



# NEGOTIATING LIBERALIZATION OF **TRADE IN SERVICES FOR DEVELOPMENT**







# NEGOTIATING LIBERALIZATION OF **TRADE IN SERVICES** **FOR DEVELOPMENT**



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## ABBREVIATIONS AND ACRONYMS

UNCPD	United Nations Central Product Classification
CTS	Council for Trade in Services
DDA	Doha Development Agenda
FDI	foreign direct investment
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
GVC	global value chain
GDP	gross domestic product
ILO	International Labour Organization
LDCs	least developed countries
MFN	most-favoured nation
RTA	Regional Trade Agreement
SDT	special and differential treatment
SDGs	Sustainable Development Goals
TISA	Trade in Services Agreement
UNCTAD	United Nations Conference on Trade and Development
WPDR	Working Party on Domestic Regulation
WPGR	Working Party on GATS Rules
WTO	World Trade Organization

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## PREFACE

As the focal point of the United Nations for the integrated treatment of trade and development and interrelated issues, the UNCTAD secretariat supports developing member States, including the least developed member States, and member States with economies in transition in achieving their beneficial and fuller integration into the international trade and world economy for sustainable development. Through intergovernmental deliberations and consensus-building, research and analysis, and capacity-building technical assistance, UNCTAD's work on trade negotiations and commercial diplomacy aims at enhancing the human and institutional capacities of these member States to analyse, formulate and implement appropriate policies and strategies for trade goals as well as for bilateral, regional and multilateral trade negotiations to assure development gains from international trade, the trading system and trade negotiations.

Services trade policies, in any country, determine the direction of policy reforms and the role which services trade should play in the broader context of growth and development strategies. Regulators, taking guidance from these policies, introduce the regulatory measures that serve the objectives of such policies. National policies and regulations then inform the positions taken by services trade negotiators to achieve outcomes that are supportive of national policy objectives and national development.

In fulfilling their responsibilities, policy makers, regulators and negotiators need to be mindful of the multilateral trade rules governing international trade in services and related negotiations. The complexity of the subject matter has often been cited as a challenge.

The purpose of this publication is to assist trade policy makers, regulators and trade negotiators in considering their decisions regarding trade in services and services negotiations in the overall national development context. It could also be useful for other stakeholders involved or interested in services negotiations and policymaking, including the private sector, researchers and non-governmental organizations. The publication seeks to do so by providing a balanced, objective and sound analysis of the technical and policy issues about the rules and negotiations on trade in services and explore possible ways to address the above-mentioned challenge, especially under the General Agreement on Trade in Services (GATS) of the World Trade Organization (WTO). A brief analysis is also conducted regarding services negotiations in the regional integration context.

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# INTRODUCTION

The services sector has been increasingly dominant in most economies. The share of services value-added in world gross domestic product (GDP) was 67.5 per cent in 2017, compared with 53.4 per cent in 1970.<sup>1</sup> Moreover, according to the International Labour Organization estimates for 2017, services are the main source of global employment with 48.5 per cent share.<sup>2</sup> The service sector has also contributed to the women's increasing participation in the job market, thus positively impact on the gender parity in employment as well as women empowerment. While employment of females in the services sector rose slightly in the LDCs in the past decades and accounted for less than 30 per cent of working females in 2017, it grew more rapidly in developing countries. In 2017 over 50 percent of working females in these countries were employed in the services sector. The share is much higher in developed countries, exceeding 85 per cent. The steady growth of the services sector over those decades is attributable to several factors. New technologies, innovative business models, globalisation of financial markets and the move towards trade liberalization played a pivotal role. Furthermore, and in certain ways more significantly, the gradual paradigm shift in the service economy, particularly in centrally planned economies, transformed services from primarily government functions, performed by designated government owned entities (telecommunications, financial services, transport, education, etc.) into commercial products produced by private sector operators and exchanged in competitive markets. This has also led to structural changes in services industries, leading to more segmentation of the production process and product differentiation leading to more arms-length transactions between service suppliers and producers of goods and other services.

The share of services in GDP on a regional basis reveals a correlation with levels of development. For example, in 2017 the share is the highest in the developed countries with 76.1 per cent followed by countries with economies in transition and developing countries with 60.4 per cent and 55.5 per cent respectively. Latin American developing countries have the highest services share (66.7 per cent) among developing country regions, followed by Africa and Asia by 53.6 per cent and 53.2 per cent respectively. The share is much lower for least developed countries (LDCs) with 48.6 per cent.<sup>3</sup> In terms of the share of services in GDP of individual countries around the world, in most cases, it is greater than manufacturing, agriculture and mining combined.<sup>4</sup>

Trade in services has emerged as the robust and fastest growing segment of international trade. According to UCTADStat, during the period of 2005–2017, world services exports growth rate of 5.4 per cent surpassed merchandise exports growth (3.9 per cent). As of 2017, with \$5.2 trillion value, services accounted for 23.5 per cent of the total world trade. Developing countries have been catching up with the rest of the world with 7.8 per cent export growth rate over the same period. The sector accounted for 16.8 per cent of these countries' total exports in 2017. The LDC group has also increased the share of services in their total exports to a similar extent in 2017, up from 11 per cent in 2008.

In many developing countries, the rise of global value chains (GVCs) and new business models have given services even more prominence and strategic importance. Services are indispensable inputs to the GVCs. Therefore, they play a critical role in attracting foreign direct investment (FDI) and creating new job opportunities.

This reality is not only true for technologically advanced industries, such as information and communication technology equipment or contemporary cars, but it also holds for the most basic production operations such as producing a loaf of bread. A study<sup>5</sup> by the Fung Global Institute in Hong Kong, China revealed that services account for 72 per cent of the final cost of a loaf of bread. The broad categories of services accounted for include importation, manufacturing, transportation, distribution, retail and back-office support functions. The example of the 30 services entering the value chain in this case is probably to be found, in one form or another, in almost all manufacturing operations to varying extents. Services can also improve the productivity of agriculture and gains from agricultural trade. For example, an UNCTAD study<sup>6</sup> shows that in Argentina, provision of road transport services has a positive and statistically significant effect on agricultural productivity. In Zambia, Malawi and Uganda, financial credit access services, transport services, marketing services and information services provided through mobile phones largely determine the gains of farmers from producing export crops destined to international markets. It is, therefore, no wonder that the strength of the services sector is a determinant of the overall level of competitiveness in any economy. For developing countries, development of the services sector also contributes directly to enhancing their national productive capacity.

The services sector is also a determinant of the level of social welfare and quality of life in societies. The strength and efficiency of sectors like health care, education, communication, energy, transport, retail, banking, insurance and others, will always be necessary to fulfil the daily needs of the population at large. Hence, services can make significant contributions to the achievement of Sustainable Development Goals (SDGs) on the 2030 Agenda. Indeed, some of the SDGs and targets directly concern services sectors (e.g. goals on access to education, health, water and sanitation, energy, telecommunication, transport and financial services) while services can facilitate the achievement of others such as the SDGs on hunger eradication, poverty reduction, gender equality and empowerment of all women and girls, employment and decent work for all, industrial innovation and nature preservation.

In today's world, national economies cannot function effectively without access to competitive global services markets, not only to strengthen the capacity of their own services sector, but also to ensure the availability of competitive, high-quality services inputs are essential to a national economy's productive sectors, be it manufacturing, agriculture, or mining. On the other hand, weaknesses in the services sector, leading to more expensive and inefficient inputs of services lead to huge losses in competitiveness across the economy.

The role of competition, introduced through liberalisation of services industries (not deregulation), has been increasingly recognized as a critical component of any successful policy mix aiming at strengthening the services sector and the economy at large. Over the past four decades, advanced economies, as well as emerging developing countries, have devoted major efforts and attention to the liberalization of the services sector, the creation and maintenance of competitive markets, and the development of pro-competitive regulatory frameworks. Designing and implementing sound and coherent services policies and regulation has always been challenging, given the diversity and heterogeneity of services sectors, as well as the multiplicity of governmental and non-governmental institutions involved in policy making and regulation. Services policies in various sectors so often overlap with many other cross-cutting economic policies such as competition, finance, labour, environmental and others. However, one of the most important areas of overlap is probably that with investment policies and

regulation. It is very difficult to have a sound investment policy that succeeds in attracting needed FDI without a corresponding policy vision for the services sector, and vice-versa. After all, in today's world, services account for half of all greenfield FDI projects.<sup>7</sup>

Services trade policies, in any country, determine the direction of policy reforms and the role which services trade should play in the broader context of growth and development strategies. Regulators, taking guidance from these policies, introduce the regulatory measures that serve the objectives of such policies. National policies and regulations then inform the positions taken by services trade negotiators to achieve outcomes that are supportive of national policy objectives and national development. In fulfilling their responsibilities, policy makers, regulators and negotiators need to be mindful of the multilateral trade rules governing international trade in services and related negotiations.

In the early 1980s, in response to the increasing strategic importance of services in the global economy and the rise of international trade in services (i.e. all cross-border business including investment and labour mobility for services), the international community started giving serious consideration to institutional arrangements for international cooperation in the field of services trade. The Uruguay Round of negotiations (1986–1994) produced the WTO General Agreement on Trade in Services (GATS), which entered into force in 1995 and, for the first time, provided a definition of, and multilateral rules for, services trade, as well as a forum for continuing negotiations for the progressive liberalization of services among WTO members. The GATS also provided a conceptual and legal reference to all subsequent bilateral and regional preferential trade agreements covering trade in services.

The concept of trade in services is relatively recent. It was developed during the Uruguay Round negotiations on services. It is legally defined under the GATS in a manner that reflects the fundamental differences that services transactions have compared to trade in goods, which, until then, had been the only known form of international trade. The term "international trade" had always been a reference to a product, produced in one economy, crossing the border into another and payment crossing the border in return. That merchandise trade paradigm never encompassed the cross-border movement of factors of production. In the case of services trade, however, cross-border factor mobility becomes a necessity. Due to the intangible nature of services products, often the supply of a service requires the physical proximity

between suppliers and consumers and even, in some cases, the simultaneity of supply and consumption of a service. It was therefore necessary for the newly developed definition of international trade in services to cover the cross-border mobility of capital and natural

persons, when such mobility is related to the supply of a service. The definition also covers the cross-border movement of consumers of services as a means of facilitating supplier/consumer proximity.

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# **THE GENERAL AGREEMENT ON TRADE IN SERVICES FRAMEWORK**

This part presents the rationale and scope of the GATS as well as its approach towards addressing the development interests and concerns of developing countries and least-developed countries.

## 1. The rationale behind the General Agreement on Trade in Services

The GATS has been based on a set of guiding concepts reflecting its purpose and informing the negotiation and formulation of its provisions. It is important for services policy makers and negotiators to be mindful of some fundamental elements.

### a. The benefits and challenges of a competitive services market

Competitive conditions in contestable services markets would bring about welfare gains to the entire economy in all countries. Whether the consumer of a service is an industrial user or a household consumer, the following **benefits** could be achieved through the creation, and maintenance, of competitive conditions in a services market:

- Higher quality, lower prices and a wider variety of services for producers of goods and services lifting their level of productivity and competitiveness, thus raising the overall competitiveness of the economy;
- Stimulating innovation in services through expanding the market and supporting research and development of new business models;
- Promoting investment in the sector by providing market access to foreign service suppliers in an attractive manner. This would be particularly important for infrastructure services which are in acute need in most developing countries and LDCs as well as for sectors of high potential in creating job opportunities such as tourism on which many developing countries and LDCs rely; and
- Major contribution to social welfare in promoting the efficiency of sectors such as healthcare, education, financial services, transport, distribution and others where most developing countries and LDCs intend to improve.

Due to the inherent cross-border factor mobility in international trade in services, the liberalization of such trade, in most cases, would have different implications compared to the liberalization of merchandise trade. For example, industrialization strategies that aim to shield infant manufacturing industries from products

produced abroad might not lead to the same outcomes in the case of services. Factor mobility in the case of services means that in most instances an “imported” service would be produced locally, employing local personnel and utilizing domestic resources. So often, foreign service suppliers come to the local market with capital (FDI) and technologies that make a major contribution to the development of a country’s domestic service capacity and efficiency which, in turn, feeds into other sectors of the economy. A case in point is the telecommunication sector and the way in which it has developed over the past three decades across many developing countries and LDCs. It is therefore worth highlighting that with proper regulation in place, opening service industries to competition can provide an important contribution to the process of development and the enhancement of developing countries’ domestic services capacity and competitiveness of their economies.

On the other hand, creating and maintaining a competitive services market has its own set of **challenges**, particularly for many developing countries and LDCs, whose service sector is transitioning from the old government led, to the new competitive model, led by private operators. One of the most important and challenging aspects of this transition process is the fundamental change it implies in the role of the government where in many instances it refrains from being the supplier of a service and becomes the “regulator” that sets policies and introduces rules to ensure the attainment of public policy objectives such as ensuring the quality of the service, protecting consumers, safeguarding competition, as well as many others. In this regard, the following challenges are important to highlight:

- The need to develop a coherent policy vision and direction of reform for the services sector and its aspired role in the economy. That vision should determine the direction and pace of policy and regulatory reforms; and
- The challenge of regulatory reform, which would translate the policy vision into specific implementation measures. This challenge can be divided into two sub-sets of issues:
  - 1) Setting **regulatory rules**, which are the laws and regulations to be enacted; and
  - 2) Establishing **regulatory institutions**, which would be mandated to implement the rules.

- The need for flanking policies necessary to achieve the aspired outcomes from policy and regulatory reforms. Such policies would include investment policy, financial and monetary, labour, education, competition policy, infrastructure development, etc.;
- The need for political leadership to pursue all the above. Such leadership would be necessary to promote convergence among different government bodies on policy vision, institutional reforms, infrastructure development and other important regulatory reforms. The experience of accession negotiations under Article XII of the WTO Agreement reveals how critical such political leadership could be to move forward in a reform process and eventually in determining negotiating positions.

### **b. Services trade liberalization, not deregulation**

The GATS aims at ensuring increased transparency and predictability of relevant rules and regulations, providing a common framework of disciplines governing international transactions of services, and promoting progressive liberalization through successive rounds of negotiations. Within the framework of the agreement, the latter concept is tantamount to improving market access and extending national treatment to foreign services and service suppliers across an increasing range of sectors. It does not, however, entail deregulation. Rather, the agreement explicitly recognizes governments' rights to regulate, and introduce new regulations, to meet national policy objectives and the need of developing countries to exercise this right.

Therefore, concept of "liberalization" in the GATS is legally defined as the granting of market access (Article XVI) and national treatment (Article XVII). It neither calls for (or even encourage) deregulation nor privatization. The legal obligations in these two provisions are focused on the kind of measures (i.e. trade restrictions) which a government must not maintain, where a commitment is undertaken. However, it should be noted that refraining from using these "trade restrictions" would not constrain a government's ability to regulate or to adopt any regulatory approach it chooses. Furthermore, the GATS does not impose any obligation on members of the WTO to privatize service supplying companies. In fact, government-owned service suppliers, in various sectors, are found across both developed and developing countries.

It should also be noted that trade in services often interfaces with a wide range of regulatory frameworks which, while aiming to achieve important public policy objectives, may sometimes unduly restrict trade or even be used as disguised trade restrictions. Examples range from licensing requirements to measures protecting privacy, consumers, prevention of fraud and regulation of payment systems. Such regulatory frameworks frequently impinge on commercial activity. At the same time, they are not part of trade policy *per se*, nor does the WTO play a role in setting their regulatory policies or standards. The only trade policy objective of the WTO in this "interface" with such areas of regulation is through exceptions provisions (e.g. GATS Articles XIV and XIV bis) which allow deviations from commitments and obligations, or through disciplines on domestic regulation to ensure the least trade restrictiveness of regulatory measures.

### **c. The need for sound regulation**

The GATS recognizes the "right to regulate" in its preamble and various operative provisions of the agreement reflect that concept. Liberalization under the GATS needs to be combined with sound regulatory reforms to ensure the attainment of the benefits from competition as well as the achievement of non-economic public policy objectives. The Preamble of the GATS states that:

*"[Members] Recognizing **the right of Members to regulate, and to introduce new regulations, on the supply of services within their territories in order to meet national policy objectives and, given asymmetries existing with respect to the degree of development of services regulations in different countries, the particular need of developing countries to exercise this right.**"*  
(emphasis added)

While the GATS does not restrict the sovereign right of governments to regulate, exercising that right is sometimes a challenge in itself. The greatest challenge that governments and policymakers face in the transformation of the services sector is the regulatory challenge. One of the most important conceptual bases of the GATS is the distinction between liberalization and (de)regulation. From a legal perspective, liberalization under GATS, in sectors where commitments are made, means granting market access and national treatment. These provisions have a defined legal scope that applies only to six types of market-access restrictions and any form of discrimination. Except for

that, governments and regulators are free to decide the shape and content of the remaining regulatory framework. While GATS does not interfere with the regulatory agenda, by the same token it does not provide much guidance either on how to pursue a sound regulatory approach.

While each services sector has its specificities and technical complexities, some general guiding

principles might be identified to assist policymakers and regulators in taking the “right path”. Such principles could be identified at a general level that might be applicable across various sectors and, at the same time, leave appropriate space for sovereign and societal policy choices. They could even be envisaged as a set of initial general questions for a “regulatory audit” type of analysis.

### Box 1. The regulatory challenges

An effective approach to sound regulation normally emanates from a clear policy vision for the services sector concerned, its role in the economy, its contribution to society and the direction that the process of reform needs to take. However, in general terms, the regulatory challenge may involve two important aspects: regulatory rules and institutions.

#### i. Rules

The term “rules” in this context refers to measures of general application such as laws, regulations and administrative guidelines. There are four characteristics that could be recommended for rules relating to the supply of services:

- **Design:** The choice of which rules may be contained in general legislation and which may be left to other forms of regulation, decrees or administrative guidelines, is important. It should be made in a manner that facilitates effective application. At the same time, the design should consider the need for possible future flexibility to adjust in the light of market developments and evolution of policy objectives;
- **Scope-jurisdiction:** The interface between central and sub-central government levels is important to consider. Both levels must act in a coherent and complementary way. The same goes for the interface between sector-specific and cross-cutting types of rules (e.g. telecommunications and competition policy);
- **Content:** The rules relating to the supply of the service need to be clearly stated and drafted, based on objective criteria and in a coherent manner. They should also, to the maximum extent possible, reduce the scope for discretionary decision-making; and
- **Transparency:** Rules must be transparent, including their underlying rationale. They should be easily accessible. Furthermore, the regulatory process itself needs to be transparent, allowing different stakeholders to observe and, where appropriate, take part.

#### ii. Institutions

When establishing the framework for regulatory institutions, policy-makers need to take into account the following:

**Mandate:** The institutional framework for the development and implementation of regulation is key. The mandate of a regulatory institution must be carefully drawn to reflect its objectives, functions and *modus operandi*. Often, mandates need to be reviewed (sometimes completely changed) to reflect the change of policy direction, for example, from a government-controlled to a competitive market structure;

**Independence:** The independence of regulatory institutions needs to be ensured. A regulator must be independent from any market commercial interest as well as from political influence. The risk of falling captive to vested interests must be avoided;

**Interface:** The institutional structure should provide for an effective interface between different governmental institutions dealing with different regulatory frameworks of mutual relevance. The interface with private-sector institutions, consumer associations, think-tanks and civil-society organizations should also be encouraged and facilitated;

**Accountability:** A regulatory body must be accountable for its decisions and the achievement of its objectives in a manner that does not compromise its independence. The authority to whom a regulator is accountable, and the terms of such accountability must be drawn carefully; and

**Human resources:** Institutions must be equipped with the required expertise in sufficient capacity. A sound human resource base is key to the sound functioning of regulators. In view of technological developments and the dynamic and innovative nature of competitive markets, this particular aspect should be a priority.

A sound approach to regulation involving reforming rules and institutions would also be related to the broader governance structure in the context of which such reforms take place. The way government institutions function, across its different branches (executive, legislative and judiciary), and the relevant consultative mechanisms put in place involving stakeholders, could have a direct bearing on the outcomes of the regulatory process. This is a challenge that is frequently faced by governments at different levels of development, but might be particularly challenging for some developing countries and LDCs due to weakness in their institutional capacities.

The GATS, in its design and architecture, takes into account the need to retain regulatory autonomy to pursue national policy objectives. Its obligations and commitments focus only on the “trade restrictions” that a government commits not to maintain. The rest of the regulatory universe falls within the sovereign government domain.

#### d. The principle of progressive liberalization

The progressivity in the process of services trade liberalization is one of the critical concepts in GATS. This concept is clearly reflected in its operative provisions as will be discussed further in this publication. It is worth highlighting, however, that the rationale behind the progressivity of liberalization is mainly to provide the space for WTO members to design, introduce, and implement policy and regulatory reforms which, in many instances, are complex and lengthy.

## 2. The scope of the General Agreement on Trade in Services

Article I of the GATS provides three key elements which constitute the “gateway” to the agreement. These are: the scope of application of the GATS; the definition of trade in services; and the sectoral coverage of the agreement. Keeping them in mind is essential for developing a well-considered negotiating position and a sound negotiating process.

The scope of application is provided in Article I:1 which stipulates that the GATS **applies to measures by WTO members affecting trade in services**. Such an effect could be direct or indirect. It does not matter in this context whether a measure is taken at central, regional or local government level, or by non-governmental bodies exercising delegated powers.

The definition of a “measure” in the GATS<sup>8</sup> covers any measure:

*“whether in the form of a law, regulation, rule, procedure, decision, administrative action, or any other form, ... in respect of:*

- *the purchase, payment or use of a service;*
- *the access to and use of, in connection with the supply of a service, services which are required by those Members to be offered to the public generally;*
- *the presence, including commercial presence, of persons of a Member for the supply of a service in the territory of another Member”.*

The definition of “trade in services” is provided in Article I:2 as the “supply of a service” through any of the **four modes** (Box 2). The four modes are structured in terms of territorial presence of the supplier and the consumer at the time of the transaction, they are the supply of a service:

- 1) from the territory of one Member into the territory of any other Member (Mode 1–Crossborder trade);
- 2) in the territory of one Member to the service consumer of any other Member (Mode 2–Consumption abroad);
- 3) by a service supplier of one Member, through commercial presence, in the territory of any other Member (Mode 3–Commercial presence); and
- 4) by a service supplier of one Member, through the presence of natural persons of a Member in the territory of any other Member (Mode 4–Presence of natural persons).

The concept of supply is further defined in Article XXVIII to include “the production, distribution, marketing, sale and delivery of a service”.

In terms of the **sectoral coverage** (Box 3), Article I:3(b) stipulates that the agreement covers “any service in any sector except services supplied in the exercise of governmental authority”. Paragraph 3(c) of the same Article proceeds to define such services as “any service which is supplied neither on a commercial basis, nor in competition with one or more service suppliers”.

The only other exclusion from the sectoral coverage of the agreement concerns the sector of air transport. Under the GATS Annex on Air Transport Services, measures affecting air traffic rights and directly related services are excluded. On the other hand, measures affecting aircraft repair and maintenance services, the selling and marketing of air transport services, and computer reservation system services have been covered by the agreement.

Under this classification system, any service sector, or segments thereof, may be included in a WTO member's schedule of commitments with specific market access and national treatment obligations. Each WTO member has submitted this schedule to the WTO. It must be noted that following this classification system is not legally required by the GATS. However, WTO members have converged on this practice in order to facilitate negotiations as well as future comparison and interpretation of commitments.

### Box 2. Examples of four modes in trade in services

#### Mode 1—Cross border

Consumer in country A receive services from abroad through telecommunications or postal network. Such supplies may include consultancy or market research reports, back office services, tele-medical advice, distance training, or architectural drawings.

#### Mode 2—Consumption abroad

Nationals of country A travel abroad as tourists, students, or patients to consume the respective services.

#### Mode 3—Commercial presence

The service is supplied within country A by a locally-established affiliate, subsidiary, or a branch of a foreign-owned and -controlled company (e.g. a bank, a hotel group or a construction company).

#### Mode 4—Movement of natural persons

A foreign national supplies services within country A as an independent supplier (e.g. a consultant or a health worker) or employee of a foreign service firm.

### Box 3. Classification of service sectors

For purposes of scheduling their commitments, WTO members have been guided by the United Nations Central Product Classification (UNCPC), on the basis of which a sectoral classification list was developed for the purpose of WTO negotiations which comprises of 12 core service sectors:

- Business services (including professional services and computer services);
- Communication services;
- Construction and related engineering services;
- Distribution services;
- Educational services;
- Environmental services;
- Financial services (including insurance and banking);
- Health-related and social services;
- Tourism and travel-related services;
- Recreational, cultural and sporting services;
- Transport services; and
- Other services not included elsewhere.

These sectors are further subdivided into a total of some 160 subsectors.

**WTO (1991), Services Sectoral Classification List, Note by the Secretariat, MTN.GNS/W/120**



### 3. The approach of the General Agreement on Trade in Services to the interests and concerns of developing countries and least developed countries

The GATS, as stated in its preamble, aims at promoting economic growth for all trading partners and the development of developing countries. The agreement is seen to have adopted an “enabling” approach to the treatment of the interests and concerns of developing countries to more effectively address development related issues. This approach is considered to be different from the traditional “exonerating” concept of special and differential treatment (SDT) developed in the 1960s to address the concerns of developing countries relating to trade in goods under the General Agreement on Tariffs and Trade (GATT). Under the GATT, S&DT starts with a common level of obligation for all (except for tariff bindings) from which derogations are granted.

The above GATS approach guided the process of negotiating the GATS and guided the design of its basic architecture which relies mainly on individual schedules to determine, not only the levels of market access and national treatment commitments but also the level of adherence to many core obligations. Most demanding substantive provisions across articles of the GATS impose obligations only in sectors where commitments are scheduled. This approach also guided the content of the GATS towards more clarity regarding expected outcomes.

#### a. Liberalization of own market

The GATS highlights the aim of facilitating the “...increasing participation of developing countries in trade in services and the expansion of their service exports including, *inter alia*, through the strengthening of their domestic services capacity and its efficiency and competitiveness”.<sup>9</sup> The reference to increasing the participation of developing countries in services trade, of which promoting their exports is one part, reflects the two-way approach adopted by the GATS in the process of liberalization. This does not mean that developed and developing countries should undertake the same levels of commitments. It means that the increasing participation of developing countries can be achieved through negotiated outcomes that result in commitments by all WTO members, be it at different levels. This approach is laid out more clearly and

perhaps more importantly in the operative provisions of the agreement.

Article IV of the GATS provides specific guidance as to how, through negotiations of commitments by both developed and developing countries, the increasing participation of developing countries in services trade could be promoted.

*“1. The increasing participation of developing country Members in world trade shall be facilitated through negotiated specific commitments, by different Members pursuant to Parts III and IV of this Agreement, relating to:*

*(a) the strengthening of their domestic services capacity and its efficiency and competitiveness, inter alia, through access to technology on a commercial basis;*

*(b) the improvement of their access to distribution channels and information networks; and*

*(c) the liberalization of market access in sectors and modes of supply of export interest to them.”*

#### Article IV of the GATS, paragraph 1

This provision seems to establish that negotiations are the means to achieve the interests of developing countries. In opening their markets to foreign service suppliers, they would expect to gain access to foreign markets and access to critical enabling factors (capital, technology, access to networks and information, etc.) to develop their domestic services capacity and competitiveness.

This provision was also reaffirmed in the Guidelines and Procedures for the Negotiations on Trade in Services (hereinafter referred to as 2001 Negotiating Guidelines)<sup>10</sup> adopted by the Council for Trade in Services (CTS) Special Session in March 2001 for the current round of services negotiations in the WTO.

#### b. Flexibility for individual members

The GATS makes repeated references to “developing countries” as a sub-group of WTO Members. However, specific operational provisions relating to negotiations envisage individual outcomes of rights and obligations. Article XIX (Negotiation of Specific Commitments) lays down the main principles and rules governing the process of progressive liberalization of services trade through successive rounds of negotiations. Paragraph 2 of that Article provides that:

*“2. The 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. There shall be **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 and, when making access to their markets available to foreign service suppliers, attaching to such access conditions aimed at achieving the objectives referred to in Article IV...” (emphasis added)*

This provision establishes that, developing countries may impose such conditions on foreign service suppliers to secure their contribution to domestic services capacities. However, it also foresees that such conditions would be subject to negotiation to clarify their rationale and, inscription in the schedule of commitments of the country concerned as limitations on market access and/or national treatment. This would be critical to ensure the stability and predictability of regulatory conditions and to avoid the imposition of future arbitrary restrictions.

Furthermore, Article XIX provides the flexibility for members to conduct negotiations in the process of their choice: bilateral, plurilateral or multilateral,<sup>11</sup> which also intends to ensure that the negotiating modalities and procedures will be structured in a manner that facilitates such customized individual outcomes. The 2001 Negotiating Guidelines reaffirmed this by providing that:

*“Liberalization shall be advanced through **bilateral, plurilateral or multilateral** negotiations. The main method of negotiation shall be the **request-offer** approach”.*<sup>12</sup> (emphasis added)

While the request/offer method of negotiation is usually more resource intensive and time consuming compared to other “formula” based methods, it is considered to be more suitable for providing “individualized” outcomes that take into account the particular priorities and circumstances of each developing country Member. The reference to “plurilateral” negotiations is also aimed at providing a flexible negotiating process allowing various configurations of negotiating settings that are most

suitable for reaching the desired outcomes. This allows sub-sets of WTO members (where they can agree) to launch, conduct and conclude negotiating initiatives without forcing other members to participate, if they do not wish. Of course, given the most-favoured-nation (MFN) principle of the GATS, such initiatives must be open to all WTO members who wish to participate, and the outcomes must be applied on an MFN basis. This flexibility allows developing countries to opt out of negotiating initiatives they don’t wish to participate in, while giving them the ability to launch their own initiatives in areas of particular interest to them. In several instances, a negotiated outcome might not involve all WTO members (e.g. the Fourth Protocol on basic telecommunications and Fifth Protocol on financial services).

GATS schedules are also designed to accommodate the widest possible variations in WTO Members’ 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.”*

**Article XX of GATS  
(Schedules of Commitments)**

The construct of schedules under the GATS aims at providing a tool that WTO members can use to tailor their commitments according to their needs and to what each has individually negotiated with other participants, not only regarding the choice of sectors to be scheduled but also the limitations and conditions attached to those commitments. The same also goes for additional commitments under Article XVIII of the GATS where members schedule “undertakings” as opposed to limitations. Such undertakings can also be customised in each case depending on the outcome of negotiations.



### **c. Liberalization of sectors and modes of interest to developing countries**

Promoting and increasing services trade opportunities for developing countries is a critical part of the “enabling” approach of the GATS. The agreement calls for the liberalization of sectors and modes of supply of export interest to developing countries. Article IV of the GATS calls for “...*negotiated specific commitments by different Members...*”.<sup>13</sup> The reference to “different Members”, in this context, is a call for developed countries to undertake commitments that expand the participation of developing countries in international services trade. Since giving effect to this provision is through negotiations, it was also reflected in the 2001 Negotiating Guidelines, which stated that:

*“There shall be no a priori exclusion of any service sector or mode of supply. Special attention shall be given to sectors and modes of supply of export interest to developing countries”.*<sup>14</sup>

Combined with the flexible (yet complex) negotiating and scheduling methods, this was the basis for the GATS “enabling” approach to the treatment of developing countries.

### **d. Binding negotiated outcomes**

One of the important characteristics of a well-functioning approach, as foreseen in the GATS, is to promote relationships between WTO members based on shared yet differentiated levels of responsibility, reflected in legally binding commitments. The GATS, therefore, promotes the interests of developing countries through negotiated outcomes that are legally binding on all concerned parties. The legal enforceability of such commitments is considered as the guarantee for the future credibility and well-functioning of the system and how it addresses development concerns.

This approach was developed during the Uruguay Round negotiations through long discussions and analysis by negotiators on different sides. One central issue in that process was, what is currently referred to as, “policy space” for developing countries. There was always recognition that developing countries must have the freedom to exercise their choices of development objectives, policies, and implementing regulatory approaches. That recognition informed the architecture of the GATS so as to accommodate the widest possible range of choices in a non-prescriptive

manner. Therefore, the predominant nature of legal obligations and commitments in committed sectors is about WTO members abstaining from imposing restrictions or discriminatory measures, unless they are scheduled and bound or justified by exceptions under the GATS. It was also recognized by all that no legally binding agreement between governments could be expected to have “zero implication” for policy space. Engaging in any trade negotiation, bilaterally, regionally or multilaterally, will result in obligations that would naturally have an impact of what the parties will do in the future after the agreement enters into force. A common view has been that, once a government chooses to engage in trade negotiations and becomes party to a legal framework, by definition, the outcome will have some impact on “policy space”. It is up to each government to decide on what, where and how such impact would be committed and implemented.

### **e. The incremental approach of the negotiating function**

The GATS approach to development assumes that a credible balance of rights and obligations should be based on an incremental approach to negotiated commitments, referred to in Article XIX as “successive rounds of negotiations” and “appropriate flexibility for individual developing country Members”.<sup>15</sup> While the incremental (bottom up) establishment of accumulated rights and obligations through successive rounds of negotiations concerns all WTO members, GATS provides 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 and, when making access to their markets available to foreign service suppliers, attaching to such access conditions aimed at achieving the objectives referred to in Article IV. Some WTO members consider this approach a more effective means of implementing the “enabling” treatment of developing countries than the SDT explicitly found in many other WTO agreements. In their view, the differentiated levels of new commitments combined with more attention on developing countries’ interests in export markets are expected to better serve developing countries.

The reliance on the negotiating function to produce incremental results through successive rounds of negotiations was also considered in other areas of trade in the WTO, notably agriculture, and that was the basis for adopting the Built-in Agenda in the Agreement on Agriculture at the end of the Uruguay

Round.<sup>16</sup> This inevitably leads to linkages and trade-offs between different negotiations that would need to be well managed through effective trade diplomacy.

#### **f. Technical assistance**

Technical assistance has always been one of the important institutional functions of the GATT. Considerable resources had been mobilized for the benefit of recipient countries. However, there has been no provision in the GATT which provided for a collective obligation by the membership in this regard. Given the novelty of trade in services and the diversity of the services sectors, each with their policies and regulatory frameworks, the need for technical assistance, particularly for developing countries, was felt much more acutely. Therefore, paragraph 2 of Article XXV of the GATS provides that:

*“Technical assistance to developing countries shall be provided at the multilateral level by the Secretariat and shall be decided upon by the Council for Trade in Services.”*

This provision has provided the backdrop to corresponding elements reflected in the 2001 Negotiating Guidelines as well as Annex (C) of the Hong Kong Ministerial Declaration. However, the entire negotiating process has subsequently come to a halt.

#### **g. Assistance to service suppliers**

One of the innovative aspects of the approach of the GATS towards development was to go beyond technical assistance to government officials and policy makers and reach out to service suppliers of developing countries seeking access to export markets. Paragraph 2 of Article IV of the GATS provides that:

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

- (a) *commercial and technical aspects of the supply of services;*
- (b) *registration, recognition and obtaining of professional qualifications; and*
- (c) *the availability of services technology.”*  
(emphasis added)

This establishes the legal obligation for developing countries to establish “contact points”. These members have notified their fulfilment of that obligation together with the relevant coordinates for the benefit of developing country service suppliers who wish to use them. However, there has been no account of whether, and to what extent, those contact points have been used. In many instances, it is not clear whether developing countries’ competent authorities have informed the service suppliers in their jurisdictions of the existence of such possible assistance.

#### **h. Special treatment to least developed countries**

While all the elements of the treatment for developing countries apply to LDCs, the GATS has provided specific provisions for the latter. Article IV:3 provides that:

*“Special priority shall be given to the least-developed country Members in the implementation of paragraphs 1 and 2. Particular account shall be taken of the serious difficulty of the least-developed countries in accepting negotiated specific commitments in view of their special economic situation and their development, trade and financial needs.”*<sup>17</sup>

The second part of this provision lays down the principle that this category of countries should be treated differently in the process of negotiating new commitments. The practical means to give it effect is to be found in Article XIX:3 which calls upon the CTS to establish modalities for the special treatment of LDCs in each round of negotiations pursuant to the above provision. During the current round of services negotiations which began in 2000 and later on became part of the Doha Round, these modalities were agreed and adopted by the CTS Special Session in 2003.<sup>18</sup>

In addressing the special priority for the LDCs which essentially concerns their export of services, at the ministerial meeting in July 2008, WTO members decided that the special treatment for LDCs in this regard could be mostly assured through a waiver that allows members to grant preferential treatment only to services and service suppliers of LDCs. This waiver was adopted in the form of a ministerial decision in December 2011 (hereinafter referred to as the LDC Services Waiver).<sup>19</sup> The decision provides WTO members with a waiver to deviate from their MFN obligation by granting preferences only to the

LDCs. The LDC Services Waiver will remain in place for fifteen years from the date of its adoption.<sup>20</sup>

Notifications by members to grant preferences to the LDCs must specify the preferential treatment, the sectors concerned and the timeframe for these preferences. Preferential treatment related to market access under GATS Article XVI can be implemented once a notification has been submitted to the CTS. Preferential treatment regarding any other measure is subject to approval by the CTS.

As no member made use of the LDC Services Waiver before the WTO Ministerial Conference held in Bali, Indonesia in December 2013, a decision was adopted at this conference to operationalize the waiver. The

decision<sup>21</sup> establishes various steps to encourage WTO members to make use of the waiver and directs the CTS to convene a High-level meeting six months after LDCs submit a collective request identifying sectors and modes of particular export interest to them.

The LDC collective request<sup>22</sup> was submitted in July 2014 and a high-level meeting of the CTS took place in February 2015 where developed countries and some developing countries indicated sectors and modes of supply where they intended to provide preferential treatment to LDC services and service suppliers. WTO members agreed to endeavor to notify preferences as early as possible, and no later than 31 July 2015.

#### Box 4. Notifications of preferential treatment under the LDC Services Waiver

Currently, there is a total of 24 notifications of preferential treatment in favour of LDC services and service suppliers. They were submitted between mid-2015 and early 2016. These notifications (counting European Union member states as one) are from: Australia; Brazil; Canada; Chile; China; European Union; Iceland, India; Japan; Liechtenstein; Mexico; New Zealand; Norway; Panama; Republic of Korea; Singapore; South Africa; Switzerland; Thailand; Turkey; United States of America; Uruguay; Hong Kong, China; and Taiwan, Province of China.\*

In November 2019, the CTS held a dedicated meeting to review how LDCs are making use of the preferences.

The LDC Services Waiver is expected to have the potential to provide an advantage that is needed to kick-start LDCs' services trade on the international markets, apart from a waiver of visa fees for LDC business persons. However, for Modes 1–3, a total of 70 per cent of notified preferences do not exceed the level of Doha Development Agenda (DDA) offers. Most DDA offers reflect the applied MFN regime. For measures going beyond DDA offers, many members have stated that these reflect measures taken from their preferential agreements with other trading partners. While these measures could be preferential – though not exclusive for LDC services and service suppliers – it should be noted that preferential agreements contain only rare instances of MFN-plus treatment.

\* Referred to as “Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu (Chinese Taipei)” in the WTO.





# **THE MAIN GENERAL OBLIGATIONS AND DISCIPLINES OF THE GENERAL AGREEMENT ON TRADE IN SERVICES**

Each WTO member has to respect certain general obligations that apply with regard to measures affecting trade in services in all services sectors regardless of the existence of specific commitments. These include 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), consultations on business practices (Article IX), and consultations on subsidies that affect trade (Article XV:2). In several cases, the same article contains both unconditional and conditional obligations.

## 1. General obligations

### a. Unconditional obligations

#### i. Most-Favoured-Nation treatment

The most-favoured-nation (MFN) principle is a cornerstone of the multilateral trading system conceived after World War II. It seeks to replace the frictions and distortions of power-based (bilateral) policies with the guarantees of a rules-based framework where trading rights do not depend on the individual participants' economic or political clout. Rather, the best access conditions that have been conceded to one country must automatically be extended to all other participants in the system. This allows everybody to benefit, without additional negotiating effort, from concessions that may have been agreed between large trading partners with much negotiating leverage.

In the context of the GATS, 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.

However, 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 for acceded members), to seek exemptions not exceeding a period of ten years in principle. More than 90 members currently maintain such exemptions, which are mostly intended to cover trade preferences on a sectoral or modal basis between two or more members. The sectors predominantly concerned are road transport and audio-visual services, followed by maritime transport and banking services. Exemptions are contained in country-specific lists. Their duration must not exceed ten years in principle.

The same annex provides for a review of all existing measures that had been granted for periods of more than five years. The review is intended to examine whether the conditions that led to the creation of the exemptions still prevail.

More importantly, the annex also requires that MFN exemptions be subject to negotiation in any subsequent round of negotiations. Concerning the current round, the Hong Kong Ministerial Declaration commits members to removing or reducing their exemptions substantially and to clarifying the scope and duration of remaining measures.

Since the MFN principle is a cornerstone of the GATS, dispute cases have developed considerable jurisprudence that might influence future negotiations as well as implementation of GATS obligations. For example, the Appellate Body found in *Canada–Autos* that the wording of Article II:1 of the GATS suggests that the test of consistency with the MFN treatment obligation of this provision proceeds in three steps<sup>23</sup>, namely:

- 1) Whether the measures at issue falls within the scope of application of Article I:1 of the GATS;
- 2) Whether the services and service suppliers concerned are “like”; and
- 3) Whether like services and service suppliers are accorded treatment no less favourable.

Once it has been established that the measure at issue is covered by Article I:1 of the GATS, it must be determined whether the service and services suppliers concerned are “like services and service suppliers”.

#### *Likeness of services and service suppliers*

In *Argentina–Financial Services*, the Appellate Body clarified that the following could be relevant for determining “likeness” under the GATS:<sup>24</sup>

- Characteristics of services and service suppliers;
- Consumers' preferences in respect of services and service suppliers; and
- Classification and description of services under, for example, the UN CPC.

The Appellate Body held that, as in the context of goods, these criteria for analysing “likeness” of services and service suppliers are “simply analytical tools to assist in the task of examining the relevant evidence”.

In the Panel's view,<sup>25</sup> where a measure provides for a distinction based exclusively on origin, there will or can be service suppliers that are the same in all respects except for origin and, accordingly, "likeness" can be presumed and the complainant is not required to establish "likeness" on the basis of the relevant criteria set out above. Accordingly, the Panel considered that, under Articles II:1 and XVII:1 of the GATS, a complainant is not required in all cases to establish "likeness" of services and service suppliers on the basis of the relevant criteria for establishing "likeness". Rather, in principle, a complainant may establish "likeness" by demonstrating that the measure at issue makes a distinction between services and service suppliers exclusively on origin.

Nonetheless, the Appellate Body considered the complexity of such an analysis in the context of the GATS. It found<sup>26</sup> that the determination of "likeness" under Articles II:1 and XVII:1 involves consideration of both the service and the service supplier. Accordingly, depending on the circumstance of the particular case, an origin-based distinction in the measure at issue would have to be assessed not only with respect to the services at issue, but also with regard to the service suppliers involved. Such consideration of both the services and the service suppliers may render more complex the analysis of whether or not a distinction is based exclusively on origin, in particular, due to the role that domestic regulation may play in shaping, for example, the characteristics of services and service suppliers and consumers' preferences.

In addition, the Appellate Body noted the principles for determining origin set out in Article XXVIII of the GATS. The definitions of the various terms set out in Article XXVIII(f), (g), and (k) through (n) of the GATS provide an indication of the possible complexities of determining origin and whether a distinction is based exclusively on origin in the existence of different modes of supply and their implications for the determination of the origin of services and service suppliers.

These considerations led the Appellate Body to conclude that "whether and to what extent such complexities have an impact on the determination of whether a distinction is based exclusively on origin in a particular case will depend on the nature, configuration, and operation of the measure at issue and the particular claims raised".

### **No less favourable treatment**

The Appellate Body in *European Community–Bananas III* found that the MFN treatment obligation of Article II:1 of the GATS applies both to *de jure* and to *de facto* discrimination.<sup>27</sup> The Appellate Body came to this conclusion in spite of the fact that Article II of the GATS, unlike Article XVII thereof, does not explicitly state that it applies to *de facto* discrimination. In this regard, the Appellate Body held that:

*"There is more than one way of writing a de facto non-discrimination provision. Article XVII of the GATS is merely one of the many provisions in the WTO Agreement that require the obligation of providing "treatment no less favourable".*

According to the Appellate Body, the possibility that the two Articles may not have exactly the same meaning does not imply that the intention of the drafters of the GATS was that a *de jure*, or formal, standard should apply in Article II of the GATS. The obligation imposed by Article II is unqualified. The ordinary meaning of the provision does not exclude *de facto* discrimination. Moreover, if Article II was not applicable to *de facto* discrimination it would not be difficult – and, indeed, it would be much easier in the case of trade in services, than in the case of trade in goods – to devise discriminatory measures aimed at circumventing the basic purpose of that article.

For these reasons, the Appellate Body concluded that "treatment no less favourable" in Article II:1 of the GATS should be interpreted to include *de facto* as well as *de jure* discrimination. The Appellate Body also stated that this conclusion is not limited to this case.

In the case of *Argentina–Financial Services*, the Appellate Body set out its interpretation of the term "treatment no less favourable" in Article II:1 and Article XVII of the GATS.<sup>28</sup>

The Appellate Body noted that Article II:1 does not further define the term "treatment no less favourable". Furthermore, it recalled that Article XVII:1 contains a national treatment obligation, whereas Article II:1 contains a most-favoured nation obligation. Nonetheless both provisions serve the function of prohibiting discrimination against foreign services and service suppliers vis-à-vis like domestic services and service suppliers. Although the immediate context of this term in Articles II:1 and XVII:1 is not expressed in identical words, and Article II does not contain the elaboration of the "less favourable treatment" standard



found in Articles XVII:2 and 3, the Appellate Body found that both provisions share the essential nature of anti-discrimination provisions, and cover both *de jure* and *de facto* discrimination. Thus, the elaboration on the meaning of the term “treatment no less favourable” contained in Article XVII, and in particular in Article XVII:3 should also be pertinent context to the meaning of the same term in Article II:1.

In the Appellate Body’s view, findings in European Community–Bananas III indicated that on substance, the concept of “treatment no less favourable” under both the MFN and national treatment provisions of the GATS is focused on a measure’s modification of the conditions of competition. This legal standard does not contemplate a separate and additional inquiry into the regulatory objective of, or the regulatory concerns underlying, the contested measure. Indeed, in prior disputes, the fact that a measure modified the conditions of competition to the detriment of services or service suppliers of any other member was, in itself, sufficient for a finding of less favourable treatment under Articles II:1 and XVII of the GATS.<sup>29</sup>

Finally, on whether there is the need to read the regulatory objective into the “no less favourable treatment” analysis in Article II, the Appellate Body held that policy objectives and flexibilities are already provided for in the GATS to strike a balance between a member’s obligations assumed under the agreement and that member’s right to pursue national policy objectives. A member’s right to pursue national policy objectives is recognised in the preamble of the GATS. Furthermore, a member may pursue a wide range of policy objectives while acting consistently with its obligations or commitments assumed under the GATS. Indeed, a member’s commitments under the GATS could in some cases serve to further its national policy objectives. Where measures are found to be inconsistent with a member’s obligations or commitments under the GATS, the GATS provides for various mechanisms, such as Article XIV, which take account of policy objectives underlying such measures.<sup>30</sup>

## ii. Transparency

Sufficient information about potentially relevant rules and regulations is critical to the effective implementation and operation of an agreement. Article III of the GATS ensures that members publish promptly all measures of general application pertaining to or affecting the

operation of the GATS. Moreover, they are obliged to notify the CTS at least annually of new or changed laws, regulations or administrative guidelines that significantly affect trade in sectors where specific commitments have been made. Members are also required to establish enquiry points which provide specific information to other members upon request. 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 concerning commercial and technical aspects of the supply of services; registration, recognition and obtaining of professional qualifications; and the availability of services technology.

However, there is no requirement to disclose confidential information, which is stipulated in Article III bis of the GATS.

Given strong government involvement in many service markets as a regulator and sometimes also as a participant, the GATS seeks to ensure the smooth operation of relevant policy schemes. Thus, each member is required under Article VI:1 to ensure, in sectors where commitments exist, that measures of general application are administered impartially and in a reasonable and objective manner. Service suppliers in all sectors must be able to use national tribunals or procedures in order to challenge administrative decisions affecting services trade as provided for in Article VI:2a.

## iii. Judicial review

Under Article VI:2, WTO members are committed to operating 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 justified, appropriate remedies for, administrative decisions affecting trade in service”.

## iv. Monopolies

Article VIII:1 requires WTO members to ensure that monopolies or exclusive service providers do not act in a manner inconsistent with the MFN obligation and commitments. Article XXVIII(h) defines a “monopoly supplier” as an entity that has been established by the member concerned, formally or, in effect, as the sole supplier of a service.



### **v. 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. Each member is required to consult with any other member, upon request, with a view to eliminating such practices.

### **vi. Subsidies**

WTO members that consider themselves adversely affected by subsidies granted by another member may request consultations under Article XV:2. The latter member is called upon to give “sympathetic consideration” to such requests.

### **b. Conditional general obligations**

A second type of general obligations applies only to sectors listed in a member’s schedule of commitments. The purpose of these obligations is to ensure that the value of specific commitments liberalising services sectors is not diminished through certain regulatory measures.

#### **i. Domestic Regulation**

Pursuant to Article VI:1, measures of general application are to be administered “in a reasonable, objective and impartial manner”. If the supply of a scheduled service is subject to authorization, WTO members are required, under Article VI:3, to inform the applicant within a reasonable period of time of the decision taken, and, upon request and without undue delay, provide information on its status.

Article VI:5 seeks to ensure that specific commitments are not nullified or impaired through regulatory requirements (licensing and qualification requirements, and technical standards) that are not based on objective and transparent criteria or are more burdensome than necessary to ensure quality. The scope of these provisions is limited, however, to the protection of reasonable expectations at the time of the commitment. Article VI:4 mandates negotiations to be conducted on any necessary disciplines that, taking account of the above considerations, would prevent domestic regulations from constituting unnecessary barriers to trade. These negotiations, which were launched after the completion of the Uruguay Round, have since been integrated into the services negotiations under the DDA.

Article VI:6 requires members that have undertaken commitments on professional services to establish adequate procedures to verify the competence of professionals of other members.

#### **ii. Monopolies**

The GATS does not forbid the existence of monopolies or exclusive service suppliers per se (Article VIII). However, as noted above, government-mandated monopolies or exclusivity arrangements are subject to the unconditional MFN obligation. Moreover, under Article VIII:2, members are required to prevent such suppliers, if these are also active in sectors beyond the scope of their monopoly rights and covered by specific commitments, from abusing their position and act inconsistently with these commitments.

In addition, Article VIII:4 requires members to report the formation of new monopolies to the CTS if the relevant sector is subject to specific commitments. In this case, the provisions of Article XXI on modification of schedules apply.

#### **iii. Payments and transfers**

GATS Article XI requires that members allow international transfers and payments for current transactions relating to specific commitments. It also provides that the rights and obligations of International Monetary Fund members, under its Articles of Agreement, shall not be affected. This is subject to the provision that capital transactions are not restricted inconsistently with specific commitments, except under Article XII or at the request of the Fund. Footnote 8 to Article XVI further limits members’ ability to restrict capital movements in sectors where they have undertaken specific commitments on cross-border trade and commercial presence.

## **2. Disciplines**

In addition to the various obligations and commitments, the GATS contains legal disciplines that apply in situations where a member wishes to take certain actions that deviate from provisions of the agreement. Such disciplines may be “permissive” provisions that allow a member to deviate from the MFN obligation in Article II of the GATS to engage in a preferential trade agreement, a labour market integration agreement or to adopt a recognition measure that differentiates between services and service suppliers from different foreign jurisdictions.

In addition to the permissive disciplines, there are also “exceptions” provisions which allow a member to deviate from any obligation or commitment under the agreement to protect public policy objectives specifically defined in the relevant provisions, subject to certain caveats.

## a. Permissive provisions

### i. Economic integration

Article V of the GATS on economic integration provides the legal basis for a WTO member to deviate from its MFN obligation and become a party to a services trade preferential agreement. It permits any WTO member to enter into such an agreement to further liberalize trade in services on a bilateral or plurilateral basis, provided the agreement has “substantial sectoral coverage” and removes substantially all discrimination between participants within the sense of Article XVII of the GATS on national treatment. Such agreement must also cover the four modes of supply of services. Recognizing that such agreements may form part of a wider process of economic integration well beyond services trade, the article allows for the above conditions to be applied in this perspective, possibly providing some room for flexibility in the application of these three conditions. Particular flexibility is allowed in the event of developing countries being parties to such agreements.

While economic integration agreements must be designed to facilitate trade among participants, the overall level of barriers should not be raised *vis-à-vis* non-participants in the sectors covered. Moreover, should parties to an agreement intend to withdraw or modify the commitments they have scheduled under the GATS, appropriate compensation must be negotiated with the members affected. Such situations may arise, for example, if the new common regime in a sector is modelled on the previous regime of a more restrictive participating country in such an agreement. The Appendix to this publication provides a brief overview of trends in RTAs.

### ii. Labour market integration

The integration of labour markets normally constitutes part of a wider process of economic integration. It typically provides for a deeper level of integration according to which citizens of the parties concerned are provided with a right of free entry to employment markets of the parties and includes measures

concerning conditions of pay, employment and social benefits.

Article V *bis* of the GATS provides legal cover for such agreements on labour markets integration similar to that provided by Article V on economic integration agreements. It allows parties to such agreements to deviate from their MFN obligation and extend to each other’s citizens more favourable treatment, in particular, in the sense that such citizens would be exempt from residency and work permit requirements.

### iii. Recognition

Notwithstanding the MFN obligation in Article II, Article VII of the GATS allows members to recognize the education or experience obtained, requirements met, or licenses or certifications granted in a particular country, for the purposes of the fulfilment of its own standards or criteria for the authorization, licensing or certification of services suppliers. This license to differentiate in the treatment of service suppliers coming from different foreign jurisdictions is subject to an important condition. A member granting recognition must not discriminate between service suppliers of different members in the application of its substantive standards according to which recognition is being granted. Article VII:3 specifically states:

*“A Member shall not accord recognition in a manner which would constitute a means of discrimination between countries in the application of its standards or criteria for the authorization, licensing or certification of services suppliers, or a disguised restriction on trade in services.”*  
(emphasis added)

The objective behind this provision is to allow a member to ensure that a foreign service supplier coming from a different jurisdiction is compliant with its requirements. However, this would not allow a member to apply different substantive requirements to service suppliers of different origins.

Such recognition may be granted on an autonomous basis or through agreement with the WTO member concerned. However, other members are to be afforded an opportunity to negotiate their accession to agreements or, in the event of autonomous recognition, to demonstrate that their requirements should be recognized as well.

## b. Exceptions

Like most trade agreements containing binding liberalization commitments, the GATS contains specific provisions allowing members of the WTO to deviate from their obligations and commitments to impose measures to address overriding concerns that are fundamental to the country concerned. There are three types of exceptions in the GATS: general exceptions, security exceptions and the prudential exception specific to the financial sector. Each addresses different types of concerns and, therefore, each has its own terms and caveats.

### i. General exceptions

Article XIV of the GATS provides legal cover for any WTO member who needs to impose a measure inconsistent with its obligations or commitments in order to protect one of the policy objectives explicitly referred to in the article.

This article does not specify any types of measures that a member may adopt. It only lists the objective that may be protected and the conditions that the member adopting the measure must observe. It stipulates that the measure in question must not constitute a means of unjustifiable discrimination or a disguised restriction on trade in services. Furthermore, it also requires that the measure in question be “necessary” for the protection of the objective. Since the objectives are already defined explicitly in each case, this necessity test is only concerned with the measure. It does not question the objective nor the level of attainment the regulator is aiming to achieve. Normally, a measure would not be deemed necessary if the same result it leads to could be achieved through an alternative measure which is less trade restrictive and reasonably available to the regulator.

### ii. Security exceptions

Article XIV bis of the GATS is designed to address national security concerns. It therefore addresses different types of situations than those covered by Article XIV.

Given the overriding nature of the situations addressed by this article, its design had to be different from Article XIV. It specifies the types of situations in which the security exception may be invoked but does not

contain similar caveats to those found in Article XIV, namely the requirement of least trade restrictiveness that the measure must be proven “necessary” to achieve the objective in question or that the measure must not constitute arbitrary or unjustifiable discrimination nor a disguised restriction on trade. In other words, as long as the national security situation in question falls within the scope of Article XIV bis, the rest is left to the judgement of the country taking the measure.

### iii. The prudential exception

The GATS Annex on Financial Services provides for an exception that is exclusive to the financial sector.

*“Notwithstanding any other provisions of the Agreement, a Member shall not be prevented from taking 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. Where such measures do not conform with the provisions of the Agreement, they shall not be used as a means of avoiding the Member’s commitments or obligations under the Agreement.”*

#### The GATS Annex on Financial Services, paragraph 2 (a)

This provision allows a member to deviate from its obligations and commitments under the GATS, if they need to adopt prudential measures. The provision does not specify any types of measures that may be adopted. It only defines the objectives that such measures would be taken for “prudential reasons”. It then proceeds to provide an indicative list of such objectives, namely “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”. This approach provides regulators with considerable flexibility in the choice of measures to be adopted for such prudential reasons. Unlike general exceptions, this prudential exception does not require that the measure in question be “necessary” to achieve the objective. Alternatively, it requires that the measure must not be used as a means of avoiding commitments or obligations under the Agreement.





## CROSS-CUTTING ISSUES

This part explains the cross-cutting issues under the GATS, including the unfinished rule-making business of the Uruguay Round negotiations on trade in services, movement of natural persons supplying services, technological neutrality, data flows and e-commerce.

## 1. Unfinished rule-making in the Uruguay Round

At the end of the Uruguay Round negotiations, some negotiating issues were not completely resolved and were included in the Agreement as mandates for future negotiations.

### a. Domestic regulation

The GATS, in providing a trade liberalizing legal framework, identifies the measures which are considered, as such, to be restrictions on services trade. Such restrictions fall within two main categories. The first is discriminatory and the second is quantitative. Discriminatory measures are addressed by the non-discrimination provisions of Articles II and XVII, while the quantitative measures are addressed by the provisions of Article XVI. This leaves a universe of regulatory measures which are necessary to address a wide range of legitimate policy objectives and, in many instances, could have a restrictive effect on services trade. Such measures are neither discriminatory, within the meaning of Articles II or XVII, nor quantitative within the meaning of Article XVI. The question then faced by the drafters of the GATS was: how to ensure that such legitimate regulatory measures, while pursuing their objectives, do not become more trade restrictive than necessary.

At the end of the Uruguay Round it was agreed that a rule making agenda should be enshrined in the architecture of the GATS. One important element of that agenda is to be found in paragraph 4 of Article VI.

It was also agreed that measures relating to qualifications, licensing and technical standards be the focus of this rule-making exercise.<sup>31</sup>

*“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.”*

#### GATS Article VI, paragraph 4

After the adoption of the disciplines for the accountancy sector in December 1998, the CTS abolished the Working Party on Professional Services and established the Working Party on Domestic Regulation (WPDR) in its lieu with broader terms of reference.

*“...2. In accordance with paragraph 4 of Article VI of the GATS, the Working Party shall develop any necessary disciplines to ensure that measures relating to licensing requirements and procedures, technical standards and qualification requirements and procedures do not constitute unnecessary barriers to trade in services. This shall also encompass the tasks assigned to the Working Party on Professional Services, including the development of general disciplines for professional services as required by paragraph 2 of the Decision on Disciplines Relating to the Accountancy Sector (S/L/63).*

*3. In fulfilling its tasks the Working Party shall develop generally applicable disciplines and may develop disciplines as appropriate for individual sectors or groups thereof.*

*4. The Working Party shall report to the Council with recommendations no later than the conclusion of the forthcoming round of services negotiations.”*

#### CTS Decision on Domestic Regulation, S/L/70

The accountancy disciplines<sup>32</sup> provide a good example of the kind of domestic regulation disciplines that could be negotiated under Article VI:4. They could provide useful guidance for future outcomes of the negotiations on domestic regulation. A core feature of the disciplines is their focus on non-discriminatory regulations that are not subject to scheduling under Articles XVI and XVII of the GATS. They are applicable only to WTO members who have scheduled specific commitments in the accountancy sector. The disciplines are to be integrated into the GATS, together with any additional results the WPDR may agree upon at the end of the current round of negotiations.

Pending the entry into force of the disciplines under Article VI:4, WTO members are required not to apply their domestic regulations in a way that would: nullify or impair specific commitments; be incompatible



with the three above criteria; and could not have reasonably been expected at the time when the relevant commitments were made, in accordance with paragraph 5 of Article VI.

In the WPDR, members have been negotiating on a set of horizontal disciplines on domestic regulation, but its Terms of Reference does not preclude the possibility of future work on sector specific disciplines. While the negotiations are still on-going, many proposals have been submitted by members and several versions of a WPDR chairman's text, which reflect drafting suggestions, have been produced.<sup>33</sup> It is difficult to summarise all the elements contained in the text and the respective proposals. Nevertheless, it appears that, in the negotiations, consideration has been given to six main regulatory elements.

#### **i. 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; information on procedures for review of administrative decisions.

#### **ii. 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.

#### **iii. 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.<sup>34</sup>

#### **iv. Legal certainty and predictability**

During the processing of an application, the assessment criteria should not be modified with the effect of treating applicants unfairly. They may need to have a reasonable time period to adjust to amended criteria or procedures.

#### **v. International standards**

Acceptance of international standards could facilitate the evaluation of qualifications obtained or requirements fulfilled abroad. Governments involved in standard-setting at the international level should ensure that this is done in a manner as transparent as possible in order to avoid capture by specific interest-groups.

#### **vi. 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 WTO Technical Barriers to Trade Agreement and Article 5.6 of the WTO Sanitary and Phytosanitary Agreement.<sup>35</sup> 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.

#### **b. Rules negotiations**

The negotiating mandates on GATS rules deal with areas, which members were unable to consider in detail and agree upon within the timeframe of the Uruguay Round. The three GATS rules mandates are contained, respectively, in GATS Article X (Emergency Safeguard Measures), Article XIII (Government Procurement) and Article XV (Subsidies). The Working Party on GATS Rules (WPGR) was created in 1995 to conduct these negotiations. Thus, GATS rules negotiations started long before the current round of services negotiations in 2000 and the Doha Round in 2001.

#### **i. Emergency safeguard measures**

Emergency safeguard measures is the topic that has been discussed at the earliest stage in the WPGR. Unlike negotiations on government procurement and subsidies, the negotiations on safeguards had been intended to conclude by a specific end date, namely "not later than 3 years from the date of entry into force of the WTO Agreement", i.e., 1 January 1998. This timeline was extended five times. The latest extension, in March 2004 (S/L/159), did not set a specific end-date anymore, but instead stipulated that the results of the 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.

The concept of emergency safeguard measures in services is to allow for the temporary suspension, in special circumstances, of market access, national treatment and/or 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. Existing relevant GATS 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; and
- Article XXI if a member intends to withdraw or modify a commitment on a permanent basis against compensation.

A potential emergency safeguard clause might be used to ease adjustment pressures in situations where a particular industry suffers serious injury as a result of a sudden (and unforeseen) increase in foreign supplies of like or directly competitive services. If the Agreement on Safeguards for goods is used as a precedent, the onus would be on the protection-seeking services industry to demonstrate that a causal link exists between such increases in service “imports” and its suffering of a serious injury. A safeguard clause would be expected to allow for the suspension of commitments during a limited period of time, with or without compensation.

Extensive discussions among members took place on some core issues to be clarified, including:

- Who should be protected by a safeguard action, and to protect from what? And, what would be the purpose of such action?
- How should “domestic industry” be defined in this context, given the particular nature of trade in services which encompasses cross-border movement of factors of production?
- On whose behalf would emergency safeguard action be taken? How to define the “domestic industry” to be protected?
- What kind of measures could be taken under an emergency safeguard measure in the different modes?

- What about feasibility and desirability of having an emergency safeguard mechanism in the GATS, given the availability of other instruments of flexibility?

Despite the extensive work done since the establishment of the WPGR in 1995, not much convergence has been achieved on the issues raised. The pace of work has diminished in recent years and the issues are still outstanding.

## ii. Government procurement

Article XIII of the GATS provides that the MFN obligation, as well as any commitments on market access and national treatment do not apply to the procurement of services for governmental purposes. However, it is important to note that this provision only suspends the application of those obligations and commitments to government procurement but do not exclude it from the scope of the GATS all together. Article XIII:2 provides for negotiations on government procurement in services to be conducted within two years from the date of entry into force of the WTO Agreement.

In addition, the GATS “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 in its territory. 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.

Although negotiations on government procurement started relatively soon after the Uruguay Round, together with those in other rule-making areas, discussions have been more limited compared to the ones on emergency safeguards.

In the first years of discussion in the WPDR, members addressed various aspects of possible disciplines. Among other things, they considered the relationship between commitments undertaken under the WTO Plurilateral Government Procurement Agreement and any disciplines that might be developed under GATS and engaged in an information-gathering exercise in relation to national procurement regimes on the basis of a questionnaire prepared by the WTO secretariat. Discussions later touched on definitional issues as well



as on the scope and coverage of possible disciplines on government procurement.

Members have, over the years, expressed diverging views as to whether the negotiations should entail market access issues (or be limited to transparency only). At the beginning of the negotiations, developing countries were strongly opposed to negotiations on the issue of market access in government procurement and have taken the view that the negotiating mandate in Article XIII did not provide for such negotiations. Some developed countries also do not appear to be actively supporting market access negotiations in this context. Discussions in the WPGR have been practically inactive for the past few years on this subject.

### iii. Subsidies

Article XV:1 of the GATS provides for negotiations on subsidies. This contains the following elements:

- Members recognize that, in certain circumstances, subsidies may have distortive effects on trade in services;
- Members shall enter into negotiations with a view to developing the necessary multilateral disciplines to avoid such trade-distortive effects;
- The negotiations shall also address the appropriateness of countervailing procedures;
- Such negotiations shall recognize the role of subsidies in relation to the development programmes of developing countries and take into account the needs of members, particularly developing country members, for flexibility in this area; and
- For the purpose of such negotiations, members shall exchange information concerning all subsidies related to trade in services that they provide to their domestic service suppliers.

An important starting point to clarify is that the fact that Article XV provides for this negotiating mandate should not be interpreted to mean that measures relating to subsidies are not covered by the GATS. Like other measures affecting trade in services, subsidies fall within the scope of the GATS and are already subject to its existing disciplines. General obligations, including MFN treatment, thus apply. Furthermore, in scheduled sectors, the national treatment obligation also applies to subsidy measures – subject to any limitations that may have been inscribed. Additional commitments could also be used to undertake additional obligations with regard to non-discriminatory subsidies. The focus

of the mandate in Article XV is thus on negotiations on disciplines that may be necessary to avoid trade-distortive effects of subsidies. Arguably these would be non-discriminatory subsidies.

Discussions on subsidies in the WPGR have been less active than on the other two topics. There are difficulties in negotiating this area given the lack of precise information and data. It was also clear that, while export subsidies were likely to be the most trade distortive, it was difficult to concretely identify the magnitude of the distortions involved without more information on actual national subsidy measures.

Overall, there has been little advancement towards possible disciplines on trade-distortive effects of subsidies. Of the three GATS Rules topics, subsidies probably are the most analytically complex and politically sensitive. The situation briefly changed a little in 2009 following the financial assistance measures taken by several members to combat the financial crisis. Greater effort was made by a few delegations to revitalise discussions with a focus on advancing the information exchange mandated by Article XV and finding a practical intermediate solution considering the politically sensitive discussion on a definition of subsidies in services.

Some delegations have also expressed an interest in developing a working definition of subsidies but, for several years now, this discussion has been stalled.

## 2. Movement of natural persons supplying services (Mode 4)

The GATS defines trade in services as the supply of a service through any of the four modes of supply.

The use of the term “through the presence of” natural persons and not “by natural persons” broadens the scope of this mode of supply to cover, not only situations where the natural person is the actual supplier but also, situations where the natural person is an “employee” of a service supplier as defined in paragraph 1 of the Annex on Movement of Natural Persons.

In the first case, the natural person would be legally the supplier of the service in question. That is a self-employed person who is a national of one member contracted to supply a service in the territory of another member. Examples would include independent professionals and contractual service suppliers.

In the second case, the natural persons would be employed by a service supplier of a member and sent abroad to supply a service for the “same” company which has commercial presence in another member’s territory (intra-corporate transferees) in the territory of another member. The actual supplier of the service in this case would be the company employing the natural person.

In both cases, the identity of the consumer is not relevant. What is relevant is the identity of the supplier and the natural person as well as the territory in which the service is being supplied.

Paragraph 2 of the same annex also provides guidance regarding what is not covered by the GATS in relation to the movement of natural persons. It specifies that GATS does not cover natural persons seeking access to the employment market nor does it cover measures regarding citizenship, residence or employment on a permanent basis. It also states that governments are free to regulate entry and temporary stay, provided these measures do not nullify or impair the commitments. Footnote 1 to the annex clarifies that differential visa requirements are not to be regarded as nullifying or impairing benefits under a specific commitment.

WTO members have followed the practice of scheduling specific commitments on Mode 4 in the horizontal sections of their schedules. They also focused, so far, more on categories of natural persons that are related to Mode 3. Typically, the categories covered by commitments are intra-corporate transferees that include:

- Executives, managers, specialists;
- Working within a juridical person/firm/enterprise established in the territory of a WTO member; and
- Being temporarily transferred in the context of the supply of a service through commercial presence (either through a branch, subsidiary or affiliate) in the territory of another Member.

Commitments also include business visitors and services salespersons. They typically, however, do not include categories of independent natural persons that are not linked to commercial presence such as independent professionals and contractual service suppliers.<sup>36</sup>

### 3. Technological neutrality

The concept of technological neutrality of the GATS is one of the important cross-cutting issues that

has implications for the supply of all sectors and transactions covered by the agreement. There is no provision in the GATS which states that the agreement is “technologically neutral”. On the other hand, there is nothing which states that it is not. The “neutrality” of the agreement on this point stems arguably from the fact that it is totally silent in this regard, and therefore it is argued that a provision that makes such a distinction would need to be cited to establish the opposite of this conclusion.

The agreement does not contain any provisions that make any distinction between the different technological means by which a service may be supplied, whether in person, by mail, by telephone or across the Internet. The supply of services through electronic means is therefore arguably covered by the agreement in the same way as all other means of supply. It is important to bear in mind that the use of electronic means for the supply of a service is not just relevant to Mode 1 but also relevant to the other three modes. For instance, a foreign bank established locally may supply its services to consumers electronically, or a foreign natural person present locally may use electronic means to deliver consultancy services. It is also important to note that the “supply” of a service is defined to include the production, distribution, marketing, sale and delivery of a service.<sup>37</sup>

While during the discussions under the WTO work program on e-commerce, some members took the view that the issue needed more examination, the principle of technological neutrality has been subsequently endorsed by jurisprudence.

For example, the Panel in United States–Gambling stated that the supply of a service through Mode 1 includes all means of delivery:

*“Therefore, 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. We note that this is in line with the principle of ‘technological neutrality’, which seems to be largely shared among WTO Members”.*<sup>38</sup>

In the dispute concerning China’s measures affecting distribution services for certain publications and audiovisual entertainment products, the Appellate Body concluded that China should not restrict

electronic delivery of sound recordings since its services schedule did not exclude this means of delivery.<sup>39</sup>

#### 4. Data flows for the purpose of supplying services

The scope of application of the GATS is extensive. Not only does the agreement define “trade in services” as encompassing services supplied through four modes of supply, but the term “supply” is also defined broadly, to include “the production, distribution, marketing, sale and delivery of a service”. Government measures relating to cross-border data flows for the purpose of the supply of services, therefore, are considered to be covered by GATS obligations to the extent that they affect the supply of services. Such measures are subject to the general obligations and disciplines as well as the specific commitments undertaken by each member.

All suppliers of committed services also benefit from the obligations on information transfers embodied in the GATS Annex on Telecommunications. The annex requires WTO members to ensure that foreign service suppliers in committed sectors may use basic telecommunications networks for the movement of digitized information within and across borders, including for intra-corporate communications.<sup>40</sup> The provision includes a caveat specifying that members may, nonetheless, take measures necessary to protect the security and confidentiality of messages, so long as these are not arbitrary, unjustifiably discriminatory, or used to conceal trade restrictions.

Of relevance to cross-border data flows are also the general exception provisions of the GATS.<sup>41</sup> These permit WTO members to take GATS-inconsistent measures “necessary” to achieve certain public policy objectives, including the protection of public morals and the maintenance of public order, as well as securing the compliance with laws or regulations, which are in themselves consistent with the GATS, including for the protection of the privacy of individuals and the prevention of deceptive and fraudulent practices. The general exceptions must not be applied in a manner which constitutes unjustifiable discrimination between members or a disguised restriction on trade in services.

#### 5. E-commerce

Discussions on e-commerce started in the WTO with “The Work Program on Electronic Commerce” adopted by the General Council in 1998, based on “The Declaration on Global Electronic Commerce” adopted by the second ministerial conference of the WTO in 1997. The General Council adopted the Work Program with specific remits to relevant WTO bodies with a view to examining all trade related issues relating to global electronic commerce, taking into account the economic, financial, and development needs of developing countries. The work program defined the term “electronic commerce” to mean “the production, distribution, marketing, sales or delivery of goods and services by electronic means”.<sup>42</sup>

In this context, the General Council assigned to the CTS the task of examining and reporting on the treatment of electronic commerce in the GATS legal framework. The CTS identifies the following e-commerce related issues:

- Scope (including modes of supply) (Article I);
- MFN (Article II);
- Transparency (Article III);
- Increasing participation of developing countries (Article IV);
- Domestic regulation, standards, and recognition (Articles VI and VII);
- Competition (Articles VIII and IX);
- Protection of privacy and public morals and the prevention of fraud (Article XIV);
- Market-access commitments on electronic supply of services (including commitments on basic and value-added telecommunications services and on distribution services) (Article XVI);
- National treatment (Article XVII);
- Access to and use of public telecommunications transport networks and services (Annex on Telecommunications);
- Customs duties; and
- Classification issues.

In July 1999, the CTS adopted its Progress report to the General Council on its discussions of these issues.<sup>43</sup> The report reflects the collective understanding of the membership regarding some of the critical questions addressed during discussions.

*“It was the general view that the electronic delivery of services falls within the scope of the GATS, since the Agreement applies to all services regardless of the means by which they are delivered, and that electronic delivery can take place under any of the four modes of supply. Measures affecting the electronic delivery of services are measures affecting trade in services in the sense of Article I of the GATS and are therefore covered by GATS obligations. It was also the general view that the GATS is 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. Some delegations expressed a view that these issues were complex and needed further examination.”*

**Progress Report, S/L/74, paragraph 4**

*“It was noted that Article XIV of the GATS (General Exceptions) applies, inter alia, to the protection of privacy and public morals and the prevention of fraud, and there was agreement that measures taken by Members must not be more trade restrictive than necessary to fulfil such objectives. They also must not constitute a means of arbitrary or unjustifiable discrimination, or a disguised restriction on trade in services. It was also noted that, as Article XIV constitutes an exception provision, it should be interpreted narrowly, and its scope cannot be expanded to cover other regulatory objectives than those listed therein.”*

**Progress Report, S/L/74, paragraph 14**

The report of the CTS reflected several other elements of convergence on how members understand the application of the GATS to e-commerce transactions. It also reflected a number of elements where members felt more discussion and work was needed such as scope and classification issues.


Discussions did not advance much beyond that stage, neither in the CTS nor in the WTO in general. Given that the work program is a deliberative remit, not a negotiating mandate, the launch of the Doha Round diverted attention and efforts of members towards pursuing the DDA negotiations with much

less effort directed to the regular agenda of the WTO. Many e-commerce related issues have come up in the course of the services negotiations under DDA. However, the fact that those negotiations came to a complete halt after 2008 deprived the outstanding issues of any opportunity to progress.

Only in December 2017, at the WTO eleventh ministerial conference in Buenos Aires, Argentina, a wide group of members adopted a joint statement on electronic commerce<sup>44</sup> to initiate exploratory work towards future WTO negotiations on trade related aspects of electronic commerce.

Work under the joint statement proceeded during 2018 with successive rounds of discussions addressing a wide range of issues that cover both trade in goods and trade in services. While that process was the “exploratory discussion” phase,<sup>45</sup> a subsequent joint statement sponsored by 76 members (counting the European Union as 28 members) was issued in January 2019 on the side of the World Economic Forum meeting in Davos, Switzerland, signalling the move towards a negotiating phase. Participation is open to all WTO members.

These negotiations would normally cover services trade within the scope of the GATS. This could include market access and national treatment commitments in sectors of particular relevance to e-commerce. They could also cover regulatory issues that could lead to additional commitments under Article XVIII of the GATS. In any case, WTO members should not lose sight of Article IV of the GATS (Increasing Participation of Developing Countries) and particular attention should be given to initiatives that can be used to advance the interests of developing countries and LDCs in relation to promoting connectivity and bridging the digital divide. Participants could explore how commitments by developing countries and LDCs could be linked to assistance in the introduction of regulatory reforms. In this respect, participants should consider possible synergies with the Aid for Trade initiative. Participants could also borrow from the Trade Facilitation Agreement experience in this regard.



**THE NEGOTIATING FRAMEWORK  
OF THE GENERAL AGREEMENT  
ON TRADE IN SERVICES**

This part analyses the negotiating framework of the GATS, explaining what to be negotiated, how negotiations should proceed, how to schedule commitments and how to modify or withdraw commitments already made. It also briefly examines the current negotiations under the GATS starting in 2000.

## 1. “What” is to be negotiated?

Part III of the GATS contains the three provisions that legally define the content of specific commitments to be undertaken by each member. A thorough understanding of the construct and the content of these provisions would be necessary to assess the implications for negotiated commitments. Those three provisions are: Article XVI (Market Access), Article XVII (National Treatment) and Article XVIII (Additional Commitments).

### a. Market access

Article XVI defines a full market access commitment by a member as refraining from introducing or maintaining six types of restrictive measures which are specified in paragraph 2 of the same article. Namely, each member shall accord, either on the basis of a regional subdivision or on the basis of its entire territory, 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 of commitments.<sup>46</sup> (Emphasis added)

The six measures listed in this paragraph comprise four types of quantitative restrictions, as well as limitations on forms of legal entity and on foreign

equity participation (Box 5). These measures are considered to be restrictions on trade because they neither relate to ensuring the quality of the service nor the capability of the supplier to supply the service. In other words, they are not considered to serve any objective other than to restrict access to the market. The list is exhaustive, and it defines the legal scope of Article XVI in terms of the measures it covers. The six types of measures are also covered regardless of whether they are non-discriminatory or whether they are discriminatory within the meaning of Article XVII (National Treatment).

### b. National treatment

Article XVII of the GATS defines the national treatment standard as “treatment no less favourable”. Such treatment may be formally identical or formally different. According to Article XVII:3, what matters is that it accords no less favourable conditions of competition.

Therefore, in the absence of any conditions and qualifications set out in a given sector inscribed in its schedule of commitments, a member grants full national treatment in that sector and mode of supply. The national treatment standard does not require formally identical treatment of domestic and foreign suppliers: formally different measures can result in effective equality of treatment; conversely, formally identical measures can in some cases result in less favourable treatment of foreign suppliers (*de facto* discrimination).

A commitment to grant national treatment to services and service suppliers of other members is an important trade liberalization instrument. Some dispute cases

#### Box 5. Types of market access limitations (Article XVI of GATS)

- 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.



have developed jurisprudence on how the provisions of Article XVII should be interpreted. The panel in China–Electronic Payment Services noted that, while the scope of the market access obligation under Article XVI:2 of the GATS “applies to six carefully defined categories of measures of a mainly quantitative nature”, the scope of the national treatment obligation under Article XVII extends generally to “all measures affecting the supply of services”.<sup>47</sup>

In China–Publication and Audiovisual Products, the panel stated that a member may limit the extent to which it grants market access and national treatment by including conditions or to put it more simply, limitations in its Schedule of Commitments:

*“[A] Member’s obligations on market access and/or national treatment are determined with reference to any such limitation inscribed in its schedule”.*<sup>48</sup>

#### **i. Likeness of services and service suppliers**

The panel in EC–Bananas III, in a finding not reviewed by the Appellate Body, addressed the issue of likeness under Article XVII and in the case where the services can only be distinguished by referring to the origin of the product in respect of which the service activity is being performed:

*“Indeed, it seems that each of the different service activities taken individually is virtually the same and can only be distinguished by referring to the origin of the bananas in respect of which the service activity is being performed. Similarly, in our view, to the extent that entities provide these like services, they are like service suppliers”.*<sup>49</sup>

In China–Electronic Payment Services, the panel found that the difference of treatment was “not exclusively linked to the origin of service suppliers but to other factors” and hence decided to undertake a more detailed analysis of the likeness issue.

The panel noted that from the wording of Articles XVII:1 and XVII:3 that “Article XVII seeks to ensure equal competitive opportunities for like services of other Members” and that “like services are services that are in a competitive relationship with each other (or would be if they were allowed to be supplied in a particular market”.<sup>50</sup>

Referring to the panel in European Community–Bananas III which had found that “to the extent that entities provide like services, they are like service suppliers”, the panel in China–Electronic Payment Services further stated that the fact that service suppliers provide like services may in some cases raise a presumption that they are ‘like’ service suppliers. However, the panel considered that, in the specific circumstances of other cases, a separate inquiry into the ‘likeness’ of the suppliers may be called for. For this reason, the panel consider that the ‘like service suppliers’ determinations should be made on a case-by-case basis.<sup>51</sup>

For further information on the “likeness” issue, see analysis in Part II.1.a(i) on Article II:1 in which the case of Argentina–Financial Services is discussed with regard to assessing the likeness of services and service suppliers.

#### **ii. No less favourable treatment**

On the issue of no less favourable treatment, in a finding not reviewed by the Appellate Body, the panel in China–Publications and Audiovisual Products stated that:

*“The treatment is to be assessed in terms of the “conditions of competition” between like services and service suppliers, as specified in Article XVII:3 of the GATS”.*<sup>52</sup>

Furthermore, in China–Electronic Payment Services, the panel observed that Article XVII:3 of the GATS provides a useful clarification regarding the concept of “less favourable treatment”:

*“... subject to all other Article XVII conditions being fulfilled, formally identical or different treatment of service suppliers of another Member constitutes a breach of Article XVII:1 if and only if such treatment modifies the conditions of competition to their detriment”.*<sup>53</sup>

In Argentina–Financial Services, the Appellate Body set out its understanding of the terms “treatment no less favourable” in Articles II:1 and XVII of the GATS.<sup>54</sup> With respect to Article XVII of the GATS, the Appellate Body observed that the second and third paragraph of Article XVII elaborate on the meaning of a member’s obligation to grant “treatment no less favourable” pursuant to Article XVII:1. Specifically, Article XVII:2 recognizes that a member may meet this requirement by according to services and service suppliers ‘either formally identical treatment or formally different



treatment'. In its view, while Article XVII:3 refers to the modification of conditions of competition in favour of domestic services or service suppliers, the legal standard set out in this paragraph calls for an examination of whether a measure modifies the conditions of competition to the detriment of services or service suppliers of any other member. Less favourable treatment of foreign services or service suppliers and more favourable treatment of like domestic services or service suppliers are flip sides of the same coin.

The Appellate Body also noted that Footnote 10 to Article XVII:1 provides further insight as to the meaning of the obligation to accord "treatment no less favourable" under Article XVII:1.<sup>55</sup> In its view, the "inherent competitive disadvantage" under footnote 10 should be distinguished from the measure's impact on the conditions of competition in the marketplace. The national treatment obligation is not about the relative competitive advantages or disadvantages of the services and service suppliers that are not caused by the contested measure. Therefore, the standard of "treatment no less favourable" must be based on the impact on the conditions of competition that results from the contested measure.<sup>56</sup>

### c. Additional commitments

Unlike Articles XVI and XVII, Article XVIII does not contain any particular legal obligations. It only provides a legal framework for members to negotiate commitments with respect to measures affecting trade in services not subject to scheduling under Articles XVI or XVII, including those regarding qualifications, standards or licensing matters. Such commitments are inscribed in a Member's Schedule.

A member may, therefore, make commitments with respect to measures affecting trade in services not subject to scheduling under Articles XVI and XVII such as, but not limited to, undertakings with respect to qualifications, technical standards, licensing requirements or procedures which fall within the scope of Article VI on domestic regulation. Additional commitments are always expressed in the form of undertakings, not limitations.

## 2. "How" negotiations should proceed?

Part IV of the GATS provides for the progressive approach of liberalizing trade in services. It contains the provisions that translate the "principle" of progressive

liberalization into specific rules that provide members with the necessary guidance for future negotiations. Article XIX provides for how the process of negotiation should unfold and the elements that must guide it while Article XX provides the legal basis for schedules of commitments and what they should contain.

### a. Negotiation of specific commitments

Article XIX gives practical meaning to the principle of progressive liberalization. The first paragraph establishes the collective obligation by members to engage in successive rounds of negotiations. It sets the timeline for the start of the first round and the periodicity of others to follow. It also provides a clear expression of what such rounds must aim to achieve. It states:

*"1. In pursuance of the objectives of this Agreement, Members shall enter into successive rounds of negotiations, beginning not later than five years from the date of entry into force of the WTO Agreement and periodically thereafter, with a view to achieving a progressively higher level of liberalization."* (emphasis added)

Paragraph 2 of Article XIX provides important guidance for future negotiations in terms of due respect for national policy objectives and the level of development of individual developing countries. This paragraph also provides an operationally important link with Article IV on increasing participation of developing countries in international trade in services to ensure that such successive rounds of negotiations will be aiming at furthering the objectives stated in that article.

Paragraph 3 of Article XIX provides for certain specific practical steps to be followed by members in preparing for the negotiations to ensure focus on the achievement of their objectives. It requires members to establish guidelines and procedures for each round based on an assessment of trade in services to be conducted by the membership in overall terms and on a sectoral basis with reference to the GATS objectives, including the objective of facilitating the increasing participation of developing countries in world trade in services set out in Article IV. It calls for the establishment of modalities for how to treat autonomous liberalization steps taken by each member outside negotiating rounds and finally, modalities that give practical meaning to the provisions of Article IV concerning least-developed countries.

Finally, paragraph 4 of Article XIX explicitly provides that negotiations can be conducted in different configurations, bilateral, plurilateral or multilateral.

### b. Schedules of specific commitments

Article XX of the GATS establishes the obligation that each member of the WTO must have a schedule of commitments. Schedules of specific commitments are the legal registry in which each member inscribes its commitments. In addition to establishing this obligation, Article XX also provides description of the elements of information to be contained in a schedule in relation to sectors/sub-sectors committed.

Paragraph 2 of Article XX provides an important scheduling convention in relation to Article XVI on market access limitations, which are, at the same time, discriminatory within the meaning of Article XVII on national treatment. It states:

*“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”.*  
(emphasis added)

This issue of overlap between the two respective scopes of Articles XVI and XVII has been subject to extensive debate between members in the early stages of the GATS. Members clarified their understanding of this provision by providing specific scheduling guidance in the Guidelines for the Scheduling of Specific Commitments they adopted in March 2001:<sup>57</sup>

*“18. A Member may wish to maintain measures which are inconsistent with both Articles XVI and XVII. 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, there may exist a discriminatory measure inconsistent with national treatment inscribed in the market access column. However, in accordance with Article XX:2, any discriminatory measure scheduled in the market access column is also to be regarded as scheduled under Article XVII and subject to the provisions of that Article. When measures inconsistent with both Articles XVI and XVII are inscribed in the column relating to Article XVI (as provided for in Article XX:2), Members could indicate that this is the case (e.g. by stating “also limits national treatment” in the market access column).”*

The legal implications of this overlap would need to be kept in the mind of negotiators during the process of negotiations as well as the scheduling of commitments.

Finally, paragraph 3 of Article XX establishes the legal status of schedules as being an integral part of the GATS. Therefore, from a legal perspective, any reference to the GATS includes the schedules of commitments.

Article XX of the GATS is central to any future legal interpretation of members' commitments.

## 3. Approaches to the scheduling of commitments

The way in which a schedule of a WTO member is structured and drafted is critical for the future legal interpretation of the commitments which have been undertaken. Members of the WTO have agreed on a set of guidelines for the scheduling of their commitments<sup>58</sup> in order to ensure the legal and technical soundness of their schedules. The agreed guidelines are complemented by the subsequent practices of scheduling commitments.

### a. Horizontal commitments

While the sectorial commitments contain market access, national treatment and additional commitments only related to a particular sector, most members of the WTO (with very few exceptions) have a horizontal section in their schedules which precedes the sector specific section. In the horizontal section, a member would enter all the market access and national treatment limitations that apply to all the sectors listed in the schedule. The only purpose for having a horizontal section, therefore, is to avoid repetition in sectoral entries. Accordingly, the same GATS provisions that apply to sectoral entries also apply to the horizontal ones with the same legal implications to all the sectors listed in the schedule.

The horizontal section could also include additional commitments under Article XVIII of the GATS, the entries for which would be in the form of undertakings, not limitations. In other words, the text of additional legal obligations needs to be inscribed in the additional commitments' column.

## **b. Three templates for scheduling commitments**

### **i. Reference papers**

The term “Reference Paper” in the GATS context has been used to refer to a template of “Additional Commitments” to be scheduled pursuant to Article XVIII of the GATS. The most prominent example of such a template is the Reference Paper on Regulatory Principles in the Basic Telecommunications Sector. The text of such a template is normally negotiated to reflect the desired outcome and then members would proceed to incorporate the content in their schedules. The template itself, however, would not have any legal standing. What takes legal effect is the content of members’ schedules. Technically, the scope of a reference paper is limited to the scope of Article XVIII, which is only about regulatory matters. It therefore should not include measures that are subject to scheduling under Articles XVI (Market Access) and XVII (National Treatment).

### **ii. Understandings**

The term “Understanding” has been used in the GATS context to refer to a template that combines additional commitments or regulatory matters falling under Article XVIII with market access and national treatment commitments. The prominent example of a template of this type is the Understanding on Financial Services agreed at the end of the Uruguay Round. Such a template would incorporate a mix of legal elements encompassing sectoral coverage, market access, national treatment, regulatory disciplines and benchmarks for levels of commitments. For example, the Understanding on Financial Services contains a “standstill” obligation according to which members scheduling according to the Understanding should list only “existing non-conforming measures” with market access and national treatment. It also contains a defined sectoral scope which those members would agree to commit through scheduling. As in the case of a reference paper, the Understanding itself does not take legal effect. What enters into force legally is the schedules of members which reflect the content of the Understanding.

### **iii. Model schedules**

Model schedules is another method which members have used to illustrate a desirable outcome of commitments under the Articles XVI, XVII and XVIII. The approach in terms of legal scope is similar to that

of the understanding. However, it tends to be less broad in the variety of legal provisions. An example of a model schedule is to be found in Attachment 7 to the Guidelines for the Scheduling of Specific Commitments WTO members adopted in 2001.<sup>59</sup> The Model Schedule for Commitments on Basic Telecommunications was developed during the negotiations on the sector.

## **4. Modification or withdrawal of commitments**

Article XXI of the GATS allows members to withdraw or modify their commitments. The purpose of this provision is to guard against unforeseen consequences of services liberalization in a given sector or mode of supply. The Article provides a framework of rules to be followed in such situations. 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 an emergency safeguard mechanism, 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 bindings elsewhere that “endeavour to maintain a general level of mutually advantageous commitments not less favourable to trade” than what existed before. Application of modifications of commitments must be on an MFN basis.

The provisions of Article XXI set the rules regarding the rights and obligations of the modifying member and any affected (self-designated) member. It provides for the stages of the process and what course of action or options to be followed at each stage. It aims to strike a balance between giving members the right to modify their commitments and preserving the right of affected members to seek redress. Should no agreement be reached in the negotiations, 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. Otherwise, if the arbitrator’s findings are ignored, affected countries have the right to retaliate by withdrawing equivalent commitments.

In 1999, the CTS adopted detailed procedures for the modification of schedules pursuant to Article XXI.<sup>60</sup>

Improvements to schedules, i.e. inscription of new sectors or removal of existing limitations, are subject to more streamlined procedures for the certification of rectifications or improvements to schedules of specific commitments.<sup>61</sup>

## 5. Current negotiations under the General Agreement on Trade in Services

The GATS, in Article XIX, requires members to enter into successive rounds of negotiations for the purpose of achieving the progressive liberalisation of service trade.

The first round of negotiations started in January 2000. The Special Session of the CTS was established to conduct the negotiations. As required by Article XIX of the GATS, negotiating guidelines were established in March 2001.<sup>62</sup> They contained elements of guidance regarding the objectives and principles governing the negotiations, the scope of the negotiations and the modalities and procedures to be followed. Members also adopted modalities for the treatment of autonomous liberalization and modalities for the treatment of autonomous liberalization and modalities for the special treatment of least-developed country members.

### a. Guidelines and procedures for the negotiations

#### i. Objectives and principles

The 2001 Negotiating Guidelines laid down the key principles and objectives enshrined in Articles IV and XIX of the GATS, including:

- 1) Negotiations to be conducted on the basis of progressive liberalisation as a means of promoting the economic growth of all trading partners and the development of developing countries; and recognition of the rights of members to regulate, and to introduce new regulations, on the supply of services;
- 2) Increased participation of developing countries in trade in services, appropriate flexibility for individual developing country members, as provided for by Article XIX:2 and special priority to be granted to least-developed country members as stipulated in Article IV:3;
- 3) Due **respect for national policy objectives, the level of development and the size of**

**economies** of individual members, both overall and in individual sectors; and due consideration to be given to the needs of small and medium-sized service suppliers, particularly those of developing countries; and

- 4) Negotiations to **take place within and respect for the existing structure and principles of the GATS**, including the right to specify sectors in which commitments will be undertaken and the four modes of supply. (emphasis added)

#### ii. Scope

The 2001 Negotiating Guidelines also clarified that the scope of the negotiations shall not exclude any sector of services. Furthermore, special attention shall be given to sectors and modes of supply of export interest to developing countries. WTO members also agreed on timelines for the conclusion of rule-making negotiations of domestic regulation and GATS Rules (emergency safeguard measures, government procurement and subsidies).

#### iii. Modalities and procedures

The section of the Negotiating Guidelines relating to the modalities and procedures to be followed in the negotiations is of importance in clarifying how the process of negotiations had been foreseen to proceed, in particular, the format and techniques to be followed.

- Negotiations shall be conducted in Special Sessions of the CTS, which will report on a regular basis to the General Council.
- Negotiations shall be transparent and open to all members and acceding States and separate customs territories.
- The **starting point** for the negotiation of specific commitments shall be the current schedules, without prejudice to the content of requests.
- Liberalization shall be advanced through **bilateral, plurilateral or multilateral** negotiations. The main method of negotiation shall be the **request-offer** approach.
- There shall be **appropriate flexibility for individual developing country members as provided for in Article XIX of the GATS**.
- Based on multilaterally agreed criteria, account shall be taken and credit shall be given in the negotiations for autonomous liberalization undertaken by members since previous negotiations. Members



shall endeavour to develop such criteria prior to the start of negotiation of specific commitments.

- The CTS in Special Sessions shall continue to carry out an assessment of trade in services in overall terms and on a sectoral basis with reference to the objectives of the GATS and of Article IV in particular. This shall be an ongoing activity of the Council and **negotiations shall be adjusted in the light of the results of the assessment.** In accordance with Article XXV of the GATS, technical assistance shall be provided to developing country members, on request, in order to carry out national/regional assessments.
- To ensure the effective implementation of Articles IV and XIX:2, the CTS in Special Session, when reviewing progress in negotiations, **shall consider the extent to which Article IV is being implemented and suggest ways and means of promoting the goals established therein.** In implementing Article IV consideration shall also be given to the needs of small service suppliers of developing countries. It shall also conduct **an evaluation, before the completion of the negotiations,** of the results attained in terms of the objectives of Article IV. (emphasis added)

The elements highlighted above were designed to ensure that the negotiations proceed in full accordance with the objectives and principles laid down in the GATS, particularly, in relation to pursuing negotiated outcomes that support the development of developing countries, whether that relates to the liberalization steps that developing countries take in their own markets or whether it relates to other members liberalizing sectors and modes of supply of export interest to developing countries.

### **b. The Doha Development Agenda**

With the adoption of the Doha Ministerial Declaration,<sup>63</sup> the services negotiations launched in 2000 were integrated into the wider context of the DDA. Over the years, 71 initial and 31 revised offers were submitted (counting European Union member states as one). Their content, in terms of sectoral coverage and depth of commitments remained quite modest, however, due in part to frictions in other negotiating areas, in particular, agricultural and non-agricultural market access.

WTO members reaffirmed at the Hong Kong Ministerial Conference in 2005 key principles of the services negotiations and called on members to

intensify their efforts moving forward in accordance with the objectives, approaches and timelines set out in Annex C of the Hong Kong Ministerial Declaration.<sup>64</sup> The annex contained a more detailed and ambitious set of objectives than any previous such document and envisaged that the negotiations, hitherto conducted predominantly in a bilateral request/offer mode, be pursued on a plurilateral basis as well. It also acknowledged that LDCs are not expected to undertake new commitments in this round.

In July 2008, in order to push forward the negotiations on services, interested members met for an informal “Signalling Conference” during a “Mini-Ministerial” in Geneva to exchange indications on what they would be ready to offer in the future course of the services negotiations, provided progress was achieved in other negotiating areas as well. Based on subsequent statements and press reports, it appeared that participants were generally satisfied with the indications provided and left the meeting with a significant sense of progress. However, the Mini-Ministerial foundered over disagreement on certain elements of the draft agricultural modalities.

The market access negotiations in services then continued at a slow pace until Easter 2011 when negotiations effectively came to a halt. While the mandate in Article XIX remained unchanged, the stalemate in other negotiating areas of the DDA, in particular, agriculture and non-agriculture market access, had taken its toll. Subsequent discussions in services have been mainly of a conceptual and theoretical nature, in the subsidiary bodies, with a view to exploring, and adding clarity to, issues surrounding the application of the GATS and the classification of sectors under conditions of rapid technical and regulatory change.

The WTO Ministerial Conference in December 2011, explicitly acknowledged that the DDA negotiations were “at an impasse”.<sup>65</sup>

Shortly after, a group of members who were keen on pursuing progress in the services negotiations, decided to enter into negotiations on a Trade in Services Agreement (TISA). The process was launched outside the WTO to avoid disagreements with other WTO members who were keen on linking progress in services with other areas of negotiation. TISA participants regularly reported on progress at meetings of the CTS to show that it was a transparent process.<sup>66</sup>

At the Bali Ministerial Conference in 2001, WTO members<sup>67</sup> did not specifically address the trade in services negotiations but instructed the WTO Trade Negotiations Committee “to prepare within the next 12 months a clearly defined work program on the remaining Doha Development Agenda issues”, including trade in services. Subsequent discussions on a services element of the post-Bali work programme did not lead to any concrete result, largely due to linkages invoked by some members with non-services elements of the work programme in which little or no progress was being made.

However, in Bali, a Ministerial Decision on the “operationalization” of the LDC Services Waiver<sup>68</sup> was adopted in response to the absence of notifications of preferences for LDC services and service suppliers since the adoption of the waiver in 2001.

After 24 years since the entry into force of the WTO Agreement, the provisions of Articles IV and XIX of the GATS relating to the negotiation of specific commitments remain unused by members. While Article XIX calls for successive rounds of negotiations to facilitate the attainment of the objectives in Article IV, so far, not a single round has been concluded.







# PREPARATION FOR NEGOTIATIONS

The life cycle of a services negotiation process is the following:<sup>69</sup>

- Mapping a strategy for services in national development plans;
- Preparing for services negotiations (i.e. developing an informed negotiating strategy or identifying the capacity needs required to do so; setting up the proper channels of communication with key stakeholders; and conducting a trade-related regulatory audit);
- Conducting a services negotiation;
- Implementing negotiated outcomes, i.e. addressing regulatory capacities and weaknesses and identifying implementation bottlenecks; and
- Supplying newly opened markets with competitive and international standard-compliant services.

## 1. Capacity constraints

In pursuing negotiations towards the liberalisation of trade in services in line with respective national development objectives and needs, developing countries and LDCs can face several capacity constraints. These can include, among others, the following:

- The need to survey existing regulatory frameworks to carefully identify the applied services regime as it relates to specific sectors, modes of supply and how relevant measures relate to the subject matter of negotiation;
- Defining a negotiating position based on coordination/consultation with all relevant ministries, regulatory agencies as well as other stakeholders;
- The drafting of schedules of commitments that reflect the desired negotiated outcome with all its intended policy and legal implications; and
- Developing a clear understanding of the implementation follow-up regarding commitments that require regulatory reforms. Particularly, where such reforms require access to technical assistance.

Furthermore, structural weaknesses in a country's economy such as an underdeveloped infrastructure, insufficient skilled and trained human resources, low productivity and diversification, could derail services reform efforts to spur economic growth, development and trade expansion. A lack of access to finance can also pose substantial challenges for infrastructure development as well as acquiring the necessary

expertise to assist in introducing needed regulatory reforms.

When embarking on services negotiations, governments must first clarify at the domestic level the policy objectives they wish to achieve. A country should gather significant knowledge before it can submit liberalisation requests to its key trading partners and make informed market-opening offers.

A major challenge in GATS negotiations is that in virtually all economies there is no single government agency responsible for all services. Sound intra-governmental coordination is thus essential. Coordination is crucial to develop negotiating positions based on a complete assessment of key national priorities, and to ensure that negotiators are well informed of the full range of factors influencing the domestic services market.

Most importantly, the overarching questions that policy makers and negotiators need to keep in mind when engaging in services negotiations is: what is feasible and desirable in the different negotiating contexts?

It is therefore best to adopt a bottom-up approach and first identify the types of problems a country is facing in each of its services subsectors. A country first needs to identify, through domestic stakeholder consultations, its interests for each sector, and only then can it see what it can reasonably request from its trading partners and what it can commit to itself. It is important to note that different sectoral issues require different tools and will lead to distinct negotiating positions.

## 2. Objectives of the stakeholder consultations

- Learning who is already exporting which services and by which mode of supply: a government must become aware of its economy's competitive strength;
- Learning what will make a competitive difference for a country's service firms: countries should know what regulatory obstacles their service exporters are encountering (by mode of supply) both in their sector and in related sectors;
- Determining priority export markets;
- Gauging the impact of various liberalisation strategies on the domestic economy; and
- Building domestic support for liberalisation of services trade.

### 3. Who to include in the consultation process

A representative cross-section of input is needed in order to make sure that all concerns are taken into account. In this context, the following list could be helpful in who to include in the consultations:

- Representatives of domestic service suppliers/exporters;
- Representatives of foreign firms established in the local market;
- Regulators of service suppliers;
- Advocates for service suppliers/exporters;
- Advocates for consumers, including user industries;
- Advocates for those employed in the services sector; and
- Researchers working on the services sector or a particular sector or sub-sector.

### 4. Issues to be covered during the consultations

The consultations should cover issues that are of particular interest to the stakeholders in order to ensure relevant and beneficial consultations. Some of the issues which may be of cross-cutting importance are temporary business entry, mutual recognition of professional credential, e-commerce, etc.

### 5. How to structure the consultation process

Effective consultation is ideally an ongoing, two-way process, this means that stakeholder provide initial input and receive initial feedback, then comment on negotiating alternatives, and receive feedback on the negotiations as they progress. It is helpful to have a dedicated official in charge of an ongoing consultation process. There are a range of mechanisms that WTO members may consider for undertaking consultations:

- Virtual consultation via e-mail;
- In-person focus/discussion groups;
- Periodic topical surveys;
- Op-ed pieces or other regular media content, seeking reactions; and
- Ongoing sectoral advisory groups.

### 6. Compiling issues from consultations

After the consultation process, a country will compile the issues that it needs to address in the actual

negotiations and how to request them. These can be divided into three broad categories:

#### 1) Removing obstacles to trade faced by exporters

Where a country has a comparative advantage and wishes to export more to conquer new markets, but the service suppliers are facing obstacles to trade, the country would have an interest in removing those obstacles imposed by the country's trading partners.

Possible solutions:

- direct request to the country imposing the obstacle to trade;
- negotiation of an agreement or a provision at the regional level to remove the obstacle to trade;
- request to the country at the WTO; and
- for a LDC, possibility for developed or developing country to provide preferences only to the LDC service-suppliers under the WTO Services Waiver for the LDCs.

#### 2) Protecting local service suppliers

A country may wish to limit its imports in a sector to protect its service suppliers from international competition and allow them to develop.

Possible solutions:

- introduction of a quantitative or qualitative limitation to the market access of foreign service-suppliers, in conformity with GATS commitments and other international agreements ratified by the country in question; and
- subsidies to local service-providers.

#### 3) Improving the efficiency in a sector

A country may wish to import services because it wants to stimulate its domestic market by attracting more efficient foreign service-suppliers, or because it does not have the supply capacity in a particular sector.

Possible solutions:

- domestic measures (improving infrastructure, conducting domestic reform);
- bilateral investment treaties and other tools to promote FDI; and
- liberalisation of the sector, either unilaterally or after committing in services schedules at the bilateral, regional, or WTO level.

Before making any commitments and submitting any liberalization requests in a given sector, it is important to go through some checkpoints.

## 7. Checklist for negotiators

The following checklist explains what questions to ask before submitting requests to trading partners and making commitments in a given sector:<sup>70</sup>

<p><b>Measures affecting cross-border supply (Modes 1 and 2)</b></p>	<ol style="list-style-type: none"> <li>1. Can non-resident suppliers of the service serve the market on a cross-border basis (i.e. without an established presence)? Is it necessary to channel those transactions through intermediaries?</li> <li>2. What types of services are allowed, or restricted, as regards cross-border supply?</li> <li>3. If entry is restricted, what are the reasons?</li> <li>4. Where and how clearly are such limits spelled out?</li> <li>5. Is electronic delivery of cross-border services allowed?</li> </ol>
<p><b>Measures governing commercial presence/ ownership (Mode 3)</b></p>	<p><b>Private participation</b></p> <ol style="list-style-type: none"> <li>1. Is there a government monopoly in the sector such that private investment is not permitted?</li> <li>2. How is private participation allowed in the sector (concessions, etc.)?</li> <li>3. How is the sector regulated at the central and local levels? What are the procedures and criteria used? Is preference given to any particular enterprise or group of enterprises? Is it a transparent process?</li> </ol> <p><b>Foreign ownership</b></p> <ol style="list-style-type: none"> <li>1. In which sectors is foreign ownership allowed in the provision of services?</li> <li>2. When laws restrict foreign shareholdings in local companies, what is the maximum foreign equity permitted or the minimum local shareholding?</li> </ol> <p><b>Investment laws</b></p> <ol style="list-style-type: none"> <li>1. Are proposed foreign investments in the sector subject to screening by a specialized authority? Which authorities are charged with the investment screening?</li> <li>2. Are there economic needs tests for approval of foreign investment in a sector or sub-sector? Are these tests transparent?</li> <li>3. Are there nationality or residency requirements for foreign establishments?</li> <li>4. Which criteria apply in evaluating applications for approval? Is there restriction to the business scope of foreign investors? Is electronic delivery of services by foreign service supplier allowed?</li> <li>5. Are investors offered rights of judicial review against unfavourable decisions by the screening authorities?</li> </ol> <p><b>Legal and joint venture requirements</b></p> <ol style="list-style-type: none"> <li>1. Are firms required to establish locally through a particular legal form of establishment (i.e. subsidiary, branch, representative office)?</li> <li>2. Are foreign established companies subject to specific performance requirements, including (i) licensing requirements and technology transfer rules; (ii) remittance and foreign exchange restrictions limiting external financial transfers; and (iii) local hiring and sourcing requirements?</li> <li>3. Is entry of the foreign firm conditional on the substantial involvement of local participants in the ownership and management of the investment project (joint venture requirement)?</li> <li>4. Is local control (e.g. 51 per cent or more of the equity contribution) required over the (equity/ contractual) joint venture? Does the law provide for a progressive increase in control over the venture?</li> <li>5. Are there requirements on the composition of the board of directors?</li> <li>6. What is the prescribed legal form of the joint undertaking (general partnership, professional corporation or limited liability company)?</li> </ol>

<p><b>Measures governing the movement of natural persons (Mode 4)</b></p>	<ol style="list-style-type: none"> <li>1. How are entry and work permits obtained?</li> <li>2. Are there any restrictions on the movement of intra-corporate transferees? What about contractual service suppliers or independent services suppliers?</li> <li>3. Do the restrictions apply to persons seeking long-term establishment or to individuals traveling for business purposes for short periods of time?</li> <li>4. Is the entry of foreign experts subject to economic needs tests or labour market tests? Are such tests transparent?</li> <li>5. Are there residency or nationality requirements with respect to certain categories of personnel employed by locally established firms?</li> </ol>
<p><b>Measures relating to licensing</b></p>	<ol style="list-style-type: none"> <li>1. What laws and regulations discipline licensing of activities in the sector?</li> <li>2. Do licenses and regimes apply in different segments? What is the rationale for such licensing?</li> <li>3. Who issues and monitors licenses?</li> <li>4. Are licenses automatic or not automatic?</li> <li>5. Are licenses open-ended or for a definite time?</li> <li>6. What licensing procedures (e.g. bidding procedures) are applied?</li> </ol>
<p><b>Preferential liberalization measures</b></p>	<ol style="list-style-type: none"> <li>1. Are there any preferential agreements affecting the supply of services? Which measures are subject to preferential treatment? Do preferential measures also apply to the movement of natural persons?</li> <li>2. What conditions must foreign suppliers of services fulfill to meet the requirements of existing mutual recognition agreements to which host country providers are parties to?</li> <li>3. Does the importing country maintain preferential access arrangements for developing country-service providers?</li> </ol>
<p><b>Government procurement (optional)</b></p>	<ol style="list-style-type: none"> <li>1. What procurement procedures are applied for services in this sector? Under what circumstances are different procedures used?</li> <li>2. How are intended procurements publicized?</li> <li>3. Are there registration, residence or other requirements for suppliers?</li> <li>4. Is procurement subject to (i) local content; (ii) technology transfer; (iii) local employment; (iv) investment/local presence in the importing country?</li> <li>5. Do procuring entities grant price advantages to domestically-owned companies over foreign companies?</li> <li>6. Are there lists of approved suppliers? If so, what are the procedures for checking the capability of firms applying for inclusion on tenderers' lists?</li> <li>7. What criteria are taken into account in the award of tenders? Are criteria for award of contracts made available in advance to potential suppliers? How are tenders received, registered and opened?</li> <li>8. Are entities required to publish details of contracts awarded or notify unsuccessful tenderers? Are entities required to publish, or provide to unsuccessful bidders, pertinent reasons why their bid was rejected?</li> <li>9. What, if any, are the procedures available for parties, domestic and foreign, to lodge complaints against the award of a contract?</li> </ol>

<b>Regulatory measures</b>	<ol style="list-style-type: none"><li>1. Which authorities are in charge of adopting and implementing regulation of services in this sector?</li><li>2. What measures (at which level) and mechanisms are in place to assure fulfillment of universal access to basic services? In which sectors? Are they objective and transparent? Are foreign service suppliers subject to different or additional conditions than domestic suppliers in relation to public service obligations?</li><li>3. Which regulations are in place to ensure service quality? Which technical standards apply? Are they transparent?</li><li>4. How is uncompetitive behaviour (abuse of monopoly power) addressed?</li><li>5. Are these regulatory institutions independent from the government? How is accountability ensured?</li><li>6. Are price changes phased in and the public informed about the reasons for the change? Are there any programmes in place to promote the participation of consumers and other stakeholders in regulation?</li></ol>
<b>Other relevant issues</b>	<ol style="list-style-type: none"><li>1. Are there subsidies for services providers in this sector or sub-sector?</li><li>2. How are the subsidies granted?</li><li>3. Are these subsidies effectively serving the intended public policy objective(s)?</li></ol>

# APPENDIX

## REGIONAL INTEGRATION AND LIBERALIZATION OF TRADE IN SERVICES



Article V of the GATS, as mentioned earlier, allows preferential services trade agreements among members of the WTO, provided that such agreements comply with the provisions stipulated in that Article. Motivations for concluding such agreements would vary from one case to the other. However, they mostly relate to some or all of the following factors:

- To strengthen ties with friendly countries through deeper economic and trade integration;
- To keep up with new ways of doing business across different jurisdictions to ensure the interoperability of service suppliers;
- To achieve more ambitious market opening in services trade to secure access for services exporters and to ensure broader future trade opportunities;
- To encourage and consolidate domestic policy and regulatory reforms towards more opening of competitive markets;
- To build more confidence in the stability and predictability of regulatory conditions to attract inward FDI flows; and
- To provide trade-offs in negotiating further liberalisation on trading goods.

Until the end of 2018, a total of 152 regional trade agreements (RTAs) have been notified to the WTO.<sup>71</sup> Most members who are active in services trade are involved in such agreements. By way of examples, the European Union is party to 17 RTAs covering services, China (14), Japan (14), the Republic of Korea (14), United States (13), Mexico (11) and Australia (10). However, despite the proliferation of RTAs covering services, there are some regional imbalances. Notably, members of the WTO in the African continent have not been actively involved in such agreements, while developing countries in other regions have been quite active. Out of the total of 152 notified agreements, 74 per cent are between North-South partners and 45 per cent or between South-South partners. Only 8 per cent of the agreements notified are between North-North partners. Notifications also showed that since 1 January 2016, two thirds of services preferential agreements are between South-South partners. In other words, only 8 per cent of RTAs covering services do not involve developing countries.

In terms of main architecture for such RTAs, they have followed two main approaches: the first is the so-called GATS-type RTAs which is also referred to as the “positive list” approach, whereby the committed

sectors are listed in the schedule. The second is so-called North American Free Trade Agreement-type RTAs which is also referred to as the “negative list” approach, whereby the sectors which are not committed are listed in the schedule. It should be noted that the reference to positive/negative listing in an agreement refers only to the listing of sectors. When it comes to the listing of limitations to market access and national treatment, all agreements stipulate that they are to be listed “negatively” in the form of any inconsistencies with the relevant articles in the agreement.

While the method of listing committed sectors is technically a mere “bookkeeping” convention, negative list agreements have been associated with higher levels of ambition to liberalize services trade. Such high ambition, however, is less the function of the method of listing sectors but more related to other substantive requirements and disciplines contained in the agreement. While such elements are more frequently used in “negative list” type agreements, they are not technically dependant of the method of listing sectors. Many of them are also used under the GATS, be it on a more progressive and selective basis. The following are examples of such elements:

- A **standstill** under which parties would bind existing levels of openness and would be able to list only existing non-conforming measures. In other words, there is no binding “overhang”. An example already contained in the GATS is the Understanding on Commitments in Financial Services (paragraph A).
- A **ratchet** provision, according to which any autonomous liberalization introduced after entry into force of a commitment, would be automatically locked-in. There is no current example under GATS of such a provision. However, it could be incorporated in a template for commitments along the lines of the Financial Services Understanding. Such a template need not be confined to one sector but could theoretically cover the entire schedule of commitments.
- The concept of ratcheting up levels of compliance with treaty provisions is not new. In fact, it is one of the oldest in the multilateral trading system. The first example is found in paragraph 1(b) of the Protocol of Provisional Application of the GATT 1947 which states that Contracting Parties would apply “Parts II of that Agreement to the fullest extent not inconsistent with existing legislation”. Subsequent jurisprudence, notably the adopted 1984 Panel

Report on United States–Manufacturing Clause, confirms the operation of the Protocol as both a standstill and what is now called a “ratchet”. The Panel interprets the Protocol as having a ratchet effect by referring to an explicit aim of the GATT, the security and predictability in trade relations between contracting parties. Standstill and ratchet are thus found to be techniques that accord with the fundamental aims of the GATT and, by extension, those of the GATS. The concept can be used as a principle that governs the flexible implementation of certain commitments over a suitable period of time (or in some cases, subject to access to technical assistance).

- **New services** that are automatically added to the sectoral coverage of existing commitments. An example is found in the Financial Services Understanding (paragraph B.7.) in relation to mode 3.
- **Government procurement** commitments involving non-Government Procurement Agreement members of the WTO with the sectoral or modal coverage of choice. These could also be incorporated in a template-like approach. An example is to be found in the Financial Services Understanding (paragraph B.2.), notwithstanding Article XIII of the GATS on Government Procurement.
- **Commitments on state-owned enterprises** which have been raised as an important new element. However, if not privileged by government interventions, state-owned enterprises are to be dealt with under the GATS as any other commercial entities. Further reaching obligations could easily be incorporated into the framework of the Agreement.

For example, the Financial Services Understanding (paragraph B.1.) provides a legal obligation, on a best-endeavour basis, to eliminate monopolies or reduce their scope even in financial “activities conducted by a public entity for the account or with the guarantee or using the financial resources of the government”.

- **Additional commitments** on regulatory issues. These could cover a wide range of issues and should be considered as an evolving agenda of negotiations in RTAs as well as under the GATS. Such commitments could be negotiated under Article XVIII of the GATS which is specifically designed for that purpose. An obvious example is the Reference Paper on regulatory principles for basic telecommunications. It provides for additional legal obligations on transparency, interconnection, licensing, allocation and use of scarce resources, and even institutional arrangements such as the establishment of independent regulators. Article XVIII provides the legal framework for negotiation on any regulatory matter that concerns measures not covered by market access and national treatment.

The above elements are examples of ingredients that, individually or in different combinations, determine the level of ambition of services RTAs. As a matter of legal architecture, they can be applied to one or more or all sectors covered by commitments in a schedule. Such elements have typically been associated with agreements that follow a negative list approach. However, they could be just as well be applied in any positive list type agreement.



## ENDNOTES

- 1 UNCTADstat.
- 2 ILOSTAT November 2018 estimates.
- 3 UNCTADstat.
- 4 World Bank, *World Development Indicators*, <https://data.worldbank.org/>.
- 5 Cheung D, Low P and Sit D (2014), *Services in Global Value Chains Project: Case Study: Hong Kong-based Bakery Chain*. Fung Global Institute. Hong Kong. Available at: <https://globalvaluechains.org/publication/fgi-services-global-value-chains-project-case-study-hong-kong-based-bakery-chain>.
- 6 UNCTAD (2010), *Services, Trade and Development*, UNCTAD/DITC/TNCD/2010/5.
- 7 UNCTAD, *World Investment Report 2018*, Annex, Table 15.
- 8 WTO, *GATS*, Article XXVIII.
- 9 WTO, *GATS*, Preamble.
- 10 WTO (2001). *Guidelines and Procedures for the Negotiations on Trade in Services*, S/L/93.
- 11 WTO, *GATS*, Article XIX:4.
- 12 WTO (2001), *Guidelines and Procedures for the Negotiations on Trade in Services*, para. 11, S/L/93.
- 13 WTO, *GATS*, Article IV:1.
- 14 WTO (2001), *Guidelines and Procedures for the Negotiations on Trade in Services*, para. 5, S/L/93.
- 15 WTO, *GATS*, Article XIX:1 and 2.
- 16 WTO, *Agreement on Agriculture*, Article 20.
- 17 WTO, *GATS*, Article IV:1 and 2.
- 18 WTO (2003), *Modalities for the Special Treatment for Least-Developed Country Members in the Negotiations on Trade in Services*, TN/S/13.
- 19 WTO (2011), *Decision on Preferential Treatment to Services and Service Suppliers of Least-Developed Countries*, WT/L/847.
- 20 The Waiver was extended by a decision at the WTO Ministerial Conference in 2015 until 31 December 2030, due to the extended period between the adoption of the Waiver in December 2011 and the notification of preferences in 2015. The same decision also instructs the CTS to initiate a process to review the operation of notified preferences. See WTO (2015), *Decision on Implementation of Preferential Treatment in Favour of Services and Service Suppliers of Least Developed Countries and Increasing LDC Participation in Services Trade*, WT/L/982.
- 21 WTO (2013), *Decision on Operationalization of the Waiver Concerning Preferential Treatment to Services and Service Suppliers of Least Developed Countries*, WT/L/918.
- 22 WTO (2014), *Collective Request pursuant to the Bali Decision on the Operationalization of the Waiver Concerning Preferential Treatment to Services and Service Suppliers of Least Developed Countries*, S/C/W/356, as corrected by S/C/W/356/Corr.1 and S/C/W/356/Corr.2.
- 23 WTO (2000), *Appellate Body Report, Canada–Certain Measures Affecting the Automobile Industry*, WT/DS139/AB/R and WT/DS142/AB/R, paras. 170–171.
- 24 WTO (2016), *Appellate Body Report, Argentina–Measures Relating to Trade in Goods and Services*, WT/DS453/AB/R and Add.1, para. 6.32.
- 25 *Ibid*, para. 6.36.
- 26 *Ibid*, paras. 6.39–6.40.
- 27 WTO (1997), *Appellate Body Report, European Communities–Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R, paras. 231–234.

- <sup>28</sup> WTO (2016), *Appellate Body Report, Argentina—Measures Relating to Trade in Goods and Services*, WT/DS453/AB/R and Add.1, paras. 6.105–6.106.
- <sup>29</sup> *Ibid.*
- <sup>30</sup> *Ibid.*
- <sup>31</sup> In subsequent negotiations, these categories of measures were further clarified as licensing requirements, licensing procedures, qualification requirements, qualification procedures and technical standards. See WTO (1998), *Disciplines on Domestic Regulation in the Accountancy Sector*, S/L/64.
- <sup>32</sup> WTO (1998), *Disciplines on Domestic Regulation in the Accountancy Sector*, S/L/64.
- <sup>33</sup> The latest version of the Chairman’s text is contained in the Room document dated 13 March 2009 and is commonly referred to as the Chairman’s March 2009 text. This draft was prepared by the then Chairman under his own responsibility, with a view to registering progress in discussions that had taken place in the Working Party since February 2008. It was intended to provide a point of departure for the work of the WPDR, at that time, under its incoming Chairperson. The Chairman’s March 2009 text was further discussed together with alternative proposals during the intensification of the DDA negotiations in the first quarter of March 2011.
- <sup>34</sup> 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. See also WTO (1997), *Guidelines for Mutual Recognition Agreements or Arrangements in the Accountancy Sector*, S/L/83.
- <sup>35</sup> The WTO secretariat, at the request of WTO members, prepared a background note on necessity tests in the WTO, S/WPDR/W/27/Add.1 and Corr.1.
- <sup>36</sup> The WTO secretariat has prepared an informal note entitled “Categories of Natural Persons Subject to Commitments Under Mode 4, Informal Note by the WTO secretariat”, JOB(03)195.
- <sup>37</sup> WTO, GATS, Article XXVIII(b).
- <sup>38</sup> WTO (2005), *Panel Report, United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/R, para. 6.285. This view of the Panel was upheld by the Appellate Body in its report. WT/DS285/AB/R.
- <sup>39</sup> WTO (2010), *Appellate Body Report, China—Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, WT/DS363/AB/R.
- <sup>40</sup> WTO, GATS Annex on Telecommunications, para. 5c.
- <sup>41</sup> WTO, GATS, Article XIV.
- <sup>42</sup> WTO (1998), *Work Programme on Electronic Commerce*, WT/L/274.
- <sup>43</sup> WTO (1999), *Work Programme on Electronic Commerce – Progress Report to the General Council*, S/L/74.
- <sup>44</sup> WTO (2017), *Joint Statement on Electronic Commerce*, WT/MIN (17)/60.
- <sup>45</sup> WTO (2019), *Joint Statement on Electronic Commerce*, WT/L/1056.
- <sup>46</sup> If a Member undertakes a market-access commitment in relation to the supply of a service through the mode of supply referred to in subparagraph 2(a) of Article I and if the cross-border movement of capital is an essential part of the service itself, that Member is thereby committed to allow such movement of capital. If a Member undertakes a market-access commitment in relation to the supply of a service through the mode of supply referred to in subparagraph 2(c) of Article I, it is thereby committed to allow related transfers of capital into its territory.
- <sup>47</sup> WTO (2012), *Panel Report, China—Certain Measures Affecting Electronic Payment Services*, WT/DS413/R and Add.1, para. 7.652.
- <sup>48</sup> WTO (2010), *Panel Report, China—Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, WT/DS363/R and Corr.1, para 7.950. This view of the panel was shared by the Appellate Body (see Appellate Body Report WT/DS363/AB/R).

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- <sup>49</sup> WTO (1997), *Panel Report, European Communities–Regime for the Importation, Sale and Distribution of Bananas, Complaint by Ecuador*, WT/DS27/R/ECU, para. 7.322.
- <sup>50</sup> WTO (2012), *Panel Report, China–Certain Measures Affecting Electronic Payment Services, WT/DS413/R and Add.1*, para. 7.700.
- <sup>51</sup> *Ibid*, para. 7.705.
- <sup>52</sup> WTO (2010), *Panel Report, China–Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, WT/DS363/R and Corr.1, para. 7.978.
- <sup>53</sup> WTO (2012), *Panel Report, China–Certain Measures Affecting Electronic Payment Services, WT/DS413/R and Add.1*, paras. 7.1130–7.1131.
- <sup>54</sup> WTO (2016), *Appellate Body Report, Argentina–Measures Relating to Trade in Goods and Services, WT/DS453/AB/R and Add.1*, paras. 6.105–6.106.
- <sup>55</sup> Footnote 10 to Article XVII stipulates that specific commitments assumed under Article XVII:1 “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”.
- <sup>56</sup> WTO (2016), *Appellate Body Report, Argentina–Measures Relating to Trade in Goods and Services, WT/DS453/AB/R and Add.1*, paras. 6.013–6.104.
- <sup>57</sup> WTO (2001), *Guidelines for the Scheduling of Specific Commitments under the General Agreement on Trade in Services*, S/L/92.
- <sup>58</sup> *Ibid*.
- <sup>59</sup> *Ibid*.
- <sup>60</sup> WTO (1999), *Procedures for the Implementation of Article XXI of the General Agreement on Trade in Services (GATS) for the Modification of Schedules*, S/L/80.
- <sup>61</sup> WTO (2000), *Procedures for the Certification of Rectifications or Improvements to Schedules of Specific Commitments*, S/L/84.
- <sup>62</sup> WTO (2001), *Guidelines and Procedures for the Negotiations on Trade in Services*, S/L/93.
- <sup>63</sup> WTO (2001), *Ministerial Declaration*, WT/MIN(01)/DEC/1 .
- <sup>64</sup> WTO (2005), *Doha Work Programme – Ministerial Declaration*, WT/MIN(05)/DEC.
- <sup>65</sup> WTO (2011), *Eighth Ministerial Conference – Chairman’s Concluding Statement*, WT/MIN(11)/11.
- <sup>66</sup> TISA negotiations stalled with a change of the United States Administration in 2017.
- <sup>67</sup> WTO (2013), *The Bali Ministerial Declaration*, WT/MIN(13)/DEC.
- <sup>68</sup> WTO (2013), *Operationalization of the Waiver Concerning Preferential Treatment to Services and Service Suppliers of Least-Developed Countries*, WT/L/918.
- <sup>69</sup> World Bank (2009), *Negotiating Trade in Services – A Practical Guide for Developing Countries*.
- <sup>70</sup> These questions are based on, with adaptation, the checklist suggested in Geloso Grosso, Massimo (2005), *Managing Request-Offer Negotiations under the GATS: the Case of Environmental services*, OECD Trade Policy Working Paper No. 11.
- <sup>71</sup> WTO Secretariat, RTA database.
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