberalization might prompt qualified doctors and nurses from developing countries to leave their home countries to practice abroad. The issue of “brain drain” has, however, not surfaced in the ongoing services negotiations. It should be remembered that nothing in the GATS would prevent a country - even if it has undertaken specific commitments in a sector – to take measures aimed at curbing outflows of domestically trained staff by obliging them, for example, to practice a minimum of X years in the country before seeking a job abroad. This is because the GATS imposes access obligations on “importing” countries, but does not include disciplines which would amount to a prohibition of “export restrictions”.

b. HEALTH SERVICES IN THE DDA

No negotiating proposal has been made and no collective request tabled on health services. So far, less than 20 Members, mainly developing countries, have made conditional offers in one or more health services. The limited interest shown in the negotiations on this sector is largely explained by the sensitivities surrounding health issues and the important part played by governments in delivering health services.
Nevertheless, during the Signalling Conference held in July 2008, a few participants indicated their willingness to undertake new commitments for hospital and other health care services, including on physical wellness services which would cover traditional Asian medicine and traditional Thai massage. There were indications from some participants that they would be seeking commitments in modes 3 and 4 for private hospital services as well as extensions of sector coverage to include spa and wellness services, and traditional Chinese medicine.

II.K.4. POLICY CHALLENGES

Trade in health services provides opportunities. When adequate regulatory conditions are set, trade liberalization can contribute to enhancing quality and efficiency of the services. For example, hospitals financed by foreign investors can provide certain services not previously available as well as offer attractive employment alternatives for health professionals who might otherwise move abroad. The revenues generated through the treatment of foreign patients may be used, for instance, to upgrade facilities for the local residents. But trade in health services also carries risks. Not all countries may be able to turn potential gains into health benefits for the majority of the population. Trade in health services may also exacerbate certain problems, such as access and equity, especially for poor people as private hospitals may tend to target more lucrative market segments and disregard the needs of remote regions and disadvantaged groups.

The challenge is to maximize the opportunities and contain the risks. Trade liberalization heightens the need for effective regulatory frameworks to ensure that private sector activity in the health system generates the expected benefits. Each country will have to assess the potential implications in developing its stance in GATS negotiations (and to decide whether to bind liberalization, and if so, in what way and at what pace).

II.L. TOURISM

II.L.1. CLASSIFICATION AND SCHEDULING ISSUES

Tourism, broadly defined, is regarded as the world’s largest industry, and one of the fastest-growing. One of the crucial aspects of this sector is that the consumer typically comes to the country of the supplier, which significantly increases opportunities for developing country exporters. Tourism services are an important export for most developing countries, and a major source of foreign exchange for almost all LDCs.

As defined under W/120, the "Tourism and Travel Related Services" sector is limited in scope, comprising only hotels and restaurants, travel agencies and tour operators, and tourist guide services (together with an "Other" sub-category). Numerous other tourism services - such as computer reservation systems; cruise ships and many other transport services; hotel construction; car rentals; certain distribution, business, and financial services; as well as most recreational, cultural and sporting services - have been placed within other W/120 sectoral categories. While this complicates the task of negotiating tourism-related GATS commitments, it often makes sense from a regulatory perspective (e.g. having the transport ministry establish and administer safety standards for tourism buses).

Under the WTO's Services Sectoral Classification List (W/120), "Tourism and Travel Related Services," is divided unto four sub-sectors, the first three of which have associated listings under the United Nations' "Provisional Central Product Classification".
IN DETAIL

<table>
<thead>
<tr>
<th>A. Tourism and Travel related Services</th>
<th>CPC</th>
</tr>
</thead>
<tbody>
<tr>
<td>a. Hotels and restaurants (including catering)</td>
<td>641-643</td>
</tr>
<tr>
<td>b. Travel agencies and tour operators services</td>
<td>7471</td>
</tr>
<tr>
<td>c. Tourist guides services</td>
<td>7472</td>
</tr>
<tr>
<td>d. Other</td>
<td></td>
</tr>
</tbody>
</table>

A comprehensive “checklist” of tourism-related services, indicating the corresponding W/120 classifications, can be found in WTO document S/CSS/W/19.

II.I.2. ECONOMIC IMPORTANCE AND MAIN FEATURES

Nearly all WTO Member governments emphasize the importance of tourism, especially in terms of its contribution to employment and generating foreign exchange. A dynamic sector, tourism-related services are labour-intensive, with numerous links to other major segments of the economy. A crucial aspect of international tourism is the cross-border movement of consumers. This permits even unskilled workers in remote areas to become "service exporters", for instance by selling craft items, performing in cultural shows, or working in a tourism lodge.

As highlighted in a paper of the United Nations Economic Commission for Africa (UNECA), tourism can make a very substantial contribution to the economic and social development of many developing countries: “As an industry, it is labor-intensive; it is less vulnerable than traditional sectors; it is noncyclical; it has a catalytic effect on the rest of the economy; it has lower barriers to entry and creates better and more gender concerned jobs than most sectors. More important, being built on natural and cultural assets and consumed onsite, it can reach the poor in rural areas where poverty is harsher”.35

The UNECA paper emphasizes that, in addition to the direct jobs created in the tourism sector (both at the investment stage in construction, manufacturing, etc., as well as the labour required to run tourism establishments), indirect jobs are created through the outsourcing of certain services and small-scale enterprises. In addition, the linkages with the informal sector are strong, for example as evidenced by the handicrafts sold by street vendors at almost every tourism destination. The paper noted that tourism contributed significantly to the graduation from LDC status of Botswana, and that in Vanuatu, Samoa, Maldives and Cape Verde, all considered for LDC graduation, it was the leading sector.36

According to the World Tourism Organization, international tourist arrivals reached 903 million in 2007, up 6.6 per cent on 2006. Earnings reached a record US$856 billion, increasing in real terms by 5.6 per cent over 2006. Receipts from international passenger transport were estimated at US$165 billion, bringing the total

35 Economic and Social Policy Division, UNECA, Tourism and Trade in Africa: How can African Countries Benefit from the Doha Round of Multilateral Trade Negotiations - Evidence from Three Countries.
36 Since the paper was issued, Cape Verde has also graduated.
international tourism receipts including international passenger transport (i.e. visitor exports), to over US$1 trillion, corresponding to almost US$3 billion a day. While, back in 1950, the top 15 destinations absorbed 98 per cent of all international tourist arrivals, in 1970 the proportion was 75 per cent, and this fell to 57 per cent in 2007, reflecting the emergence of new destinations, many of them in developing countries.  

Europe accounted for about one-half of worldwide tourism receipts in 2007 (50.6 per cent), Asia-Pacific 22.1 per cent, the Americas 20 per cent, the Middle East 4 per cent and Africa 3.3 per cent. At the national level, the top-earning countries in 2007 were the US (US$96.7 billion), Spain (US$57.8 billion), France (US$54.2 billion), Italy (US$42.7 billion), China (US$41.9 billion), the UK (US$37.6 billion), Germany (US$36 billion), Australia (US$22.2 billion), Austria (US$15.4 billion), and Turkey (US$18.5 billion).

II.L.3. SPECIFIC COMMITMENTS AND NEGOTIATIONS

a. COMMITMENTS

About 130 WTO Members (counting the EU as one Member) have made GATS commitments under the category “Tourism and Travel Related Services” as defined under W/120. This number is greater than for any other sector, and may indicate the intention of most Members, both developing and developed, to expand their tourism sectors and attract inward FDI. While the current structure of the services database unfortunately does not permit the wider monitoring of tourism commitments according to the “Cluster of Tourism Industries,” an analysis of the data for the Caribbean and for the Middle East indicates generally low levels of commitments.

The level of commitments by both mode of supply and sub-sector varies widely for Tourism and Travel-Related Services. The percentage of Members making no commitments ("Unbound") is significantly higher for Mode 1 (cross-border supply) than for other modes, posing potential difficulties, especially for the supply of travel agency and tour operators services. By sub-sector, all Members making tourism commitments included commitments under Hotels and Restaurants (sub-sector A), with a significantly smaller number (106) making commitments under Travel Agencies and Tour Operators Services (sub-sector B). Only about half (64) of Members with tourism commitments made them under Tourist Guides Services (sub-sector C), and only 17 made commitments for the "Other" category (sub-sector D).

b. TOURISM SERVICES IN THE DDA

In the negotiations, a moderate level of attention has been given to tourism, with about 20 developing country Members and 6 developed country Members (counting the EU as one Member) making initial offers. For the most part, the offers are modest improvements to existing commitments, with only a limited number of Members adding new sub-sectors.

II.L.4. POLICY CHALLENGES

Unlike for most goods and services sectors, the liberalization of international trade in tourism services is typically a process of domestic policy reform, rather than of obtaining concessions from trading partners. Tourism is extremely dependent on effective linkages with a wide range of infrastructural services, including transport, financial services, and telecommunications, which offers further opportunities for trade liberalization. Promotion of sustainable tourism can have an important impact on poverty alleviation, due to significant employment opportunities for low-skilled labour, as well as to the location of many tourism attractions in rural and remote areas.

It must be emphasized that adequate infrastructure needs to be in place (and sufficiently maintained) to support any intended tourism activities, both for domestic and international tourism. This most obviously includes airport facilities, port facilities, road systems and telecommunications, as well as water supplies, electric power and sewage treatment facilities. Regarding actual tourism facilities, adequate consideration must be given to lodging and food, as well as local transportation. Obviously, trade liberalization, including under GATS mode 3 commitments, could have a significant effect in providing needed technology and capital.

In the current GATS negotiations, the fragmented nature of the industry often makes policy coordination difficult. Tourism in most countries is dominated by small and medium sized enterprises, many of which are in the informal sector, and includes parts of many different economic sectors. The result is frequently a lack of strong domestic lobbies for tourism. In this context, large domestic interests, e.g. national airlines, telecoms monopolies, etc., can often override the general interests of the tourism sector. National-level committees to address tourism issues might thus be desirable, presided over by suitably high-ranking leaders with the authority to ensure cooperation between the relevant ministries and other government agencies.

II.M. TRANSPORT SERVICES

Transport services are a key facilitator of trade and also of the economy as whole. It is an an extremely heterogeneous sector and covers: (1) maritime transport; (2) land transport; (3) air transport; (4) space transport; (5) inland waterways transport; and (6) services auxiliary to all modes of transport. Each of these sub-sectors have their own inherent characteristics and need to be explained separately.

II.M.1. MARITIME TRANSPORT

a. CLASSIFICATION AND SCHEDULING ISSUES

Members that have scheduled maritime transport commitments have two classifications at their disposal, the W/120 system and the so-called "maritime model schedule" (MMS). They can also mix those two classifications and /or use sui generis concepts. The W/120 and MMS systems of classification are described below.

38 For a detailed description of the various modes of transport and their WTO regime: see S/CW270, SC/W/270add1 and S/C/W/270 add 2 for air transport, S/C/W/62 and S/CSS/W106 or maritime transport, S/C/W/60 for road transport (including urban freight and coaches) and S/C/W/61 for railways transport.
IN DETAIL

<table>
<thead>
<tr>
<th>The W/120 maritime classification</th>
<th>CPC</th>
</tr>
</thead>
<tbody>
<tr>
<td>a. Passenger transportation</td>
<td>7211</td>
</tr>
<tr>
<td>b. Freight transportation</td>
<td>7212</td>
</tr>
<tr>
<td>c. Rental of vessels with crew</td>
<td>7213</td>
</tr>
<tr>
<td>d. Maintenance and repair of vessels</td>
<td>8868**</td>
</tr>
<tr>
<td>e. Pushing and towing services</td>
<td>7214</td>
</tr>
<tr>
<td>f. Supporting services for maritime transport</td>
<td>745**</td>
</tr>
</tbody>
</table>

These categories are complemented by services auxiliary to all modes of transport (item 11.H of the CPC) insofar as they are provided in a maritime context.

These auxiliary services include the following:

<table>
<thead>
<tr>
<th>The W/120 maritime classification</th>
<th>CPC</th>
</tr>
</thead>
<tbody>
<tr>
<td>a. Cargo-handling services</td>
<td>741</td>
</tr>
<tr>
<td>b. Storage and warehouse services</td>
<td>742</td>
</tr>
<tr>
<td>c. Freight transport agency services</td>
<td>748</td>
</tr>
<tr>
<td>d. Other</td>
<td>749</td>
</tr>
</tbody>
</table>

The W/120 classification for maritime transport has predominantly been used in "old" commitments (i.e. those undertaken in 1993). More recent commitments (those taken in 1996 - see below - or as a result of accession) and DDA offers tend to be based on the MMS which has been specifically devised to describe the maritime sector in more detail. The MMS is divided in four "pillars", namely

(a) international maritime transport (which is further divided into liner, bulk and tramp, and other international shipping including passenger transportation),

(b) auxiliary services (divided in six sub-sectors)**

(c) access to and use of port services (divided in nine sub-categories)*, and

(d) access to and use of multimodal transport services.

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39 The (**) indicates that the service specified constitutes only a part of the total range of activities covered by the CPC concordance (e.g. voice mail is only a component of CPC item 7523).

40 Maritime cargo handling services, storage and warehousing services, customs clearance services, container stations and depot services, maritime agency services and [maritime] freight forwarding services.

41 Pilotage / towing and the tug assistance / provisioning, fuelling and watering / garbage collecting and ballast waste disposal / port captain's services / navigation aids / shore based operational services essential to ship operations including communications water and electrical supplies / emergency repair facilities [and anchorage, berth and berthing facilities].
The sub-sectors contained in the first two pillars have an approximate equivalent in the CPC. The third and fourth pillars are not directly related to liberalization, but to guarantees given to foreign suppliers that may access certain services. They therefore appear in the “additional commitments” column.

Unlike CPC, the MMS does not cover maintenance and repair of vessels nor port services as activities for undertaking market access and national treatment commitments. The Model Schedule is not intended to provide an exhaustive classification, but a model for ‘ideal’ commitments. Its scope is thus narrower than that of the CPC in two instances: (i) it excludes cabotage (i.e. domestic traffic, for which has proven too difficult to obtain commitments, even though this activity falls within the scope of the GATS); and (ii) for the same reason, it excludes "the direct activities of dockers, when this workforce is organised independently of the stevedoring or terminal operator companies."

Paradoxically, as private management and operation of terminal without docker pools has become the dominant mode of delivery, it is now better reflected by the CPC definition of cargo handling.

b. Economic Importance and Main Features

Often dubbed the “life blood of world trade”, shipping remains the dominant mode of international transport. It accounts for 90 per cent of the volume of world trade (one containership may carry the equivalent of 8000 truckloads or 40 trainloads). The world fleet currently consists of 26,280 cargo ships, manned by over 1.2 million seafarers, and owned by some 4,800 companies. The total turnover of the sector was estimated by UNCTAD in 2004 at US$380 billion, including US$100 billion for liner shipping, US$30 billion for container terminal operators, and US$25 billion for freight forwarding.

The industry is increasingly concentrated in certain segments (liner, car carriers, cruise, large tankers, reefers), where the top five players often account for more than 50 per cent of the traffic. In other segments, small companies are still prevalent (dry bulk, non-containerized general cargo, small tankers, ferries). The 35 largest maritime nations account for 97 per cent of the tonnage, of which two-thirds are under foreign flag ("controlled fleet"), mostly open registry fleets. The global transport volume has quadrupled over the past forty years, with the container segment growing 2.5 times faster than world GDP.

c. Specific Commitments and Treatment in Negotiations

Commitments

56 Members currently have maritime commitments. Of these, 29 followed the W/120, 20 the MMS, and seven a combination of both. In terms of Members, which used the W/120 as the basis for their commitments, the breakdown in terms of individual sub-sectors is shown below:
<table>
<thead>
<tr>
<th><strong>W/120 Sub-sector</strong></th>
<th><strong>Current GATS Commitments (No. of Members)</strong></th>
</tr>
</thead>
<tbody>
<tr>
<td>Passenger transport</td>
<td>19</td>
</tr>
<tr>
<td>Freight</td>
<td>22</td>
</tr>
<tr>
<td>Rental with crew</td>
<td>16</td>
</tr>
<tr>
<td>Maintenance and repair</td>
<td>20</td>
</tr>
<tr>
<td>Towing and pushing</td>
<td>10</td>
</tr>
<tr>
<td>Supporting services</td>
<td>11</td>
</tr>
</tbody>
</table>

In the case of Members using the MMS pillars, the following commitments were taken:

<table>
<thead>
<tr>
<th><strong>MMS Pillars</strong></th>
<th><strong>Current GATS Commitments (No. of Members)</strong></th>
</tr>
</thead>
<tbody>
<tr>
<td>International maritime transport</td>
<td>18</td>
</tr>
<tr>
<td>Auxiliary services</td>
<td>4</td>
</tr>
<tr>
<td>Access to and use of port services</td>
<td>19</td>
</tr>
<tr>
<td>Access to and use of multimodal transport services</td>
<td>2</td>
</tr>
</tbody>
</table>

It is notable that there are few commitments on key segments of modern shipping - auxiliary services, access to and use of multimodal transport.

**MARITIME TRANSPORT IN THE DDA**

The maritime sector is subject to a specific regime, as specified in decision S/L/24, which was the outcome of the 1995-1996 sectoral negotiations. The scope of this decision covers international maritime transport, access to use of port services and maritime auxiliary services. The Decision suspended the MFN obligation to maritime transport except for commitments already undertaken. It also suspended the then ongoing negotiations and foresaw their resumption in the framework of the next round of services negotiations (which was subsequently launched in 2000 and later subsumed under the DDA negotiations). A standstill obligation was also imposed and it was further stipulated that notwithstanding Articles II and XXI of the GATS, Members would be allowed 60 days before the end of the negotiations to revisit their specific commitments and MFN exemptions\(^\text{42}\), as they saw fit.

\(^{42}\) MFN exemptions in maritime transport services typically cover bilateral cargo sharing agreements, membership of the UN liner code of conduct for maritime conferences, and reciprocity regimes for access to cargo or to maritime professions as well as tax exemptions.
In other words, maritime transport is the only area of the services negotiations where Members can modify or withdraw their existing commitments without being subject to the procedures (and potential compensation) required Article XXI of the GATS. It is also the only sector where Members can list new MFN exemptions or enlarge the scope of existing ones. The relevant rules in that respect are contained in the "Explanatory note on listing of Article II exemptions".

During the early phase of the DDA, several negotiating proposals and collective statements were made on maritime transport. In November 2005, Members collectively identified sectoral and modal objectives for the negotiations on maritime transport. Following the Hong Kong Ministerial Declaration, two separate plurilateral requests were submitted to targeted Members recommending the use of the maritime model schedule. The requests called for the elimination: of cargo reservations; restrictions on foreign equity participation; and on the right to establish a commercial presence both for international freight transport and for maritime auxiliary services. The requests also called for additional commitments on access to/use of port services and multimodal transport services, as well as for the elimination of MFN exemptions.

d. POLICY CHALLENGES

The costs of maritime protectionism for the overall economy in terms of lost export trade and hence employment, and of additional cost on imports, are well documented notably in research by the World Bank. Free flow of goods through an efficient ocean transport system is of paramount importance to world trade. To a large extent, it is the development of containerization of specialized bulk vessels and the consequent productivity gains in shipping (e.g. the size of container vessels has quadrupled in less than twenty years) that has made globalization possible.

Because of their provisional nature (see earlier explanation of S/L/24 decision), maritime commitments are fragile and can be legally withdrawn as Members have flexibility to modify their commitments during the 60 day period before the end of the current round. There are risks that during an economic downturn, maritime restrictions may be used as a form of "hidden" protection as they are relatively easy to implement.

II.M.2. LAND TRANSPORT

a. CLASSIFICATION AND SCHEDULING ISSUES

In accordance with W/120, land transport encompasses 3 sub-sectors: rail, road and pipelines. Each of these sub-sectors are further broken down into different sets of discrete activities (see below).

43 For a detailed description of these proposals and statements see Job (05) /299 "Maritime transport services, information by the Secretariat".
IN DETAIL

Sub-sectors that are covered by land transport include:

<table>
<thead>
<tr>
<th>E. Rail Transport Services</th>
<th>CPC</th>
</tr>
</thead>
<tbody>
<tr>
<td>a. Passenger transportation</td>
<td>7111</td>
</tr>
<tr>
<td>b. Freight transportation</td>
<td>7112</td>
</tr>
<tr>
<td>c. Pushing and towing services</td>
<td>7113</td>
</tr>
<tr>
<td>d. Maintenance and repair of rail transport equipment</td>
<td>8868**</td>
</tr>
<tr>
<td>e. Supporting services for rail transport services</td>
<td>743</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>F. Road Transport Services</th>
<th>CPC</th>
</tr>
</thead>
<tbody>
<tr>
<td>a. Passenger transportation</td>
<td>7121+7122</td>
</tr>
<tr>
<td>b. Freight transportation</td>
<td>7123</td>
</tr>
<tr>
<td>c. Rental of commercial vehicles with operator</td>
<td>7124</td>
</tr>
<tr>
<td>d. Maintenance and repair of road transport equipment</td>
<td>6112+8867</td>
</tr>
<tr>
<td>e. Supporting services for road transport services</td>
<td>744</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>G. Pipeline Transport</th>
<th>CPC</th>
</tr>
</thead>
<tbody>
<tr>
<td>a. Transportation of fuels</td>
<td>7131</td>
</tr>
<tr>
<td>b. Transportation of other goods</td>
<td>7139</td>
</tr>
</tbody>
</table>

For rail transport, there are no classification problems although one of the W/120 items (11.E.c item pushing and towing [on a fee or contract basis]) is in practice not a service that is usually provided by on a third-party basis. This service is often undertaken by the rail carrier itself and not by a separate "pushing and towing" service provider. There are, however, some scheduling difficulties. There are two main ways of liberalizing rail transport: (i) short, or long-term concessions given to one operator with a monopoly on part or totality of the network; or (ii) the separation of the operation of the network from the operation of the carriage with the allocation of "paths" to a multiplicity of carriers in an open access regime. Both arrangements have no direct equivalent in GATS terms and do not fit easily within the conceptual framework of Articles XV, XVII and XVIII.

For pipeline transport, similar scheduling issues as those in rail transport arise. The operation of the pipeline network can be separated from the activities of pipeline users. In such a situation, as in rail transport, it is necessary to have disciplines that ensure pipeline operators do not abuse their position by establishing unreasonable/anti-competitive terms for access and use of the network. WTO Members have, however, not developed in the GATS framework the types of third-party access disciplines that regulate this sector in many national regimes. In addition, the relevance and meaning of mode 1 commitments remain somewhat unclear except for advisory services and remote monitoring and control activities. On the other hand the classification
of pipeline services is straightforward (transportation of fuels including gas versus transportation of other goods including chemical products) and does not seem to have created any particular difficulties.

**For road transport**, in terms of scheduling, the difficulties arise from the over-aggregated nature of the W/120 classification. For instance, item a: "road passenger transport, CPC 7121 + 7122" groups together activities such as taxis, urban buses and light rail networks, inter-urban and international coaches. The problem is that each of these components of road transport follow very different market access and licensing regimes. This makes it difficult to use W/120 as a tool for scheduling commitments. Hence, Members wishing to schedule commitments in the area of road transport may often need to disaggregate activities by using the individual five digits items of the CPC or their own *sui generis* definitions.

Another important factor to be borne in mind is that international trucking and coach transport have traditionally been regulated through bilateral-cargo sharing agreements. A Member desiring to preserve such arrangements should list them in their MFN exemption list. This option, however, currently only applies to acceding countries, as existing Members of the WTO cannot now add new MFN exemptions to their schedule. There is also an issue of compatibility between scheduling commitments under mode 1 and bilateral agreements. For example, a bilateral agreement may not allow any non-parties to have any market access to provide international trucking and coach transport services. In such a case, a Member should not schedule commitments under mode 1.

**b. Economic importance and main features**

The land transport sector covers a wide range of activities which often have little in common. Some types of transport are highly capital-intensive (e.g. rail transport, pipelines), whereas others require relatively little investment (e.g. taxis, trucks, even coaches). Large numbers of people are employed in rail transport, for example, where a single company may employ several hundred thousand staff but in other cases, such as pipelines, labour costs are only of marginal importance. Moreover, some of these activities take place within a regulatory context characterized by the need to provide a public or universal service (e.g. urban public transport, passenger rail transport), whereas others are clearly treated as purely market activities (e.g. pipelines, freight transport by road and rail).

The degree of concentration is also extremely variable. Some activities are in the hands of monopolies or oligopolies (e.g. pipelines, rail transport), while others are performed by companies of various sizes or even by individuals (e.g. taxis, urban and suburban road passenger transport, road haulage). Nevertheless, these activities have certain features in common. They are "downstream" secondary activities whose cycles follow and amplify those of the general economy, i.e. an increase in GDP results in a more than proportional increase in the demand for transport.

Furthermore, there are activities which, to some extent, compete with each other and with other modes of transport. For instance, taxis, urban buses and subways compete for urban passengers; rail, road, inland waterways, cargo ships and pipelines compete for freight traffic; and trains, aircraft, coaches and even taxis compete for the inter-urban passenger business. This inter-modal competition and the steady shift of traffic from rail to road, which began in the 1930's are largely responsible for the regulatory regime governing land transport. The "foreign competition" element is often marginal and a consideration only in the road freight transport sector.
c. **Specific Commitments and Negotiations**

**For road transport**, as defined by 11.F of W/120, 56 Members (EU counted as one) have undertaken commitments while 41 Members (not necessarily the same) listed MFN exemptions in this sector. Many restrictions have been listed in this somewhat heavily regulated sector.

**For rail transport**, the number of commitments is lower and stands at 35 Members (EU counted as one), mostly on maintenance and repair; rail transport strictly speaking being the object of less commitments (i.e. 18 for freight and 17 for passengers). There, too, the commitments are the object of many qualifications. MFN exemptions have been listed by 13 Members.

**For pipelines transport**, 15 Members (EU counted as one) have undertaken commitments, including one on transit in the form of additional commitments, while one Member has listed an MFN exemption.

In November 2005, WTO Members collectively identified in generic terms their sectoral and modal objectives of negotiations for road, rail and pipelines transport. Unlike many other sectors, road and rail transport have not been the object of a plurilateral request, and pipeline transport was not included in the plurilateral request on energy services.

d. **Policy Challenges**

The relatively low number of commitments in land transport as well the low priority given to the sector in the DDA negotiations reflects several factors. These are strategically/politically sensitive sectors where national and regional liberalization processes are often still underway and disputed (e.g. third party access is not yet the universal rule for pipelines; rail transport liberalization is spreading, be it in the form of concessions or open access, but is not universal). In addition, in the case of the somewhat less sensitive sector of road transport, the pre-existence of a bilateral framework makes the transition to a multilateral regime difficult - despite the fact that international road transport represents less than 5 per cent of total traffic, and mode 3 commitments could prove beneficial to the investing and to the receiving country. Finally, while private management of urban transport has become very widespread, there is the issue of whether government awarded concessions fall within the scope of the GATS.

**II.M.3. AIR TRANSPORT**

a. **Scope, Classification and Scheduling Issues**

This sector is governed by a specific Annex to the GATS which contains particular disciplines and definitions. This Annex excludes from the disciplines of the GATS the largest part of air transport services: traffic rights and services directly related to traffic, but subjects this exclusion to a regular review. Traffic rights are defined in a very precise and encompassing manner, while services directly related to traffic rights have not been defined at all.

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44 For a detailed description of those restrictions see document S/C/W/60
The Annex, however, indicates that the GATS shall apply to measures affecting three sectors, namely: aircraft repair and maintenance services; computer reservation system services; and selling and marketing of air transport services.

IN DETAIL

The definitions given for each of the sectors covered by the GATS are the following:

(a) "Aircraft repair and maintenance services" mean such activities when undertaken on an aircraft or a part thereof while it is withdrawn from service and do not include so-called line maintenance.

(b) "Selling and marketing of air transport services" mean opportunities for the air carrier concerned to sell and market freely its air transport services including all aspects of marketing such as market research, advertising and distribution. These activities do not include the pricing of air transport services nor the applicable conditions.

(c) "Computer reservation system (CRS) services" mean services provided by computerised systems that contain information about air carriers' schedules, availability, fares and fare rules, through which reservations can be made or tickets may be issued.

The absence of a definition for "services related to traffic rights" has triggered a longstanding "grey area controversy" among Members. Some of them, the so-called "friends of aviation", contend that all aviation-related services that do not require operationally the detention of traffic rights such as airport management services, ground handling services, catering services, hangar services, leasing services, freight forwarding in an air transport context, etc. are already within the scope of the GATS and can therefore be the object of commitments. Other Members consider that those services are related to traffic rights and therefore not covered by the GATS.

From a practical point of view, the consequences of this somewhat complex situation is that a Member willing to commit on the services listed in the Air Transport Annex should do so by using the definition contained therein, rather than the W/120. Only one of the three items of the Annex, aircraft repair and maintenance has a straightforward equivalent in the W/120: "d. Maintenance and repair of aircraft, 8868**45**. But even then the definition is not as clear and equivalent in scope as that of the Annex, as there is no exclusion of line maintenance. 46 The other two items, computer reservation system services and selling and marketing of air transport services have no clear correspondence within the W/120. 47 As for the other two air transport items of the W/120, namely "11.C.a passenger transportation, CPC 731" and "11.C.B freight transportation; CPC 732", these seem to fall clearly outside the scope of the GATS because of the traffic rights exclusion.

Members that embrace the views of the "friends of aviation" on the scope of the Annex, and are willing to commit on aviation-related sectors other than those explicitly listed, should do so on the basis of precise definitions that are drawn from the CPC or are sui generis in nature.

45 The (**) indicates that the service specified constitutes only a part of the total range of activities covered by the CPC concordance (e.g. voice mail is only a component of CPC item 7523).

46 It is fact limited to a title "Repair services of other transport equipment [than automobiles, trailers and semi-trailers] on a fee or contract basis.

47 For detailed discussion of these points see S/C/W/59 paragraphs 37-40, page 13.
It should be noted also that even for air services falling within the scope of the GATS, the Air Transport Annex creates a specific regime. First, it grandfathered obligations stemming from bilateral or multilateral obligations that were in effect at the date of entry into force of the WTO Agreement (1 January 1995).

Second, the dispute settlement provisions of the GATS may only be invoked where dispute settlement procedures in bilateral and other multilateral agreements or arrangements have been exhausted.

b. Economic importance and main features

Close to 2 billion passengers annually and 40 per cent of international tourists now travel by air. Forty per cent of intercontinental exports of goods by value and 25 per cent of all companies’ sales are dependent on air transport.

The airline and airport industry directly employs 4.3 million people (2.1 million for airlines and handling agents; 330,000 for airport operators and 1.9 million jobs onsite at airports). It creates 5.8 million indirect jobs through the purchase of goods and services from companies in the supply chain, 2.7 million induced jobs through spending by industry employees, and 15.5 million direct (6.7 million) and indirect (8.3 million) jobs through its impact on tourism, which makes a total of 28.3 million direct and indirect jobs. The direct contribution of the sector to world GDP is valued at US$330 billion in 2004 and its total direct and indirect contribution to US$880 billion, that is to say 2.4 per cent of world GDP.

c. Specific commitments and negotiations

As of February 2009, there are in total 40 commitments (counting the EU as one) on CRS, 35 on selling and marketing and 53 on aircraft repair and maintenance. In addition, under the item 11.C “air transport services” of their schedules of commitments, nine Members have undertaken commitments in sectors other than those listed explicitly in paragraph 3 of the Annex, notably on rental and leasing with crew (six Members), and part or totality of supporting services for air transport, i.e. airport operation services, air navigation services and hangar services (six Members).

MFN exemptions are relatively numerous for CRS (19, counting the EU as one) and selling and marketing (20) due to the existence of “codes of conduct” containing market access sanctions in case of anti-competitive practices. Those codes of conduct have largely lost their relevance since airlines have ceased to control CRS and since the relative market share of CRS in total bookings has considerably diminished with the advent of internet bookings. There are only three MFN exemptions for aircraft repair and maintenance, one for ground handling and two for tax treatment.

In November 2005, WTO Members collectively identified their sectoral and modal objectives of negotiations for air transport. In March 2006 a plurilateral request on air transport was submitted which called for extensive commitments in five sub-sectors namely aircraft repair and maintenance, selling and marketing, computer reservation services, ground handling services and airport operation services, including full commitments on mode 1 (when technically feasible) and on mode 2, and elimination of economic needs tests and restrictions on foreign equity participation for mode 3.
d. POLICY CHALLENGES

CRS and selling and marketing of air transport services are largely liberalized except, to a certain extent, in former state trading countries. In the case of aircraft repair and maintenance, protectionist “repair local” policies are being phased-out and outsourcing is flourishing in the sector. However, as with CRS, this trend is not reflected in the commitments that have, so far, been undertaken.

Ground handling, which used to be an in-house activity for airlines or for airports has become a third-party activity enjoying structural growth in an increasingly liberalized market. While commitments have been requested in this sector in the DDA context, its GATS status remain uncertain due to disagreements among Members on the scope of the Air Transport Annex. The same is true for airport management, which has in a few years become a very large sector involving billions of dollars of investments that are linked with long term concessions.

That being said, the bulk of the aviation sector remains outside the scope of the GATS and the discussions held in the context of the two reviews (2001-2003 and the ongoing one, opened in September 2005) have not led so far to an enlargement or clarification of the scope of the Annex.

II.M.4. SPACE TRANSPORT

a. CLASSIFICATION AND SCHEDULING ISSUES

The GATS also covers space transport which is defined by W/120 as “Transportation of passengers or freight via space” (11.D – CPC 733). It thus covers, on the one hand, satellite launching services and, on the other hand, the still embryonic sector of spatial tourism. So far, no specific classification or scheduling problems have arisen in this sector.

b. SPECIFIC COMMITMENTS AND NEGOTIATIONS

Given the highly strategic nature of space transport, only three Members have taken commitments in this sector, essentially on mode 2, i.e. in this particular case allowing local consumer of satellite services (e.g. telecommunication companies) to consume satellite services abroad. One Member has listed an MFN exemption in order to cover “quantitative restrictions and price disciplines in certain bilateral agreements on the launch of satellites in the international commercial space launch market”. Space transport has not been mentioned, so far, in a multilateral context during the DDA negotiations.

c. POLICY CHALLENGES

For the moment, the sector has received little attention within the GATS context.
II.M.5. INTERNAL WATERWAYS TRANSPORT

a. **CLASSIFICATION AND SCHEDULING ISSUES**

Internal waterways transport is divided by W/120 into 6 sub-sectors, namely:

**IN DETAIL**

<table>
<thead>
<tr>
<th>11. B Internal Waterways Transport</th>
<th>CPC</th>
</tr>
</thead>
<tbody>
<tr>
<td>a. Passenger transportation</td>
<td>7221</td>
</tr>
<tr>
<td>b. Freight transportation</td>
<td>7222</td>
</tr>
<tr>
<td>c. Rental of vessels with crew</td>
<td>7223</td>
</tr>
<tr>
<td>d. Maintenance and repair of vessels</td>
<td>8868**</td>
</tr>
<tr>
<td>e. Pushing and towing services</td>
<td>7224</td>
</tr>
<tr>
<td>f. Supporting services for internal waterways</td>
<td>745**</td>
</tr>
</tbody>
</table>

Two classification problems potentially arise in this sector. The first concerns distinctions made on the type of vessels. W/120 item 11.B "Internal waterways transport" cross refers to subdivisions of CPC 721 "transport by non sea-going vessels". A similar correspondence exists between the W/120 item 11.A "maritime transport" and subdivisions of CPC 721 "transport by sea going vessels". This somewhat simplistic division of the CPC by type of vessels ignores the existence of ships that can be used on both seas and rivers. A mention in the first column "including traffic by sea/river vessels" could probably solve the problem.

The second potential problem is the status of closed seas such as the Caspian Sea or the Aral Sea. It is unclear if possible future commitments concerning those waters would fall within internal waterways (11.B) or within maritime transport (11.A). This question has never been discussed multilaterally.

b. **ECONOMIC IMPORTANCE AND MAIN FEATURES**

This sector is economically significant in only about 30 WTO Members or acceding countries. Even there, it is in most instances governed by cabotage rules and national flag monopolies, explaining the low level of commitments.

c. **SPECIFIC COMMITMENTS AND NEGOTIATIONS**

Eighteen Members (counting the EU as one) have undertaken commitments on internal waterways and 11 Members have listed MFN exemptions. Internal waterways transport has not been mentioned, so far, in a multilateral context during the DDA negotiations.
d. **POLICY CHALLENGES**

Apart from possibly accession negotiations, Members have paid little attention to this sector.

**II.M.6. SERVICES AUXILIARY TO ALL MODES OF TRANSPORT**

### a. **CLASSIFICATION AND SCHEDULING ISSUES**

#### IN DETAIL

<table>
<thead>
<tr>
<th>11. H Services auxiliary to all modes of transport</th>
<th>CPC</th>
</tr>
</thead>
<tbody>
<tr>
<td>a. Cargo-handling services</td>
<td>741</td>
</tr>
<tr>
<td>b. Storage and warehouse services</td>
<td>742</td>
</tr>
<tr>
<td>c. Freight transport agency services</td>
<td>748</td>
</tr>
<tr>
<td>d. Other</td>
<td>749</td>
</tr>
</tbody>
</table>

In terms of classification, three difficulties have emerged. The first relates to differences in maritime, air and land transport cargo handling. Maritime cargo handling providers operate under very different legal and physical conditions (long-term concession and heavy investment) than air transport ground handling operators (whose GATS status remains uncertain, see the section on air transport). This activity also does not seem to exist on a third-party basis neither for road transport nor for rail and pipeline transport.

Second, the existence of specific definitions of maritime auxiliary services in the Maritime Model Schedule should be taken into account when drafting commitments. If a Member commits on maritime auxiliary services, following the MMS, and then undertakes commitments in a service auxiliary to all modes of transport, it should make sure that there is no overlap between the two commitments.

Finally, the CPC definition of 11.H.c "Freight transport agency services" (CPC 748) and 11.H.d "Other auxiliary services" CPC 749 overlap as they both contain freight brokerage services. This may have been due to an error by the drafters of the CPC whose items are meant to be mutually exclusive.

The sectors does not seem to raise scheduling problems per se.

### b. **ECONOMIC IMPORTANCE AND MAIN FEATURES**

The global outsourced market for logistics was estimated at US$130 billion in 2002 by the US International Trade Commission. Unfortunately, no geographic breakdown is provided. Other sources indicate that the US third party logistics (3PL) market in 2003 amounted to US$77 billion. The value of outsourced European logistics in 2004 was estimated at EUR36.5 billion, which is said to be less than 10 per cent of the total market. For the US, the share of outsourced logistics reportedly exceeds 40 per cent, but the discrepancy with Europe suggests that such figures should be interpreted with extreme care. Data for other regions are rarely
available, except for China. Again, however, there are wide discrepancies between different sources; one study values the market at US$3.8 billion in 2003 and another at US$8.5 billion. Predicted annual growth exceeds 10 per cent, possibly in expectation that a deliberate policy to reduce logistics costs to US or European levels will bear fruit (transport, inventory and administrative cost add up to some 10 per cent of GDP in the USA, 12-13 per cent in Europe, and over 20 per cent in China).

Although employment figures are subject to similar uncertainties, it is obvious that the sector represents a large workforce. For instance, the Freight Forwarding International association, which groups together the nine largest European freight forwarding companies, claims that its members employ over 445,000 persons. In most instances, these are skilled jobs since IT systems are key to modern logistics (e.g. Fedex reportedly has 2.5 computers per employee). The web of small local companies, generally family businesses around airports and ports, which deal with customs clearance, freight forwarding and agency activities are not covered by existing data. These companies are particularly frequent in developing countries.

c. SPECIFIC COMMITMENTS AND NEGOTIATIONS

Setting aside commitments on maritime auxiliary services under the MMS, 33 Members (counting the EU as one) have undertaken commitments on cargo handling, 47 on storage and warehousing, 42 on freight transport agencies and 32 on other auxiliary services. Ten Members have listed MFN exemptions.

In November 2005, Members collectively identified their sectoral and modal objectives for the negotiations on logistics services. Following the Hong Kong Ministerial Declaration, a plurilateral request was addressed to targeted Members. The request divided logistics services into four clusters: core logistics services (i.e. auxiliary services to all modes of transport); freight transport services; other related logistics services (engineering and integrated engineering services, technical testing and analysis, postal and courier services - including express delivery - and distribution services except franchising); and non-core freight logistics services (computer and related services, packaging and management consulting and related services).

In all four instances, the request called for new and improved commitments on modes 1 and 2 as well as for the right of establishment under mode 3 without substantial limitations. It also called for additional commitments regarding the right to offer services in combination, to have electronic documentation accepted, to have access to use of core logistics and freight logistics services on reasonable and non-discriminatory terms, and to ensure that procedures and formalities would not be unnecessarily burdensome.

d. POLICY CHALLENGES

Logistics costs are a key factor of export competitiveness. This is well documented by the economic literature (see, for instance, the recent "Logistics Performance Index" established by the World Bank). Undertaking commitments in this area is one way, among many, to lower logistics costs by attracting foreign competition and investments as well as state-of-the-art technologies and equipment. However the interest shown by many WTO Members remains to be translated into commitments.
III. SUMMARY

This module has provided a broad overview of a wide range of sectors from the perspective of the GATS. Particular attention has been given to classification and scheduling issues, the economic importance of the sector and its main features, the type of commitments taken and treatment in the negotiations, and any policy challenges that could have a bearing on trade in services. The various sections are intended to be introductory and do not attempt to provide comprehensive descriptions of the huge and complex industries that are represented in the highly heterogeneous services sector. Thus, issues have been dealt only so far as they relate to the scheduling of commitments in the GATS and cross-references have been provided to subjects that are dealt with in greater depth in other modules of this course.

EXERCISES

1. How are financial services defined in the "Annex on Financial Services" and what is the "Understanding on commitments in Financial Services"?

2. In financial services, may a Member take prudential measures that are inconsistent with its commitments, and if yes, please explain why?

3. What is the purpose of the telecoms reference paper?

4. Why is it sometimes said that "the liberalization of international trade is tourism services is typically a process of domestic policy reform, rather than of obtaining concessions from trading partners"?

5. What is the difference between the classification of maritime transport under the W/120 list and the maritime model schedule (MMS)?
PROPOSED ANSWERS:

1. The GATS Annex on Financial Services defines a "financial service" as "any service of a financial nature offered by a financial service supplier of a Member". The Annex specifies two broad categories of services: insurance and insurance-related services and banking and other financial services. These two categories are further broken down into the following:

   - Insurance and insurance-related services, cover life and non-life insurance, reinsurance, insurance intermediation such as brokerage and agency services, and services auxiliary to insurance such as consultancy and actuarial services.

   - Banking and other financial services, include all banking and other financial services, such as the acceptance of deposits and other repayable funds from the public, lending of all types (e.g. consumer credit, mortgage credit, factoring and financing of commercial transaction), financial leasing, all payment and money transmission services (e.g. credit, charge and debit cards, travellers' cheques and bankers' drafts), guarantees and commitments, securities trading, underwriting, money broking, asset management, settlement and clearing services, provision and transfer of financial information, and advisory, intermediation and other auxiliary financial services.

The "Understanding on Commitments in Financial Services" is a unique legal instrument in the WTO that was included in the Final Act, but is not formally part of the GATS. As stated in the introduction to the Understanding, Members "have been enabled to take on specific commitments with respect to financial services under the GATS on the basis of an alternative approach to that covered by the provisions of Part III of the Agreement". Members following the approach prescribed in the Understanding agree to a standstill provision requiring any conditions, limitations and qualifications in schedules to be limited to existing non-conforming measures. Further obligations that are specific to the financial sector are also taken with respect to market access and national treatment. Despite being a sort of formula approach, and an alternative to Part III of the GATS, it remains possible for Members scheduling on the basis of the Understanding to introduce market access and national treatment limitations. Specific commitments undertaken pursuant to the Understanding apply on an MFN basis.

2. The GATS Annex on Financial Services contains the so-called, "prudential carve-out", in section 2, under the heading "Domestic Regulation." The carve-out allows Members to take "measures for prudential reasons, including for the protection of investors, depositors, policy holders or persons to whom a fiduciary duty is owed by a financial service supplier, or to ensure the integrity and stability of the financial system", even if they are inconsistent with GATS obligations and commitments. The same paragraph goes on to say that where prudential measures do not conform with other provisions of the GATS, they must not be used as a means of avoiding commitments or obligations under the Agreement.

As explained in the scheduling guidelines (document S/L/92), prudential measures need not be inscribed in Members' schedules of specific commitments, as they are not regarded as limitations on market access or national treatment (see also Module 5). The main purpose of the carve-out is to ensure that GATS commitments and disciplines do not curtail Members' ability to regulate the financial sector for prudential reasons.

3. For Members that have done so, the Reference Paper adds obligations related to the domestic telecom regulatory framework. The implications for the government concerned is that it is obliged to provide competition safeguards, interconnection guarantees (including cost-oriented rates with dominant operators), licensing disciplines, competition neutral universal service mechanisms, and ensure fairness in the allocation of scarce resources, such as the radio spectrum. Although most Members added the
standard template Reference Paper, departures were possible, so the schedule's additional commitments should be checked and confirmed for each market in which a supplier wishes to do business. More than 80 governments have attached the Reference Paper on telecom regulatory principles to their schedules as "additional commitments" and an additional seven governments have inscribed certain of its principles.

4. Tourism is extremely dependent on effective linkages with a wide range of infrastructural services, including transport, financial services, and telecommunications, which offers further opportunities for trade liberalization. Promotion of sustainable tourism can have an important impact on poverty alleviation, due to significant employment opportunities for low-skilled labour, as well as to the location of many tourism attractions in rural and remote areas. A full commitment on mode 2 for tourism services undertaken by other Members will have little effect if the local tourism infrastructure, including the transportation network, is underdeveloped.

It must be emphasized that adequate infrastructure needs to be in place (and sufficiently maintained) to support any intended tourism activities, both for domestic and international tourism. This most obviously includes airport facilities, port facilities, road systems and telecommunications, as well as water supplies, electric power and sewage treatment facilities. Regarding actual tourism facilities, adequate consideration must be given to lodging and food, as well as local transportation. Obviously, trade liberalization, including under GATS mode 3 commitments, could have a significant effect in providing needed technology and capital.

5. Members that have scheduled maritime transport commitments have two classifications at their disposal, the W/120 system and the so-called "maritime model schedule" (MMS). They can also mix those two classifications and /or use sui generis concepts.

MMS was specifically devised to describe the maritime sector in more detail. The MMS is divided in four "pillars", namely

(a) international maritime transport (which is further divided into liner, bulk and tramp, and other international shipping including passenger transportation),
(b) auxiliary services (divided in six sub-sectors),
(c) access to and use of port services (divided in nine sub-categories) , and
(d) access to and use of multimodal transport services.

The sub-sectors contained in the first two pillars have an approximate equivalent in the W/120. The third and fourth pillars are not directly related to liberalization, but to guarantees given to foreign suppliers that may access certain services. They therefore appear in the "additional commitments" column.

Unlike the W/120, the MMS does not cover maintenance and repair of vessels nor port services as activities for undertaking market access and national treatment commitments. The Model Schedule is not intended to provide an exhaustive classification, but a model for ‘ideal’ commitments. Its scope is thus narrower than that of the W/120 in two instances: (i) it excludes cabotage (i.e domestic traffic, for which has proven too difficult to obtain commitments, even though this activity falls within the scope of the GATS); and (ii) for the same reason, it excludes "the direct activities of dockers, when this workforce is organised independently of the stevedoring or terminal operator companies."
Mandates for services negotiations: progressive liberalization and rule-making

ESTIMATED TIME: 3 hours

OBJECTIVES OF MODULE 8

- Explain the various mandates for services negotiations, including those covering the rule-making areas of domestic regulation, emergency safeguard measures, government procurement and subsidies;

- explain the negotiating modalities and procedures that have been adopted by Members; and

- provide a broad appreciation of the issues involved and the various stages that have been undertaken in the services negotiations.
I. INTRODUCTION

The GATS explicitly provides for future trade negotiations with a view to achieving "a progressively higher level of liberalization". The Uruguay Round marked only a first step in improving - or at least binding - access conditions for trade in services, and contained in the Agreement is a mandate for future successive rounds of negotiations. Also contained in the Agreement are several mandates for further negotiations on disciplines on domestic regulation, as well as on GATS rules (emergency safeguard measures, government procurement and subsidies).

The GATS built-in agenda includes the mandates to undertake two types of negotiations. On the one hand, the negotiation of progressive liberalization according to the mandate contained in Article XIX; and on the other, the rule making negotiations on domestic regulation (Article VI.4), Emergency Safeguard Mechanism (Article X), Government Procurement (Article XIII), and Subsidies (Article XV). Figure 1 illustrates the scope and the manner under which each of these negotiations have been undertaken.

![Figure 1: GATS negotiations](image)

The negotiation of specific commitments under Article XIX began five years after the WTO Agreement entered into force; their aim is to achieve progressively higher levels of liberalization. Basically these negotiations are directed to the reduction or elimination of limitations and the progressive extension of commitments to more sectors. Also within the scope of these negotiations Members are expected to eliminate MFN exemptions that were taken at the moment of their accession to the WTO. Members have agreed that this process of liberalization shall take place with due respect for national policy objectives and the level of development of individual Members, both overall and in individual sectors. The negotiation mandate contained in Article XIX explains that the process of progressive liberalization shall be advanced in each round of negotiations through bilateral, plurilateral or multilateral negotiations. In this round, the market access negotiations have been pursued through the exchange of requests and offers, organized on a bilateral or plurilateral basis.

The rule making negotiations began upon entry into force of the GATS. Their scope was defined by the GATS, and their aim is to create new rules, in most of the cases to prevent adverse trade effects. Members engaged in these negotiations follow a different methodology and conduct the negotiations through proposals leading towards the establishment of new disciplines. These negotiations are undertaken in the Working Parties created for this purpose. The Working Party on Domestic Regulation is in charge of Article VI.4 negotiations, while the
Working Party on GATS rules is in charge of the safeguards (Article X), government procurement (Article XIII), and subsidies (Article XV) negotiations.

In this module, the various mandates for the negotiations will be presented. In doing so, further explanation will be given on their scope, the issues involved, as well as the negotiating modalities and procedures that have been adopted by Members.
II. SERVICES NEGOTIATIONS IN CONTEXT

While the Uruguay Round helped to establish a set of multilateral rules for services trade and the architecture for future negotiations, it did not contribute to significant cuts in actual trade barriers. Commitments taken by Members were modest and varied widely in terms of their breadth and depth. For instance, while almost all Members have committed at least one out of several tourism services and more than 100 Members have scheduled one or more financial, communication or business services, only about 50 Members have scheduled commitments in the health and/or education sectors.\(^{48}\)

This uneven pattern of commitments is explained by several factors. Firstly, some services have traditionally been open to foreign participation; for example virtually all Members have long maintained comparatively liberal investment regimes in tourism. On the other hand, certain other services, such as education and health, are in many countries predominantly within the domain of the public sector.

Secondly, sectors of general infrastructural importance, such as finance or communication, have tended to attract commitments due to the widespread growth and efficiency effects associated with inflows of foreign capital, modern technology, skills and expertise. Indeed, several developing countries that did not initially participate in the extended negotiations on basic telecommunications (concluded in February 1997) later volunteered deeper commitments. Overall, the extended negotiations in basic telecommunications and financial services (December 1997) produced far more economically significant results than those that had initially emerged from the Uruguay Round.

Thirdly, it has been observed that the number of commitments inscribed by an individual Member tends to rise with the level of its economic development, and the newness of its membership in the WTO (see Table 1).\(^{49}\) Commitments undertaken by new WTO Members, i.e. developing and transition economies that have joined since 1995, are comparable in number to those undertaken by developed Members. There is, however, considerable variation within groupings. For instance, while the average number of commitments taken by developing countries is 53, this masks a very large range from 1 to 147.

\(^{48}\) The EC Member States are counted individually.

\(^{49}\) Such comparisons need to be interpreted with care. For example, they do not take into account differences in economic importance between sectors, nor the restrictiveness of the limitations that may have been attached in individual cases.
Commitments of different groups of Members

<table>
<thead>
<tr>
<th>Members</th>
<th>Average number of sectors committed per Member</th>
<th>Range (Lowest/highest number of scheduled sectors)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Least-developed economies in 2013</td>
<td>29</td>
<td>1 – 110</td>
</tr>
<tr>
<td>Developing &amp; transition economies</td>
<td>53</td>
<td>1 – 147</td>
</tr>
<tr>
<td>Developed countries*</td>
<td>94</td>
<td>12 – 127</td>
</tr>
<tr>
<td>Accessions since 1995</td>
<td>103</td>
<td>37 – 147</td>
</tr>
<tr>
<td>ALL MEMBERS</td>
<td>55</td>
<td>1 – 147</td>
</tr>
</tbody>
</table>

Table 1: Commitments of different groups of Members

* Including all EU Members in 2013

Total number of sectors: ~160.

Source: WTO Secretariat

Turning to the levels of access committed, apart from recently acceded Members, available evidence suggests that most Members have confined themselves to locking in status quo access conditions, or even less, at the time of the Uruguay Round negotiations. {50} In many cases, actual access conditions today are more liberal than existing GATS commitments would indicate.

II.A. NEGOTIATION OF SPECIFIC COMMITMENTS

ARTICLE XIX

The services negotiations which began on 1 January 2000, fulfilled the requirement of Article XIX. The latter called for successive rounds of negotiations, the first of which was to start "not later than five years from the date of entry into force of the WTO Agreement", i.e. 1 January 1995. The services negotiations thus commenced before launch of the Doha Development Agenda in November 2001, and have since been integrated into the Doha Round.

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{50} See Hoekman (1996), Hoekman, Mattoo and English (2002), Dobson and Jacquet (1998) and WTO Secretariat (2001). Recently acceded Members, in particular several transition economies, have undertaken commitments that are subjected to a smaller number of limitations as compared to other Members. For example, more than one-third of the market access commitments undertaken by accession economies under mode 3 are without limitations, which is almost three times the share for developed countries.
Article XIX contains several sub-paragraphs (1-4), which specify various objectives and principles, as well as certain procedural matters pertaining to the conduct of negotiations. These include the following:

- **Article XIX:1** stipulates *certain objectives for future successive rounds of negotiations.* In Article XIX:1, it is stated that "...the negotiations shall be directed to the reduction or elimination of the adverse effects on trade in services of measures as a means of providing effective market access". It also specifies that, "This process shall take place with a view to promoting the interests of all participants on a mutually advantageous basis and to securing an overall balance of rights and obligations".

- **Article XIX:2** reaffirms that in the process of liberalisation there shall be "...due respect for national policy objectives and the level of development of individual Members, both overall and in individual sectors". It also provides for "appropriate flexibility for individual developing country Members for opening fewer sectors, liberalizing fewer types of transactions, progressively extending market access in line with their development situation...". When access is given to foreign service suppliers, flexibility may also be exercised to attach conditions aimed at achieving the objectives referred to in Article IV ('Increasing Participation of Developing Countries').

- **Article XIX:3** calls for the *establishment of negotiating guidelines and procedures for each round of negotiations.* To establish such guidelines, the Council for Trade in Services is mandated to "...carry out an assessment of trade in services in overall terms and on a sectoral basis...". The sub-paragraph also specifies that the negotiating guidelines shall establish: modalities for the treatment of autonomous liberalization by Members since previous negotiations, as well as the special treatment of least developed countries.

- **Article XIX:4** states that for each round the "...process of progressive liberalization shall be advanced through bilateral, plurilateral or multilateral negotiations..".

### II.B. GUIDELINES AND PROCEDURES FOR THE NEGOTIATIONS ON TRADE IN SERVICES

As required by Article XIX:3, 29 on March 2001, the Council for Trade in Services in Special Session, approved the Guidelines and Procedures for the Negotiations on Trade in Services (S/L/93). The document (which comprises of objectives and principles, scope, and modalities and procedures, for the negotiations), builds to a large extent on relevant GATS provisions, in particular Article IV ('Increasing Participation of Developing Countries') and Article XIX ('Negotiation of Specific Commitments').

### II.B.1. OBJECTIVES AND PRINCIPLES

The first part of the Guidelines reaffirms the objective of progressive liberalization as enshrined in relevant GATS provisions, as well as the right of Members to regulate, and to introduce new regulations on the supply of services. It recalls that developing countries have "appropriate flexibility" as provided for in Article XIX:2, and that special priority shall be given to least-developed countries. *Reference is made to the needs of small and medium-sized service suppliers, particularly of developing countries.* It reaffirms that the negotiations shall...

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51 Article XIX:3 further specifies that assessment is to be carried out with reference to the objectives of the GATS, including those set out in paragraph 1 of Article IV.
respect "the existing structure and principles of the GATS" (e.g. the bottom-up approach to scheduling and the four modes of supply).

II.B.2. SCOPE

The second part sets out the scope of the negotiations, which is to be comprehensive as there "shall be no a priori exclusion of any service sector or mode of supply". It is further specified that special attention is to be given to sectors and modes of supply of export interests of developing countries. It is highlighted that MFN exemptions are also subject to negotiation. The Agreement's rule-making agenda - concerning disciplines on domestic regulation (pursuant to Article VI:4), emergency safeguards (Article X), government procurement (Article XIII), and subsidies (Article XV) – is integrated into the wider context of the services negotiations.

II.B.3. MODALITIES AND PROCEDURES

The third part of the Guidelines state that current schedules, rather than actual market conditions, are to be used as the starting point for the negotiations. It further specifies that the main method for the negotiations shall be the request-offer approach. In this connection, keep in mind that Article XIX:4 simply refers to the possibility of bilateral, plurilateral and multilateral negotiations to advance liberalization, but does not establish priorities between these approaches. 'Bilateral' negotiations are normally conducted in a request-offer context, where interested governments swap liberalization moves across sectors or, as the case may be, modes of supply.

Other matters raised under modalities and procedures include: negotiating credit for autonomous liberalization undertaken by Members based on common criteria (see explanation below); ongoing assessment of trade in services by the Council for Trade in Services in Special Session; mandate for the Services Council to evaluate the results of the negotiations prior to their completion in the light of Article IV.

The Guidelines were later complemented by two additional modalities on the treatment of autonomous liberalization and of LDCs:

- Modalities for the Treatment of Autonomous Liberalization provide the criteria for assessing the value of autonomous liberalization and the procedures for how such liberalization could be treated in the context of the current round of services negotiations. The granting of credit for autonomous liberalization measures shall be advanced through bilateral negotiations.

- Modalities for the Special Treatment for Least-Developed Country Members seek to ensure "maximum flexibility" for LDCs in the negotiations. All Members are committed inter alia, to exercising restraint in seeking commitments from LDCs. At the same time, in preparing their own schedules, Members are urged to give special priority to sectors and modes of export interest to LDCs. In turn, least-developed

52 The Hong Kong Ministerial Declaration also provides for the possibility of 'plurilateral request-offer' negotiations (see below).

53 This assessment was not initially conceived as an ongoing process, but should have been conducted for the purpose of establishing the Negotiating Guidelines (Article XIX:3).

54 The Hong Kong Ministerial Declaration affirmed that LDCs are not expected to undertake new commitments.
Members are called upon to indicate their priority sectors and modes so that these can be taken into account. Referring to mode 4, the Modalities recognize the potential benefits provided by the movement of natural persons to both sending and recipient countries. Further, Members envisage, to the extent possible and consistent with Article XIX of the GATS, to undertake commitments on that mode taking into account "all categories of natural persons identified by LDCs in their requests".

- The Council for Trade in Services in Special Session (CTSSS) is the body responsible for overseeing the negotiations. All subsidiary bodies, such as the Working Party on Domestic Regulation and the Working Party on GATS Rules, report to the Council. In the CTSSS, Members may inter alia review progress and take any relevant decisions for the conduct of the negotiations.

**II.C. NEGOTIATING APPROACHES**

As noted earlier, the negotiations on specific commitments are conducted mainly on a request-offer basis. In this process, Members negotiate with other Members of the WTO either in a bilateral or plurilateral format on additions and/or improvements to their schedule of specific commitments.

**II.C.1. BILATERAL REQUEST-OFFER**

The exchange of requests in services negotiations has traditionally been conducted on a bilateral basis. A WTO Member develops an initial request and submits it to other WTO Members in which it has an interest in seeking improved commitments from. The approach is called "bilateral" since the initial request and any subsequent follow-up negotiations are conducted on a two-party basis. In a typical situation, once the request has been sent to target Members there will be follow-up consultations for further questions and clarifications.

**Box 1: What might be contained in a request?**

A request often takes the form of a simple letter, in which a Member states what it wishes another to do and may include the following (not mutually exclusive):

| (i) | Addition of sectors that are not included in the relevant schedule. |
| (ii) | Removal or reduction in level of restrictiveness of existing limitations on market access (Article XVI) and/or national treatment (Article XVII). These may include either the complete removal of all limitations by scheduling a "none", the transformation of an "unbound" to a commitment with limitations, or the elimination/reduction of certain barriers (e.g. removal of foreign equity restrictions, increases in the number of admitted suppliers, removal of discriminatory tax measures, etc). |
| (iii) | Inscription of additional commitments (Article XVIII) relating to matters not falling within the scope of Articles XVI and XVII. Requests for additional commitments under Article XVIII may need to be legally specific since the Article merely provides a framework for scheduling commitments on matters not falling under market access or national treatment. As evidenced by the telecommunications Reference Paper, such commitments may extend to areas not directly addressed within the GATS itself, such as the establishment of an independent regulator. |
Box 1: What might be contained in a request?

(iv) **Removal of MFN exemptions.** Paragraph 6 of the Annex on MFN Exemptions provides that existing exemptions be subject to negotiations in successive rounds of negotiations. The request might be targeted at removal of a specific MFN exemption or the reduction of its scope and/or level.

See JOB 3670 for further information on technical aspects of requests.

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After initial requests have been made, Members have the opportunity to submit offers in accordance with the deadlines established at the beginning of the negotiations (see sections below on the key stages in the services negotiations). While requests are normally addressed bilaterally to targeted Members, offers, which are submitted via the Secretariat, are multilateral in nature. This is not only useful for transparency purposes, but also helps to ensure compliance with the MFN principle enshrined in the GATS (see Module 4 for an explanation of MFN). An offer is thus open to consultations and negotiations by the whole membership, not only those who may have made requests to the Member concerned.

**Box 2: Technical Aspects of Offers**

Offers would normally address the same set of issues as listed in Box 1.

While requests are usually presented in the form of a letter, an offer normally takes the form of a draft schedule of commitments. Therefore, offers require considerably more preparation.

In the Doha Round, offers are submitted on the basis of existing schedules that incorporate not only the Uruguay Round outcome, but any later amendments and extensions, including those resulting from the negotiations on basic telecommunications and financial services.

The modifications offered in current negotiations would be indicated through strikeouts, bolded insertions, italics or other agreed methods. The draft offer is a negotiating document with no legal status and have no binding effects on the participant concerned.

In their offer, Members also have the opportunity to introduce technical clarifications/refinements to existing commitments, but these must not substantively alter or backtrack on the bindings that have already been undertaken.

See JOB 3670 for further information on technical aspects of offers and JOB (02)/88 on practical procedures for the consolidation of Members' specific commitments.

The submission of initial offers is expected to trigger the submission of further requests, and the process may become a succession of requests and offers (see sections below on the key stages in the negotiations). In this context, delegations usually spend more time negotiating directly with each other than in the meetings of the various GATS bodies. Over the course of the negotiations, offers may be subject to several revisions before they are eventually finalised.
II.C.2. COLLECTIVE REQUESTS UNDER THE PLURILATERAL APPROACH

At the Hong Kong Ministerial Conference of December 2005, Ministers decided to give the negotiations greater impetus by agreeing to launch collective requests and exchanges. Paragraph 7 of Annex C of the Ministerial Declaration affirmed that the request-offer negotiations should also be pursued on a plurilateral basis and provides guidelines for the conduct of these negotiations (see Box 3).

Box 3: "Plurilateral approach" as stipulated in the Hong Kong Ministerial Conference

Paragraph 7 of the Hong Kong Ministerial Declaration states that:

"7. In addition to bilateral negotiations, we agree that the request-offer negotiations should also be pursued on a plurilateral basis in accordance with the principles of the GATS and the Guidelines and Procedures for the Negotiations on Trade in Services. The results of such negotiations shall be extended on an MFN basis. These negotiations would be organized in the following manner:

(a) Any Member or group of Members may present requests or collective requests to other Members in any specific sector or mode of supply, identifying their objectives for the negotiations in that sector or mode of supply.

(b) Members to whom such requests have been made shall consider such requests in accordance with paragraphs 2 and 4 of Article XIX of the GATS and paragraph 11 of the Guidelines and Procedures for the Negotiations on Trade in Services.

(c) Plurilateral negotiations should be organised with a view to facilitating the participation of all Members, taking into account the limited capacity of developing countries and smaller delegations to participate in such negotiations."

In reading the Declaration, several points are important to note. Firstly, the GATS already provides the possibility for negotiations to be conducted on a plurilateral basis. Paragraph 4 of the Article XIX states that "[t]he process of progressive liberalization shall be advanced (...) through bilateral, plurilateral or multilateral negotiations directed towards increasing the general level of specific commitments undertaken by Members under this Agreement". The negotiating Guidelines approved in 2001 also reaffirmed in paragraph 11 that "[l]iberalization shall be advanced through bilateral, plurilateral or multilateral negotiations".

Secondly, the main method for the services negotiation, namely the "request-offer" approach was not changed by this decision. Under plurilateral negotiations, a group of Members with common interests make a collective request to targeted Members to improve specific commitments in a particular sector or mode of supply. Subsequently, requesting and requested Members meet for follow-up discussions. The process is driven by Members with a common negotiating interest in a particular sector or mode.
Thirdly, any results stemming from these negotiations would be multilateralised. Offers that are made by participants in the plurilateral groups remain subject to the MFN principle embedded in the GATS. The plurilateral approach was meant to facilitate the process of negotiating specific commitments and should not be confused with plurilateral agreements, which by definition apply only to their signatories.

**Box 4: Collective requests in the plurilateral negotiations conducted between 2006-2007**

Two rounds of plurilateral negotiations were conducted in early 2006, based on 22 collective requests that were formulated mostly along sector lines. The feedback from the informal negotiating groups dealing with these requests was positive.

**Collective requests:**

- Air Transport
- Architectural
- Engineering and Integrated Engineering Services
- Audiovisual Services
- Computer and Related Services
- Construction Services
- Distribution Services
- Education Services
- Energy-Related Services
- Environmental Services
- Financial Services
- Legal Services
- Logistic Services
- Maritime Transport Services
- Postal and Courier Services
- Services related to Agriculture
- Telecommunication Services
- Tourism Services
- Cross-Border Supply (Modes 1 and 2)
- Mode 3
- Mode 4
- MFN Exemptions

The results of the plurilateral negotiations, as well as additional bilateral meetings, were expected to be reflected in a second round of revised offers. While Annex C provided a timeline of 31 July 2006 for the submission of these offers, all negotiations under the Doha Development Agenda (DDA) were suspended just one week earlier, due mostly to a stalemate over agricultural and non-agricultural market access (NAMA).

It was not until February 2007 that the time seemed ripe for a full resumption of the negotiations. As before, meetings in services were organized mostly in the form of clusters so as to afford experts from capitals an opportunity to attend meetings. After several such clusters, there was a prevailing sentiment that the ‘plurilaterals’ had served their purpose for the time being.

**II.D. NEGOTIATIONS ON RULE-MAKING AREAS**

In addition to the market access negotiations, there are also mandates to further develop certain rule-making areas of the GATS. The Working Party on Domestic Regulation is mandated under Article VI.4 to develop disciplines in the area of domestic regulation. The Working Party on GATS Rules has three negotiating mandates: emergency safeguard measures (Article X), government procurement (Article XIII) and subsidies (Article XV).
II.D.1. DISCIPLINES ON DOMESTIC REGULATION

a. ARTICLE VI:4 MANDATE

The mandate for the negotiations on Domestic Regulation is contained in Article VI:4 of the GATS, which requires Members to develop any necessary disciplines aimed at ensuring that measures relating to qualification requirements and procedures, technical standards and licensing requirements do not constitute unnecessary barriers to trade in services. Such disciplines are intended to address trade barriers arising from non-discriminatory domestic regulation (see Module 4 for further explanation of the articles pertaining to domestic regulation). Similar disciplines exist in the goods area, particularly in the TBT and SPS Agreements.

b. GUIDELINES FOR MUTUAL RECOGNITION AGREEMENTS AND ARRANGEMENTS AND THE ADOPTION OF ACCOUNTANCY DISCIPLINES

At the end of the Uruguay Round, WTO Members established the Working Party on Professional Services (WPPS) with the task of fulfilling the Article VI:4 mandate by giving priority to the accountancy sector.\(^55\)

In May 1997, the WPPS concluded the Guidelines for Mutual Recognition Agreements or Arrangements in the Accountancy Sector. These guidelines are non-binding and their objective is to facilitate the negotiation of recognition agreements and the accession of third parties to existing agreements.

In December 1998, the WPPS finalized its work on disciplines on domestic regulation in the accountancy sector (the "Accountancy Disciplines")\(^56\). These disciplines apply where Members have undertaken specific commitments in the accountancy sector and contain a general "necessity test", applicable to qualification requirements and procedures, technical standards and licensing requirements, as well as more detailed rules mainly focusing on procedural matters (time for processing applications, providing reasons for rejection, frequency of examinations, etc.). The Council for Trade in Services adopted the Accountancy Disciplines on 14 December 1998\(^57\), but decided to suspend their application until the conclusion of the forthcoming round of services negotiations (later integrated into the DDA), in order to allow entry into force together with disciplines applicable to other sectors.

c. WORKING PARTY ON DOMESTIC REGULATION

Having completed the Accountancy Disciplines, WTO Members dissolved the WPPS and created the Working Party on Domestic Regulation (WPDR) on 26 April 1999, to develop as appropriate Article VI:4 disciplines applicable to all sectors ("horizontal disciplines"), individual sectors or groups thereof.

In the WPDR, Members have been negotiating on a set of horizontal disciplines on domestic regulation, but this does not preclude the possibility of future work on sectoral disciplines. While the negotiations are still on-

\(^{55}\) Decision on Professional Services


\(^{57}\) Document S/L/63, 14 December 1998
going, many proposals have been submitted by Members and several versions of a Chairman’s text, which reflect drafting suggestions, have been produced. It is difficult to summarise the elements contained in the text and the respective proposals, as the negotiations are still on-going and consensus has not yet been reached on all the elements that should be included in the disciplines. Nevertheless, it can be said that in the negotiations, consideration has been given to the following regulatory principles:

**Transparency**

Information on regulatory requirements and procedures should be accessible to all parties concerned. Relevant criteria include: the publication and availability of information on regulations and procedures; specification of reasonable time periods for responding to applications for licences; information as to the reasons why an application was rejected; notification on what information is missing in an application; specification of reasonable time periods for responding to applications; information on procedures for review of administrative decisions.

**Impartiality and objectivity**

Decisions by competent authorities must be made in an impartial manner, independent from any commercial interests or political influence. The criteria should be clearly spelled out to avoid excessive discretion.

**Relevance of foreign qualifications and experience**

Account should be taken of relevant educational qualifications and professional experience a supplier may have obtained abroad. Complementing this principle, governments may want to negotiate agreements to accept the equivalence of qualifications obtained under other jurisdictions or unilaterally recognise equivalence.\(^{58}\)

**Legal certainty**

During the course of an application, the assessment criteria should not be modified with a view to treating applicants unfairly. They may need to have a reasonable time period to adjust to amended criteria or procedures.

**International Standards**

Acceptance of international standards could facilitate the evaluation of qualifications obtained abroad. Governments involved in standard-setting at the international level should ensure that this is done in as transparent a manner as possible in order to avoid capture by specific interest-groups.

**Necessity**

Article VI:4 indicates that the disciplines shall aim to ensure that measures of domestic regulation do not constitute unnecessary barriers to trade in services. Similar language can be found in Article 2.2 of the TBT Agreement and Article 5.6 of the SPS Agreement.\(^{59}\) The “necessity tests” under these Agreements focus on whether a legitimate objective chosen by a WTO Member could equally be achieved by means of a reasonably available alternative that is less trade-restrictive.

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\(^{58}\) GATS Article VII allows for recognition measures as long as there are adequate provisions for other Members to negotiate accession and/or achieve recognition of their requirements and certificates, and the measures do not constitute a means of discrimination or a disguised restriction on trade.

\(^{59}\) The Secretariat, at the request of Members, prepared a background Note on “Necessity Tests” in the WTO, S/WPDR/W/27/Add.1 and Corr.1.
d. Development of Text for Regulatory Disciplines

Between 1999 and 2003, the WPDR carried out background work on regulation of various services sectors until Members started to submit concrete proposals on the development of disciplines, beginning in the second half of 2003.

In 2001, at the Doha Ministerial Conference, work on the Article VI:4 mandate was integrated into the DDA and became part of the single undertaking. In 2005, the Hong Kong Ministerial Declaration strengthened the Article VI:4 mandate by restating the commitments to developing disciplines by the end of the round and by calling upon Members to develop text for adoption. As a result, Members intensified work in 2005 and until mid-2006, by submitting various concrete text proposals, covering all elements of possible domestic regulation disciplines applicable to all service sectors ("horizontal disciplines").

In July 2006, the Chairman of the WPDR, prepared a first consolidated text of proposals on regulatory disciplines under Article VI:4 of the GATS (JOB (06)/225). This text already attempted to bridge differences on some issues (scope of application, definitions, transparency and procedures), while still reflecting Members' diverging position on other issues ("necessity", qualification requirements, technical standards, "prior comment procedure" and development). 60

Following consultations on the basis of the consolidated text, Members requested the Chairman to prepare his own draft, attempting to further bridge gaps. This draft was presented in April 2007 as a Room Document, a revised draft was issued in January 2008 and a second revised draft in March 2009 (see Box 5). The latter document is commonly called by negotiators as the Chairman's March 2009 draft text. The proposed disciplines have horizontal application (i.e. apply to all sectors included in a Member’s specific commitments). The draft contains eleven Sections ("Introduction", "Definitions"; "General Provisions"; "Transparency"; "Licensing Requirements"; "Licensing Procedures"; "Qualification Requirements"; "Qualification Procedures"; Technical Standards"; "Development"; and "Institutional Provisions").

The text no longer contained a "necessity test" for domestic regulation, which had proved to be unacceptable to a growing number of developing and developed countries, because of its perceived unknown impact on Members' ability to regulate. Several of the provisions in the text were in the form of "best endeavour" obligations, particularly the section on "prior comment" on draft legislation. It was agreed that while for the current round the disciplines would be horizontal in nature, this neither excluded or prejudiced future work on sector specific disciplines.

At the end of 2010, Members resumed efforts to produce a draft text with brackets by the first quarter of 2011. Following intensive negotiations a Chairman’s Progress report was circulated, reflecting areas where gaps had been narrowed, alternative language proposals and issues where there remained major differences. The Progress Report was attached to the Report by the Chairman of the Council on Trade in Services to the Trade Negotiations Committee.

On some paragraphs agreement has been reached on an ad referendum basis; on others, language proposals have been reduced to a single alternative with brackets, in addition to the Chair’s March 2009 text; while for paragraphs, multiple alternatives and language options remain. In addition, the question of whether a normative standard in the form of a "necessity test" should be included into the disciplines is still to be solved.

A few Members have stated that they do not share the assessment in this Chairman's Progress Report.

60 Document S/L/70.
As progress in other parts of the Doha Development Agenda was not achieved in the first quarter of 2011, work on the bracketed text was halted.

**Box 5: Stages in the evolution of the draft text on domestic regulation disciplines**

**First review of the 2007 draft text**

In January 2008, the Chairman presented a first revised draft which attempted to capture those elements on which progress had been made in the negotiations.

- The revised draft contained changes to approximately half of its original paragraphs; most of which related to the sections on Licensing and Qualification Procedures, where the language and sequencing has been streamlined.
- In the section of transparency, an illustrative list of information that shall be made publicly available was added.
- No changes were made to the development section of the draft.

In March 2008, the Chair presented an informal Note on eight issues on which he considered that progress was both necessary and possible. These issues include the question of the use of the concept of "disguised restrictions on trade in services", the structure of various transparency provisions, the extent to which fees for licensing and qualification procedures shall be disciplined; and the notion and disciplines on technical standards.

At the end of July 2008, the DDA negotiations grounded to a halt as Members failed to agree on modalities for the Agriculture and NAMA negotiations. Pending the overall resumption of negotiations, work on domestic regulation slowed down.

**Second review of the 2007 draft text: the Chairman's March 2009 draft text**

Although the specific commitments negotiations were halted, the domestic regulation negotiations continued and in March 2009 the Chairman issued a second revised draft text.

The revision revision reflected drafting suggestion on a few issues. These changes did not suggest any compromise language on the eight issues which had been presented in the Chairman's informal note.

For the rest of 2011 onwards, the Working Party launched a programme of technical discussions based on Members' questions. A total of 93 questions were compiled and are contained in an Informal Note by the Chairman entitled "List of Potential Technical Issues Submitted for Discussion".

The various questions have been grouped into a work plan with eight separate meetings. The issues submitted by Members seek to address questions that have arisen in the negotiations with respect to certain domestic regulation concepts and terms, as well as on the actual regulatory practices of Members. Certain Members,

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61 Chairman's revised draft disciplines contained in Job 474 dated 23 January 2008
62 Chairman's March 2009 draft text contained in Job 2160 dated 20 March 2009
have also considered the implications of the information provided for horizontal disciplines. These discussions have been conducted in informal mode and summaries are provided by the Chairman, together with any specific regulatory practises shared by Members. As requested, the Secretariat has also prepared several Background Notes to assist the discussions. These include the following: Regulatory Issues in Sectors and Modes of Supply; Technical Standards in Services; and Services-Related Challenges Faced by Developing Countries.

A group of Members have also tabled their reflections on the implications of the technical discussions for the horizontal disciplines for domestic regulation. The reflections seek to distinguish between those issues in the draft text which appear to be more or less stable, and those on which further discussion or rethinking of the envisaged discipline may be required. The co-sponsors of this document have requested other Members to share their views. There are however some Members who feel that it is not timely to engage in such reflections. They also do not share the assessment in the Chairman's Progress Report and see the Chair’s March 2009 text as the only working basis.

e. Possible Modalities for the Adoption of Disciplines

At the end of the negotiations, Members will have to decide on the legal form of any disciplines they adopt. At the same time, the Accountancy Disciplines will need to be "integrated into the GATS," as mandated in the Decision adopting these Disciplines. The most likely outcome would be to integrate both sets of disciplines as Annexes to the GATS, which in turn would require an amendment of the Agreement.

An alternative would be to incorporate the text of the disciplines through Article XVIII as Additional Commitments into the Schedule of Members, but this option seems less attractive because of the lack of uniform application should individual Members fail to include the disciplines in their schedules of specific commitments. Further, Members would need to decide on the fate of Articles VI:4 and 5, which contain the negotiating mandate for any necessary disciplines, as well as a transition clause ensuring that Members adhere to the objectives set out in Article VI:4 until disciplines have been developed.

II.D.2. GATS Rules (Emergency Safeguard Measures, Government Procurement and Subsidies)

The Working Party on GATS Rules is charged with negotiations on emergency safeguard measures, government procurement, and subsidies. The mandate for the negotiations on these topics is contained in Articles X, XIII and XV of the GATS, respectively.

In addition to the mandates contained in the three relevant GATS Articles, further guidance is to be found in the Guidelines and Procedures for the Negotiations on Trade in Services (S/L/93, 29 March 2001, paragraph 7), the Fifth Decision on the Negotiations on Emergency Safeguard Measures (S/L/159, 17 March 2004), the “July Package” (WT/L/579, 2 August 2004, Annex C, paragraph (e)), and the Modalities for the Special Treatment for Least-Developed Country Members in the Negotiations on Services (TN/S/13, 5 September 2003, paragraph 11).

Discussions in all three areas have been difficult and protracted. Despite the many years devoted to these negotiations, there has been limited progress in bridging differences. In the Hong Kong Ministerial Declaration, the relevant section on GATS Rules reads as follows:
“Members must intensify their efforts to conclude the negotiations on rule-making under GATS Articles X, XIII, and XV in accordance with their respective mandates and timelines:

(a) Members should engage in more focused discussions in connection with the technical and procedural questions relating to the operation and application of any possible emergency safeguard measures in services.

(b) On government procurement, Members should engage in more focused discussions and in this context put greater emphasis on proposals by Members, in accordance with Article XIII of the GATS.

(c) On subsidies, Members should intensify their efforts to expedite and fulfill the information exchange required for the purpose of such negotiations, and should engage in more focused discussions on proposals by Members, including the development of a possible working definition of subsidies in services.”

This mandate differs from the one adopted for the negotiation on disciplines on domestic regulation, where the Hong Declaration provides that Members shall develop such disciplines before the end of the current round of negotiations.

a. **Emergency Safeguard Measures**

**Negotiating Mandate**

Emergency safeguard measures is the topic that has been most discussed in the WPGR. Unlike Article XIII and XV, the negotiations foreseen in Article X had to conclude by a specific end date, i.e., not later than 3 years from the date of entry into force of the WTO Agreement: 1 January 1998. This timeline has been extended five times so far. The latest extension (March 2004: S/L/159) does not set a specific end-date, but says that "the results of such negotiations shall enter into effect on a date not later than the date of entry into force of the results of the current round of services negotiations", subject to the outcome of the mandate of Article X:1 on the question of emergency safeguard measures.

**Issues Under Consideration**

What is sought by the proponents of an emergency safeguard is an instrument that would allow for the temporary suspension, in special circumstances, of commitments on market access, national treatment and/or any additional commitments that Members have assumed in individual sectors. Any such mechanism, should it be agreed to by Members, would complement existing provisions under the GATS that already allow for temporary or permanent departures from general obligations or specific commitments. Relevant provisions include:

- Article XII if a Member experiences serious balance of payments and external financial difficulties;
- Article XIV if action is deemed necessary for overriding policy concerns such as protection of life and health or protection of public morals;

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63 Paragraph 4 of Annex C to the Hong Kong Ministerial Declaration.

64 Paragraph 5 of Annex C to the Hong Kong Ministerial Declaration.
- Article XXI if a Member intends to withdraw or modify a commitment on a permanent basis against compensation; and
- Prudential carve-out for financial services (Annex on Financial Services).

Contrasting with these provisions, an emergency safeguard might be used to ease adjustment pressures in situations where a particular industry suffers serious injury as a result of a sudden increase in foreign supplies. If the Agreement on Safeguards for goods is used as a precedent, the onus would be on a protection-seeking industry to demonstrate that a causal link exists between such increases in supplies and its suffering serious injury. A safeguard clause, as envisaged by the proponents in the negotiations, would be expected to allow for the suspension of commitments during a limited period of time, possibly without compensation.

Broadly speaking, there are two main schools of thought among Members. One group is not convinced that such a mechanism is desirable, given the scheduling flexibility under the GATS and the risk of undermining the stability of existing commitments through new emergency provisions. There are some doubts whether a services safeguard would be workable in practice. Sceptical Members also point to the scarcity of reliable trade and production data in many sectors, and the technical complexities associated with the multi-modal structure of the GATS. Proponents of ESMs, on the other hand, feel that the availability of safeguards in the event of unforeseeable market disruptions, would encourage more liberal commitments in services negotiations. In their view, abuse could be avoided through strict procedural disciplines.

During the course of the negotiations, a very wide range of issues have been discussed. These include the following:

- the situations where the use of emergency safeguard measures might be justified;
- the concept of "a limited window of time" during which an ESM could be used;
- whether the availability of an ESM should be conditioned on progressive liberalization in the sector concerned;
- whether the concept of 'domestic industry' should include foreign-owned suppliers established in the Member's territory;
- whether 'acquired rights' of foreign suppliers established in the Member's territory should be exempt from the application of a safeguard measure;
- the extent to which 'acquired rights' should be protected in modes of supply other than mode 3;
- the type of data used in making a determination of injury, e.g., to measure a rise of imports per mode of supply.
- the type of measures that could be used in implementing a safeguard action;
- how to ensure that safeguard measures would use the least trade-restrictive option and be applied only to the extent necessary;
- what would be the period of application of a safeguard measure, and whether an extension could be granted;
- the type of surveillance procedures that might be established to monitor the application of safeguard measures; and
- the type of special and differential treatment that might form part of an ESM.
b. GOVERNMENT PROCUREMENT

NEGOTIATING MANDATE

Article XIII provides that the MFN obligation (Article II), as well as any commitments on market access and national treatment (Articles XVI and XVII) do not apply to the procurement of services for governmental purposes. However, Article XIII:2 provides for negotiations on government procurement in services to be conducted under the GATS. Although these negotiations started relatively soon after the Uruguay Round, together with those in the other rule-making areas, progress has been limited to date.

ISSUES UNDER CONSIDERATION

The share of government purchases of services - e.g., construction, professional, computer or environmental services - is significant in many markets, and so are the trade effects that may result from access restrictions. Further, as tradability of services increases, opportunities are expanding for the provision of services to governments. The GATS imposes no effective disciplines on governments’ use of such restrictions, whether in the form of exclusions of foreign participation, or of preferential margins favouring domestic suppliers.

The only general procurement disciplines under WTO provisions (goods or services) are those contained in the Plurilateral Government Procurement Agreement, whose scope has, so far, been mainly confined to a limited number of mostly economically advanced Members. The Agreement applies to purchases of goods and services and provides for transparency and compliance with other procedural rules and, in specifically listed sectors, non-discrimination in the award process among signatories.

Under the GATS, only the Understanding on Commitments in Financial Services provides for the granting of MFN and national treatment to financial service suppliers of any other Member as regards the purchase or acquisition of financial services by public entities of a Member (paragraph B.2). This obligation is limited to the treatment of foreign suppliers that are established in the territory of the procuring Member. It is binding only on those Members that have expressly indicated in their schedule of specific commitments that they comply with the Understanding. Resulting commitments apply on a most-favoured-nation basis.

The main objective of the proponents is thus to create a GATS framework for commitments on government procurement in services. To this end, it has been proposed that Members should be able to undertake market access commitments on government procurement in the sectors and modes of supply of their choosing, with the possibility to schedule relevant limitations, e.g., price preferences for nationals, thresholds for contracts, covered entities, and to list MFN exemptions in the area of procurement. An Annex to the GATS on Government Procurement has also been proposed, which would provide for the legal framework and contain additional procedural rules, e.g., transparency, as well as a carve-out to preserve the preferential treatment granted among signatories to the Government Procurement Agreement (GPA).

Members have, over the years, expressed diverging views as to whether the negotiations on government procurement in services should entail market access issues or remain confined to transparency and similar obligations.

In terms of the discussions in the WPGR, specific access-related issues that have been raised include the following:

- the meaning of government procurement commitments for certain modes of supply and their application to "concessions";
• how contracts involving more than one sector might be treated;
• how thresholds and covered entities might be scheduled;
• whether the MFN obligation would in principle apply to all services sectors (as in GATS) or only to those
  where government procurement commitments were made;
• the interaction between the proposed framework, including its MFN obligation, and the GPA where some
  Members have attached reciprocity provisions to their commitments;
• possible benefits to developing countries of the proposed framework;
• the opportunity of distinguishing between goods and services in the context of disciplines on
  government procurement; and
• special and differential treatment.

c. **Subsidies**

**Negotiating Mandate**

Like other measures affecting trade in services, subsidies are already subject to the GATS. The unconditional
general obligations, including MFN treatment, thus apply. In scheduled sectors, these are complemented by
the national treatment obligation, subject to any limitations that may have been inscribed, and a variety of
conditional obligations.

Article XV:1 nevertheless provides for negotiations on disciplines that may be necessary to avoid
trade-distortive effects that subsidies may have. It also specifies that the negotiations shall address the
appropriateness of countervailing procedures, recognize the role of subsidies in relation to development
programmes of developing countries and take into account the needs of Members, particularly developing
country ones, for flexibility in this area.

In addition, Article XV:1 provides that "(f)or the purpose of such negotiations, Members shall exchange
information concerning all subsidies related to trade in services that they provide to their domestic services
suppliers". The Hong Kong Ministerial Declaration, in addition to calling for more focused discussions on
Members' proposals, including the development of a working definition of subsidy, also expects Members to
"intensify their efforts to expedite and fulfil the information exchange required for the purpose of such
negotiations". 65

Furthermore, paragraph 2 of Article XV provides for consultations in the event that a Member considers itself
adversely affected by another Member's subsidies. The Working Party has so far not been informed of any
such consultations.

**Issues Under Consideration**

Overall, there has been little advancement towards defining, let alone establishing possible disciplines on
trade-distortive effects of subsidies. Members have reflected on the issue, but no concrete negotiating

65 Paragraph 4(c) of Annex C to the Hong Kong Ministerial Declaration.
A proposal has been put forward. Efforts have mainly focused on trying to advance the information exchange and launching a conceptual discussion on elements of a possible definition.

The WTO Agreement on Subsidies and Countervailing Measures Agreement was developed for goods trade, and may not necessarily prove an appropriate model for services. For one, subsidies are commonly used in services to pursue a vast array of social, cultural and general development objectives. Second, unlike for merchandise trade where the only permissible tool of protection are tariffs, many other restrictions - and more distortive and economically sub-optimal ones - are permissible and remain in place in services (e.g., quantitative restrictions, discriminatory subsidies). Further, identifying trade-distortive subsidies on the basis of their actual impact on trade flows seems hardly feasible - if only because of the paucity of trade statistics - and possible remedies such as countervailing measures do not appear workable.

Unlike for government procurement and emergency safeguard measures, no negotiating proposals have so far been tabled on what may be necessary disciplines (or specific problems to be tackled) in relation to subsidies. This likely reflects a certain lack of negotiating interest but may also be attributed to the complexity of the subject. Some Members have focused on developing a definition of subsidy for services and on encouraging the exchange of information on subsidies, which, despite being provided for in Article XV:1, has been met only with very limited success. These delegations argue that the exchange of information is needed so as to better guide the negotiations. Reactions have, so far, been mixed. Some feel that sufficient information is already available and fear that this will amount to a notification exercise which might put Members under pressure at a later point. While export subsidies are subject to the most stringent disciplines in relation to both merchandise and agricultural trade, they have not been discussed in any detail in the services context.

More recently, a proposal has been submitted to identify "non-actionable subsidies". However, many delegations have not yet expressed views on the approach. Others have raised doubts whether it could be discussed in the abstract, not knowing the nature of the disciplines from which such subsidies were being exempted.
III. KEY STAGES IN THE NEGOTIATIONS

| TIMELINE |
|-----------------|--------------------------------------------------|
| **January 2000** | Negotiations begin                              |
| **March 2001**   | Guidelines and the Procedures for the Negotiations on Trade in Services are adopted |
| **November 2001**| Doha Development Agenda is adopted               |
| **March 2003**   | Deadline for receiving “initial offers”          |
| **July 2004**    | “July Package” resuscitates negotiations and establishes deadline of May 2005 for submission of revised offers |
| **December 2005**| Hong Kong Ministerial Conference reaffirms key principles of services negotiations |
| **July 2006**    | Doha negotiations suspended                      |
| **January 2007** | Resumption of Doha negotiations                  |
| **May 2008**     | Report on services issued                        |
| **July 2008**    | Services Signalling Conference held as part of “July 2008” package |
| **March 2010**   | Stocktaking exercise                             |
| **April 2011**   | Report to the Trade Negotiations Committee       |
| **December 2011**| Adoption of the LDC services waiver              |

III.A. FROM DOHA TO CANCUN

In view of the Negotiating Guidelines of March 2001, paragraph 15 of the Doha Ministerial Declaration virtually confined itself to endorsing the Guidelines and bringing services under the wider framework of the Doha Development Agenda. The Doha Declaration introduced target dates for the circulation of initial requests (30 June 2002) and initial offers (31 March 2003) of specific commitments and envisaged all negotiations, which form part of a single undertaking, to be concluded not later than 1 January 2005.

The Cancun Ministerial Meeting in early September 2003 failed to make progress. The concluding statement reaffirmed the Doha Declaration and Decisions and recommitted members “to working to implement them fully and faithfully”. Reflecting the lack of political impetus, the request-and-offer process in services grounded to a halt in the wake of Cancun.
III.B. THE "JULY PACKAGE" IN THE AFTERMATH OF CANCEUN

It was not until mid-2004 that the so-called July 2004 Package (Doha Work Programme — Decision adopted by the General Council on 1 August 2004, WT/L/579) - injected new momentum into the negotiations. With regard to services, the July Package contained a target date of May 2005 for the submission of revised offers and reiterated a set of recommendations that had been agreed before by the Council for Trade in Services (Special Session). These recommendations include the following:

- Members that had not yet submitted initial offers to do so as soon as possible;
- ensuring a high quality of offers, in particular in sectors and modes of export interest to developing countries, with special attention being given to least-developed countries (LDCs);
- intensifying efforts to conclude the rule-making negotiations (which will be examined below) under Articles VI.4, X, XIII and XV in accordance with their mandates and deadlines;
- providing "targeted" technical assistance to developing countries with a view to enabling them to participate effectively.

III.C. ANNEX C AND THE HONG KONG MINISTERIAL DECLARATION

The Hong Kong Ministerial Declaration of December 2005 reaffirmed key principles and objectives of the services negotiations and called on Members to intensify the negotiations in accordance with the objectives, approaches and timelines set out in Annex C to the Declaration with a view to expanding sectoral and modal coverage of commitments and improving their quality, with particular attention to export interests of developing countries. The Ministerial Declaration also established that LDCs are not expected to undertake new commitments in this Round.

Annex C contained a more detailed and ambitious set of negotiating objectives to guide Members than any previous such document. While ensuring appropriate flexibility for individual developing country Members, it established a framework for:

- offering new or improved commitments under each mode of supply
- treating Most-Favoured Nation (MFN) exemptions
- the scheduling and classification of commitments.

The Annex also urged Members to intensify their efforts to conclude the rule-making negotiations, develop text for adoption on disciplines on domestic regulation, and devise methods for the full and effective implementation of the Modalities for the Special Treatment of Least-Developed Country Members. With respect to negotiating approaches, Annex C envisaged that the request-offer negotiations also be pursued on a plurilateral basis (see section above for an explanation of how such negotiations are conducted).
III.D. PLURILATERAL NEGOTIATIONS LAUNCHED

In keeping with this mandate, two rounds of plurilateral negotiations were conducted in early 2006, based on 22 collective requests that were formulated mostly along sector lines. The feedback from the informal negotiating groups dealing with these requests was positive.

The results of the plurilateral negotiations, as well as additional bilateral meetings, were expected to be reflected in a second round of revised offers. While Annex C provided a timeline of 31 July 2006 for the submission of these offers, all negotiations under the Doha Development Agenda (DDA) were suspended just one week earlier, due mostly to a stalemate over agricultural and non-agricultural market access (NAMA).

It was not until February 2007 that the time seemed ripe for a full resumption of the negotiations. As before, meetings in services were organized mostly in the form of clusters so as to afford experts from capitals an opportunity, every three or four months, not only to attend relevant Council and Committee meetings but to organize bilateral and plurilateral encounters in order to explore the scope for and content of improved offers. After several such clusters, there was a prevailing sentiment that the ‘plurilaterals’ had served their purpose for the time being.

III.E. SIGNALLING CONFERENCE AND ELEMENTS FOR THE COMPLETION OF THE SERVICES NEGOTIATIONS

While continuing with bilateral encounters, Members have also been discussing the elements that will guide the services negotiations to completion within the overall context of the DDA. In this connection, the Chair of the Council for Trade in Services in Special Session issued on 26 May 2008 a report with a draft services text that WTO Members, after further discussion, could adopt. The draft, which was based on consultations conducted by the Chair, addressed issues such as participants’ level of ambition, their willingness to bind existing and improved levels of market access and national treatment, as well as specific references to Modes 1 and 4 with respect to the treatment of sectors and modes of supply of export interest to developing countries.

On a parallel track, the Chair of the Trade Negotiations Committee (TNC), at the request of WTO Members, convened a “Signalling Conference” for interested ministers as part of the “July 2008” package. At the Signalling Conference, participating ministers indicated how their governments’ current services offers might be improved in response to the requests they had received. The signals were not intended to represent the final outcome of the services negotiations but enabled Members to assess the progress made in the request-offer negotiations while preparing new draft schedules for submission. Subsequently, the TNC Chair reported on the Conference.
Members reaffirm that the services negotiations are an essential part of the DDA. They recognize that an ambitious and balanced outcome in services would be integral to the overall balance in the results of the DDA single undertaking. Accordingly, the negotiations shall aim at a progressively higher level of liberalization of trade in services with a view to promoting the economic growth of all trading partners, and the development of developing and least-developed countries. There shall be no a priori exclusion of any service sector or mode of supply. With due flexibility for individual developing countries, Members should to the maximum extent possible expand the sectoral and modal coverage of their commitments and improve their quality by making deeper or full commitments.

However, although progress was registered in the Services Signalling Conference, other parts of the DDA failed to advance. The anticipated July 2008 package failed to materialize as Members could not agree on modalities for agriculture and non-agricultural market access (NAMA). This put a chilling effect on the DDA overall, including on the services negotiations. A stocktaking exercise was undertaken by the Chairman of the CTSSS in 2010. The remaining gaps were reflected in his stocktaking report to the Trade Negotiations Committee.

At the beginning of 2011, an effort was made to intensify the services negotiations together with other areas under the Doha Development Agenda. In April, the Chairman of the Council for Trade in Services submitted a report to the Trade Negotiations Committee on the achievements and remaining gaps in all four areas of the services negotiations: market access; domestic regulation; GATS rules; and the implementation of LDC modalities.

### III.F. STOCKTAKING EXERCISE

Progress was limited following the failure to conclude agriculture and non-agricultural market access (NAMA) modalities in the July 2008 package. The remaining gaps were reflected in the stocktaking report by the Chairman of the Council for Trade in Services in Special Session to the Trade Negotiations Committee (TN/S/35 of 22 March 2010).

### III.G. INTENSIFICATION OF NEGOTIATIONS

As with other areas under the Doha Development Agenda, the services negotiations entered into an intensified phase at the beginning of 2011.

In April 2011, the Chairman of the Council for Trade in Services submitted a report to the Trade Negotiations Committee (TN/S/36 OF 21 April 2011) on the achievements and remaining gaps in all four areas of the services negotiations: market access; domestic regulation; GATS rules; and the implementation of LDC modalities.
III.H. ADOPTION OF THE LDC SERVICES WAIVER

In December 2011, the WTO Eighth Ministerial Conference adopted a waiver which allows WTO members to provide preferential treatment to services and service suppliers from least-developed countries (LDCs). Of the 159 WTO members, 34 are LDCs who stand to benefit from preferential treatment designed to promote their trade in those sectors and modes of supply that are of particular export interest to them. This waiver, like all others of its kind, would be reviewed by the General Council every year and it is scheduled to expire fifteen years after its adoption in 2026. Further details concerning the waiver are contained in Box 7.

**Box 7: LDC Services Waiver**

**Scope**

The LDC services waiver was adopted on 17 December 2011, by a Decision of the Ministerial Conference. From that date, and notwithstanding the MFN requirement in Article II of the GATS, Members have been free to notify and grant more favourable treatment to services and service suppliers of LDCs with respect to the six categories of measures described in GATS Article XVI. The decision also mentions the possibility of providing preferential treatment in respect of "any other measures annexed to the waiver", however the application of those measures is subject to approval by the Council for Trade in Services. The preferential treatment may be granted in any sector or mode of supply, and it may be subjected to a defined period of time. It should be noted that the waiver does not allow a Member to accord any other Member less favourable treatment than that inscribed in its schedule. The waiver only allows the Member to give more favourable treatment.

**Beneficiaries from the waiver**

Preferential treatment covered by the LDC waiver may be accorded to any LDC, whether a Member or not, but this treatment must be extended "immediately and unconditionally" on an MFN basis to all LDC Members designated by the United Nations. With respect to origin rules for services and service suppliers under paragraph 1 of the waiver, LDC Member-controlled firms or firms organized under the laws of an LDC Member have LDC origin. In contrast, to benefit from the waiver, non-LDC controlled firms have to show, in addition, that they have substantive business operations in an LDC.

**Members granting waiver-covered preferences**

A preference covered by the waiver may be accorded by any WTO Member regardless of its status as developed, developing, or LDC. The waiver contains no exclusions in this respect.

**Other conditions applying to waiver-covered preferences**

Waiver preferences are accorded by Members autonomously. However, they must notify the Council for Trade in Services before they grant the preference, giving details of its nature and duration. Any change in waiver conditions must again be notified. As to duration, the waiver terminates 15 years from its adoption, on 11 December 2026. In principle, the waiver could be terminated earlier as a result of the annual review by the General Council as to whether the "exceptional circumstances" justifying the waiver still exist. As well, a preference granted autonomously under the waiver may be withdrawn at any time by the granting Member.

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66 Para 2 of the Waiver.
67 Para 7 of the Waiver.
68 Para 6 of the Waiver.
IV. SUMMARY

The GATS explicitly provides for future trade negotiations with a view to achieving "a progressively higher level of liberalization". The Uruguay Round marked only a first step in improving – or at least binding - access conditions for trade in services, and contained in the Agreement is a mandate for future successive rounds of negotiations. Also contained in the Agreement are several mandates for further negotiations on disciplines on domestic regulation, as well as on GATS rules (emergency safeguard measures, government procurement and subsidies).

The GATS built-in agenda includes the mandates to undertake two types of negotiations. On the one hand, the negotiation of progressive liberalization according to the mandate contained in Article XIX; and on the other, the rule making negotiations on domestic regulation (Article VI.4), Emergency Safeguard Mechanism (Article X), Government Procurement (Article XIII), and Subsidies (Article XV).

The negotiation of specific commitments under Article XIX began five years after the WTO Agreement entered into force; their aim is to achieve progressively higher levels of liberalization. Basically these negotiations are directed to the reduction or elimination of limitations and the progressive extension of commitments to more sectors. Also within the scope of these negotiations Members are expected to eliminate MFN exemptions that were taken at the moment of their accession to the WTO. Members have agreed that this process of liberalization shall take place with due respect for national policy objectives and the level of development of individual Members, both overall and in individual sectors. The negotiation mandate contained in Article XIX explains that the process of progressive liberalization shall be advanced in each round of negotiations through bilateral, plurilateral or multilateral negotiations. In this round, the negotiations have been pursued through the exchange of requests and offers, organized on a bilateral or plurilateral basis. The Council for Trade in Services in Special Session (CTSSS) is the body responsible for overseeing the negotiations.

The rule making negotiations began upon entry into force of the GATS. Their scope was defined by the GATS, and their aim is to create new rules, in most of the cases to prevent adverse trade effects. Members engaged in these negotiations follow a different methodology and conduct the negotiations through proposals leading towards the establishment of new disciplines. These negotiations are undertaken in the Working Parties created for this purpose. The Working Party on Domestic Regulation is in charge of Article VI.4 negotiations, while the Working Party on GATS rules is in charge of the safeguards (Article X), government procurement (Article XIII), and subsidies (Article XV) negotiations.

EXERCISES

1. What are the two dimensions of the current round of services negotiations, please explain the issues and objectives involved?

2. The negotiating guidelines specify that the main method for the negotiations shall be the "request-offer" approach, please explain how such negotiations care conducted?
PROPOSED ANSWERS:

1. The GATS explicitly provides for future trade negotiations with a view to achieving “a progressively higher level of liberalization”. The Uruguay Round marked only a first step in improving – or at least binding – access conditions for trade in services, and contained in the Agreement is a mandate for future successive rounds of negotiations. Also contained in the Agreement are several mandates for further negotiations in the rule-making areas of domestic regulation, as well as on emergency safeguard measures, government procurement and subsidies.

   For the market access negotiations, Article XIX contains several sub-paragraphs (1-4), which specify various objective and principles, as well as certain procedural matters pertaining to the conduct of negotiations. As required by Article XIX:3, on March 2001, the Council for Trade in Services in Special Session, approved the Guidelines and Procedures for the Negotiations on Trade in Services. The document (which comprises of objectives and principles, scope, and modalities and procedures, for the negotiations), builds to a large extent on relevant GATS provisions, in particular Article IV (‘Increasing Participation of Developing Countries’) and Article XIX (‘Negotiation of Specific Commitments’).

   The negotiations on the rule-making areas include those conducted in the Working Party on Domestic Regulation and the Working Party on GATS Rules. The mandate for the negotiations on Domestic Regulation is contained in Article VI:4 of the GATS, which requires Members to develop any necessary disciplines aimed at ensuring that measures relating to qualification requirements and procedures, technical standards and licensing requirements do not constitute unnecessary barriers to trade in services. Such disciplines are intended to address trade barriers arising from non-discriminatory domestic regulation. Mandates for the negotiations on GATS Rules include those on emergency safeguard measures (Article X), government procurement (Article XIII) and subsidies (Article XV).

2. The third part of the Guidelines state that current schedules, rather than actual market conditions, are to be used as the starting point for the negotiations. It further specifies that the main method for the negotiations shall be the request-offer approach. In this connection, keep in mind that Article XIX:4 simply refers to the possibility of bilateral, plurilateral and multilateral negotiations to advance liberalization, but does not establish priorities between these approaches. ‘Bilateral’ negotiations are normally conducted in a request-offer context, where interested governments negotiate improvements across sectors or, as the case may be, modes of supply.
The exchange of requests in services negotiations has traditionally been conducted on a bilateral basis. A WTO Member develops an initial request and submits it to other WTO Members in which it has an interest in seeking improved commitments from. The approach is called "bilateral" since the initial request and any subsequent follow-up negotiations are conducted on a two-party basis. In a typical situation, once the request has been sent to target Members there will be follow-up consultations for further questions and clarifications.

At the Hong Kong Ministerial Conference of December 2005, Ministers decided to give the negotiations greater impetus by agreeing to launch collective requests and exchanges. Paragraph 7 of Annex C of the Ministerial Declaration affirmed that the request-offer negotiations should also be pursued on a plurilateral basis and provides guidelines for the conduct of these negotiations. Under plurilateral negotiations, Members with common interests make a collective request to targeted Members to improve specific commitments in a particular sector or mode of supply. Subsequently, requesting and requested Members meet for follow-up discussions. The process is driven by Members with a common negotiating interest in a particular sector or mode. As with the bilateral request-offer negotiations, the WTO Secretariat is not involved in the exchanges between Members.
Administering the GATS

ESTIMATED TIME: 2 hours

OBJECTIVES OF MODULE 9

- Briefly describe the various bodies and mechanisms involved in administering the GATS; and

- outline the various roles and responsibilities of WTO Members and the Secretariat in the development and administration of the GATS, as well as the conduct of negotiations.
I. INTRODUCTION

This module explains how the GATS is administered. A brief description is given of the functions of the various WTO bodies in which Members discuss matters related to the implementation of the Agreement. The module also outlines the role and responsibilities on the part of both the Membership and the Secretariat.

I.A. COUNCIL FOR TRADE IN SERVICES

The top decision-making body of the WTO is the Ministerial Conference, which is composed of representatives of all Members is expected to meet at least once every two years. In the interim, the Conference is represented by the General Council. The Council for Trade in Services operates under the guidance of the General Council and is responsible for overseeing the functioning of the General Agreement on Trade in Services (GATS). It is open to all Members and meets several times a year in regular session and, for the conduct of the ongoing services negotiations, in special session.

I.B. SUBSIDIARY BODIES

The Council for Trade in Services oversees four subsidiary bodies that deal with sector-specific or technical issues, and negotiations in rule-making areas that were not concluded during the Uruguay Round.

The Committee on Trade in Financial Services discusses trade and regulatory developments in financial services. It is responsible for the continuous review of the application of the GATS with respect to this sector, and serves as a forum for technical discussions and examination of regulatory developments affecting financial services trade. The Committee receives periodic updates from the few Members that have not yet ratified the Fifth Protocol (see Module 7 for further information on financial services).

The Committee on Specific Commitments discusses matters related to the classification of services and the scheduling of commitments (see Module 5 for further information on the scheduling of specific commitments). The Committee also provides the forum, during the course of negotiations, to discuss technical matters concerning the finalization of schedules at the end of a round of negotiations.

The Working Party on Domestic Regulation (WPDR) is mandated to develop disciplines in the area of domestic regulation pursuant to Article VI:4. The Working Party was set up in April 1999 to replace the Working Party on Professional Services (WPPS). Disciplines on Domestic Regulation in the Accountancy Sector (S/L/64) were approved by the Council for Trade in Services in December 1998. However, these disciplines are not yet in force and are to be integrated into the GATS, together with any results that the WPDR may achieve, at the end of the current round (for further information on negotiations on domestic regulation see Module 8).
The Working Party on GATS Rules has three negotiating mandates: Emergency Safeguard Measures (Article X); Government Procurement (Article XIII); and Subsidies (Article XV). Of these, only the negotiations on emergency safeguards were initially subject to a deadline specified in the Agreement but after several extensions this has been replaced by an open-ended timeframe. All three subjects are part of the services negotiations in the Doha Round (for further information on GATS Rules negotiations see Module 7).

Meetings of the various bodies are usually attended by Geneva-based delegations. In the case of services, which cuts across many different sectors, there is often a need for trade negotiators to be supported by sector specialists, especially on technical/regulatory matters. In this connection, sometimes governments also send capital-based experts to these meetings.
II. DISPUTE SETTLEMENT PROCEDURES

Apart from the bodies described above, as with other WTO Agreements, effective dispute resolution - from the stage of friction to consultation, complaint, adjudication and implementation - is critical to the effective functioning of the GATS. In the event of problems related to the operation of the GATS, Articles XXII and XXIII provide the framework for consultations and, if need be, dispute settlement and enforcement among Members. The relevant provisions of the Dispute Settlement Understanding (DSU) apply.

The preferred outcome of the DSU process is resolution through consultation, rather than through panel rulings. If these are needed, nevertheless, the initial ruling by an independent panel is endorsed (unless there is a full consensus that it be rejected) by the WTO’s General Council which in this case meets as the Dispute Settlement Body. Appeals based on points of law are possible. Box 1 outlines the dispute settlement process.

<table>
<thead>
<tr>
<th>Box 1: Dispute settlement within the WTO</th>
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<tbody>
<tr>
<td><strong>Step 1:</strong></td>
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<td><strong>Step 2:</strong></td>
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<td><strong>Step 3:</strong></td>
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<td><strong>Step 4:</strong></td>
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<td><strong>Step 5:</strong></td>
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<tr>
<td><strong>Step 6:</strong></td>
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<tr>
<td><strong>Step 7:</strong></td>
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<tr>
<td><strong>Step 8:</strong></td>
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<tr>
<td><strong>Step 9:</strong></td>
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</tbody>
</table>
The DSU provides a timeframe for each of the dispute settlement stages:

<table>
<thead>
<tr>
<th>Timeframe</th>
<th>Activity</th>
</tr>
</thead>
<tbody>
<tr>
<td>60 days</td>
<td>Consultations, mediation, etc</td>
</tr>
<tr>
<td>45 days</td>
<td>Panel set up and panelists appointed</td>
</tr>
<tr>
<td>6 months</td>
<td>Final panel report to parties</td>
</tr>
<tr>
<td>3 weeks</td>
<td>Final panel report to WTO Members</td>
</tr>
<tr>
<td>60 days</td>
<td>Dispute Settlement Body adopts report</td>
</tr>
<tr>
<td>Total =</td>
<td>12 months (without appeal)</td>
</tr>
<tr>
<td>90 days</td>
<td>Appellate Body report</td>
</tr>
<tr>
<td>30 days</td>
<td>Dispute Settlement Body adopts Appellate Body report</td>
</tr>
<tr>
<td>Total =</td>
<td>15 months (with appeal)</td>
</tr>
</tbody>
</table>

If a case runs its full course to a first ruling, it should not normally take more than one year or 15 months, there is an appeal. The agreed time limits are flexible, and, if the case is considered urgent, it could take as little as nine months. Since a ruling is automatically adopted unless there is a consensus to reject it, any dissatisfied Member would need to persuade all other WTO Members (including all parties to the case) of its view.

The DSB has the sole authority to establish “panels” to consider the case, and to accept or reject the findings. If the respondent Member loses, it must abide by the Panel’s or the Appellate Body’s recommendations and state its intention to do so at a DSB meeting held within 30 days of the report’s adoption. If immediate compliance proves impractical, the Member will be afforded a “reasonable period of time”.

If the Member feels unable to act in time, it has to enter into negotiations with the complaining Member(s) in order to agree on mutually-acceptable compensation. If this proves impossible within 20 days, the complaining Member may ask the DSB for permission to impose limited trade sanctions (“suspend concessions or obligations”) against the other Member. The DSB is to grant authorisation unless there is a consensus against this request.

In principle, sanctions should be imposed within the sector concerned. If this is not practical or not effective, a different sector under the same agreement may be chosen. As a last resort, action may also be taken under another Agreement. The objective is to minimize the risk of unrelated sectors and legal frameworks being drawn into the matter, while at the same time ensuring effectiveness.
III. ROLE AND RESPONSIBILITIES OF MEMBER GOVERNMENTS

III.A. MINISTRIES AND AGENCIES INVOLVED

The GATS is a relatively new agreement as compared to the GATT. National administrations thus have less experience in dealing with GATS-related issues than with "traditional" trade problems under the GATT, and they do not normally have a central structure for coordinating their services-related policies. A wide range of ministries and agencies at various government levels may be involved.

Regulation of services often occurs at sub-federal levels (state/province/parish and municipal) or, in some instances (e.g. professional licensing) are delegated to private sector organisations. A related challenge is the fact that there are some 160 service subsectors involved, which would be difficult to oversee for any central agency. In order to ensure compliance with existing obligations, and to participate effectively in negotiations, national administrations may find it useful to create sector- or issue-related working groups. Box 2 suggests how such groups might be composed.

**Box 2: Possible composition of the government working groups**

<table>
<thead>
<tr>
<th>Government Working Group</th>
<th>Government Working Group Composition</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Responsible Government Ministries/Agencies</td>
</tr>
<tr>
<td>Business services</td>
<td>Industry and Commerce</td>
</tr>
<tr>
<td></td>
<td>Agriculture</td>
</tr>
<tr>
<td></td>
<td>Fisheries</td>
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<tr>
<td></td>
<td>Forestry</td>
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<tr>
<td></td>
<td>Mining</td>
</tr>
<tr>
<td></td>
<td>Justice</td>
</tr>
<tr>
<td>Communication services</td>
<td>Communications</td>
</tr>
<tr>
<td></td>
<td>Industry and Commerce</td>
</tr>
<tr>
<td></td>
<td>Culture and Education</td>
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<td></td>
<td></td>
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<tr>
<td>Construction and related</td>
<td>Public Works</td>
</tr>
<tr>
<td>engineering services</td>
<td>Industry and Commerce</td>
</tr>
<tr>
<td>Distribution services</td>
<td>Industry and Commerce</td>
</tr>
<tr>
<td>Educational services</td>
<td>Customs Authority</td>
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<tr>
<td>Environmental services</td>
<td>Environment</td>
</tr>
<tr>
<td></td>
<td>Industry and Commerce</td>
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<td></td>
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</tbody>
</table>
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</thead>
<tbody>
<tr>
<td></td>
<td>Responsible Government Ministries/Agencies</td>
</tr>
<tr>
<td>Financial services</td>
<td>Finance&lt;br&gt;Central Bank&lt;br&gt;Insurance/Banking Registrar&lt;br&gt;Securities Regulator&lt;br&gt;Pension Fund Regulator</td>
</tr>
<tr>
<td>Health-related and social services</td>
<td>Health&lt;br&gt;Social Welfare&lt;br&gt;Women &amp; Families</td>
</tr>
<tr>
<td>Recreational, cultural and sporting services</td>
<td>Culture and Education&lt;br&gt;Sports&lt;br&gt;Parks Authority</td>
</tr>
<tr>
<td>Tourism and travel-related services</td>
<td>Tourism&lt;br&gt;Parks Authority</td>
</tr>
<tr>
<td>Transport services</td>
<td>Transportation&lt;br&gt;Vehicle Licensing</td>
</tr>
<tr>
<td>Other services</td>
<td>Utilities Regulator</td>
</tr>
<tr>
<td>Cross-Sector: Modes of Supply &amp; E-Trade</td>
<td>Immigration Authority&lt;br&gt;Investment Authority&lt;br&gt;Export Development Authority&lt;br&gt;Company Registry&lt;br&gt;Land Title Registry&lt;br&gt;Industry and Commerce</td>
</tr>
<tr>
<td>Cross-Sector: Standards &amp; Professional Credentials</td>
<td>Standards Agency&lt;br&gt;Employment Standards&lt;br&gt;Worker’s Compensation Board&lt;br&gt;Licensing &amp; Work Permits&lt;br&gt;Ministry of Trade</td>
</tr>
<tr>
<td>Cross-Sector: Co-ordination among Levels of Government</td>
<td>Industry and Commerce</td>
</tr>
</tbody>
</table>

Source: Adapted from OECD, 2002.
Given the regulatory intensity of many service activities and the range of sectors involved, proper co-ordination and information across agencies and government levels is critical for at least three purposes:

(i) Ensuring awareness of the types of GATS-related measures falling under a ministry’s or agency’s jurisdiction.

(ii) Ensuring that each ministry/agency has properly identified and analyzed - against the background of existing GATS obligations, including specific commitments - its current use of measures.

(iii) Ensuring that, in preparing and/or implementing new measures, relevant GATS obligations - including notification requirements - are taken into account and complied with (see Box 3 for a reminder of unconditional and conditional obligations).

**Box 3: A reminder of the different types of GATS obligations**

Apart from specific commitments, there are in principle two types of legal obligations under the Agreement: unconditional obligations that apply across all services covered by GATS, and conditional obligations that apply only to sectors where specific commitments have been made (see Module 4 for a more detailed explanation).

<table>
<thead>
<tr>
<th>(i) Obligations in all sectors falling under the GATS (&quot;unconditional&quot;):</th>
<th>(ii) Obligations in sectors in which GATS commitments have been undertaken (&quot;conditional&quot;):</th>
</tr>
</thead>
<tbody>
<tr>
<td>○ Ensure compliance with MFN requirement (Article II)</td>
<td>○ Notify any new laws, regulations etc. that significantly affect trade (Article III:3)</td>
</tr>
<tr>
<td>○ Publish all measures pertaining to or affecting the operation of GATS (Article III:1)</td>
<td>○ Administer regulations in a reasonable, objective, and impartial manner (Article VI:1)</td>
</tr>
<tr>
<td>○ Institute legal complaints mechanisms for affected suppliers (Article VI:2)</td>
<td>○ Prevent new licensing and qualification requirements and technical standards from nullifying or impairing commitments (relevant criteria are specified in Article VI:5)</td>
</tr>
<tr>
<td>○ Ensure that recognition measures are compatible with the provisions of Article VII</td>
<td>○ Prevent monopolies from undermining commitments (Articles VIII:1 and 2)</td>
</tr>
<tr>
<td>○ Prevent monopolies from undermining the MFN requirement (Article VIII:1)</td>
<td>○ Ensure absence of restrictions on payments and transfers (Article XI:1)</td>
</tr>
<tr>
<td>○ Consult with other Members, upon request, on business practices that may restrain competition (Article IX:2)</td>
<td>And, finally:</td>
</tr>
<tr>
<td></td>
<td>○ Grant market access and national treatment to the extent set out in the schedule (Articles XVI and XVII)</td>
</tr>
<tr>
<td></td>
<td>○ Respect any additional commitments undertaken under Article XVIII</td>
</tr>
</tbody>
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III.B. NOTIFICATIONS

In addition to transparency obligations under Article III:1 and 3, Members have further notification and information requirements in specified circumstances. In particular, they need to notify and/or provide information on:

**Enquiry points and contact points**
- Establishment of *enquiry points* pursuant to Article III:4 and of *contact points* pursuant to Article IV:2 (document S/L/23).

**Economic integration**
- Conclusion, enlargement or significant modification of *economic integration agreements* (Article V:7 (a))
- Progress on implementation if such agreements are phased-in (Article V:7 b)
- Intention to "withdraw or modify a specific commitment" in the context of an economic integration agreement (Article V:5)
- *Labour markets integration agreements* (Article V bis)

**Recognition**
- Existing *recognition measures* (within 12 months of the GATS taking effect) and whether these are based on mutual agreement (Article VII:4a).
- Opening of negotiations on a mutual recognition agreement (Article VII:4b)
- Adoption or significant modification of recognition measures (Article VII:4c)

**Monopolies**
- Intentions to grant *monopoly rights* or exclusive service supplier status in services covered by specific commitments (Article VIII:4)

**Balance of Payments**
- Trade restrictions adopted or maintained due to serious *balance-of-payments or external financial difficulties* or threat thereof (Article XII:4)

**Security Exceptions**
- Invocation of *security exceptions* pursuant to Article XIV bis (information to be provided "to the fullest extent possible")

**Modification or withdrawal of a specific commitment**
- Intention to *modify or withdraw a scheduled commitment* (Articles XXI:1b and X:2)
MFN exemption

- Introduction of **MFN-consistent regime** at the termination of the relevant exemption (paragraph 7 of Annex on Article II Exemptions)

In all cases, notifications are made to the Council for Trade in Services. For further information on notifications see **Guidelines for Notifications under the General Agreement on Trade in Services (S/L/5)** and the **Decision on the Notification of the Establishment of Enquiry and Contact Points (S/L/23)**.

### III.C. ENQUIRY POINTS

Given the crucial role of regulation in determining market entry and market participation in many services sectors, there are various provisions in the Agreement to improve the transparency of Members' regulatory regimes. In addition to notification and information requirements, these include the obligation on all Members to maintain one or more enquiry points. At such points, other Members can request and receive specific information on measures of general application or international agreements affecting services trade (Article III:4). A list of these enquiry points is available on the WTO Website (http://www.wto.org/).

Enquiry points are intended only for government access. Queries from the business community may be channelled through the home-country government to the enquiry point of the Member concerned. In order for these points to be effective, they should have at their disposal an inventory or a database of relevant measures and international agreements within the meaning of Article III:1 and 3. Increasingly, such information is being made more generally available through searchable websites.

### III.D. CONTACT POINTS

To help increase the participation of developing countries in trade, developed country Members - and, to the extent possible, other Members - are required to establish contact points. These are intended to facilitate access of developing countries' service suppliers to information regarding “commercial and technical aspect of the supply of services; registration, recognition and obtaining of professional qualifications; and the availability of services technology” (Article IV:2).
IV. ROLE OF THE WTO SECRETARIAT

Work and information related to the GATS is provided and/or coordinated within the WTO Secretariat by the Trade in Services Division. Staff of the Division assists Members in the development, negotiation, administration and application of the GATS. This entails a variety of supporting functions for relevant WTO bodies (councils, committees, working parties, etc.), the provision of technical assistance and advice to Members and countries in accession, the monitoring and analyses of trade and trade policy developments in individual economies and overall, and the contribution of legal information and advice in dispute cases. Upon the request of the Membership, the Division may also organise symposiums on specific services topics.
V. SUMMARY

This module has provided a brief overview of the various bodies and mechanisms that help administer the GATS. It has explained the structure and functions of the Council, Committee and Working Parties in which Members discuss issues, clarify their understanding of relevant provisions, undertake negotiations, and monitor developments with respect to the implementation of the Agreement. A brief description has also been given of the dispute settlement procedures which, though less frequently used than in merchandise trade to date, play a vital role in the effective functioning of the Agreement. Finally, the module outlined the respective roles and responsibilities of the WTO membership and Secretariat.

EXERCISES

1. Please explain the framework for overseeing the functioning of the GATS, including the role and functions of the various bodies?

2. Why is it said that in the regulation of services it is difficult for one central agency to oversee all matters, and therefore it is critical to have proper co-ordination and information across agencies and government levels?
PROPOSED ANSWERS:

1. The Council for Trade in Services operates under the guidance of the General Council and is responsible for overseeing the functioning of the General Agreement on Trade in Services (GATS). It is open to all Members and meets several times a year in regular session and, for the conduct of the ongoing services negotiations, in special session.

The Council for Trade in Services oversees four subsidiary bodies that deal with sector-specific or technical issues, and negotiations in rule-making areas that were not concluded during the Uruguay Round.

- The Committee on Trade in Financial Services discusses trade and regulatory developments in financial services. It is responsible for the continuous review of the application of the GATS with respect to this sector, and serves as a forum for technical discussions and examination of regulatory developments affecting financial services trade. The Committee receives periodic updates from the few Members that have not yet ratified the Fifth Protocol (see Module 7 for further information on financial services).

- The Committee on Specific Commitments discusses matters related to the classification of services and the scheduling of commitments (see Module 5 for further information on the scheduling of specific commitments). The Committee also provides the forum, during the course of negotiations, to discuss technical matters concerning the finalization of schedules at the end of a round of negotiations.

- The Working Party on Domestic Regulation (WPDR) is mandated to develop disciplines in the area of domestic regulation pursuant to Article VI:4. The Working Party was set up in April 1999 to replace the Working Party on Professional Services (WPPS). Disciplines on Domestic Regulation in the Accountancy Sector (S/L/64) were approved by the Council for Trade in Services in December 1998. However, these disciplines are not yet in force and are to be integrated into the GATS, together with any results that the WPDR may achieve, at the end of the current round (for further information on negotiations on domestic regulation see Module 8).

- The Working Party on GATS Rules has three negotiating mandates: Emergency Safeguard Measures (Article X); Government Procurement (Article XIII); and Subsidies (Article XV). Of these, only the negotiations on emergency safeguards were initially subject to a deadline specified in the Agreement but after several extensions this has been replaced by an open-ended timeframe. All three subjects are part of the services negotiations in the Doha Round (for further information on GATS Rules negotiations see Module 7).

2. The GATS is a relatively new agreement as compared to the GATT. National administrations thus have less experience in dealing with GATS-related issues than with "traditional" trade problems under the GATT, and they do not normally have a central structure for coordinating their services-related policies. A wide range of ministries and agencies at various government levels may be involved. Moreover, since trade in services involves four modes of supply, measures affecting trade in services are typically "behind the border" and are embedded in a Member's domestic regulation.
Regulation of services often occurs at sub-federal levels (state/province/parish and municipal) or, in some instances (e.g., professional licensing) are delegated to private sector organisations. A related challenge is the fact that there are some 160 service subsectors involved, which would be difficult to oversee for any central agency. In order to ensure compliance with existing obligations, and to participate effectively in negotiations, national administrations may find it useful to create sector- or issue-related working groups.
Measuring Trade in Services

ESTIMATED TIME: 3 hours

OBJECTIVES OF MODULE 10

- Illustrate the statistical frameworks used to measure trade in services:
  - balance of payments trade in services statistics,
  - foreign affiliates statistics;
- present the current state of play with regard to statistics enabling to assess the supply of services by mode; and
- present the statistics currently available and where they can be found at the international level.
I. INTRODUCTION

Following the entry into force of the WTO General Agreement on Trade in Services (GATS), there has been an increasing demand for detailed, relevant and internationally comparable statistical information on the international supply of services. Trade negotiators require statistics, possibly by mode of supply, as a guide to negotiate specific commitments and to monitor their economic impact for each type of service. Not only GATS has inflated demand for enhanced statistics, but it has also highlighted that the scope of international supply of services is far wider than what statistics conventionally measure.

This module builds upon the Manual on Statistics of International Trade in Services (MSITS) 2010. MSITS 2010 provides guidelines and recommendations on how to measure the international supply of services. Two building blocks are identified:

1. Balance of payments (BOP) statistics, which summarise transactions of an economy with the rest of the world and display data on trade in services as conventionally measured (i.e. between residents and non-residents). These statistics are discussed in Section II;

2. Foreign Affiliates Statistics (FATS), which expand the statistical definition of international trade in services by recommending the measurement of services supplied by foreign affiliates (not included in BOP). The FATS framework is illustrated in Section III.

These statistics should be available broken down according to the type of service supplied, by partner and by mode. Such breakdowns give a firm basis for the multilateral and bilateral trade in services negotiations, and are important for a variety of analytical purposes. However, it is often difficult (e.g. in terms of cost, confidentiality, quality of statistics) to collect very detailed data which is why data compilers often have to make a compromise between user's needs and what is reasonably feasible in terms of data collection.

The statistical approach for linking the value of international trade in services to the four modes of supply is discussed in Section IV and finally international data sources are listed and briefly described in Section V. This last section also provides indication of what other statistics could be of interest for a more complete analysis of trade in services (e.g. quantitative indicators).

RECALL

As stressed in GATS, international trade in services can take place through four modes of supply:

- in Mode 1, cross-border supply, only the service crosses the border;
- Mode 2, consumption abroad, occurs when consumers consume services while outside their country;
- in Mode 3, the service supplier establishes its commercial presence in another country through e.g. branches or subsidiaries; and
- Mode 4, presence of natural persons, occurs when an individual has moved temporarily into the territory of the consumer in the context of the service supply, whether self-employed or as an employee of a foreign supplier.
II. BALANCE OF PAYMENT STATISTICS ON INTERNATIONAL TRADE IN SERVICES AND THEIR LINKS WITH GATS

This section provides an overview of the fundamental concepts that underpin the measurement of trade in services as recorded in the balance of payments (i.e. trade in services between residents and non-residents). Moreover, it introduces the detailed classification of trade in services statistics (the Extended Balance of Payments Services Classification 2010 – EBOPS 2010).

IN BRIEF

International trade in services is traditionally measured within the balance of payments (BOP), that is, between residents and non-residents of a country. However BOP only covers the value of trade in services taking place through modes 1, 2 and 4. Mode 3 is generally not covered, and is measured in Foreign Affiliates Statistics.

Trade in services measured in the Balance of Payments are broken down according to 12 major balance of payments (BPM6) services categories, or the more detailed EBOPS 2010 items. EBOPS 2010 is completely in line with the BPM6 classification. There is no one-to-one identity between EBOPS and W/120, but a correspondence table facilitates the linkage between both classifications.

II.A. COVERAGE OF BALANCE OF PAYMENTS TRADE IN SERVICES STATISTICS

Balance of payments (BOP) statistics are the most used source of data on trade in services and is often the only information available. The Services account of the BOP records services transactions between residents and non-residents following principles set forth in the IMF’s 6th edition of the Balance of Payments and International Investment Position Manual (BPM6). The chart below is derived from such statistics. It shows the major trend in commercial services exports over the last three decades.

The residence concept of the BOP is not based on nationality or legal criteria but on a person’s centre of predominant economic interest. It is deemed that an enterprise has a centre of predominant economic interest in a country when it engages or intends to engage in economic activities on a significant scale, and over a long time period, within the country’s territory. A household has a centre of predominant economic interest where it maintains one or more dwellings within the country that members of the household use as their principal dwelling. A period of one year (or more) is suggested as a flexible guideline (the “one-year rule”) for determining residence.
What do available statistics tell us on the importance of trade in services and its developments?

In 2009 **World exports of commercial services** (i.e. total services excluding government services n.i.e., recorded on a balance of payments basis) amounted to US$ 3,350 billion, after growing on average at around 7.9% per year in value terms since 1980. Trade in commercial services grew faster than trade in goods (6.6% on average) during this period, increasing its share in total world trade by 6 percentage points. In 2009, the share of services in world trade reached 21%, that is 2 percentage points up from the previous year, as the decline in global trade in services was considerably less pronounced than that of goods.

![Graph showing World exports of commercial services, 1980-2009 (USD billion and percentage)](image)

*Source: WTO*

As a consequence of the definition of residence, **BOP services statistics mainly cover the supply of services through modes 1, 2 and 4.** Services supplied cross-border, services consumed by consumers while abroad or services supplied through the temporary presence of a natural person are in the majority of cases actually supplied to a resident consumer by a non-resident supplier or vice-versa. However the need for proximity for supplying many services has led producers to establish a **commercial presence abroad,** taking the form of an affiliate which is considered resident in the host country. In GATS terms, services supplied by these affiliates to the local market are mode 3 trade. In statistical terms, such transactions take place among residents of the host country: they are not captured in BOP and need to be measured in a different statistical framework (see Section III).

How much of GATS trade in services is not covered by BOP trade in services statistics?

Fragmentary available data suggest that the value of services supplied through foreign affiliates is higher than the value of services traded on a BOP basis.

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69 On the issue of the residence of natural persons moving under mode 4 and related statistical treatment, see Tip box below.
The one year guideline and supply of services through the presence of natural persons

It is often argued that as a one-year guideline is used to define residency of transactors, balance of payments trade in services statistics may not capture services supplied through the presence of a natural person when they stay in the host country for more than one year. However, this is often not true as although the natural person may be staying more than one year, if she/he is an employee of a foreign service supplier with no commercial presence, the transaction remains between the resident client and the non-resident service supplier (note that if employed in a foreign affiliate, the supply of services is through mode 3). See section IV.A below.

II.B. THE EXTENDED BALANCE OF PAYMENTS SERVICES CLASSIFICATION (EBOPS 2010)

Data on trade in services is displayed in BOP statistics under BPM6 into 12 items, which are broken down into a list of standard and supplementary components. Although it would have seemed attractive, statisticians do not see as realistic options the compilation of data according to the Central Product Classification (CPC)\(^{70}\) or the W/120 (the classification generally used by WTO Members for making commitments or negotiations under GATS). Such a level of detail would be burdensome for data providers (banks or survey respondents) and often prone to errors (not always easy to identify specific services).

In order to respond to the needs for more precise information required by trade negotiations, statisticians developed the more detailed EBOPS 2010 classification as a further breakdown of BPM6 services items. The main BPM6/EBOPS 2010 components are listed below. Items of EBOPS 2010 may generally be described in terms of the CPC Version 2. In addition, to facilitate the use of statistics based on EBOPS 2010 for GATS purposes, tables of correspondence between EBOPS 2010, CPC and W/120 are provided on-line (http://unstats.un.org/unsd/tradeserv/default.htm).\(^{71}\)

\(^{70}\) The CPC is the standard international product classification. The W/120 is described in terms of the CPC provisional version which was drafted in 1989. The current version of the CPC is Version 2 and was agreed as the new international standard in 2008.

\(^{71}\) At the time of writing, these are foreseen as being made available in 2011.
**EBOPS 2010 main components**

**Manufacturing services on physical inputs owned by others** includes activities such as processing, assembly, labelling, packing, etc., undertaken by enterprises that do not own the goods (e.g. oil refining, assembly of clothing, cars, electronics).

**Maintenance and repair services not included elsewhere (n.i.e.)**

**Transport** covers all transport services and related supporting and auxiliary services. EBOPS 2010 distinguishes eight modes of transport – sea, air, space, rail, road, internal waterway, pipeline and electricity transmission - and other supporting and auxiliary transportation services. Post and courier services are also covered under transport.

**Travel** differs from most categories listed in that it is the consumer of these products that gives travel its distinctive characterisation. *Travel* does not refer to a particular product and covers expenses for goods and services (including accommodation, food, souvenirs, etc.) acquired by a person during his/her visit in a country other than his/her own. Note that students studying abroad and patients receiving health care abroad, remain residents of their economies of origin even if they stay longer than one year. Travel is subdivided into *business travel*, and *personal travel*. The latter can be further divided into – *health-related expenditure*, *education-related expenditure*, and all *other* personal travel expenditure. An alternative breakdown by type of product consumed is also proposed.

**Construction**

**Insurance and pension services**

**Financial services**

**Charges for the use of intellectual property, n.i.e.** is divided into franchises and trademarks licensing fees and licenses referring to the use of outcomes of research and development, or for the reproduction/distribution of computer software or audiovisual and related products.

**Telecommunications, computer and information services**

**Other business services** include research and development services, professional and management consulting services (legal services; accounting, auditing; business and management consulting and public relations services; advertising); and technical, trade-related and other business services (architectural, engineering, waste treatment and de-pollution, agriculture, mining; operational leasing services; and trade-related services).

**Personal, cultural, and recreational services** comprises audiovisual and related services and other personal, cultural, and recreational services. The second component covers services such as those associated with education services, health services (provided cross-border or through the presence of natural persons), heritage and recreational services, and other personal services.

**Government goods and services, n.i.e.** covers all government and international organizations’ transactions not contained in other EBOPS 2010 items. Note that GATS does not cover services supplied in the exercise of governmental authority.

The highest priority for the development of BOP trade in services statistics by product is on the development of statistics at the level described in BPM6. The second priority is then to develop this breakdown into the more detailed EBOPS 2010 components, which should be carried out in stages. Compilers generally commence with the disaggregation of services of major economic importance to their own economies.

At the time of writing countries were still working and publishing data on the basis of BPM5 and EBOPS 2002, the previous versions of international recommendations described here. The main differences lie in the introduction of 2 new items under services in BPM6/EBOPS 2010 (manufacturing services and maintenance and repair services) and a number of minor internal reclassifications and naming changes.
III. MEASURING MODE 3 AND MORE... FOREIGN AFFILIATES AND FDI STATISTICS

Section II.A above highlighted that trade in services statistics as measured by the balance of payments mainly cover the supply of services through mode 1, 2 and 4. However, services suppliers often establish affiliates abroad to be closer to the consumer. These foreign affiliates are resident in their host economy and their sales to consumers of this country are therefore considered dometric transactions.

The statistical framework of Foreign Affiliates Statistics (FATS) has been designed to capture information on the activities of these foreign affiliates. FATS provide for a satisfactory approximation of Mode 3 through the computation of the output of foreign-controlled enterprises active in the service sector. FATS also include a wide range of information suitable for analysing not only Mode 3 but also the phenomenon of globalisation in general. Although they are not yet widely compiled across the world (see section V), FATS produced by a number of large developed economies already provide a precious source of information on these areas.

IN BRIEF

Conventional statistics on trade in services between residents and non-residents do not cover Mode 3. This mode of supply will be better measured within the newly created Foreign Affiliates Statistics (FATS) framework.

FATS encompass a set of indicators on the operations of foreign-controlled enterprises which cover both resident affiliates of foreigners (inward FATS) and residents' affiliates located abroad (outward FATS). FATS cover both producers of goods and services, however they provide for breakdowns that enable a suitable identification of services and their sub-sectors.

Although they cannot be considered as statistics for measuring Mode 3, Foreign Direct Investment (FDI) statistics can be considered an important complement.

III.A. THE FATS FRAMEWORK

The population of enterprises for which FATS variables are measured is that of affiliates in which a single investor owns more than 50 % of voting power (i.e. controls a foreign affiliate). "Control" is the key element of FATS relationships. Consequently FATS reflect all operations of the affiliates concerned: they are not prorated according to the share owned by the foreign investor. FATS cover producers of goods and services alike: GATS Mode 3 information needs are taken into account through the breakdown of statistics by economic activity, which identify separately producers of goods and producers of services. In general data are available for a wide range of different service sectors.

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72 In 2008, for the United States, international supply of services through foreign affiliates is more than twice as high as through cross-border trade.

73 This statistical criteria relates closely, although not exactly, to GATS definition of control ("power to name a majority of its directors or otherwise to legally direct its actions").
The illustration below shows the importance of clearly identifying chains of control and highlights how inward and outward FATS should be recorded by compilers of each country involved in the chain of control (the countries of residency of the affiliate, the immediate and the ultimate controllers).

**Illustration: FATS and control through chains of ownership**

The chart features two foreign-controlled enterprises whose operations are measured in FATS. Enterprise EB is directly controlled by an investor EA in country A, and controls directly an enterprise EC in country C. As a consequence EC is also indirectly controlled by EA, even if EA only owns 33% of EC from an arithmetic standpoint (i.e. 55% times 60%). EA is the ultimate controlling institutional unit (UCI), controlling both enterprises EB and EC. The modalities of the control relationship (“who controls whom and in which way”) determine how the operations of EB and EC are measured in inward and outward FATS.

Company EB, resident in country B, is foreign controlled: its operations are therefore included in country B’s inward FATS. In country A, the country where the investor is resident, the operations of EB are described in outward FATS. As enterprise EB controls EC, country B therefore includes the operations of enterprise EC in its outward FATS. Enterprise EB being itself controlled by EA, the operations of EC should also be described in country A’s outward FATS. However this results in double counting (i.e. recording of operations of EC in outward FATS of both country A and country B), in particular when conducting comparisons at the international level. To facilitate analysis, MSITS 2010 therefore strongly encourages compilers to identify the share of (outward) FATS variables accounted for by resident enterprises which are UCI.

Country C reports the operations of enterprise EC in its inwards FATS.

**III.B. FATS GEOGRAPHICAL ATTRIBUTION**

The geographical attribution of FATS can be particularly complex as it is often necessary to analyse chains of control. In breaking down variables by economy, the issues to be addressed depend on whether the statistics are on inward FATS or outward FATS.

- **Outward FATS** are attributed to the economy of the affiliate whose operations are described by the variables.
**Inward FATS** are allocated to the economy that ultimately controls and that derives the benefits from controlling the affiliate (UCI).

**FATS geographical attribution: an illustration**

If a British company controls an affiliate in the United States through a holding company located in Bermuda, then in British outward FATS the affiliate should be attributed to the United States rather than to Bermuda.

If a Moroccan enterprise is indirectly controlled by a French enterprise through its controlled subsidiary in the Netherlands, then in inward FATS compiled by Morocco, the data should be attributed to France. However, considering that information on immediate controllers (or “first foreign parents”) may be available as a by-product of FDI data, and to facilitate comparisons with these data, economies are encouraged to also compile some data classified to the country of the first foreign controller.

**III.C. ECONOMIC VARIABLES FOR FATS**

The FATS variables to be collected include at least the following basic measures relating to foreign affiliates:

- **sales** (turnover) and/or **output** (services output is used as the preferred measure of the international supply of services through Mode 3);
- **employment**;
- **value added**;
- **exports and imports of goods and services**;
- **number of enterprises**.

**III.D. HOW ARE SERVICE SECTORS IDENTIFIED?**

FATS variables are broken down by **activity of the affiliates**. On this basis, all of the data for a given enterprise are classified to its primary activity, that is, the single activity for which its sales (or another key variable) are largest. A special activity classification for FATS variables, termed **ISIC Categories for Foreign Affiliates in services (ICFA Rev.1)**, has been developed so as to cover all economic activities with more detail for activities where the production/sales of services is important.

**TIP**

When analysing FATS data broken down by activity, one needs to keep in mind that these statistics might give an approximation, but not a precise measure, of the activity itself. For example, the total output recorded in FATS under **legal activities** refers to the total output of law firms rather than the total supply of legal services. Some enterprises which are not classified as law firms also offer legal services as a secondary activity, however this production is not included in **legal activities**. Further, the output of **legal activities** might include some of law firms’ output resulting from secondary activities, such as, for instance, providing financial advisory services.
The extent to which data on resident/non-resident (BOP) trade classified by product can be aligned with data on FATS variables classified by activity is inherently limited. Nonetheless, a correspondence between EBOPS 2010 and ICFA Rev.1 is provided on-line at unstats.un.org/unsd/tradeserv. Finally, some countries (e.g. United States) further breakdown the sales (or output) of the affiliates broken down by activity by identifying separately the total sales of goods products from that of total sales of services. The latter provides a closer measure to the mode 3 information needs, and all countries are encouraged to develop a similar breakdown.

III.E. COMMERCIAL PRESENCE AND FDI STATISTICS

Foreign direct investment (FDI) is the category of international investment that reflects the objective of an investor to obtain a lasting interest in a foreign enterprise. For statistical purposes, FDI relationships are characterized by the investor's ownership of at least 10% of a foreign enterprise's voting power (the latter enterprise is referred to as the direct investment enterprise).

FDI statistics form part of the BOP framework. They monitor international economic relations between direct investors and their direct investment enterprises by measuring financial transactions between them, and related income and investment position (stock). Unlike FATS variables, FDI indicators do not enable an assessment of mode 3’s full economic and social impact. They are nevertheless an important complementary set of information in that they enable to assess the extent to which commercial presence is created and develops across borders and the direct net benefits that accrue to investors. In addition, these statistics are much more widely available than FATS and although not enabling to measure mode 3 they currently provide the set of indicators most commonly used in commercial presence-related analysis.

74 At the time of writing, these are foreseen as being made available in 2011.
IV. STATISTICS ON THE INTERNATIONAL SUPPLY OF SERVICES BY MODE

Links between statistics on the value of trade in services and the different modes of supply are not always straightforward and issues are particularly complex regarding Mode 4.

GATS mode 4 covers more than the direct supply of services by foreign natural persons. For instance, intra-corporate transferees or persons that negotiate service contracts are natural persons that not necessarily produce a service, but are instrumental to its supply. Section IV.A presents the categories of natural persons concerned by Mode 4 and identifies those that are actually directly involved in the supply of a service and for which the value of trade should be measured in statistics.

Another difficulty lies in the identification of the different modes of supply in existing statistics. Such a breakdown is, at the time of writing, generally not being compiled and currently not being considered as a priority. MSITS 2010 nevertheless provides a simplified statistical approach for compilers to approximate the value of the international supply of services by mode. This approach, summarized in section IV.B, is based on the overall good correspondence between FATS and Mode 3, and BOP statistics and the three other modes.

IN BRIEF

| The value of mode 4 trade is almost entirely captured in BOP statistics on trade in services between residents and non-residents. |
| While the value of mode 3 is mainly covered by FATS, a separate identification of the other modes of supply within BOP statistics is more complex. |
| Services items identified in EBOPS are however deemed to be supplied through one or two dominant modes. This serves as a basis for a simplified approach in MSITS 2010 to use FATS and BOP data to approximate the value of the international supply of services by modes. |

IV.A. MODE 4 TRADE: A STATISTICAL VIEW

Mode 4 is not limited to foreign persons directly involved in the rendering of services but also concerns those whose presence abroad is instrumental to the provision of a service.

GATS qualifies Mode 4 trade in services as being “the supply of a service ... by a service supplier of one Member, through presence of natural persons of a Member in the territory of any other Member”. Therefore from a statistical perspective, Mode 4 covers foreign natural persons entering the host economy to:

- fulfill directly service contracts (contractual service suppliers): this covers self-employed persons (independent professionals) or employees of a foreign service supplier;
work in a foreign affiliate that delivers services (intra-corporate transfer or directly recruited by the affiliate); negotiate contracts (services sellers), negotiate the constitution/acquisition of an establishment supplying services (persons responsible for setting up commercial presence), market a service etc.

GATS information needs relating to Mode 4 do not only cover the value of services traded, but also the number of natural persons concerned for each of these categories.75 As far as the value of Mode 4 trade in services is concerned, it is only relevant for categories of persons identified in the first bullet point above, i.e. self-employed service suppliers or employees of a foreign service supplier entering the host economy of the client to produce/provide directly a service. For intra-corporate transferees and foreign persons directly employed by the foreign affiliate, it is considered that the supply of the service takes place through Mode 3. For service sellers and persons responsible for setting up commercial presence there is at least initially no production or delivery of a service (it should in principle take place at a later stage, in either of the modes).

Another key issue is the temporary nature of the presence: although GATS does not define temporary presence in terms of a specific duration of stay, in practice this is done in Member's schedules of commitments. This definition is not always consistent with the “one-year guideline” which distinguishes residents of an economy from non-residents. Nevertheless, the value of Mode 4 trade in services is almost entirely captured (together with other modes) within the services components in BOP which covers transactions relating to international service contracts between residents and non-residents, even if the natural persons stays or intends to stay more than one year in the host economy:

- in the case of contractual service suppliers as employees of a foreign service supplier, although the natural person may have become statistically resident in the host economy, the contract and its payment remain between a resident client and non-resident supplier (i.e. the employer of the natural person);
- for self-employed persons, MSITS 2010 considers that they seldom become residents of the host economy, except if they establish themselves in a host country, in which case it is done as per a mode 3 commitment.

The BOP main services items that are thought to include significant elements of Mode 4 are computer and information services; other business services; personal, cultural and recreational services; and construction.

TIP

BOP labour-related flows (i.e. compensation of employees and workers’ remittances) are not measures of mode 4. They provide interesting information on the income flows originating from general (temporary or indefinite) movements of persons or migration, of which labour mobility. However, unlike BOP services indicators, (i) labour-related flows do not measure trade flows (transactions) as specified in international service contracts between service suppliers and consumers; and (ii) the universe of persons covered with respect to labour-related flows generally largely differs from the universe of persons involved in Mode 4 service trade (i.e. most of the universe for the latter is not covered by BOP labour-related flows).

75 Sources of data to measure the number of persons moving under Mode 4 are examined in section V.C.1 below.
IV.B. ALLOCATION OF BOP ITEMS TO MODES OF SUPPLY

Statistics on trade in services are not broken down by mode of supply, and the production of such a breakdown is not currently a priority in comparison with other statistical developments needed to fulfill GATS-related information needs. As a first step, MSITS 2010 however proposes a simplified approach for the allocation of FATS and BOP data to modes of supply based on the following considerations:

- To the extent that foreign affiliates are a good approximation of commercial presence entities, FATS provide most information for services supplied through Mode 3; and
- Service transactions between residents and non-residents, as captured in the balance of payments, broadly cover Mode 1, Mode 2, and Mode 4. Although an accurate breakdown by mode is not compiled, the individual services items identified in EBOPS are generally prone to being delivered only through one or two dominant modes, which enables approximation.

MSITS 2010 thus identifies the most important mode(s) of supply involved for each EBOPS item and proposes a simplified approach for allocating FATS and BOP statistics by mode (see MSITS Chapter V, and in particular Table 5.2). The main principles of this approach are summarized in Table IV.1 below.

<table>
<thead>
<tr>
<th>Mode of supply</th>
<th>Relevant statistical domain simplified presentation</th>
<th>Inadequacies</th>
</tr>
</thead>
<tbody>
<tr>
<td>Mode 1: Cross-border supply</td>
<td>BOP: commercial services (excluding travel, manufacturing services on physical inputs owned by others, maintenance and repair services, construction and part of transport).</td>
<td>BOP does, at the time of writing, not allow a separation between modes of supply.</td>
</tr>
<tr>
<td>Mode 2: Consumption abroad</td>
<td>BOP: travel, manufacturing services on physical inputs owned by others, maintenance and repair services and part of transport</td>
<td>Travel also contains goods consumed by travellers and although an alternative breakdown by type of product is recommended, data generally available are not subdivided into the different categories of services consumed by travellers. BOP does, at the time of writing, not allow a separation between modes of supply for the other listed BOP items when deemed necessary.</td>
</tr>
</tbody>
</table>
As shown on the second row of this table, a fair approximation of services supplied through consumption abroad (Mode 2) is feasible by aggregating travel and a few other service items. Similarly a number of other EBOPS items like financial services are clearly mainly supplied cross-border (Mode 1).

Some other important services identified in EBOPS can be delivered through two modes of supply which may be both important elements. For example, a country’s exports of computer services may be well measured overall. However how much of these sales relate to cross-border supply (Mode 1, e.g. electronic transmission of a specific software developed in the country of the provider), and how much relate to the presence of natural persons (Mode 4, e.g. a programmer developing a specific application in the premises of the foreign customer)?

MSITS 2010 acknowledges that compilers will not be able to allocate each EBOPS type of service by GATS modes of supply in the near future. The simplified approach, operational in the current statistical context, is meant for producing approximations. This approach is only considered as a first step in the estimation process, and MSITS 2010 fully acknowledges that further research and empirical information will be required to validate and to refine the estimates, especially for BOP services items where two dominant modes are involved.
V. AVAILABILITY AND DISSEMINATION OF DATA ON THE INTERNATIONAL SUPPLY OF SERVICES

This section informs on the availability and international dissemination of BOP trade in services statistics, as well as on statistics regarding commercial presence (FATS and FDI data). It also identifies additional indicators and sources used for analysing the international supply of services.

V.A. BOP TRADE IN SERVICES DATA AVAILABILITY AND DISSEMINATION

BOP trade in services data collection is relatively well established and widespread. Data is available for most economies, at least at the level of the major BPM/EBOPS components.

An increasing number of countries are also breaking down their BOP/EBOPS trade in services statistics by partner country; finally, a larger number of economies are now collecting quarterly/monthly data on trade in commercial services to monitor recent trade developments.

Although the revised international standards were recently published (BPM6 and MSITS 2010), which in particular propose revised services classification (EBOPS 2010), available statistics are still based on the BPM5 and EBOPS released in 2002.

Table V.1 below summarizes the major sources of BOP data, specifying the country/partner coverage, the type of service and the format.

<table>
<thead>
<tr>
<th>Publication</th>
<th>Format</th>
<th>Country coverage</th>
<th>By type of service</th>
<th>By partner country</th>
</tr>
</thead>
<tbody>
<tr>
<td>IMF Balance of Payments Statistics Database-- also available from ITC’s Trade Map</td>
<td>book, on-line and CD-ROM</td>
<td>IMF members</td>
<td>BPM5 and EBOPS (provided to IMF on voluntary basis)</td>
<td>No</td>
</tr>
<tr>
<td>Eurostat Database</td>
<td>on-line and CD-ROM</td>
<td>EU members, total EU, euro area, EU candidate countries</td>
<td>EBOPS</td>
<td>Yes, over 200 partners</td>
</tr>
<tr>
<td>OECD Statistics on International Trade in Services</td>
<td>book, on-line and CD-ROM</td>
<td>OECD members; Hong Kong, China and Russian Federation</td>
<td>EBOPS (and additional detail)</td>
<td>Yes, over 200 partners</td>
</tr>
<tr>
<td>Volume 1 Detailed Tables by Service Category and Volume 2 Detailed Tables by Partner Country</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
### UNCTAD Handbook of Statistics

| book, on-line and DVD-ROM | Around 200 economies | BPM5 main items | No |

### UN ServiceTrade database

| on-line | Around 200 economies | EBOPS | Yes, over 200 partners |

### WTO’s International Trade Statistics

| book, on-line and CD-ROM | All economies, regions, world | Summary data and analysis |

The online versions of these databases are available at the following addresses:

- **IMF Balance of Payments Statistics Database**
  

- **Eurostat Database**
  

- **OECD Statistics on International Trade in Services**
  

- **UNCTAD Handbook of Statistics**
  

- **UN ServiceTrade database**
  

- **WTO’s International Trade Statistics**
  
  [http://www.wto.org/English/res_e/statis_e/statis_e.htm](http://www.wto.org/English/res_e/statis_e/statis_e.htm)

### V.B. COMMERCIAL PRESENCE: INFORMATION AVAILABLE

Compared with trade in services in BOP, FATS are still at an early stage of development. Nevertheless, their collection and dissemination are taking an increasing importance at **Eurostat** and **OECD**, fuelled by the growth in national activity in this area. When countries do not yet collect FATS, FDI statistics can provide a useful indication of commercial presence.

### V.B.1. AVAILABILITY AND DISSEMINATION OF FATS

**Eurostat and OECD use FATS questionnaires** inquiring their member countries both inward and outward FATS information, by activity and by country of origin/destination of investment. The coverage of inward FATS is relatively good compared to the outward situation, which is due to the difficulty for national agencies to collect statistics on operations performed outside the country territory or jurisdiction.
Table V.2 below summarizes the major sources of FATS, specifying the country/partner coverage, the activity breakdown and the format.

<table>
<thead>
<tr>
<th>Publication</th>
<th>Format</th>
<th>Country coverage</th>
<th>By activity</th>
<th>By partner country</th>
</tr>
</thead>
<tbody>
<tr>
<td>Measuring Globalisation: The Role of Multinationals in OECD Economies, Volume II: Services</td>
<td>book, on-line and CD-ROM</td>
<td>OECD members</td>
<td>ISIC rev. 2 and 3</td>
<td>Yes</td>
</tr>
<tr>
<td>Eurostat Database</td>
<td>on-line</td>
<td>EU members</td>
<td>NACE Rev. 1.1 Section C to K</td>
<td>Yes</td>
</tr>
<tr>
<td>WTO’s International Trade Statistics</td>
<td>book, on-line and CD-ROM</td>
<td>Selected countries</td>
<td>Total</td>
<td>Total</td>
</tr>
</tbody>
</table>

The online versions of these databases are available at the following addresses:

- Activity of Multinationals
  
  http://stats.oecd.org/ > Globalisation > Activity of multinationals

- Eurostat Database
  
  http://epp.eurostat.ec.europa.eu > Statistics > Industry, trade and services > structural business statistics > Database > Foreign controlled EU enterprises - inward FATS or Foreign affiliates of EU enterprises - outward FATS

- WTO’s International Trade Statistics
  
  http://www.wto.org/english/res_e/statis_e/statis_e.htm

**V.B.2. FDI STATISTICS**

The main collectors and disseminators of FDI data are Eurostat, IMF, OECD and UNCTAD. Eurostat and the OECD use a common questionnaire to collect FDI inward and outward stocks, flows and income data, broken down by industry and by country of origin or destination. The IMF collects FDI positions, flows and income according to the components set out in BPM5, but without any industry and partner country breakdowns.

Table V.3 below summarizes the major sources of FDI data, specifying the country/partner coverage, the activity breakdown and the format.
Table V.3: SUMMARY OF FDI DATA DISSEMINATION BY INTERNATIONAL ORGANIZATIONS

<table>
<thead>
<tr>
<th>Publication</th>
<th>Format</th>
<th>Country coverage</th>
<th>By activity</th>
<th>By partner country</th>
</tr>
</thead>
<tbody>
<tr>
<td>Eurostat Database</td>
<td>on-line</td>
<td>EU members</td>
<td>NACE Rev. 1.1</td>
<td>Yes</td>
</tr>
<tr>
<td>IMF’s Balance of Payments and International Investment Position Statistic</td>
<td>book and CD-ROM</td>
<td>IMF members</td>
<td>No</td>
<td>No</td>
</tr>
<tr>
<td>OECD’s International Direct Investment Statistics</td>
<td>on-line and CD-ROM</td>
<td>OECD members</td>
<td>ISIC rev. 3 (2 digits)</td>
<td>Yes</td>
</tr>
<tr>
<td>UNCTAD Foreign Direct Investment Database</td>
<td>on-line</td>
<td>around 200 economies</td>
<td>No</td>
<td>No</td>
</tr>
</tbody>
</table>

The online versions of these databases are available at the following addresses:

- Eurostat Database

- IMF’s Balance of Payments and International Investment Position Statistic

- OECD’s International Direct Investment Statistics
  http://stats.oecd.org/ > Globalisation > Foreign Direct Investment Statistics

- UNCTAD Foreign Direct Investment Database
  http://unctadstat.unctad.org/ > Foreign Direct Investment

V.C. ADDITIONAL INDICATORS FOR ANALYZING THE INTERNATIONAL SUPPLY OF SERVICES

Trade in services statistical needs go beyond that of the value of services trade. Negotiators and analysts need additional information to further guide negotiations, to support comparison of commitments, as background for the settling of disputes and for the assessment of the international supply of services. Additional information is also necessary for a more complete economic analysis and to evaluate market access opportunities. Further to
international trade values, statistics on the overall importance of services activities as well as quantitative information that might be linked to individual service sectors by modes of supply are of particular relevance.

The number of persons moving and temporarily present abroad in the context of mode 4 is one of those additional needs, and an important complement to the value of mode 4 trade, which is why it is described in detail in MSITS 2010. The first part of this section particularly focuses on quantitative indicators on mode 4 and the rest of this section then discusses possible data sources for production and employment data, as well as quantitative indicators and other types of indicators.

V.C.1. THE NUMBER OF PERSONS FOR MODE 4

Tourism and migration/labour statistics partly respond to the needs identified for measuring the number of persons moving under Mode 4. However, adjustments in related statistical concepts (e.g. duration of stay, categories of migrants and non-migrants) are needed in order to respond to trade policy needs. These frameworks could be used as follows:

- within tourism and migration (non-migrants) statistics, separately identify business travellers/visitors travelling for business purposes;
- in short- and long-term migrant categories, separately identify intra-corporate transferees and foreigners directly recruited by foreign affiliates.

Useful information on existing labour and migration statistics and classifications can also be found at the ILO International Labour Migration Database, www.ilo.org.

V.C.2. MEASURING THE IMPORTANCE OF SERVICES BEYOND INTERNATIONAL TRADE: STATISTICS ON DOMESTIC ACTIVITY

National Accounts constitute the statistical framework out of which main macroeconomic aggregates are calculated (production, Gross Domestic Product, Gross National Income, consumption…). Value added broken down by industry permits the measurement of the contribution of the services sector and its sub-sectors to GDP.

Employment statistics provide the total number of people employed in various sectors of activity. They allow to identify the number of people employed in the services sector and their distribution among different sub-sectors (it should be noted that such statistics also form part of the central framework of National Accounts).

Other information such as prices, business statistics (available from regional and international organizations) as well as data provided by business federations may also be useful for assessing the activity of specific services sectors.

These data (which are available at various levels of detail) may be sourced from various international databases such as Eurostat, ILO, OECD, UNSD, World Bank.
V.C.3. QUANTITATIVE INDICATORS ON SPECIFIC SECTORS

Quantitative indicators available on specific service sectors include, for instance, the number of international students enrolled in basic education, arrivals of tourists, number of letters mailed, kilometres flown by planes, number of phone calls, etc.. Used as a complement to the value of international trade flows, they provide an invaluable additional perspective that enables a more in-depth analysis of services sectors.

Relevant sources of information related to specific sectors are, among others:

- ICAO Digests of Statistics on civil aviation
- UIC Statistics on rail transport
- UIS statistical database on education, culture, audiovisual, R&D
- International Telecommunication Union
- UPU Postal statistics database
- World Tourism Organization
- WIPO Industrial Property Statistics on patents, utility models, industrial designs etc.
  [http://www.wipo.int/ipstats](http://www.wipo.int/ipstats)

Finally, the World Bank’s World Development Indicators ([http://databank.worldbank.org/](http://databank.worldbank.org/)) include a wide range of analytically useful series for trade in services related analysis, such as quantitative information on communication and transportation, in addition to statistics enabling to assess the domestic importance of services mentioned in section V.C.2 above.

V.C.4. OTHER INDICATORS

Other tools are also important sources of information for trade negotiators, analysts and economists, such as the WTO Services Database, which presents information on WTO Members' schedules of commitments and exemptions, the World Bank Regulatory Barriers in Services Trade database[^76], providing a comprehensive repository of regulatory barriers to international trade in selected services sectors, or the Quantitative Air services Agreements Review database. The OECD also developed a Services Trade Restrictiveness Index for three sectors: business services, construction and telecommunications services. These tools are described in the document "Trade and market access data for policy makers"[^77] which was first prepared for the Data Day held at the WTO on 18-19 May 2009.

[^76]: At the time of writing, these were still work in progress.
EXERCISES

1. How is residence defined in the balance of payments framework?

2. What product classification is used to report and publish detailed balance of payments services data?

3. The services produced for the local market by a branch of a foreign service supplier are considered in GATS as delivered through Mode 3 by the foreign owner.
   a. Why are these services not measured in BOP statistics?
   b. Which statistical framework would permit to measure the value of these services?

4. Which indicator(s) can be used to measure the value of mode 4 trade?

5. How would the international supply of health services be recorded using BOP and FATS data?
VI. SUMMARY

Following the entry into force of the WTO General Agreement on Trade in Services (GATS), there has been an increasing demand for detailed and internationally comparable statistical information on the international supply of services, possibly by mode of supply.

This module presents the measurement of the international supply of services and the existing issues with respect to the approximation of data by mode of supply. Two building blocks are identified: Balance of Payments (BOP) statistics and Foreign Affiliates Statistics (FATS).

BOP statistics, which summarise transactions of an economy with the rest of the world, display data on trade in services as conventionally measured (i.e. between residents and non-residents). Trade in services measured in the BOP are broken down according to 12 major balance of payments (BPM6) services categories, which are further broken down into the more detailed Extended Balance of Payments Services Classification (EBOPS 2010).

FATS expand the statistical definition of international trade in services by recommending the measurement of services supplied by foreign affiliates. FATS encompass a set of indicators on the operations of foreign-controlled enterprises which cover both resident affiliates of foreigners (inward FATS) and residents’ affiliates located abroad (outward FATS). FATS cover both producers of goods and services, however they provide for breakdowns that enable a suitable identification of services and their sub-sectors.

Links between statistics on the value of trade in services and the different modes of supply are not always straightforward. Although acknowledging that further work is needed in this respect, the Manual on Statistics of International Trade in Services (MSITS 2010) provides guidelines for linking the value of international trade in services to the four modes of supply:

- the value of mode 4 trade is only relevant for foreign natural persons entering the economy to directly fulfill service contracts (either self-employed or employees of a foreign service supplier); it is almost entirely captured in BOP statistics on trade in services between residents and non-residents;
- the value of mode 3 is mainly covered by FATS. Foreign Direct Investment (FDI) statistics can be considered as an important complement, although they do not measure mode 3;
- services items identified in the balance of payments broadly cover modes 1, 2 and 4; they are deemed to be supplied through one or two dominant modes (simplified approach).

BOP trade in services statistics are available for most economies, at least at the level of the major BPM/EBOPS components. The major sources of data are IMF, Eurostat, OECD, UNCTAD, UNSD and WTO.

FATS are still at an early stage of development; Eurostat and OECD are the main providers of FATS data.

Other statistics could be of interest for a more complete analysis of trade in services. Tourism and migration statistics respond to the needs for measuring the number of persons moving under mode 4 however adjustments to data collection systems would be needed. National Accounts and employment statistics assess the contribution of the service sectors to GDP and employment. Quantitative indicators on specific sectors can be useful complements to the value of international trade flows.
1. Centre of predominant economic interest in a country's economic territory.
   - For an enterprise, when it engages or intends to engage in economic activities on a significant scale, and over a long time period, within the country's territory.
   - For a household, where it maintains one or more dwellings within the country that members of the household use as their principal dwelling.

A period of one year (or more) is suggested as a flexible guideline (the “one-year rule”) for determining residence.

Not based on nationality or legal criteria.

2. What product classification is used to report and publish detailed balance of payments services data?
   - Balance of Payments Manual 6th edition (BPM6) items included in the services account.

3. The services produced for the local market by a branch of a foreign service supplier are considered in GATS as delivered through Mode 3 by the foreign owner.
   a. Why are these services not measured in BOP statistics?
      - These are resident to resident transactions in the host country.
      - The BOP only records transactions between residents and non-residents.
   b. Which statistical framework would permit to measure the value of these services?
      - Foreign Affiliates Statistics (FATS), in particular the sales or output variables (services output is used as the preferred measure of the international supply of services through Mode 3).
      - Although they do not enable to measure GATS Mode 3 supply of services, FDI are an important complementary set of information to FATS in that they enable to assess the extent to which commercial presence is created and develops across borders and the direct net benefits that accrue to investors. However unlike FATS variables, FDI indicators do not enable an assessment of mode 3’s full economic and social impact.

4. Which indicator(s) can be used to measure the value of mode 4 trade?

The value of Mode 4 trade in services is almost entirely captured (together with other modes) within the services items in BOP. These cover transactions relating to international service contracts between residents and non-residents.

The BOP main services items that are thought to include significant elements of Mode 4 are computer and information services; other business services; personal, cultural and recreational services; and construction.

BOP labour-related flows (i.e. compensation of employees and workers' remittances) are not measures of mode 4. Unlike BOP services indicators, (i) labour-related flows do not measure trade flows (transactions) as specified in international service contracts between service suppliers and consumers; and (ii) the universe of persons covered with respect to labour-related flows generally largely differs from the
universe of persons involved in Mode 4 service trade (i.e. most of the universe for the latter is not covered by BOP labour-related flows).

5. **How would the international supply of health services be recorded using BOP and FATS data?**

   - Mode 1 and 4 supply of health services will be recorded under the BPM6/EBOPS 2010 component Personal, cultural, and recreational services.
   - Mode 2 supply of health services will be recorded under the BPM6/EBOPS 2010 component Travel.
   - Mode 3 supply of health services will be recorded in FATS data (most probably under the primary activity corresponding to human health activities, unless a product breakdown is available).
Conclusion

ESTIMATED TIME: 2 hours

OBJECTIVES OF MODULE 11

- Revise the most important points of our course.
I. INTRODUCTION TO THE WORLD TRADE ORGANIZATION

OBJECTIVES OF THE WTO

Improve the welfare of the peoples of the Member countries.

FUNCTIONS OF THE WTO

- Facilitate the implementation, administration and operation, and furthering of the objectives of the WTO Agreements (including the Plurilateral Agreements);
- Serve as a forum for trade negotiations;
- Administer the Dispute Settlement Understanding (DSU);
- Administer the Trade Policy Review Mechanism (TPRM); and
- Cooperate with the IMF and the IBRD (World Bank) to achieve coherence in global economic policy/making.

STRUCTURE OF THE WTO

Ministerial Conference

| General Council (also DSB and TPRB)

| Councils for Goods, Services, Intellectual Property

| Committees

| Sub-Committees
II. SUMMARY ON THE MAIN ECONOMIC CONCEPTS AND OBJECTIVES UNDERPINNING THE GATS

It has sought to explain some of the reasons for an agreement on trade in services as well as the potential benefits of services liberalization. This will hopefully contribute to a better understanding of the legal provisions of the Agreement, as you work through the other modules of this course, as well as the challenges and opportunities of the ongoing Doha negotiations.

The GATS consists of:

- A framework of general rules and disciplines (including annexes addressing individual sectors and modes)
- Commitments on access conditions for specific sectors and modes of supply listed in each Members’ schedule.

Trade in services is defined through four modes of supply, which extend the traditional concept of cross-border trade to include movements of consumers as well as factor flows of investment and labour. All measures undertaken by governments, as well non-governmental bodies acting under delegated authority, which have an effect on trade in services fall within the scope of the GATS. While comprehensive in its coverage, Members have the flexibility to accommodate virtually any regulatory or policy situation since the main access obligations are contained in Member-specific schedules. In this connection, market access and national treatment obligations only apply to scheduled sectors and are subject to any accompanying limitations. Unlike the GATT, it is possible for Members to take “one-off” MFN exemptions (in principle for a duration of 10 years), to impose conditions on national treatment and to use quantitative restrictions to limit market access. The Agreement also foresees future rounds of negotiations to progressively liberalise trade in services, and contains negotiating mandates to complete the framework of rules.

Article XX requires each Member to submit a schedule of commitments, which form “an integral part” of the GATS itself, but does not prescribe the sector scope or level of liberalization. Entries into schedules should remain confined to measures incompatible with either the market access or national treatment provisions of the GATS, and include any additional commitments a Member may want to undertake under Article XVIII.

Schedules would not provide legal cover for measures inconsistent with other provisions of the Agreement such the MFN requirement of Article II or the disciplines on domestic regulation of Article VI. Only measures that constitute limitations in the sense of Article XVI and Article XVII fall within the scope of scheduling. Any other trade-impeding measures do not call for scheduling per se. By the same token, there is no need to schedule access restrictions, such as sales bans on arms or pornographic material and the like, that fall under the General Exceptions of Article XIV or prudential measures aimed to ensure the stability and integrity of the financial services sector.

While this module has sought to cover the main principles and techniques involved in constructing a schedule of specific commitments it cannot substitute for a thorough reading of the relevant provisions of the Agreement in conjunction with the Scheduling Guidelines.
III. SUMMARY ON THE FOUR MODES OF SUPPLY USED IN THE GATS TO DEFINE TRADE IN SERVICES

Based on this framework the scope of the GATS is much broader than that of the GATT in merchandise trade. The GATS covers not only traditional trade flows across borders but also three additional types of transactions where suppliers and consumer directly interact. In some cases it may prove challenging to determine precisely which modes are actually involved in a service transaction. This particularly so in the case of modes 1 and 2 where the introduction of new technology has transformed the way that services are produced, distributed, sold and delivered across borders.
IV. SUMMARY ON THE WIDE RANGE OF SECTORS FROM THE PERSPECTIVE OF THE GATS

Particular attention has been given to classification and scheduling issues, the economic importance of the sector and its main features, the type of commitments taken and treatment in the negotiations, and any policy challenges that could have a bearing on trade in services. The various sections are intended to be introductory and do not attempt to provide comprehensive descriptions of the huge and complex industries that represented in the highly heterogeneous services sector. Thus, issues have been dealt only in so far as they relate to the GATS and cross-references have been provided to subjects that are dealt with in greater depth in other modules of this course.

While it is difficult to summarise the current state of the services negotiations as these are on-going, some general observations can be made of the process:

- At the target date of 31 March 2003, 12 initial offers were available, followed by 26 more submissions (including one schedule for the European Union) prior to the Cancun Ministerial Meeting in early September 2003. By December 2005, the date of the Hong Kong Ministerial Meeting, the total number had reached 69 (covering 93 WTO members), complemented by 30 revised offers. There has been very little change since; only the number of initial offers has increased to 71 and revised offers to 31.

- All developed members and relatively many developing countries with some exceptions, have made contributions. The fact that Sub-Saharan African countries have submitted a relatively low number of offers might be attributed to a high share of least-developed countries (LDCs) in this region. According to the Hong Kong Ministerial Declaration, LDCs “are not expected to undertake new commitments”.

- Overall, the offers have focused on the sectors and modes that already dominate existing schedules, with relatively few significant changes in the pattern of bindings. Sectors with a limited number of existing commitments (e.g. in education, health distribution, postal-courier, road transport) have not attracted many offers. The limited progress of the request-offer process was highlighted by the report of the Chairman of the Council for Trade in Services to the Trade Negotiations Committee (TN/S/23). In the report, Members’ sectoral and modal objectives were also compiled.

- In July 2008, at the request of WTO Members, the Chair of the TNC convened a Services Signalling Conference for interested ministers to indicate how their governments’ current services offers might be improved in response to requests that had been received. The signals, as reported by the Chair of the TNC, were noted by participants as being better than expected.

- Little headway is being made in the rule-making areas. While the Chair of the Working Party on Domestic Regulation has been able to table a draft text that seeks to define middle-ground positions, the negotiations on the three other issues (emergency safeguards, government procurement and subsidies) are far less advanced.

- Services are an important component of the Doha Development Agenda (DDA) and given the concept of a Single Undertaking, a meaningful package in the services area will be important to ensuring a successful conclusion of the Round.
V. SUMMARY ON THE VARIOUS BODIES AND MECHANISMS THAT HELP ADMINISTER THE GATS

It has explained the structure and functions of the Council Committee and Working Parties in which Members discuss issues clarify their understanding of relevant provisions undertake negotiations and monitor developments with respect to the implementation of the Agreement. A brief description has also been given of the dispute settlement procedures which though less frequently used than in merchandise trade to date play a vital role in the effective functioning of the Agreement. Finally the module outlined the respective roles and responsibilities of the WTO membership and Secretariat.