

## IV. Services

### A. The international services economy

The first two parts of this study have been concerned with market access, and international trade itself, in its traditional sense: exchanges of goods across borders, subject to whatever tariffs and other border measures are in force. In this context, market access can be assessed in terms of the incidence of border measures and other explicit trade restrictions, plus a limited range of domestic measures which may have distortive effects, such as subsidies. In the realm of trade in services the assessment of market access is a great deal more complex, for two reasons. First, the international exchange of services is vastly more complex than the movement of goods across frontiers. It is extremely difficult, sometimes impossible, to disconnect the production of services from their consumption. This means that either the producer or the consumer must move, which accounts for the definition of trade in services in the GATS as taking place under four different modes of supply, including the movement of capital and persons. Secondly, the production and consumption of services are subject to a vast range of policy interventions by governments—policies which have usually been developed without regard for their trade effects because they serve other objectives. The assessment of market access in services, therefore, must be concerned not only with measures applied at the border, which are easily identifiable but hardly significant in the services context, but with a much larger range of regulations and controls going far beyond trade policy as traditionally understood.

The objective of this part is to throw light on the degree of market access guaranteed by commitments under the GATS, on the relative importance of the different trading modes and of the main obstacles to trade for specific services. It also reflects upon some of the main policy and political challenges facing governments as we prepare for a new phase of the services negotiations. The analysis is essentially based on the GATS schedules of WTO Members and on a series of background papers covering the main sectors which were produced by the Secretariat to facilitate preparations for the new round of negotiations by the Council for Trade in Services. Because these papers are available from the WTO website ([www.wto.org](http://www.wto.org)) the study does not contain descriptions of individual sectors: readers are invited to consult the background papers themselves.<sup>81</sup>

To understand the important place that services is coming to occupy in the multilateral trading system, it is first necessary to understand the increasingly central role

that services now play in the global economy and the major technical and regulatory changes that are driving this transformation. Services production is a dominant economic activity in virtually all countries of the world, regardless of their level of development. The sector represents well over 60% of world GDP. There is, however, significant variation across different country groupings; available data suggest that the size of the services sector is strongly related to income. For example, in 1998 services were estimated to account for 38% of gross domestic product (GDP) in low income economies, 56% in middle income economies, and 65% in high income economies (for individual country data see Chart IV.1).<sup>82</sup> This pattern is consistent with expectations based on standard economic literature. The factors normally expected to contribute to this services/development link are: (i) high income elasticity of demand: as people grow richer, they tend to spend relatively more on services; (ii) increasing services content of many advanced industrial goods: sophisticated products tend to incorporate a wide range of tertiary sector inputs provided by specialized suppliers (design, development, marketing, distribution, insurance, finance, etc.); and (iii) favourable production conditions in higher-income countries, which are relatively better endowed with infrastructural and human capital, for many rapidly expanding services activities.

Services tend to be an even more important source of employment—and employment creation—than the above figures suggest. Many traditional services, such as distribution, construction, education, health and social services, are particularly labour-intensive; and it has generally proved more difficult in these areas to substitute equipment for human inputs than in manufacturing.

The expansion of the services sector in recent years has been driven mainly by income-related demand shifts, benefiting for example the hotel and tourist industries; the economic stimulus generated by new information and communication technologies; and the growing importance of basic infrastructural services, including communication and finance, for a wide range of user industries. It is particularly noteworthy that, while the services share in economic activity has increased world-wide, this growth has been particularly strong in developing countries. During the period from 1980 to 1998, the services share in world GDP has reportedly risen by five percentage points, and the corresponding increase for low and middle income countries has been estimated at nine percentage points.<sup>83</sup> Hong Kong, China is perhaps the most striking example of the switch from an economy strongly orient-

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<sup>81</sup> See Appendix 1 for list of WTO Secretariat sectoral background studies.

<sup>82</sup> World Bank (1999).

A note of caution is necessary, however, as individual countries may depart significantly from such average estimates. For example, capitalizing on locational and/or natural advantages, various low-income economies have developed large tourism or maritime transport sectors.

<sup>83</sup> World Bank, *op.cit.*

ed towards manufacturing to almost complete dependence on services. Service industries now account for 85% of Hong Kong, China's GDP and for 79% of employment.

The strong and growing role of services in world production, however, is not reflected in its share of world trade. With some notable exceptions, such as maritime transport and segments of international finance, services have not historically been traded on a significant scale and most have been regarded as essentially domestic activities. Even today, services account for no more than one-fifth of total *cross-border* trade, though to this must be added the substantial volume of trade done through the other modes of supply covered by the GATS—in particular through establishment in the export market.

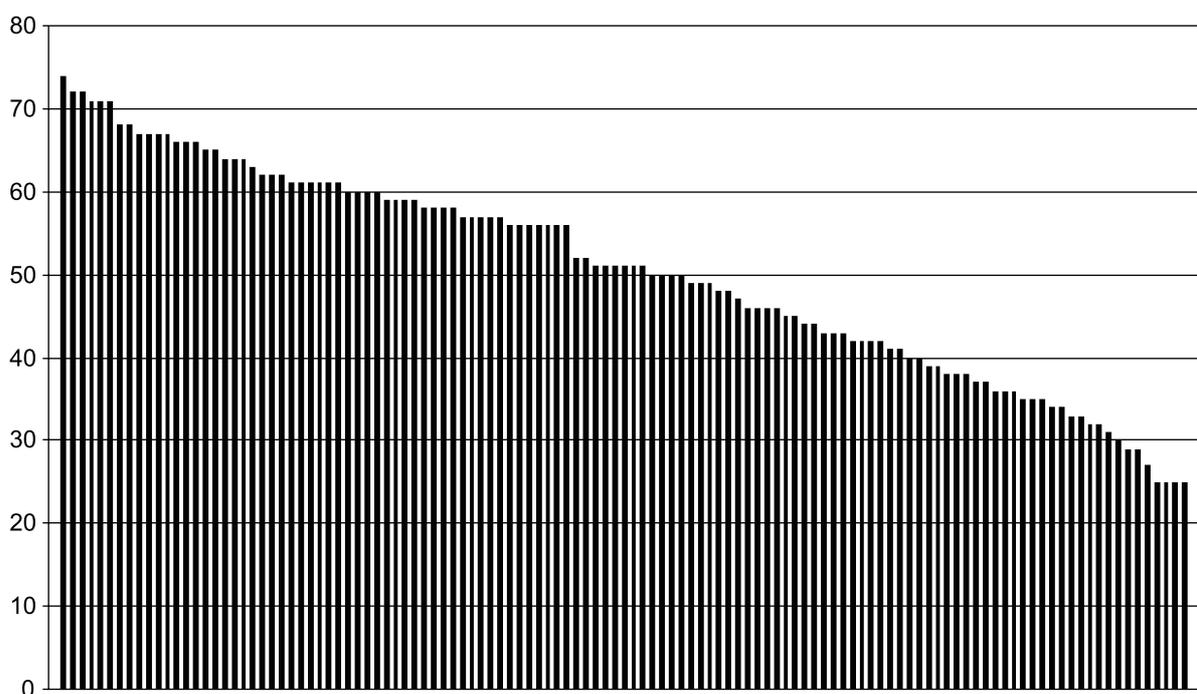
The non-tradability of a significant number of services has been due mainly to technical constraints, or in other words to the impossibility of disconnecting production from consumption and supplying customers at a distance. But new communication technologies are rapidly changing the situation in a variety of sectors; the advent of telehealth and tele-education services are cases in point. However, non-tradability has also been policy-induced. Many important markets, including rail transport, basic telecommunications and health insurance, have traditionally been reserved for monopoly suppliers or made subject to strict regulation and entry control, often for essential policy purposes, such as security of supply and protection

of the public interest. Nevertheless, technical change is having an impact in these areas as well.

A number of recent market reforms have been driven by technology in the sense that governments have found it increasingly difficult to continue operating traditional regimes or to enforce them effectively against by-pass technologies. Examples include the proliferation of call-back and calling-card services in high-cost telecom markets, which have undermined the ability of monopoly suppliers to control prices. In a similar vein, new aircraft designs have helped to bring travel costs down to a point where international consumer mobility makes it possible in certain services, such as health, to replace domestic supply by consumption abroad. However, this is not to suggest that policy makers have operated predominantly in a reactive role, driven by developments they are unable to prevent. There is also ample evidence of governments recognizing the economy-wide benefits of efficient services and, with this in view, devising liberalization strategies. Efficiency, so the underlying tenet runs, depends on the spur of competition or, in other words, on the promise of profits (for innovation) and the threat of losses (for complacency).

As financial, telecommunications and transport services are the backbones of modern economies, it is no surprise that initial policy reforms in North America and Europe focused precisely on these areas. It would be misleading, however, to suggest that there is an automatic

Chart IV.1. Share of services in GDP of selected countries, 1998



Source: World Bank, World Development Indicators 2000.

link between internal deregulation and improvement in market access for foreign suppliers. Despite the high potential benefits of competition and inward investment, governments very often find it difficult to liberalize autonomously: it helps to be able to point to matching "concessions" by trading partners. Autonomous liberalization runs counter to the striving for "reciprocity" which is one of the most deep-rooted, though economically dubious, compulsions in international trade policy-making. Nevertheless, the likelihood of autonomous liberalization, explicitly done to achieve more competitive markets and attract investment, appears greater in services, especially in the infrastructural services, than in agriculture or manufacturing, where mercantilist assumptions have a stronger hold. In the telecommunications sector, a number of developing countries have tabled commitments unilaterally—the first examples of the kind.

## B. Market access in services

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### a. The scope of the GATS

The GATS covers all services with the exception of those provided in the exercise of governmental authority and the greater part of the air transport sector. The exclusion of services provided in the exercise of governmental authority ensures the ability of governments, notwithstanding their GATS obligations, to implement important objectives of public policy. It means for example that public health and education services which are supplied neither on a commercial basis nor in competition—this is the relevant definition—fall outside the scope of the GATS while the private services which may co-exist alongside them and are supplied on a competitive basis are covered by the Agreement.

The GATS also covers all measures by Members<sup>84</sup> affecting trade in services. The term "affecting" is unqualified, and has been interpreted in two dispute settlement cases to mean measures which not only directly but also indirectly affect services trade.

The most-favoured-nation (MFN) obligation in Article II of the Agreement requires Members to extend to all other Members the best treatment that they give to the services and service suppliers of any other country. The MFN principle is a powerful instrument of liberalization and guarantee of market access. However, the principle is not unqualified: Article II permits Members to maintain exemptions from the MFN principle, under which more favourable treatment is given to some trading partners than to others. Exemptions were permitted to be taken only on the entry into force of the Agreement, or, in the case of countries acceding to the WTO, on the date of their accession. Exemptions are subject to review and negotiation and should not in principle be maintained for more than 10 years (see Table IV.1).

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<sup>84</sup> Measures by Members include those taken by all levels of government -national, regional and local -and by non-governmental bodies to which governmental powers have been delegated.

Given the heavy regulation of most services, effective access also depends on accurate knowledge of the laws and regulations in force, that is on transparency. Article III requires Members to publish "all relevant measures of general application which pertain to or affect the operation of this Agreement" and to notify any changes in laws or regulations affecting sectors on which commitments have been made. The work so far done on the development of disciplines on domestic regulation under Article VI has also been heavily focussed on transparency.

### b. Schedules of commitments

Its very comprehensive coverage would probably have made the Agreement unacceptable to many countries had it not provided at the same time a remarkable degree of flexibility. Members have great freedom in negotiations to specify and limit the extent to which they will guarantee access to their markets. Though every Member must maintain a national schedule of commitments, it is free to decide which service sectors will be included in the schedule and, within those sectors, to maintain specified limitations on the degree of market access and national treatment guaranteed to foreign suppliers. The Agreement prescribes no minimum coverage or threshold; a commitment in one sector is sufficient to meet the requirement that all WTO Members must have a GATS schedule. It is a basic principle of the Agreement that liberalization should take place with due respect for the level of development of individual Members, and in general there is a strong positive relationship between the level of development of Members and the coverage of their schedules—although this is much less true of the schedules negotiated by countries acceding to the WTO, which are commonly far more extensive than those submitted by countries at a similar level of development in the Uruguay Round.

The GATS defines trade in services as taking place under four different modes of supply:

- **Mode 1:** Cross-border supply, from the territory of one Member into that of another. (This corresponds to the traditional movement of goods across borders);
- **Mode 2:** consumption abroad, in which the service is supplied in the territory of one Member to the consumer of another;
- **Mode 3:** supply through commercial presence, in which the service supplier is legally established in the export market; and
- **Mode 4:** supply through the movement of natural persons, meaning the temporary presence of individuals without legal personality to supply services in a Member's market.

Member governments may make commitments guaranteeing the right to supply services under any or all of

## Box IV.1. Review of MFN exemptions

The GATS requires the Council for Trade in Services to review MFN exemptions listed by Members. Accordingly, a review process was started at the end of 1999 and concluded in the autumn of 2000. Its essential purpose was to examine whether the conditions which had created the need for an exemption still prevail. The Annex also indicates that exemptions will be subject to negotiations, effectively creating a separation between the review process and the negotiations.

Around two thirds of WTO Members have listed MFN exemptions. They are mainly concentrated in four sectors—transport (especially maritime), communication (mostly audiovisual), financial and business services. A significant number of other exemptions apply horizontally, to all sectors, such as those listed for mode 4 or mode 3-related discrimination. Exemptions are generally motivated by preferential regional arrangements which do not qualify as Article V Economic Integration Agreements, bilateral or plurilateral agreements, which usually reflect historical preferences, and by unilaterally imposed reciprocity provisions. In more than four-fifths of cases, no time limit has been attached to the measures listed, and the duration of the exemption is often "indefinite", in spite the Annex indicating that exemptions should, in principle, not exceed ten years.

An MFN exemption is a deviation only from the obligations in Article II, and cannot be used to escape obligations deriving from specific commitments undertaken under Articles XVI and XVII. In other words, the level of market access and national treatment bound in a schedule has to be granted as a minimum to all WTO Members and commitments cannot be undercut, e.g. by way of reciprocity conditions, through MFN exemptions. In turn, this means that the deeper the commitments in a given sector, the more limited the discrimination potential of an MFN exemption. Viewed in this light, the distortion potential of MFN exemptions is greatest in sectors such as audiovisual and transport services, where the number of exemptions is highest relative to the number of commitments. The MFN obligation, and the requirement to list MFN-inconsistent measures in the Annex, are suspended for maritime transport services, for those Members not having undertaken any commitments in the sector, until the conclusion of the—equally—suspended negotiations on maritime transport.

What scope is there for the elimination of MFN exemptions in the current round of negotiations? The review was essentially an exchange of information, in itself not aimed at reducing the number of exemptions, but it nonetheless provided a useful indication of what could reasonably be expected over the next few years. A first, welcome effect of the review has been the realization, on the part of a few Members, that some of their exemptions were no longer necessary, mainly as a result of progress in regional integration processes. Several Members have also indicated that they might consider reduction of the scope, if not outright removal, of some of their exemptions. Others, however, have stressed that the conditions which had created the need for their exemptions continue to prevail, thereby indicating little room for liberalization in this area.

It is therefore plausible that progress with respect to MFN exemptions will take place within the context of the negotiations on specific commitments, when the economic significance of the exemptions is likely to become fully apparent. However, many exemptions stand little chance of being removed before the expiry of the period of ten years, in principle, specified in the Annex, and it can be expected that even at that point it will be maintained that some of them continue to be necessary.

Table IV.1. Number of MFN-exemptions by sector, as of March 2000

Sector	Number of measures
Transport services	147
Maritime transport	63
Internal waterways transport	10
Air transport	22
Space transport	1
Rail transport	4
Road transport	45
Pipeline	1
Services auxiliary to all modes of transport	1
Communication services	98
Postal services	1
Telecommunication services	19
Audiovisual services	78
Financial services	51
Business services	22
Professional services	15
Other Business services	7
Recreational, cultural and sporting services	4
Distribution services	3
Construction and related engineering	2
Health-related and Social services	1
Tourism and Travel-related services	1
Non-sector specific	73

Notes: EC members counted as one.

Measures listed for more than one sector/sub-sector have been counted once only.

No indication about the sectoral coverage of the exemptions can be drawn from the table.

Source: WTO Secretariat.

these modes. For each service on which a commitment is made, the schedule must indicate, under each of the four modes, any limitations on market access or national treatment which it is intended to maintain; limitations not scheduled in this way become illegal. The entry "none" signifies full access—no limitations are maintained. "Unbound" indicates that no commitment is made on the mode of supply concerned; the Member remains free to introduce restrictions. Between these two extremes come all the entries listing specific limitations, which are partial commitments. The schedules are thus a combination of a "positive list" of covered services with a "negative list" of scheduled measures. They guarantee a minimum standard of access; countries are always free to grant higher levels of market access and national treatment than are specified in their schedules, on an MFN basis, and many do so. The absence of a commitment therefore does not mean that supply is not permitted. A country may maintain a very liberal regime while making no GATS commitments at all—but without commitments there is no guar-

antee that it will stay liberal. This means that as a guide to the degree of openness of individual markets the schedules must be used with great caution. They nevertheless throw useful light on three important issues: the degree of sensitivity, or of trade interest, of different sectors as revealed by the number of countries making commitments on them; the relative importance, or acceptability, of the different modes of supply from the view point of the scheduling country; and the prevalence of different types of trade barriers, as revealed by the limitations on market access and national treatment which governments have scheduled.

Sectoral commitments are presented in a four-column format. The first column defines the sector or sub-sector concerned, the second column indicates any limitations on market access and the third limitations on national treatment. The fourth column contains "additional commitments" made under Article XVIII on measures not subject to scheduling under Articles XVI or XVII. (The major example of the scheduling of additional commitments is

the regulatory principles subscribed by nearly all participants in the negotiations on basic telecommunications in 1997, which provide safeguards against abusive or anti-competitive behaviour by monopolies and dominant suppliers.) Commitments or limitations which relate to all sectors are recorded as "horizontal commitments" in the first part of the national schedule, in the same four-column format. It is also possible for Members to bind measures of liberalization to come into force at a future date, as some have done in the telecommunications negotiations, for example, and to make commitments applying to only part of their territory.

Article XVI lists six different types of limitations on market access which must be scheduled if they are to be maintained. It is to be noted that these access limitations must be scheduled whether or not they contain any element of discrimination against foreign services and service suppliers. They are set out, with typical examples, in Table IV.2

Article XVII, which contains the national treatment obligation, also permits Members to schedule and maintain limitations. In this it is very different from the unqualified national treatment obligation in the GATT. This must be seen as a natural corollary of the absence of tariff protection in services, which means that an unqualified market access and national treatment commitment would

Table IV.2. Article XVI: limitations on market access

Market-access limitations	Example
(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;	Licences for new restaurants subject to economic needs test based on population density.
(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;	Foreign bank subsidiaries limited to x per cent of total domestic assets of all banks.
(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; <sup>a</sup>	Restrictions on the broadcasting time available for foreign films.
(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;	Foreign labour should not exceed x per cent of the work force and/or not account for more than y per cent of total wages.
(e) Measures which restrict or require specific types of legal entity or joint venture through which a service supplier may supply a service;	Commercial presence excludes representative offices.
(f) Limitations on the participation of foreign capital in terms of maximum percentage limit on foreign share-holding or the total value of individual or aggregate foreign investment.	Foreign equity participation in domestic insurance companies should not exceed x per cent.

<sup>a</sup> Subparagraph 2(c) does not cover measures of a Member which limit inputs for the supply of services.

amount to full free trade. Unlike Article XVI, Article XVII contains no closed list of measures subject to scheduling; any measure which affects conditions of competition to the detriment of foreign services or suppliers must be scheduled. Typical national treatment limitations included in schedules of commitments relate to nationality or residency requirements for executives and board members, requirements to invest a certain amount of assets in local currency, restrictions on the purchase of land by foreign service suppliers, special subsidy or tax privileges granted to domestic suppliers, differential capital requirements and special operational limits applying only to operations of foreign suppliers.

A scheduled commitment does not necessarily involve liberalization. The majority of commitments negotiated and scheduled in the Uruguay Round were in fact "standstill bindings", committing the country concerned only to maintain the current level of access; more liberalization took place in the 1997 negotiations on basic telecommunications and financial services. However, standstill bindings have value. They provide traders and investors with the assurance that the conditions on which their decisions are based will not be overturned by sudden policy changes. Nevertheless, trade liberalization is the essential purpose of the new round, to be achieved both by removing or reducing existing limitations and by extending the sectoral coverage of schedules.

It must also be understood that liberalization is not to be equated with deregulation. Many services are heavily regulated, for very good reasons, and regulations cannot be simply assimilated to trade restrictions. The preamble to the GATS recognizes the right of Members to regulate, and to introduce new regulations on, the supply of services to meet national policy objectives. Domestic regulations which do not fall under the six categories of limitation in Article XVI and which do not discriminate against foreign suppliers are not subject to scheduling. Most of them are subject to the disciplines of Article VI, which are explained in Part Four below. Some regulations, such as competition law, fall under none of these three Articles. A footnote to Article XVII makes it clear that there is no obligation to compensate for any competitive disadvantages which are inherent in the foreign character of foreign services or service suppliers—such as unfamiliarity with the local language or business culture, for example.

The commitments which governments have assumed under the GATS are thus specific to particular services and to the particular modes by which they are delivered. This "industry-specific" character of the Agreement renders it impossible to present a generalized picture of market access for "services" as a whole. Since there are significant differences between services in terms of their overall economic importance, their tradability and, in this context,

the relative importance of the modes of supply, the value of an access commitment for a particular sector and mode can be assessed only in its sector context. There is also virtually unlimited variation between limitations in terms of their trade-restrictive effect, so that to assign a common weighting to partial commitments can give only the most crude impression of the economic quality of commitments.

## C. The Uruguay Round and subsequent negotiations

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### 1. Results of the Uruguay Round

Unlike previous trade rounds under the GATT, which essentially focused on trade liberalization within an established legal framework, the Uruguay Round broke new ground in integrating completely new areas—services and trade-related aspects of intellectual property rights—into the system. For services in particular a new legal architecture needed to be created and filled with substance. This was an enormous task, requiring negotiators to re-think and sometimes re-invent basic trade policy concepts and instruments. Apart from the EC's Single Market, there was little experience with comprehensive services trade agreements. Although tempting, it was impossible to simply re-apply basic GATT provisions—given important structural differences between merchandise and services trade—and retain the GATT's focus on measures affecting the sale of products across borders. This meant that a great deal of negotiating energy went into rule-making, partly at the expense of market-opening negotiations. Governments may also have been reluctant to take on liberalization commitments as the accompanying legal framework—governing for example quality standards, licensing requirements and regulatory supervision in a more open environment—had still to be created. And some participants might also have fallen victim to a traditional negotiating instinct, namely to wait for trading partners' requests, rather than actively using the Agreement to create more favourable trade and investment conditions by way of autonomous bindings which could lock in reform policies and thus create stability and predictability for traders and investors, domestic and foreign.

As a result, the levels of commitments undertaken in the Uruguay Round were generally rather modest, both in terms of the number of sectors included in many schedules and of the quality of bindings in relevant modes of supply. As stated above, most commitments appear to have been confined to binding the status quo, rather than expanding already existing access opportunities. In many cases, the level of access guaranteed by commitments was lower than that provided *de facto*. It has to be said that this assessment is based mainly on anecdotal evidence, since there is no comprehensive information in existence

on the trade and regulatory regimes of Members, either before or after the Uruguay Round.

a. *Overview of current commitments*

Research on trade restrictiveness indicators for services, while highly promising, is still at a relatively early stage.<sup>85</sup> Available estimates are limited in country and sector coverage, focusing in particular on banking and telecommunications, and are subject to methodological constraints. There are difficulties, for example, in distinguishing the price effects associated with trade barriers falling under Articles XVI and XVII of GATS (market access and national treatment), from those attributable to "non-protective" domestic regulations (prudential measures, quality standards, etc.), universal service obligations (e.g. requirements on banks or telecom operators to provide certain non-profitable services on regional or social policy grounds), and higher prices of local inputs (including wages, license fees, and user charges for basic infrastructural facilities). Thus, even if the Uruguay Round had resulted in sweeping liberalization across many sectors and countries, it might not have been (fully) reflected in currently existing indicators of trade restrictions, many of which use the price differentials in individual sectors between domestic and international markets. The absence of commitments on a particular sector or mode cannot be taken as indicating that there are market access or national treatment problems in that area. Of course, scheduled commitments will have more value for economic operators, in terms of transparency and predictability, the more closely they reflect the regimes in place.<sup>86</sup>

Given these constraints, the following overview of Uruguay Round results essentially remains confined to a description, from various angles, of the commitments undertaken by Members across sectors and modes. The commitments currently in force—undertaken mainly in the context of the Uruguay Round, recent accessions and the extended negotiations (movement of natural persons, maritime transport, basic telecommunications and financial services)—can be assessed in at least three ways: from the perspective of the Members involved, the sectors covered, and the modes bound. The schedules reveal significant variation, regardless of the perspective adopted.

b. *Commitments by Members*

The classification list (see Appendix) generally used for scheduling purposes divides all services into 11 broadly defined service sectors, and these are further divided into 160 sub-sectors. Of the latter, about one third of WTO Members have committed on 20 sectors or less, one-third on between 21 and 60, and the remaining third by more than 61 subsectors (Table IV.3). On average across all

schedules, a "typical" WTO Member has undertaken commitments on slightly more than 25 subsectors, thus covering about 15% of the total. The only criterion used here is the inclusion of a sector in a Member's schedule; no attention is paid to the quality of the relevant commitment in terms of modal coverage or the existence and restrictiveness of limitations.

The composition of the three groups of Members only partly corroborates *a priori* assumptions suggesting that developing and transition economies might find it more difficult to undertake commitments than developed countries; the third group, those Members with commitments on the largest number of sectors, includes several developing and least developed economies—many but not all of them countries which have acceded to the WTO since 1995.

c. *Commitments by sector*

Among the 11 broad service sectors, tourism has drawn by far the highest number of bindings. More than 90% of WTO Members have included at least one sub-sector of tourism in their schedules. Financial and business services rank next, while health and education services, with 46 and 44 entries respectively, are the least commonly scheduled of the major sectors (Chart IV.2). It is however striking that the distribution sector—a major industry apparently subject to no particular political or cultural sensitivities—has been scheduled by only 52 Members. The high number of commitments in telecommunications and financial services reflects the results of the extended negotiations concluded in February 1997 on basic telecommunications and December 1997 on financial services (Part III.b).

In general, developed countries have made commitments in nearly all major sectors. There are notable exceptions, such as the omission of maritime transport services by the US and the EU, and of audiovisual services by Canada, the EU and Switzerland, but the only sectors in which significant numbers of developed countries have chosen not to make commitments are education and health and social services.<sup>87</sup> There is more variation among developing countries in the sectors they have chosen to schedule; given the high proportion of developing and least-developed countries among WTO Members, Chart IV.2 essentially reflects the scheduling preferences of these countries.

d. *Commitments by mode*

Although it is difficult to find adequate indicators reflecting the state of liberalization across modes, it is evident from Chart IV.3 that the bindings undertaken for mode 2 are significantly more liberal than those for other

<sup>85</sup> For an overview see, for example, the recent annual report by the Australian Productivity Commission (1999).

<sup>86</sup> See Kono *et al* (1997).

<sup>87</sup> Among the developed countries, Canada, Finland, Iceland and Sweden have not committed on education services, while the same countries plus Liechtenstein, New Zealand, Norway and Switzerland have not scheduled health and social services.

modes and that bindings on mode 4 are the least liberal of all. About 50% of the entries made under market access for mode 2 are without limitation, while the share of unlimited commitments on mode 4 is close to nil (Chart IV.3). Governments may have felt it unnecessary to seek to restrain their nationals' consumption of services abroad—or may have judged it to be impracticable.<sup>88</sup> The apparent sensitivity of mode 4 trade is also reflected in a particularly high number of horizontal limitations that have been made in individual schedules to apply to all included sectors: slightly more than 20 such limitations for mode 2 compare with some 100 for mode 4. It is interesting to note in this context that the level of bindings for individual modes does not differ significantly between developed economies on the one hand and developing and transition economies on the other: though the movement of natural persons has often been presented as a north-south issue, there is no evidence that developing countries have found it easier to make commitments under this mode than their developed partners.

Cross-border supply (mode 1) and commercial presence (mode 3) are generally considered to be the economically most important modes. Subject to a variety of assumptions, it has been estimated that each currently accounts for some 40% of total world services trade, followed by mode 2 with 20%, while the value of mode 4 trade was found to be insignificant.<sup>89</sup> Chart IV.3 not only reveals more full commitments, but also a far higher share of non-bindings for mode 1 than for mode 3. The lower number of commitments on the former mode may be due to several factors which are not necessarily associated with restrictive policy intentions. In particular, Members may have preferred not to bind cross-border supplies in sectors such as hotel, restaurant or hospital services as they considered such supplies not to be technically feasible.

There may also be policy reasons, however, that have caused Members to prefer commitments for mode 3 (commercial presence) over those for mode 1 (cross-border trade). For example, it has been suggested that "regulatory precaution" has led to a more restrictive policy stance *vis-à-vis* mode 1; governments may not have wished to guarantee access for services over which they could exercise no regulatory control.<sup>90</sup> This hypothesis is not convincing in all cases, however, as measures could be developed to protect domestic users from sub-standard services supplied from across the border. Alternatively, the higher share of mode 3-commitments could also be at-

tributed to governments' interest in attracting foreign direct investment. The "investment-promotion hypothesis" needs to be qualified as well, however. Sectors such as basic telecommunications, banking and insurance services reveal a significant number of—economically highly restrictive—mode 3 limitations. The economic impact in individual cases may be tantamount to a wholesale prohibition of new entry under this mode, possibly reflecting deeply rooted policy concerns about private market participation in areas of infrastructural or social importance.<sup>91</sup> (It is not always clear from the schedules whether a measure is maintained *vis-à-vis* all suppliers, regardless of nationality, or whether it is targeted at foreigners only.) For example, a high number of commitments undertaken on basic telecommunications are subject to restrictions on foreign equity participation, and many of the bindings scheduled for banking and other financial services provide for limitations on the number of suppliers. In other instances, however, limitations inserted under mode 3 merely reflect the existence of non-discriminatory regulation, including licensing and qualification requirements and other measures falling under Article VI (Domestic Regulation), which would not have required scheduling at all.

#### e. *Expected benefits from GATS commitments*

The economic rationale for services liberalization under GATS is not different in principle from the rationale that has driven the liberalization of merchandise trade under GATT since 1948. Open markets are expected to encourage quality improvement and product and process innovation; reduce the scope for wasteful resource use and rent-seeking; constrain the power of individual economic operators; increase a sector's resilience to exogenous shocks; and ensure users continued product availability on reasonable conditions. In infrastructural services an important additional factor enters the policy equation: liberalization of transport, communications and financial services has the potential to increase the productivity of the entire economy.<sup>92</sup>

Such considerations no doubt caused some developing and least-developed countries (Barbados, Cyprus, Kenya, Suriname and Uganda) which did not initially participate in the extended negotiations on basic telecommunications, to volunteer commitments after the end of the negotiations. There are few precedents, if any, in GATT/WTO history of developing countries assuming market access obligations in a non-negotiating context—simply because they consider them to be in their national

<sup>88</sup> However, there are restrictions conceivable in individual sectors that would need to be scheduled under mode 2. Examples of national treatment limitations under this mode are exclusion of health treatment in a foreign country from coverage under national insurance schemes, the imposition of exit visa charges on residents travelling as tourists abroad, or the non-recognition of insurance contracts concluded by nationals abroad (e.g. motor vehicle liability insurance) by the competent home-country authorities.

<sup>89</sup> Karsenty (2000).

<sup>90</sup> Sauv  (2000).

<sup>91</sup> It may be worth recalling that the existence of limitations must not be equated with the existence of access restrictions in individual cases; the scheduling country merely reserves the right, subject to the MFN requirement, to introduce the measures listed.

<sup>92</sup> Hodge and Nord s (1999).

economic interest, and this is striking testimony to the potential for liberalization under GATS as an inducement to foreign direct investment. The fact that liberalization benefits in many services sectors are evident, and that these benefits do not essentially depend on a country's development status, may also explain why the relationship between income levels and the number of sectors committed under GATS is relatively weak (Chart IV.4).<sup>93</sup> One common feature, however, immediately emerges from Chart IV.4: all countries that have joined the WTO since 1995 have scheduled more sectors than their fellow Members at similar income levels.

Against this backdrop, it seems inappropriate to ask whether a country can "afford" policy bindings; one should rather ask whether it can afford *not* to commit. This is more than a rhetorical question. WTO Members may indeed have hesitated for understandable reasons, including lack of familiarity with the Agreement and fear of the impact of competition on long-protected domestic industries, to undertake wide and deep commitments in the Uruguay Round. But these hesitations can be expected to diminish over time. Members have now had several years to familiarize themselves with the GATS and with the benefits of the strong world-wide movement towards services liberalization, and international organizations in-

Table IV.3. Structure of commitments by Members, June 2000

Committed sectors	Number of Members	WTO Members
≤20	44	Angola; Bahrain; Bangladesh; Belize; Benin; Bolivia; Botswana; Burkina Faso; Cameroon; Central African Republic; Chad; Congo; Democratic Republic of Congo; Djibouti; Fiji; Gabon; Grenada; Guatemala; Guinea; Guinea-Bissau; Guyana; Haiti; Honduras; Madagascar; Maldives; Mali; Malta; Mauritania; Mozambique; Myanmar; Namibia; Niger; Paraguay; Rwanda; St. Kitts & Nevis; St. Lucia; St. Vincent & Grenadines; Suriname; Swaziland; Tanzania; Togo; Tunisia; Uganda; Zambia
21-60	47	Antigua & Barbuda; Argentina; Barbados; Brazil; Brunei Darussalam; Burundi; Chile; Colombia; Costa Rica; Côte d'Ivoire; Cuba; Cyprus; Dominica; Dominican Republic; Ecuador; Egypt; El Salvador; Ghana; India; Indonesia; Israel; Jamaica; Kenya; Kuwait; Macau, China; Malawi; Mauritius; Mongolia; Morocco; Nicaragua; Nigeria; Pakistan; Papua New Guinea; Peru; Philippines; Poland; Qatar; Romania; Senegal; Singapore; Solomon Islands; Sri Lanka; Trinidad & Tobago; United Arab Emirates; Uruguay; Venezuela; Zimbabwe
≥61	45	Australia; Bulgaria; Canada; Czech Republic; EC (15); Estonia; Georgia; Hong Kong, China; Hungary; Iceland; Japan; Jordan; Republic of Korea; Kyrgyz Republic; Latvia; Liechtenstein; Lesotho; Malaysia; Mexico; New Zealand; Norway; Panama; Sierra Leone; Slovak Republic; Slovenia; South Africa; Switzerland; Thailand; Gambia; Turkey; United States

<sup>93</sup> There is also considerable variation within regions. For example, of the Sub-Saharan African WTO Members, 26 committed on 20 sectors and less, nine on between 21 and 80 sectors, and three on more than 80 sectors (Gambia, Lesotho and South Africa).

Chart IV.2. Structure of WTO Members' commitments by sector, June 2000

(Maximum number 140)

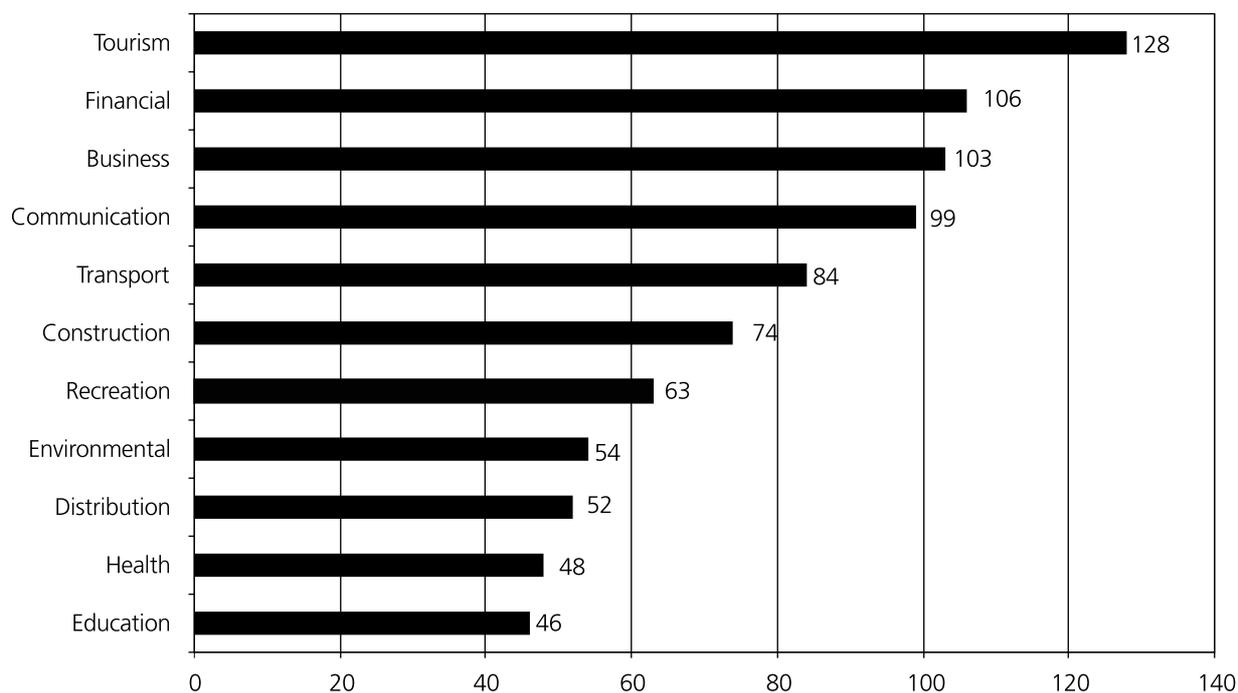
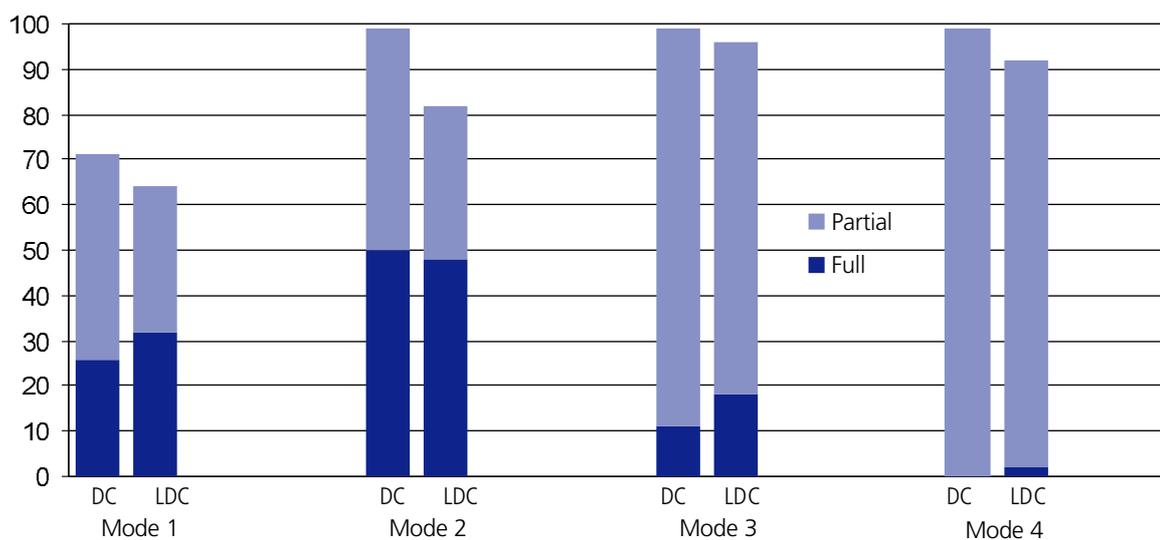


Chart IV.3. Structure of market access commitments by mode, June 2000<sup>a</sup>

(Percentage of bindings)

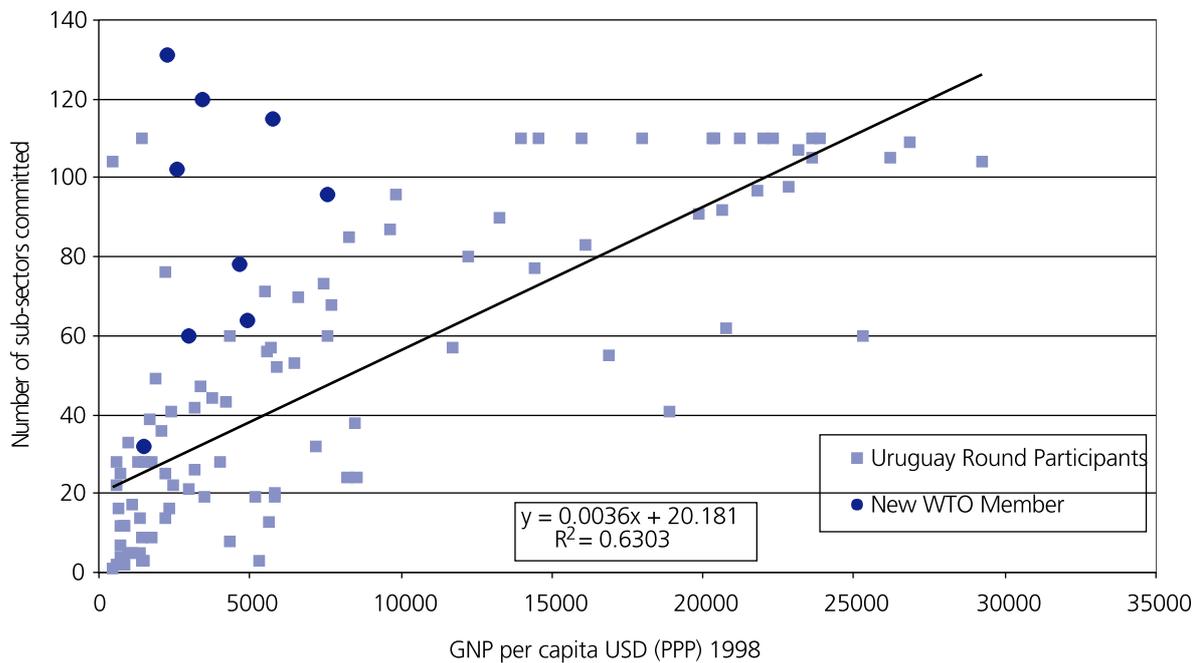


<sup>a</sup> Calculated on the basis of a sample of 37 sectors deemed representative for various services areas (See WTO Document S/C/W/99, 2 March 1999)

DC = Developed countries

LDC = Developing and transition economies

Chart IV.4. Relationship between level of income and GATS commitments



cluding the World Bank and the International Telecommunication Union are helping developing countries to construct the regulatory frameworks necessary to master the challenge of liberalization and reap its benefits.

## 2. Extended negotiations

WTO Members have been negotiating on services continuously since the end of the Uruguay Round in December 1993. In addition to the negotiations on rule making directed towards completion of the framework of the GATS, which will be described in Part Four, there have been four discrete negotiations whose purpose was the expansion of market-access commitments—on financial services, maritime transport, movement of natural persons and basic telecommunications. The essential motivation for further negotiation in the first three cases was dissatisfaction, for different reasons, with the results achieved in these sectors in the Uruguay Round. The case of basic telecommunications, however was different. Negotiators had agreed during the Uruguay Round that the time was not ripe for substantive negotiations in that sector because of the profound economic and political transformation it was undergoing: in particular, the construction of the European Single Market in telecommunications, and the privatizations of public monopoly suppliers

associated with it, were not complete. It was therefore agreed to open negotiations on basic telecoms in 1995; they were completed in February 1997.

Trade policy makers have often debated the question whether it is practicable to achieve significant liberalization in a self-contained or single-sector negotiation, or whether important results can only be expected in the context of a major round encompassing many subjects and therefore offering the possibility of trade-offs between them. The experience of the Uruguay Round certainly suggested that the sheer size of the undertaking and the extent of the interests involved in the end made failure unthinkable: but the length and complexity of the Round also caused some to believe that for the future more limited, even single-sector, negotiations would produce tangible results within short periods. The experience of the sectoral negotiations in services throws some light on this question. Whereas the results achieved in maritime transport and the movement of natural persons were frankly disappointing, the negotiations on financial services and basic telecoms were notably successful. The following short account of the extended negotiations draws attention to some of the factors which brought about such disparities in their results.

a. *Financial Services*

Of the post-Uruguay Round negotiations those on financial services were the most protracted but ultimately one of the most successful. Although 76 countries had made commitments on financial services in the Round, (Table IV.4) the United States in particular took the view that commitments by some important partners, and thus the overall package, were not adequate to justify a full MFN commitment on its own part. This was consistent with a long-held US position that since the existing, essentially bilateral, international regime in banking and related services worked reasonably well, to introduce a new system of multilateral obligations could only be justified if the overall level and quality of commitments were sufficiently high. WTO Members therefore decided to continue negotiations in the sector until 30 June 1995, a deadline which was later extended to 28 July 1995. The stated objective of the negotiation was to secure significant improvement of the commitments and to have them applied on an MFN basis. Failure to do so might have resulted in the withdrawal of commitments already made and called into question the inclusion of financial services in the Agreement, whose integrity would have been seriously compromised. At the deadline of July 1995 it proved impossible to reach agreement that an acceptable body of commitments—a "critical mass"—had been achieved, and the US extended to the insurance sector the MFN exemption it had already taken in relation to banking. The US made commitments regarding new activities by existing operators and entrance in its market. It was, however, agreed by participants (except the US, Colombia and Mauritius) that the offers made during this negotiation would be implemented on an MFN basis—they were incorporated in the GATS through the Second Protocol—and that negotiations would continue until December 1997. At that time, all Members would be free to modify or withdraw their commitments and would finalize their positions regarding MFN exemptions.

The further negotiations produced substantial improvements in scheduled commitments, notably by a large number of developing countries, and resulted in the full integration of financial services into the GATS: the threat of wholesale MFN exemptions, amounting to the virtual exclusion of the sector, was ended. It was notable that the concluding phases of the negotiation coincided with the peak of the Asian financial crisis in the latter months of 1997, and that the crisis had no apparent effect on the commitment of WTO Members to the process. No Member withdrew or wrote down any of the commitments it had offered. It was recognized that liberalization of financial services under the GATS in no way compromised the ability of governments to pursue strong regula-

tory policies or to take any measures necessary to safeguard the integrity of financial systems, and indeed that the introduction through liberalization of foreign equity capital and expertise might be expected to increase the sector's resilience to shocks. As a result, the number of Members making commitments in this sector rose to 102, second only to tourism. It has since risen to 106, due to commitments made by acceding countries.

One of the important issues arising in the negotiations was the difference, often substantial, between the level of access guaranteed in commitments and the actual level of access permitted, *de facto*, by existing policies. Negotiators sought commitments from their partners which would guarantee existing access conditions and which would in particular prevent the forced divestiture of existing equity positions—a concern frequently referred to as the "grandfathering" of acquired rights. Some Members did make commitments with this effect as a result. As in earlier negotiations, attention focused heavily upon securing more liberal bindings for the commercial presence mode of supply. Improvements were made, by eliminating or relaxing restrictions on types of juridical form of commercial presence, eliminating economic needs tests and raising or eliminating limits on the expansion of existing operations and on foreign equity participation in financial institutions.<sup>94</sup> At least six Members guaranteed foreign majority ownership for the first time in certain subsectors and three eliminated monopolies.<sup>95</sup> Five decided to schedule their commitments in accordance with the Understanding on Commitments in Financial Services. Three Members withdrew broad exemptions from MFN, one withdrew an exemption covering securities and four reduced the scope of their exemptions.

b. *Basic telecommunications*

Although a few Members made commitments on services falling within the definition of basic telecommunications services, they were for the most part deliberately left aside in the Uruguay Round. It was recognized that to postpone negotiations, so as to allow completion of the framework for the EU single market, would create far more propitious circumstances for a first negotiation in a sector of great technical and political complexity. It subsequently became clear that such an intense and time-consuming negotiation would in any case have been extremely difficult for most delegations to manage as part of a larger round. The negotiation was scheduled to end in April 1996, but at that point it was again impossible to reach agreement that a "critical mass" of commitments had been achieved, and the negotiations were prolonged until February 1997. At that time commitments undertaken by 69 Members were annexed to the Fourth Protocol

<sup>94</sup> Approximately 16% of participants liberalized in some form restrictions on the types of juridical persons; approximately 9% eliminated economic needs tests in relation to one or more activities; and approximately 13% raised or eliminated limits on operations or foreign equity participation in relation to one or more activities.

<sup>95</sup> The Czech Republic abolished a monopoly in compulsory air transport insurance, the Slovak Republic eliminated the monopoly in basic health insurance, and the Republic of Korea terminated a duopoly in fidelity and surety insurance.

Table IV.4. Participation in the extended negotiations on financial services

<b>Members making commitments in Uruguay Round</b>	Antigua & Barbuda; Argentina; Australia; Austria; Bahrain; Barbados; Benin; Brazil; Brunei; Canada; Chile; Colombia; Cuba; Cyprus; Czech Republic; Dominica; Dominican Republic; Egypt; El Salvador; EC(12); Finland; Gabon; Ghana; Grenada; Guatemala; Guyana; Honduras; Hong Kong, China; Hungary; Iceland; India; Indonesia; Israel; Jamaica; Japan; Kenya; Republic of Korea; Liechtenstein; Macau, China; Malaysia; Malta; Mexico; Morocco; Mozambique; New Zealand; Nicaragua; Nigeria; Norway; Pakistan; Paraguay; Peru; Philippines; Poland; Romania; St Lucia; St. Vincent & Grenadines; Singapore; Slovak Republic; South Africa; Sweden; Switzerland; Thailand; Trinidad & Tobago; Tunisia; Turkey; Uruguay; United States; Venezuela; Zimbabwe
76	
<b>Members making commitments in Second Protocol</b>	Australia; Brazil*; Canada; Chile; Czech Republic; Dominican Republic; Egypt; EC(15); Hong Kong, China; Hungary; India; Indonesia; Japan; Republic of Korea; Kuwait; Malaysia; Mexico; Morocco; Norway; Pakistan; Philippines; Poland; Singapore; Slovak Republic; South Africa; Switzerland; Thailand; Turkey; Venezuela
43	
<b>Members making commitments in Fifth Protocol</b>	Australia; Bahrain; Bolivia*; Brazil*; Bulgaria; Canada; Chile; Colombia; Costa Rica; Cyprus; Czech Republic; Dominican Republic*; Ecuador; El Salvador; Egypt; EC(15); Ghana; Honduras; Hong Kong, China; Hungary; Iceland; India; Indonesia; Israel; Jamaica*; Japan; Kenya; Republic of Korea; Kuwait; Macau, China; Malaysia; Malta; Mauritius; Mexico; Nicaragua; Nigeria; New Zealand; Norway; Pakistan; Peru; Philippines*; Poland*; Romania; Senegal; Singapore; Slovak Republic; Slovenia; South Africa; Sri Lanka; Switzerland; Thailand; Tunisia; Turkey; Uruguay*; United States; Venezuela
70	

\*The countries marked by asterisks are those which have not yet ratified and implemented the commitments attached to the second and fifth protocols.

to the GATS.<sup>96</sup> They entered into force on 5 February 1998. The markets of the participating countries accounted for more than 90% of global telecommunications revenues.<sup>97</sup>

The success of this negotiation clearly owed a great deal to the profound changes taking place at the time in world telecoms markets. Government monopolies were being privatized and subjected to competition, under the pressure of call-back and other technologies which made it possible to bypass high-cost monopoly suppliers and in response to growing demand of user industries for better

and cheaper service. At the close of the Uruguay Round, it was very rare for fixed public telephony to be liberalized. Only a handful of governments had introduced competition in basic telecoms, and in most of these cases at least some networks or market segments remained under monopoly. Three years later, the situation had been transformed. Under the Fourth Protocol more than 60 governments permitted competitive supply<sup>98</sup> of fixed public voice telephony,<sup>99</sup> usually through the establishment of a commercial presence. Given that basic telecommunication services had until very recently been regarded everywhere as a "natural monopoly" in which the concept of

<sup>96</sup> Antigua & Barbuda, Argentina, Australia, Bangladesh, Belize, Bolivia, Brazil, Brunei Darussalam, Bulgaria, Canada, Chile, Colombia, Côte d'Ivoire, Czech Republic, Dominica, Dominican Republic, Ecuador, El Salvador, European Communities and its Member States, Ghana, Grenada, Guatemala, Hong Kong, Hungary, Iceland, India, Indonesia, Israel, Jamaica, Japan, Republic of Korea, Malaysia, Mauritius, Mexico, Morocco, New Zealand, Norway, Pakistan, Papua New Guinea, Peru, Philippines, Poland, Romania, Senegal, Singapore, Sri Lanka, Switzerland, Slovak Republic, South Africa, Thailand, Trinidad & Tobago, Tunisia, Turkey, United States and Venezuela. Four participants, Brazil, Guatemala, Papua New Guinea and the Philippines have not yet ratified the Protocol. Although Guatemala did not sign the 4th Protocol, it submitted commitments under the certification procedures used for "late" commitments, in which its regulatory commitments were somewhat modified.

<sup>97</sup> Under a very broad and essentially open-ended definition employed for the WTO negotiations, basic telecommunications were considered any telecommunications transport networks or services providing real-time transmission of customer-supplied information; the resulting schedules cover a wide variety of services fitting this definition. Some schedules also include services which fall outside the scope of this definition such as the so-called value-added or enhanced services.

<sup>98</sup> Defined here as permitting two or more suppliers to serve one or more market segments. Thus, for example, the figure includes participants that committed to set up a duopoly regime for fixed telephony, rather than full competition, at least initially.

<sup>99</sup> "Fixed" refers to wire-based telephone networks (as contrasted with radio-based or mobile networks) which can nevertheless have some radio or microwave components. The term "public" in the context of service provision commonly refers to obligations on operators to serve the general public (i.e. serve all "customers") (as compared with companies who may choose to serve only certain types of clients or market niches, e.g. businesses or financial institutions). It does not refer to nature of ownership, e.g. government versus private sector ownership, of the firms.

foreign competition seemed anomalous, this was a remarkable outcome.

Since it was clear that in many markets, monopolies or former monopolies would continue to be dominant for some time to come, it was necessary to take measures to prevent the nullification of negotiated commitments by the abuse of market power. The necessity arises in particular because the ability to provide public telephony depends on having access to the existing network, which in most cases continues to be owned or controlled by the former monopoly. If interconnection with the network were not to be available on reasonable commercial terms effective competition would be impossible. The participants therefore negotiated a set of regulatory principles including competition safeguards, interconnection guarantees, transparency in licensing, independence of regulators, competition-neutral universal service mechanisms and fairness in allocating scarce resources such as radio spectrum and rights of way. The principles are included in a "reference paper" which participants were free to include, in whole or in part, as legally binding additional commitment in their schedules. Fifty-seven Members assumed these obligations in full or with only minor modifications. Six chose to commit on a modified or scaled-down set of regulatory principles and a further six made no regulatory commitments.

As in the case of financial services, the level of participation by developing countries in this negotiation was striking. Forty-six developing countries and countries in transition, many of them very small, made commitments, in addition to all of the industrialized Members of the WTO. The strong emphasis on mode 3 commitments, as well as direct contacts with the governments concerned, made it clear that their participation was strongly motivated by the intention to induce foreign direct investment in the sector, and to put incumbent suppliers under competitive pressure. After the conclusion of the negotiation, five additional developing countries unilaterally submitted basic telecoms commitments, and three of the participants in the Fourth Protocol improved on the commitments they had negotiated. These bindings of unilateral liberalization by developing countries appear to be without precedent, and they testify to the recognition that efficient and competitive telecommunication systems are a necessity in modern economies. In addition, six developing countries have so far included commitments on basic telecommunications in their schedules of accession to the WTO.

### c. *Maritime transport*

The decision to continue negotiation on maritime transport services was taken in the last days of the Uruguay Round following decisions by the United States

and the European Union to make no commitments in this sector. Thirty-one other Members maintained the commitments which they had offered during the Round and it was agreed to prolong negotiations until 30 June 1996, at which time Members would be free to improve, maintain or withdraw their commitments and to finalize MFN exemptions.

It had been recognized throughout the Uruguay Round that this sector presented special political difficulties, particularly for the United States, and these difficulties did not diminish during the period of extended negotiations. Indeed, in this case there is some reason to believe that negotiators came closer to the achievement of a successful outcome in the Uruguay Round—in the sense of the tabling of commitments by the US and the EU, which would no doubt have stimulated further commitments by others—than was possible in the self-contained negotiations of 1996, which failed to produce significant results. Only two countries, Iceland and Norway, improved on the commitments they had made in the Uruguay Round. Canada and Malaysia modified their earlier commitments and Austria and the Dominican Republic decided to withdraw them. It was agreed to suspend the negotiations and to resume them at the commencement of the next comprehensive round. This is therefore the only sector on which a specific obligation to negotiate in the new round exists. It is also the only sector falling within the scope of the GATS in which the MFN principle is not fully applied: for those Members not making commitments on maritime transport, the MFN obligation was suspended until the end of the new round, though existing commitments are of course applied on an MFN basis. It should not be concluded from this that there is widespread protectionism in maritime transport, in which many formerly significant restrictions—for example, the strict implementation of the United Nations Code of Conduct for Liner Conferences, bilateral agreements with state trading countries, unilateral cargo reservations, public monopoly of harbour services—have greatly diminished in the past 20 years. Nonetheless, there are still serious obstacles to doing business which could be addressed in negotiations. Shipowners' associations have listed the following "negative factors": restricted or regulated access to ports and port services; preferential cargo allocation; restrictions on establishment of owned branch offices; discriminatory measures favouring the use of national carriers; cumbersome procedures and personal harassment during port calls; abusive tariffs for services; and unrealistic and unjustifiable liability claims by customers. Other problems noted by shipping professionals include the limited granting of freight agency or terminal operators' licences, the prohibition of trans-shipment, the blocking of amounts collected by shipping lines for containers demurrage and other unilateral actions with extra-territorial impact. All modes of supply are of great significance in this sector. Mode 1 is obviously important for in-

ternational shipping, but shipping activities frequently involve a complete service from factory to customer, not just the delivery of passengers or cargo from port to port. The need to establish a commercial presence to manage these operations makes mode 3 extremely relevant also, as it is for harbour services. Mode 2 is important for the repair and maintenance of vessels but also to ensure that ship-ers, the actual consumers of maritime transport services, have access to foreign-based service providers. Mode 4 is also important as it touches upon the possibility of hiring foreign crew members and officers, which is an essential parameter of the operating costs of this rather labour intensive industry.

Currently there are 39 Members with commitments in maritime transport. Of the limitations scheduled in this sector, the most significant are foreign equity ceilings, nationality requirements for ownership and registration of vessels under the national flag, requirements to appoint a local agent, limitations on government-owned cargoes, discriminatory taxation and discriminatory port charges. MFN exemptions have been taken by 37 Members, but only those of 25 Members are in force due to the suspension of the MFN obligation in all instances except where specific commitments have been taken. Of the exemptions listed, four cover measures taken under the UN Convention on a Code of Conduct on Liner Conferences and give preferential treatment to other members of the

Code. Four are specific to cabotage and are reciprocal and three to tax treatment, and are also reciprocal. The vast majority of exemptions taken are scheduled as having indefinite or unlimited duration.

#### d. *Movement of Natural Persons*

The extension of negotiations on the movement of natural persons was motivated by the dissatisfaction of developing countries with the level of commitments undertaken on mode 4, which were largely confined to business visitors and intra-corporate transfers of managers and technical staff. Very few Members have made liberal commitments in this mode, for which market access conditions tend to be significantly more restrictive than for any other. Negotiations on mode 4 were extended until 30 June 1995, the same as the original deadline for financial services, with the clear implication of a negotiating link between the two. Indeed, some countries made their participation in the extended financial services negotiations conditional on improved offers in mode 4. In that sense, the negotiations on mode 4 were not entirely "self-contained". Nevertheless, they produced no major breakthrough. Australia, Canada, the EU and its member States, India, Norway and Switzerland improved on the commitments they had made in the Uruguay Round, and these improvements were annexed to the Third Protocol to the GATS. The improvements mostly concern access

### Box IV.2. Movement of natural persons

Mode 4 commitments are likely to draw considerable attention in the course of the new round of negotiations. The reasons are manifold. First, the level of bound liberalization is rather shallow, making for a low starting-point for the negotiations. Second, the lack of meaningful commitments could, at least partly, have resulted from sensitivities linked to the movement of persons and from inexperience with the operation of the Agreement. Third, and more importantly, interest for liberalization of mode 4 trade is increasingly coming from all quarters, and not just from developing countries, which had always been perceived as the "traditional"—and often sole—*demandeurs* for improved commitments in mode 4.

First, market access conditions tend to be significantly more restrictive for mode 4 than for any other mode. This is reflected in the very small number of Members having undertaken fully liberal commitments in this mode. It is also reflected in the nature of the commitments undertaken. In most cases, the "negative list" approach to scheduling limitations has been turned upside-down; schedules start with a general "unbound" which is then qualified by liberalization commitments, mostly limited to intra-corporate transfers of technicians and managers and to business visitors. No significant differences exist between access conditions granted by developing and by developed countries; both groups seem to have been equally hesitant in opening up mode 4 trade.

Commitments are often exclusively governed by what is inscribed in the horizontal part of the schedule, so that identical access conditions apply to all scheduled sectors. Commitments are often based on functional or hierarchical criteria, related either to the type of person involved (e.g. executive, manager, specialist) or to the purpose of their movement (e.g. to establish business contacts, negotiate sales, set up a commercial presence). Besides, no generally agreed definitions or precise descriptions exist of the types of natural persons to which access is granted, which detracts from the predictability of entry conditions.

Box IV.2. (cont'd.)

Similarly, significant administrative discretion results from Members' schedules are mostly biased in favour of "intra-corporate transferees", hence making the economic value of such commitments dependent on access conditions for mode 3. They are also more open for highly skilled labour, where

developing countries tend to be net importers, as their comparative advantage lies with relatively unskilled labour-intensive services. It is also widely acknowledged that Members' mode 4 commitments do not generally reflect actual entry conditions for natural persons, as Members have bound less than the access granted in practice.

Why have several Members felt unable to bind at least the "status quo" with respect to mode 4? Part of the explanation might lie with governments' unwillingness to "tie their hands" and formally expose labour markets to the competition coming from foreign natural persons. Given an adequate regulatory framework, trade liberalization will result in increased competition in the liberalized domestic market. The "threat" to domestic jobs—and the consequent regulatory capture by domestic lobbies—is more apparent when labour enters the market directly, even though temporarily, rather than when it is embodied in a product. However, there is important complementarity between modes, and Members have increasingly realised that the efficient delivery of services even under modes 1 and 3 is often hindered by difficulty in moving staff temporarily into the relevant market.

Resistance to mode 4 liberalization might possibly, and perhaps frequently, have stemmed from the misleading equation between trade-related temporary mobility under the GATS and longer-term migration, or from the fear that mode 4 movement might result in a large amount of slippage from temporary to permanent migration. The sensitivity surrounding migration for employment and settlement purposes might have added to the confusion. However, the GATS does not apply to measures affecting natural persons seeking access to the employment market or to measures regarding citizenship, residence or employment on a permanent basis. In addition, it explicitly allows Members to apply measures to regulate the entry and temporary stay of natural persons in their territory, including those measures necessary to protect the integrity of, and ensure the orderly movement of natural persons across, their borders. The risk of some illegal leakage from temporary movement to permanent migration does exist, but it is likely to be limited, easier to control as generally based on a trade-related, pre-negotiated and time-bound arrangement, and liable to be further contained by appropriate policy and operational measures.

Available statistical information, though imperfect, suggests that, as a group, developing countries are net exporters of services through mode 4, and developed countries net importers. However, the overall picture is likely to hide significant sectoral variations, as well as the fact that movement of natural persons often complements and facilitates—and is therefore captured by—trade through other modes of supply, notably mode 3. At any rate, significant benefits can be expected from greater liberalization of this mode of supply, for exporting and importing countries alike. Exporting countries stand to gain from greater foreign exchange earnings, improved employment opportunities for their nationals and the skills and experience they gain abroad, which could contribute, upon return, to the development of human capital at home. A risk does exist that developing countries might lose scarce domestic skills and expertise, and the associated educational investment, but is somewhat mitigated by the temporary nature of the movement of natural persons under the GATS. Besides, the threat of the so-called "brain drain" rests on the assumption that the persons moving would alternatively have found similar employment opportunities in their home country. Importing countries are set to benefit from the easing of short-term labour shortages, from access to the skills and knowledge embodied in—cheaper—foreign personnel, and, consequently, from reduced pressure for wage inflation. In addition, the movement of natural persons under the GATS, being temporary and trade-related, might help to avoid the problems that destination countries often associate with permanent migration and, partially, substitute for it.

It is therefore not surprising that developed countries have manifested increasing interest in further liberalization of movement of natural persons. This points to Members directing considerable negotiating efforts at mode 4 and to a greater potential for opening up trade through this mode of supply. Whilst difficult to predict, it is likely that negotiations will be directed, on the one hand, at making existing commitments more predictable, for instance through agreed definitions, or by attaching conditions to economic needs tests, and, on the other, at further liberalization, with respect to categories, levels of skills, types of movements or lengths of stay, which is likely to be more easier if targeted at specific sectors, rather than uniformly applied.

opportunities for additional categories of service suppliers, usually independent foreign professionals in a number of business sectors, or the extension of their permitted duration of stay. The bias in most schedules in favour of natural persons who are "intra-corporate transferees" and of highly qualified personnel tends to diminish the economic value of these commitments for developing countries, for many of whom comparative advantage in mode 4 lies in relatively lower-skilled and labour intensive services. As in many other contexts, Members have very often bound less than the level of access granted in practice.

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### 3. Commitments undertaken by acceding countries since 1995

Nine countries joined the WTO between January 1995, the date of entry into force of the WTO, and July 2000. Like existing WTO Members, these countries were required to submit a schedule of specific commitments on services. The scope and content of the schedule were to be negotiated in the accession process.

The nine new Members are low- and middle- income economies from various regions of the world, including six transition economies, which had long operated under state-trading regimes. While, from a trade policy perspective, there may not be many commonalities between these countries, one feature stands out: all have assumed higher levels of commitments, in terms of sectors included, than current Members at comparable levels of development (Chart IV.4). This applies especially in the case of the Kyrgyz Republic, which acceded in December 1998, and the four countries (Latvia, Estonia, Jordan and Georgia) that have joined since. While the first group—Ecuador, Mongolia, Bulgaria and Panama—committed on 63 sectors on average, the corresponding number for the latter group is 118 (Table IV.5).

All nine countries undertook commitments on accountancy, construction, distribution, insurance and banking services. Seven countries, including the five more recent Members (Kyrgyz Republic and following accessions), committed on basic telecommunication services. All countries in the latter group also scheduled courier services as well as various health and social services. A closer look further reveals that the commitments assumed by acceding countries are generally deeper, i.e. are subject to a smaller number of limitations, than the commitments undertaken by other comparable Members. For example, the share of full commitments on market access scheduled by acceding countries under mode 3 (commercial presence)—36%—is more than twice as high as the average for all Members and 3½ times as high as that for developed Members (Table IV.6).<sup>100</sup>

Why have the new Members undertaken more ambitious commitments than many participants in the Uruguay Round? Though no doubt they were due in part

to the growing perception of the economic benefits of liberal access commitments, it is clear that the negotiating context in accession cases, which is quite different from that in ordinary trade rounds, played a major role. Terms of accession are agreed in detail between the applicant country and current WTO Members, while the majority of current country schedules have been negotiated in a more anonymous setting and, in particular, subject to tighter time and resource constraints. Few of the Uruguay Round schedules were subjected to detailed examination, still less negotiation, by trading partners.

As already noted, however, this does not imply that it would have been to the benefit of the acceding countries to undertake fewer commitments. Liberalization in the services sector, particularly in the infrastructural services, is likely to be an effective way to upgrade the efficiency of the economy as a whole, and the commitments which acceding countries have made can be expected to promote their basic developmental interests by creating attractive conditions for foreign investment and related inflows of skills and expertise. Commitments under mode 3 (commercial presence) are particularly relevant in this regard.

### D. What can be expected in the new round?

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#### 1. Objectives and modalities

The purpose of the successive rounds of negotiations on services trade mandated by Article XIX of the GATS is to achieve a "progressively higher level of liberalization", meaning the improvement of market access by extending the sectoral coverage of schedules and reducing or eliminating the restrictive effects of scheduled measures. The success or failure of the new round which started in January 2000 will be judged mainly in terms of the resulting expansion and improvement of commitments on specific services. There is huge scope for improvement of the schedules: many Members have so far made minimal commitments and even the most comprehensive schedules contain a large number of restrictive limitations which will be a target for negotiating partners. The negotiations on new commitments will take place largely in the bilateral request/offer mode, but the Agreement makes it clear that other, plurilateral and multilateral, approaches may also be used. However, the negotiations will extend well beyond market access in this limited sense. There is already in progress a series of negotiating processes on the GATS framework of rules, whose results will almost certainly form part of the final package and which may be as important in securing effective access to markets as the negotiation of new commitments. Since the rule-making negotiations deal with the structure of the GATS itself they are necessarily multilateral processes.

In this subsection we first examine the objectives of the new round and the negotiating techniques and approaches which are available to Members. We then con-

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<sup>100</sup> The comparison in Table IV.7 is confined to commitments for market access as these tend to be more important, in economic terms, than those for national treatment.

Table IV.5. Commitments scheduled by recently acceding Members

(Number of sub-sectors included)

	Ecuador	Bulgaria	Mongolia	Panama	Kyrgyz Republic	Latvia	Estonia	Jordan	Georgia
Business services [46] <sup>a</sup>	16	27	6	23	39	37	28	35	41
Communication [24] <sup>a</sup> (Basic Telecom [7] <sup>a</sup> )	9 (1)	11 (7)	9 (0)	12 (0)	22 (7)	16 (7)	16 (7)	19 (7)	20 (7)
Construction, related engineering [5] <sup>a</sup>	1	4	2	4	5	5	5	5	5
Distribution services [5] <sup>a</sup>	1	4	2	3	3	4	4	4	4
Education services [5] <sup>a</sup>	0	3	0	3	4	4	5	5	4
Environmental services [4] <sup>a</sup>	4	4	0	1	4	4	2	2	4
Financial services[17] Insurance [4] <sup>a</sup> Banking [12] <sup>a</sup>	14 (4) (10)	14 (4) (9)	10 (2) (8)	13 (2) (11)	14 (3) (11)	16 (4) (12)	16 (4) (12)	16 (4) (12)	16 (4) (12)
Health-related and social services [4] <sup>a</sup>	1	1	0	1	4	2	4	3	3
Tourism and travel-related services. [4] <sup>a</sup>	2	2	3	2	4	4	3	3	3
Recreation, cultural, sporting services [5] <sup>a</sup>	3	1	0	1	5	2	5	4	4
Transport services [35] <sup>a</sup>	9	7	0	1	27	21	8	6	16
<b>TOTAL [155]<sup>a</sup></b>	<b>60</b>	<b>78</b>	<b>32</b>	<b>64</b>	<b>131</b>	<b>115</b>	<b>96</b>	<b>102</b>	<b>120</b>

<sup>a</sup> Total number of sub-sectors in the relevant category.

Note: The dates of entry into force are: Ecuador, 21 January 1996; Bulgaria, 1 December 1996; Mongolia, 29 January 1997; Panama, 6 September 1997; Kyrgyz Republic, 20 December 1998; Latvia, 10 February 1999; Estonia, 13 November 1999; Jordan, 5 April 2000; and Georgia, 14 June 2000.

Source: WTO Secretariat.

Table IV.6. Structure of commitments on market access—acceding countries versus "old" Members  
(Percentages)

	Mode 1			Mode 2			Mode 3		
	Full	Partial	None	Full	Partial	None	Full	Partial	None
Acceding countries	52	24	24	71	24	5	36	61	3
Developed country Members	26	50	24	48	50	2	10	89	1
All Members	32	38	30	51	39	10	15	82	3

Note: The above shares are based on the commitments undertaken in 37 sectors, chosen from the relevant Classification List, which are deemed representative of the main services industries.

Source: WTO Secretariat.

sider the ongoing negotiations in the Working Party on GATS Rules, on emergency safeguard measures, subsidies and government procurement of services, and in the Working Party on Domestic Regulation. Although the work in these areas is not strictly speaking part of the new round, since it has been underway for several years and in the case of domestic regulation has already produced results in the form of disciplines for the accountancy sector, it is nevertheless clear that it has received added impetus from the new negotiations and that the results achieved in these working parties are likely to come into force as part of the final package of results.

The point has been made in subsection B above that the importance of the different modes of supply will vary as between one service and another according to the ways in which they are commonly supplied. However, it is widely expected that in the new round more attention will be paid than in the past to securing strong commitments under mode 1 (cross-border supply) because of the increasing importance of electronic commerce. The analysis of existing commitments in Part III shows the relative paucity of commitments on many services under mode 1. There are a number of reasons for this, including the concern of governments to exercise control over the standard of services rendered to the public and the desire of many to prioritize supply through mode 3, which brings with it the benefits of foreign direct investment in capital, technology and personnel, but the emphasis seems likely to change, even if increased interest in mode 1 will not diminish pressure for improved commitments under modes 3 and 4. The third mode of supply, commercial presence, has profoundly important implications for development, and we have seen in the negotiations on basic telecommunications and financial services the strong interest of

developing countries in mode 3 commitments as an inducement to foreign direct investment. For many countries this will remain the greatest benefit of participation in the GATS, particularly where investment in the basic infrastructural services which condition the efficiency of entire economies is concerned. It also remains true, notwithstanding the expansion of electronic commerce, that for many service suppliers a legally established presence in the export market is indispensable, and that commitments establishing the terms on which such investments will be made have real economic significance.

The negotiation of commitments under mode 4, movement of natural persons, will be a higher priority for many countries in this round than in the Uruguay Round. Though this mode has been seen as a major interest of developing countries—and they have laid a great deal of emphasis on it throughout the preparations for the new round—it is now widely understood that impediments to the temporary movement of personnel can be a serious problem for service providers of all kinds, from the largest to the smallest, and that interest in their removal is by no means confined to developing countries. This is a healthy development. It was misleading and counterproductive that freedom of movement for natural persons should be seen as a north-south issue, and we may expect better results from negotiations on this mode now that it is recognized as a matter of common interest.

Although the basic technique for the negotiation of market-access commitments is likely to be the request/offer approach, the Agreement recognizes the legitimacy of alternative negotiating approaches, as mentioned above. Thought has been given to the possibility of developing "clusters" of services related to certain core activities, where it has been realized that effective liberalization of

the core activity will often be very difficult if the services on which it depends remain unliberalized. In the case of tourism, which is subject to relatively few direct restrictions, the growth of trade is most likely to be promoted by liberalization in related areas such as air transport. However, there has been no common understanding as yet of the meaning to be attached to the cluster concept. It could serve simply as a tool for negotiators, assisting them to make the linkages with services upstream and downstream from the core services which may be necessary to ensure effective liberalization. It could always be used in this role unilaterally, of course, but might also serve as an agreed basis for negotiations. In addition, a cluster could have the status of an agreed basis for the scheduling of commitments, like the model schedule developed in the negotiations on basic telecommunications. However, the "cluster" would differ from the earlier model schedules in that, whereas they itemized the coverage of homogenous sectors, the purpose of the cluster would be to bring together disparate activities linked by commercial and market realities but perhaps widely separated in terms of classification. It seems clear however that the use of clusters, whether they have been agreed on a multilateral basis or not, would be voluntary. Commitments resulting from any negotiations based on them would of course be applied on a multilateral basis.

There has also been some discussion, notably among academics, of possible "formula" approaches to the market-access negotiations, but these ideas have so far taken no concrete shape in discussions between negotiators, except to the extent that it is widely recognized that "model schedules" can have real value in the negotiation and drafting of commitments. Model schedules are simply agreed lists of the subsectors falling under a given sector: the development of a common list of the activities falling under the classification of basic telecommunications greatly improved the clarity and comparability of the commitments undertaken on that sector in 1997 (see Table IV.7). There may be a role for mechanisms, similar to tariff reduction formulae in merchandise trade, that would encourage broader and deeper commitments across countries, sectors and modes, though to be acceptable any such mechanism would no doubt need to allow for country-specific modifications. Their role would be to complement, rather than substitute for, traditional request-offer procedures and their main beneficiaries might well be smaller participants without strong leverage, which could harness synergies in negotiating common solutions to common problems.

In the financial sector a formula approach has already been adopted by some Members, who have made their commitments on the basis of the Understanding on Financial Services negotiated in the Uruguay Round. The

understanding provides an alternative approach to scheduling to that provided in part III of the GATS. Its use is optional, and to date it has been employed by 31 Members.<sup>101</sup> If scheduled and implemented in full the understanding would provide an open "ideal" level of commitments on financial services, and it is generally seen as a method of ensuring a higher level of liberalization under the GATS. It provides for a binding of the status quo in relation to all the undertakings indicated in the text; it stipulates the granting of market access under all modes of supply; specifies certain national treatment obligations, including a binding on government procurement of financial services; and it contains other provisions pertaining to monopoly rights, new financial services and non-discriminatory measures.<sup>102</sup> However, commitments based on the understanding may also be subject to limitations on market access and national treatment; they do not necessarily reflect the understanding in its entirety.

In some sectors, model or formula approaches might also be used to define additional disciplines which would ensure the integrity or effectiveness of commitments, as in the case of the competition safeguards, interconnection rules and other regulatory disciplines developed and used—on a voluntary basis—in the negotiations on basic telecommunications.

Academic critics have also suggested on many occasions that the basic architecture of GATS commitments should have been modelled on the North American Free Trade Agreement or the Australia New Zealand Closer Economic Relations Trade Agreement. Both Agreements provide that, in the absence of limitations to the contrary, all sectors and modes of supply are automatically subject to market access and national treatment obligations. This is the "top-down" approach, which contrasts with the "bottom-up" approach of the GATS, under which committed sectors have to be specified. It is suggested that the top-down approach would lead to wider and deeper liberalization than is likely to be attained under existing procedures, where the content of a country schedule is largely determined in request-offer negotiations with interested trading partners. This may mean, for example, that while no trading partner might have sought to negotiate access to a small country's road transport industry in the Uruguay Round, it could be extremely beneficial for this country—in terms of the potential efficiency gains associated with foreign entry—nevertheless to bind access to this sector. In other words, it may be that the request-offer technique tends to perpetuate a mercantilist approach which is inappropriate in an agreement heavily concerned with inward investment, and to services whose liberalization is so clearly advantageous to the liberalizing country above all.

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<sup>101</sup> Australia, Bulgaria, Canada, Czech Republic, European Communities (15), Hungary, Iceland, Japan, Liechtenstein, New Zealand, Nigeria, Norway, Slovak Republic, Sri Lanka (excluding insurance), Switzerland, Turkey, and the United States.

<sup>102</sup> Trebilcock, M.J. and R. Howse, (1999) state that the commitments contained in the Understanding, taken together, represent a very extensive degree of liberalization.

Table IV.7. Possible negotiating formulae for services

Formula	Basic principle	Example/model	References
Negative listing ("top down" approach)	All sectors are automatically subject to market access and national treatment obligations across all modes of supply. Exceptions must be listed in schedules.	Services Chapters of the North American Free Trade Agreement (NAFTA) and the Closer Economic Relations Agreement between Australia and New Zealand.	Hoekman B. (1996) Snape R. (1998)
Tariffication	Barriers to cross-border trade are replaced by tariff-like charges which, in turn, may be made subject to negotiated reductions.	Tariffication of border measures under the WTO Agreement on Agriculture.	Snape R. (1998)
Model schedule	Members undertake standardized commitments in individual sectors.	Understanding on Commitments in Financial Services; Draft Schedule on Maritime Transport Services; Model Schedule of Commitments on Basic Telecommunications.	WTO Secretariat Informal Note of 15.04.1996 (NGMTS, 1872) and WTO Website ( <a href="http://www.wto.org/wto/services/services.htm">www.wto.org/wto/services/services.htm</a> )
Cluster approach	Commitments are not assumed for individual sectors but, where relevant, for clusters of related sectors.	Proposals to encourage complementary commitments on: courier and related transport services (e.g. road freight transport); various environmentally important services; health care and health insurance services; and multimodal transport services (maritime transport and related road and waterways transport).	WTO documents S/C/W/39, 46, 50 and 62 (WTO Secretariat Notes on Postal and Courier Services; Environmental Services; Health and Social Services; and Maritime Transport Services); at: <a href="http://www.wto.org/wto/services/services.htm">www.wto.org/wto/services/services.htm</a>
<b>Minimum sector coverage</b>	(i) "Qualitative" approach	Obligation to include certain economically important sectors in all schedules.	Feketekuty G. (1998)
(ii) "Quantitative" approach	Obligation to include a minimum number of sectors in all schedules.	Members could undertake to commit at least X sub-sectors out of the 11 large areas specified for scheduling purposes under GATS (Document MTN.GNS/W/120).	Adlung R. (2000)
<b>Standard commitments</b>	(i) "Negative" approach	Members refrain from operating and/or scheduling measures considered to be particularly restrictive or distortive.	Ministerial Declaration on Global Electronic Commerce (25.05.1998) Communications from individual WTO Members in preparation for the 1999 Ministerial Conference
(ii) "Positive" approach	Members undertake additional disciplines in specified areas.	(i) Undertaking not to impose duties on electronic-transmissions; (ii) Proposals for the new round to exclude specified transactions from economic needs tests, and review the role and restrictiveness of nationality requirements, foreign equity ceilings, etc. Competition disciplines in basic telecommunications ("Reference Paper").	Tuthill L. (1997)
(iii) "Standstill"-type commitments	Members bind their currently applied regimes in scheduled sectors (or across the board).	Understanding on Commitments in Financial Services.	Communications from individual WTO Members in preparation for the 1999 Ministerial Conference.

Source: Adlung R., (1999).

It should be made clear that the GATS approach is in fact a hybrid between "top down" and "bottom up" scheduling. Schedules are already "top-down" in the sense that where a sector has been committed, no limitations on access or national treatment may be maintained except those specifically scheduled. The effect of a full "top down" approach would be that all sectors would be included and all measures restricting access to them would be listed. On the basis of such listing all sectors would be bound across the board.

However, there has been no suggestion by any delegation that the basic architecture of the GATS should be changed—on the contrary, delegations have shown a strong resolve to maintain the "bottom-up" approach to scheduling. This attitude may have been strengthened by the difficulty observed in the OECD negotiations for a multilateral agreement on investment, where the "top-down" approach to the scheduling of reservations from the basic disciplines produced very long and complex lists of reservations, which tend to undermine the claim that GATS schedules based on this approach would be "cleaner" and easier to understand than the current schedules. A "top-down" approach might not induce additional coverage, but rather the scheduling of hundreds of pages of exclusions and limitations—at the expense of the clarity and readability of schedules. Or, alternatively, Members might opt for a "solution" they have already used extensively for mode 4, where the initial concept—listing only of limitations—was turned on its head in most schedules. The prevailing entry for this mode, contained in the horizontal section, consists of an "unbound" which is then qualified by listing those categories of natural persons—usually managers and technicians associated with inward investments—who will be admitted. The binding or liberalization of any sectoral mode will always be the result of a policy decision, not of scheduling techniques.

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## 2. GATS rules—safeguards, subsidies and government procurement

The GATS contains no specific rules on emergency safeguard measures, government procurement or subsidies for services. In part this reflects the time pressures under which the Uruguay Round negotiators were working; though they recognized the importance of these issues they accepted that it would not be possible to draft disciplines upon them within the time available. But it was more than a problem of time. In each case, there were conceptual problems and differences of approach which would have been difficult to reconcile in a much longer time scale (and which still persist). It was therefore agreed that negotiations on these matters should take place after the Uruguay Round and the respective mandates are contained in Articles X, XIII and XV of the GATS. In the work on these subjects under the auspices of the Working Party on GATS Rules particular attention has been giv-

en to the question of safeguards, and it is here that most progress has been made. Overall, however, progress has been slow, due in part to the priority given to extended sectoral negotiations but also to the absence—for a long time—of real "demandeurs" and to the complexity of the issues. However, the start of the new round of services negotiations has provided a new impetus to this rule-making activity, since it is foreseeable that any disciplines developed will enter into force as part of the overall package of results.

### a. *Negotiations on the question of emergency safeguard measures (GATS Article X)*

GATS Article X mandates Members to "undertake multilateral negotiations on the question of emergency safeguard measures based on the principle of non-discrimination". There is an ambiguity in the Article in that it mandates negotiations "on the question" of safeguards, thus implying that it is not yet determined that there should be a safeguard discipline, but adds that the results of such negotiations "shall enter into effect" not later than the beginning of 1998. This deadline has since been extended, but the basic ambiguity has not yet been resolved. However, while not all Members are yet convinced that it is necessary or perhaps feasible to create an emergency safeguard mechanism, work on the content of such a mechanism is nevertheless proceeding, with a target date of 15 December 2000.

The GATS already contains several provisions which, under certain conditions, allow a Member government to depart from the commitments it has undertaken. These include the suspension of commitments for balance of payments reasons, the withdrawal and renegotiation of commitments under Article XXI and invocation of the exceptions provision in Article XIV. An emergency safeguard mechanism (ESM) under Article X would therefore be intended to respond to situations other than these and it is generally understood as serving the same purpose as GATT Article XIX (*Emergency Action on Imports of Particular Products*). It would allow a government to suspend a commitment and temporarily stop or limit the supply or consumption of a foreign service in order to relieve a domestic industry which is threatened with or suffering serious injury as a result of an unforeseen surge in supply of foreign services. It is in this sense that the Article X mandate is discussed below.

It is common ground that the case for and against the introduction of a safeguard mechanism should revolve around the effects it could be expected to have on the quality and stability of commitments. Supporters of the ESM contend that the existence of a safety valve would promote more liberal access commitments since it would help governments to overcome industry concerns about the possible negative effects of increased foreign competition, and may forestall recourse to "informal" or "grey-

area" measures which might otherwise be used in emergency trade situations. Sceptics reply that the GATS already provides sufficient flexibility—in particular through the scheduling approach—to allow Members to protect the interests of particular sectors and that to add the possibility of recourse to a safeguard would reduce the security of commitments without guaranteeing increased liberalization.

The case for an ESM would thus be strengthened if a credible link could be made between its introduction and improved commitments. It would be possible to envisage several approaches which would establish such a link. For instance, the introduction of a safeguard mechanism could be coupled with an understanding that economic needs tests which specify no criteria, and therefore confer a degree of discretion depriving the commitment of any real value, would be abolished. Alternatively—or in addition—Members might agree that a safeguard mechanism could be invoked only with respect to new commitments. Finally, the possibility under Article XVIII to schedule additional commitments might be used to forego the right to invoke a safeguard in a given sector, which in turn might be an additional and useful parameter to be considered in market access negotiations. These few examples suggest that the introduction of an ESM in the GATS is not necessarily a matter of "either ...or", but that the existing framework provides sufficient flexibility to accommodate a variety of approaches and objectives.

Technical problems also require attention. While in goods trade the concept of a safeguard measure is relatively straightforward—in most cases, it will take the form of a quantitative import restriction or tariff increase applied at the border—its implementation in services trade raises a range of difficult conceptual and practical questions. The fact that a service can be supplied not only cross-border, but also through the establishment of a commercial presence, the temporary presence of natural persons in the market or through consumption abroad, gives new dimensions to the application of safeguard measures. While it might be easy to provide statistical support for a safeguard measure relating to a mode 4 commitment, it would be more difficult under modes 1 and 2. To apply a safeguard measure to service suppliers established in the market under a Mode 3 commitment might be still more problematical. Would the "domestic industry" be defined for the purposes of safeguard action as including only nationally-owned suppliers or all established suppliers?

In the Working Party on GATS Rules, two different types of safeguard measures have been under discussion. The first would be a generally available or "horizontal" measure, applicable to all services, which would be modelled on GATT Article XIX and the Agreement on Safeguards (AS) and which could be invoked in regard to any commitment. The second type, which has been referred

to as a "sector-specific" safeguard, would be available only in sectors where the schedule explicitly reserved the right of invocation. Such indications would become an integral element of market access negotiations. "Sector-specific" safeguards of this kind would imply anticipation by the government in question of possible problems in a given sector, which would cast a rather different light on the concept of emergency measures. The choice between horizontal and sector-specific safeguards is likely to be ultimately guided by policy considerations rather than feasibility since the main conceptual and practical questions to be resolved are similar in both instances.

*b Negotiations on government procurement under GATS Article XIII*

Since the inception of a framework for international trade, governments have shown the desire to exempt their own purchases from multilateral trade rules in order to be able to favour national suppliers when awarding contracts. Government procurement of goods and services is subject to the WTO Agreement on Government Procurement (the GPA), which is a "plurilateral agreement" with 26 signatories, mostly developed countries. In 1996, at the first WTO Ministerial Conference, Members established a Working Group on Transparency in Government Procurement, whose task is to examine the current practice of governments in relation to transparency in procurement and, on this basis, to develop the elements for a multilateral agreement. It is against this background that the situation of government procurement in the GATS and in future services negotiations must be assessed.

Pursuant to GATS Article XIII, government procurement remains outside the scope of specific commitments under Articles XVI and XVII. Similarly, it is not subject to the MFN obligation, which means that signatories of the GPA need not extend to other WTO Members the benefits of the obligations they have assumed under it. There is one exception from this general exclusion of government procurement from GATS disciplines: the Understanding on Commitments in Financial Services stipulates that "each Member shall ensure that financial services suppliers of any other Member established in its territory are accorded most-favoured-nation treatment and national treatment as regards the purchase or acquisition of financial services by public entities of the Member in its territory". But the Understanding is assumed voluntarily by those Members wishing to do so: it is not a basic discipline of the GATS. In addition, if the scope of Economic Integration Agreement includes government procurement, its members are required by Article V:6 to extend its benefits to companies owned by third countries which are established in the integration area.

General disciplines therefore remain to be considered. In this case the Article specifies no terminal date for the

negotiations. Little progress has been achieved so far, in part because of the concurrent attempts to negotiate a framework for transparency in government procurement of both goods and services; Members have understandably hesitated to undertake overlapping work in two *fora*.

The question underlying work on government procurement of service—if any disciplines are developed—is whether and how far Members, most of whom currently have no obligations on the subject, would wish to go beyond procedural matters such as transparency and tendering procedures to substantive obligations, which would largely be based on the national treatment and most-favoured-nation concepts. Any future disciplines could be established on a horizontal basis, i.e. applicable to all services—but possibly with sectoral modifications, if needed. However, this would not necessarily oblige a Member to apply them to all sectors. A more flexible approach might be possible, whereby Members would have the possibility to undertake agreed horizontal disciplines in specifically selected sectors, similar to the telecommunication Reference Paper or the Understanding on Commitments on Financial Services. The launch of the new services round provides an opportunity for a new look at these questions.

c. *Negotiations on subsidies under GATS Article XV*

Article XV of the GATS mandates Members to enter into negotiations in order to develop the necessary multi-lateral disciplines to avoid possible trade distortive effects of subsidies. This provision also explicitly stipulates that negotiations will have to take due account of the role of subsidies in relation to development programmes of developing countries as well as the need, in particular for developing countries, for flexibility in this area. Unlike Article X, Article XV does not fix a deadline for completing the negotiations. So far, work has proceeded no further than conceptual discussions and examination of the very limited empirical information which is available on the prevalence and effects of subsidies in the services sector. No systematic information is available, which would allow Members to identify the kind of subsidies granted, the sectors mainly concerned and the potential trade-distortive effects. Available sources, including WTO Trade Policy Reviews, and limitations contained in Members' schedules of specific commitments, tend to indicate that subsidies play a particular role in sectors such as financial services, transport, audiovisual and tourism services.

Before considering new disciplines in this area, it appears necessary to assess the extent to which subsidies are already regulated under the existing GATS framework. In so far as subsidies are "measures affecting trade in services" within the meaning of GATS Article I, they are subject to the relevant general provisions of the Agreement. For instance, the most-favoured-nation obligation, applicable irrespective of whether specific commitments have

been undertaken, would prohibit discriminatory allocation of subsidies to the nationals of one Member rather than others, and would be applicable even in the absence of specific commitments. Second, where they have undertaken commitments the national treatment obligation prevents governments from granting subsidies only to national suppliers and services, unless a limitation to this effect has been scheduled. A number of Members have in fact scheduled such limitations, either on a horizontal or on a sector-specific basis.

Besides its application only in scheduled sectors, the national treatment principle might not suffice to address all potential trade distortions arising from subsidies. It would not, for example, provide a legal basis for action or complaint against subsidies having the effect of export subsidies in third markets. Moreover, uncertainties remain concerning the reach of the principle across modes of supply, and the related question of the concept of "like service". For instance, while national treatment commitments under modes 3 and 4 ensure that locally-established foreign suppliers are eligible for any relevant subsidy programme, it is not clear that national treatment commitments under modes 1 and 2 would ensure that such subsidies do not disadvantage the same services when imported from, or consumed abroad.

As in safeguards, the relevance of existing goods models, and in particular the Agreement on Subsidies and Countervailing Measures, may provide guidance for negotiators. But, again, the specificities of services trade, including the existence of four modes of supply and the fact that national treatment is subject to negotiations, create a far more complex scenario. As mandated in Article XV, consideration has also to be given to "the appropriateness of countervailing procedures" but preliminary reactions from Members tend to question the feasibility of such measures in the services context; examination of other forms of remedy, or *ex ante* control of certain forms of subsidy, may be warranted. It can be anticipated that much attention would be paid to the treatment of subsidy programmes with social or cultural policy objectives. It must be recalled, however, that services provided in the exercise of governmental authority are completely outside the scope of the GATS (subsection E.1).

In the Working Party on GATS Rules, the issue of subsidies has attracted less attention so far than safeguards. This is not surprising since the questions involved are difficult to address outside the scope of a services round and conceivable solutions are liable to affect the legal scope and economic value of current commitments. A new round, with the resulting trade liberalization, may render the need for clearer disciplines more pressing, and may also provide Member governments with more leeway for finding solutions.

### 3. Domestic regulation

The GATS specifically recognizes "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". The right to regulate is one of the fundamental premises on which the Agreement is based, and it is easy to understand why. Many services, perhaps most, are very closely regulated, for good reasons, among which the protection of public health and safety, the rights of consumers and the quality of services provided are among the most obvious. No country can afford to allow unqualified doctors, accountants and lawyers to practice; proper safety standards must be enforced in all modes of transport; providers of water, energy, distribution and catering services must meet environmental and health standards. The list is endless. All WTO Members attach great importance to the regulation of services and work on this subject to date has shown no disposition on the part of any Member to compromise the right to regulate in any degree.

The objective of the GATS is liberalization of services trade, not the deregulation of services. The right to supply services under a GATS commitment is a right to supply subject to whatever domestic regulations are in force and there is no implication whatever that standards or other regulations will be modified to facilitate foreign competition. Domestic regulations are not characterized as barriers to market access and they are therefore not subject to scheduling or to negotiations on market access. The WTO does not and will not set standards for the regulation of services, nor is there the slightest likelihood that Members would seek or agree to set limits on their powers to regulate. The suggestion that health standards might be endangered by liberalization in this sector, for example, is simply false. The protection of health is explicitly recognized as a policy concern of overriding importance; under Article XIV the need to act to protect health would override all GATS obligations, including specific commitments.

Article VI of the GATS does however contain certain disciplines on domestic regulation and mandates further work on the subject, which is taking place in the Working Party on Domestic Regulation. The basic philosophy of Article VI is that regulations should be administered in an objective and impartial manner. This includes the need for transparency and due administrative process. It is implicitly recognized, though not stated, that regulations may be unnecessarily burdensome or obscure and that they may have the effect, whether intended or not, of discriminating against foreign suppliers. The first two paragraphs of the Article therefore call for reasonable, objective and im-

partial administration and for impartial review, on request, of administrative decisions.

Article VI also mandates further work on measures relating to qualification requirements and procedures, technical standards and licensing requirements. Members are working to develop "any necessary disciplines" to ensure that such measures "do not constitute unnecessary barriers to trade in services." Paragraph (b) of Article VI:4 further specifies that such disciplines shall aim to ensure that regulatory measures are "not more burdensome than necessary to ensure the quality of the service". It is important to note that the Agreement establishes a relationship between a regulatory measure and the intended objective—ensuring the quality of the service—but in no way limits Members' scope in defining any such objective.

It was decided by Ministers at the conclusion of the Uruguay Round that this work should begin with priority given to accountancy services, largely in response to the strong interest manifested by the industry itself. Work on the accountancy sector was completed in December 1998, when its results, the "Disciplines on Domestic Regulation in the Accountancy Sector", were adopted. They are not yet in force; they would become legally binding on those Members who have scheduled specific commitments on accountancy at the end of the current negotiations, when they will form part of the overall package of results. Meanwhile, all members have agreed a "standstill" provision to the effect that they will not take new measures in the accountancy sector which would be in violation of the disciplines. The Working Party is considering whether these or similar disciplines could be applicable to other professions, or to services generally.

The accountancy disciplines therefore provide a useful indication of the focus and possible outcome of the ongoing work on domestic regulations. It is made explicit that they do not address market access and national treatment restrictions which should be scheduled under Articles XVI and XVII: domestic regulations serve to ensure the quality of services rendered to the public, not to protect national suppliers, and in principle do not discriminate against foreign suppliers. The disciplines say nothing about the level of qualifications to be required of accountants and auditors, though it is said that they may include education, examination, practical training and language skills. Nor do they specify the content of technical standards of any kind. It was never envisaged that the WTO would enter upon the business of setting standards or qualification requirements, and it was clear throughout that national legislators and regulators would retain all their prerogatives in these areas. A large part of the disciplines is devoted to the need to ensure transparency—for the publication of all relevant information about regulations, entry qualifications and technical standards. Members are also required to explain upon request the ratio-

nale behind regulatory measures in the accountancy sector and to provide an opportunity for trading partners to comment on proposed new measures affecting the sector before their adoption.

The most important element of the disciplines is the creation of a necessity test, which is a requirement that measures relating to licencing, technical standards and qualifications should not be more trade-restrictive than necessary to fulfill a legitimate objective. In relation to standards, for example, the disciplines require that they should be prepared, adopted and applied only to fulfill legitimate objectives, which are stated to include the protection of consumers, including all users of accounting services and the public generally, the quality of the service, professional competence and the integrity of the profession. It should be noted that this is not a closed list of "legitimate objectives". This does not mean that all regulatory measures will be reviewed against the necessity test: it simply provides the opportunity for trading partners to question requirements which they believe are unnecessarily burdensome or restrictive.

As stated, the Working Party is now considering the possibility of applying similar disciplines to other services. The value of doing so may be particularly apparent for those countries with large reserves of skilled personnel who may now find it very difficult to find their way through complex and forbidding procedures to employment in foreign markets. In many services, to obtain market access and national treatment commitments under Mode 4 would not be sufficient: it would still be necessary to satisfy the licencing and qualification requirements imposed in the importing country. There is good reason to believe that such impediments weigh more heavily on potential suppliers from developing countries.

The idea that liberalization may entail a degree of deregulation has also been raised with reference to the financial sector. During the negotiations on financial services which ended in December 1997, it was sometimes suggested in the press—though never in the negotiations themselves—that liberalization in the GATS context might weaken the power of governments to regulate this critically important sector: the fact that the end of the negotiations coincided with the financial crisis in Asia appeared to some to give particular force to such fears. However, they were clearly not shared by the negotiating governments. As stated in Part III above, the crisis had no impact whatever on the commitments offered in the negotiations. Governments recognized that international competition was not the cause of the crisis in any of the affected countries, and might well help to resolve it. As a result, the financial services sector now has 106 governments making commitments, the second highest number after tourism.

Because of the strategic importance of financial stability, the GATS contains specific provisions which preserve and emphasize the right of governments to intervene in the management of the sector. First, the activities of central banks and other monetary authorities in the pursuit of monetary or exchange rate policies, and macro-economic policy management in general, are excluded from the scope of the Agreement. The same applies to activities forming part of a statutory system of social security or public retirement plans. Secondly, and directly related to the area of domestic regulation, there is an overriding right to take measures which are necessary for prudential reasons. Paragraph 2 (a) of the Annex on Financial Services states that:

"Notwithstanding 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."

This means that even specific market-access commitments may be set aside if a government considers it necessary to take such measures, though they must not of course be used simply as a means of escaping commitments or other obligations under the Agreement.

Regulatory interventions by governments which are not made for prudential reasons and which affect conditions of competition in financial markets would fall within the ambit of Article VI, as described above, unless their effect is to restrict market access or national treatment, when they would need to be consistent with the country's commitments under Articles XVI and XVII. It is measures of the latter kind—those aimed at restricting the supply of financial services by foreign suppliers—which are the subject of trade liberalization under the GATS.

## E. Issues arising in negotiations

This final subsection examines several of the general or systemic issues underlying the negotiations in the new round, where appropriate with special reference to the services to which these issues are particularly relevant. We deal successively with the status of services supplied in the exercise of governmental authority, questions arising from the need for access to networks, the importance of electronic commerce for the supply of services and the development dimension.

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### 1. Governmental services

In a number of Member countries concerns have been raised about the possible impact of services liberalization on social, environmental and other public policy objectives. Such concerns may be particularly acute in the services sector because some vital services have long been, and still are, provided by public authorities for non-com-

mercial reasons. Health and education are obvious cases in point. The supply of health and education services is generally understood, by all governments, to be among their prime responsibilities, above all because of the direct impact of these services on social welfare and justice. Their infrastructural roles and their effects on overall economic performance are also vital—increasingly so, as economies develop—but the social role is predominant. They are seen so much as socially-motivated rather than economic activities that the promotion of international trade in them is a concept foreign to the thinking of most regulators, even though in both sectors the existence of private, commercial provision has been familiar for so many centuries. The perception that health and education services are essentially the business of government probably accounts, at least in part, for the surprisingly small number of WTO Members who have chosen to make commitments on these sectors; 48 countries have made commitments on health and 46 on education (Chart IV.2). A number of developed countries and the great majority of developing countries have not included any of the relevant sub-sectors in their schedules, though as in many other areas, Members recently acceding to the WTO have undertaken broad and deep commitments in these sectors as well (Table IV.5).<sup>103</sup>

It would be wrong to suggest that this reticence is entirely due to concern about the status of public services in a more open market environment but it has certainly played a part. It is therefore worthwhile to stress that *services supplied in the exercise of governmental authority are not subject to the GATS*. Article I of the Agreement provides a complete exemption from coverage for all such services, which are defined as any service supplied "neither on a commercial basis nor in competition with one or more service suppliers". This means that such services are not subject to negotiation under the Agreement, that they will not be subject to commitments in national schedules and that such general disciplines as the MFN and transparency obligations do not apply to them. Any disciplines which may be developed on the subsidization of services would not apply to the subsidization of governmental services—even if financial transfers within the public sector (e.g. from the Treasury to Health and Education Ministries and their subordinate agencies) could be regarded as subsidies, which seems very doubtful. A government wishing to maintain a given service as a public service or monopoly is entirely free to do so.

Of course, not all monopolies provide services in the exercise of governmental authority. Many operate commercially, and are thus subject to the general GATS obligations, notably the MFN principle. Article VIII of the GATS, which deals with monopolies and exclusive service suppliers, contains disciplines intended to ensure that such a supplier does not abuse its monopoly position or act in a way that would undermine the country's non-discrimina-

tion and market access obligations on other services which the monopoly may be in a position to influence. But nothing in Article VIII overrides the basic point that services supplied in the exercise of governmental authority are outside the scope of the Agreement.

It is perfectly possible for governmental services to co-exist in the same jurisdiction with private services. In the health and education sectors this is so common as to be virtually the norm. Although there has never been a dispute or any other occasion requiring the interpretation of Article I:3 it seems clear that the existence of private health services, for example, in parallel with public services could not be held to invalidate the status of the latter as "governmental services": this would void the exclusion of governmental services of most of its significance. This provision was of political importance to all negotiating governments and there is no reason to believe that they would agree to compromise or undermine it now. Nevertheless, if it were thought desirable, since the issue has been raised in the press—though never in the GATS—to take further steps to make it clear that the liberalization of services trade is not a threat to the autonomy of governmental services, it would be possible to use the opportunity provided by the new round to make it clear that the co-existence of governmental and private services in the same industry does not mean that they are in competition in the sense of Article I.3c and therefore does not invalidate the exclusion from the GATS of the public sector. Commitments under the GATS do not call in question the maintenance of state-funded public services.

It is also important to emphasize that even in services which are covered by GATS, no WTO Member is obliged to allow foreign supply. Health services which are not provided in the exercise of governmental authority are covered by the GATS, but a government which wishes to make no commitments in the health sector is free to prohibit foreign supply of health services altogether. Furthermore, if it chooses to make commitments, it may subject them to any specified limitations.

Questions have also been raised about the indirect effects on public services of market-access commitments in the private sector. It has been suggested that private suppliers (and by implication foreign suppliers in particular since the arguments are posed in terms of international trade) may fall below basic performance standards, thus provoking a "race to the bottom", or that they may cream off wealthier clientele and highly qualified staff, thus impoverishing the public sector. Fears have also been expressed, especially in relation to education, about possible impacts on cultural values and national identity, and some perceive a conflict between market efficiency and equity—between the profit motive and the universal availability of basic services.

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<sup>103</sup> For example, market access and national treatment for hospital services under mode 3 have been fully committed by the Kyrgyz Republic, Ecuador and Estonia (the latter commitment is subject only to a relatively minor national treatment limitation).

There is nothing in the GATS that would require governments in committed sectors to compromise existing quality standards and licensing conditions, or to refrain from tightening them in response to public demand or new challenges. These are perfectly legitimate aims of domestic regulation, and the right to regulate is specifically safeguarded in the GATS, as explained above. In the same way, governments are free, even in completely liberalized sectors, to operate universal service obligations, and many do so, usually on regional or social policy grounds. Nothing would proscribe, for example, the use of requirements on private hospitals or schools to combine profitable undertakings in agglomerations with non-profitable services in remote areas or to train a certain percentage of staff beyond their own needs. Nor would governments be prevented from taxing private suppliers, patients or students and using the funds raised to cross-subsidize unprofitable services for other groups. From that perspective, rather than undermining public policy objectives, liberal access bindings might even be used—within an appropriate regulatory framework—to further such objectives in certain segments of the health and education sectors.

Moreover, liberalization under GATS would not entail the risk of foreigners crowding out domestic patients or students. Members remain free in any of the sectors covered by their schedules to reserve capacity for resident users; nothing would prevent them, for example, from restricting inflows of foreigners seeking hospital treatment or university education in their territory. Mode 2 commitments apply only to measures affecting the ability of residents of the scheduling country to consume services abroad, not to measures the authorities may want to use to attract or deter foreign residents. Neither under mode 2 nor mode 4 is there anything to prevent a Member, for example through visa or deposit requirements, from discouraging its own doctors or teachers from moving abroad in order to capitalize on taxpayers' investment in their education. (On the other hand, liberalization of foreign commercial presence under mode 3, and the creation of attractive domestic working conditions, might be a less restrictive and more efficient way to stem the "brain drain".)

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## 2. Electronic commerce and internet access provision

The status of electronic commerce under the GATS is a systemic issue of fundamental importance which will permeate the negotiations on market-access commitments in most sectors. The purpose of this section is to make that status clear. The WTO is a system of legal obligations between its Members, and in relation to electronic commerce, as in all other contexts of trade relations between Members, the essential question to consider is "What relevant obligations have Members assumed, and what further obligations may they wish to assume?".

As far as trade in services is concerned, electronic commerce consists of transactions of three different kinds: the first is the electronic delivery of services directly to customers in the form of digitized information flows; the second is the use of the Internet as a channel for distribution services, retail and wholesale, by which goods and services are purchased over the net and delivered to the customer subsequently in non-electronic form; the third is the provision of Internet access services themselves. GATS obligations and specific commitments relate to all of these, because they provide the legal framework for services trade in *all* its other forms, including electronic supply.

Services of many kinds are already traded electronically on a huge scale. In some sectors, such as financial services, it has become virtually impossible to conceive of trade being conducted without recourse to computers. It was the revolution in computer technology which caused many services previously regarded as essentially non-tradeable to be recognized as eminently tradeable, and cross-border trade in particular has been greatly facilitated by the ease with which services products can be converted into digital information flows. The GATS makes no distinction between the different technological means by which a service may be delivered—whether in person, by mail, by telephone, across the Internet or in any other way. It would be possible for a country, in making commitments on a particular service, to define it in such a way that electronic supply would be excluded (though such commitments would no doubt be seen by trading partners as having very little value) but failing this the supply of services through electronic means is covered by commitments in the same way as all other means of delivery.

The general disciplines of the GATS also apply to electronic delivery: measures affecting the electronic delivery of services are "measures affecting trade in services" in the sense of Article 1 of the GATS, just as they would be if imposed on delivery by any other means. (A tariff imposed on imports of services supplied electronically would be a "measure affecting trade in services" and could not be imposed if it increased the level of protection stipulated in the schedule). As is the case throughout the WTO system, the legal regime which governs a given transaction is determined by the nature of the product which is traded, not by the technique of production or delivery. This is in fact an important legal principle; it has been confirmed in many dispute settlement cases that market-access commitments on a given product cannot be invalidated by reference to production or process methods. This is why the question "Is electronic commerce trade in goods or trade in services?" makes little sense: electronic commerce is simply a way of doing business. It involves the sale of goods and services in the form of Internet retailing and wholesaling—a process similar to selling through mail-order catalogues—and the sale and delivery

of services in electronic form. In both cases the legal rights of the seller to do international business in this way are those provided by the GATS: the right to offer and sell goods and services over the net is covered by commitments on distribution services, and the right to deliver services electronically and otherwise is covered by commitments on the services in question. Where market access and national treatment commitments exist, restrictions on electronic supply would be subject to challenge as nullifying or impairing the value of the commitment.

There is an on-going debate as to whether some products, even when delivered electronically, should be classified as goods rather than services and subject to the rules of GATT. The classical example is computer software, which from the consumer's point of view is identical whether it is purchased on a hard carrier from a shop or downloaded from a computer; it can reasonably be asked whether the legal regime applying to the two forms should not be the same. If in such cases—books have been suggested as a further example—Members could agree that the rules of GATT rather than GATS should apply, or that both Agreements are relevant, no systemic harm would be done. But it should be clear that what is in question is the classification of certain products whose electronic and physical forms are virtually identical, not that of electronic commerce *per se*. To decide that because these or any other products are supplied electronically they are not services would void the GATS obligations, and the bulk of the commitments governments have assumed under it, of most of their substance. Commitments on the supply of financial services, for example, would be valueless if it could be argued that they did not guarantee the right to use computer networks in doing the business. Indeed, the GATS Annex on Telecommunications contains an obligation on all Members to ensure that service suppliers of any other Member have access on reasonable terms to any public telecommunications network or service which is necessary for the supply of their service. This is of course critically important for providers of Internet access services, who must have access to telecommunications networks, usually by way of leased circuits, and for the many service providers now using the Internet and other electronic networks to do business.

Though it is natural to think of electronic commerce primarily in terms of cross-border trade, it is important to bear in mind that commitments under Modes 3 and 4 also cover the right to deliver the service electronically. A bank established under Mode 3 or a consultant working abroad on the basis of a Mode 4 commitment must be guaranteed the right to use computers to deliver their services.

It can be expected that in negotiations on market access the growing facility of electronic supply will increase interest in securing commitments in many professional services, including accountancy and all forms of consultancy, but also in sectors like education and health where cross-border supply is a relatively new and important concept. The potential benefits of distance learning and telemedicine, especially in thinly-populated areas and developing countries, are obvious.

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### 3. Access to networks and competition safeguards

Telecommunications, energy services, postal delivery services and many transport services share long antecedents as domains reserved to government monopolies. Traditionally, the rationale for monopolies was that such industries were characterized by "natural" monopoly features, such as prohibitively high costs of building extensive network infrastructure, as well as features attributed to "public goods", such as promoting social and economic cohesion, that market mechanisms might not capture. As a consequence, the notion prevailed that the public interest would be best served through the maintenance of sole providers that were, originally, the governments themselves and often, later, government-run corporations or private entities closely monitored by and directly responsible to governments. As a host of technologies used in these industries has advanced and become less costly, natural monopoly assumptions have been revisited and often found to be outdated.

Unless provided in the exercise of governmental authority (see above) such services fall within the ambit of the GATS. However, only telecommunications has thus far been subject to extensive market-access commitments by governments. Perhaps this is in large part because new technologies have had most impact in telecommunications, providing support for a case for freer markets. Changes in other sectors are, however, beginning to take hold. As these sectors are converted by governments from monopoly to competitive regimes, they give rise to negotiating problems that rarely arise in sectors where competition is the norm. The challenges stem from a need to devise mechanisms to facilitate transition from monopoly to market-based regimes more consonant with GATS commitments. As governments introduce liberalization, the straightforward disciplines regarding monopoly behaviour of GATS Article VIII become at first inadequate and, later, obsolete.<sup>104</sup>

It is first worth noting, however, that GATS Members have moved into the realm of access issues and competition policy purely to ensure the effective value of GATS obligations and commitments. Whatever the merits of competition policy for its own sake, this is not the vantage

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<sup>104</sup> GATS Article VIII requires each WTO Member to ensure that "any monopoly supplier of a service in its territory does not, in the supply of the monopoly service in the relevant market, act in a manner inconsistent with that Member's obligations" under Most-favoured-nation treatment and specific commitments" and where a monopoly supplier competes, either directly or through an affiliate, in a service outside the scope of its monopoly rights which is "subject to that Member's specific commitments, the Member shall ensure that such a supplier does not abuse its monopoly position ... in a manner inconsistent with such commitments."

### Box IV.3. WTO Work Programme on Electronic Commerce

The WTO Ministerial meeting of 1998 took two decisions relating to electronic commerce. The first was to adopt a political understanding that customs duties would not be applied to "electronic transmissions". The status of this understanding, which was to be reviewed at the Seattle Ministerial meeting, is now unclear. It does however demonstrate the disposition of governments to avoid creating barriers to electronic trade. As is said above, a tariff on imports of services would be a measure covered by the GATS and could not be applied to a committed service if it had the effect of diminishing the level of access bound in the schedule.

The second Ministerial decision was to set up a work programme on electronic commerce. This was the first systematic examination of the subject in the WTO. The Councils for Goods, Services and Intellectual Property and the Committee on Trade and Development were mandated to examine and report on subjects arising in their areas of responsibility and it was agreed that the General Council would consider any trade-related issues of a cross-cutting nature. The work programme has not been completed, but in the services context it has thrown light on some important issues. In two reports<sup>1</sup> to the General Council, an "interim" report of March 1999 and a "progress" report of July 1999, although final positions could not be taken owing to the status of the reports, a number of issues on which a common understanding appear to be emerging were stated. The first was that the electronic delivery of services falls within the scope of the GATS 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 and would therefore be covered by GATS obligations. Secondly, the technological neutrality of the Agreement would also mean that electronic supply is permitted by specific commitments unless the schedule states otherwise. Thirdly, all GATS provisions, whether relating to general obligations or specific commitments are applicable to the supply of services through electronic means.

A number of issues were identified as requiring further consideration. They included the need to clarify the distinction between modes 1 and 2 in the context of electronic delivery and the question whether certain products delivered electronically might be classified as goods and therefore subject to GATT disciplines rather than as services. The need to clarify the classification and improve the scheduling of Internet access and other related services, and to clarify their relationship with telecommunications commitments and the obligations in the Annex on Telecommunications was also noted.

The purpose of the work programme as a whole can be said to be to provide answers to three questions: first, how do existing WTO Agreements impact on e-commerce; second, are there any weaknesses or lacunae in the existing law which need to be remedied; and third, are there any new issues, not now covered by the WTO system, on which Members would wish to negotiate new disciplines. As far as services is concerned, the first two questions have been substantially addressed in the reports referred to above, and it has become clear that WTO Agreements are important not only for electronic commerce itself but also for the *facilitation* of electronic commerce. As to the third question, no delegation has yet suggested the negotiation of disciplines on any new issue.

A further important element of the work programme, which is relevant to the work on goods, services and intellectual property, is the examination by the Committee on Trade and Development of the development implications of electronic commerce. A major issue here is to find ways of enhancing the participation of developing countries in electronic commerce, in particular as exporters of electronically-delivered products. The role of improved access to infrastructure and transport technology, and of movement of natural persons, is also under study. Many of these considerations are directly relevant to the GATS, which has already contributed to the adoption of economic reforms which will facilitate participation in electronic commerce in a truly sustainable manner. Effective participation in electronic commerce is inescapably dependent on making access to the Internet available to the broadest possible spectrum of companies and individuals. This requires access to computers and related equipment and to efficient telecommunications services at affordable prices. Those countries which have participated in the elimination of customs duties under the Information Technology Agreement have already taken an important step towards reducing the cost of hardware. Those which have made commitments under the GATS permitting the competitive supply of telecommunications services done much to facilitate internet access. Competition in telecoms supply permits internet access providers a range of new alternatives, both for transmission capacity and for consumer access conduits, such as mobile internet access, all at lower costs. It has already become apparent that by liberalizing telecom network infrastructure and capacity across a variety of technologies (including cable, mobile and satellite) the cost of access to the internet and therefore of participation in electronic commerce can be reduced dramatically, both for businesses and individual consumers. Together with the promotion of technical training, such policies may be the most effective means within the control of developing country governments to narrow the "digital divide". Many governments are considering ways to relax certain controls, such as licensing or certification regimes requiring residency, that may have applied to the supply of services by traditional means. Wishing to avoid stifling the growth of legitimate electronic commerce governments are enacting digital signature laws and other enabling legislation to facilitate participation in the digital economy. Such positive approaches may be especially important for those developing countries whose nationals and businesses already face a host of barriers to effective participation.

<sup>1</sup> These reports by the Services Council (S/C/8 and S/L/74 respectively) are available on the WTO website.

point from which GATS discussions have broached these issues. Second, initial efforts in this area have addressed a sector, telecoms, in which there is no prior experience with competition, and will probably continue to focus on sectors with similar features. By contrast, general competition policy is usually applied to achieve occasional intervention in market that are normally competitive. In recognizing the need for special provisions to preserve the value of commitments in newly liberalized sectors, negotiators recognized that there is an imbalance in market forces to reckon with from the outset.

These issues first became apparent in the context of telecommunications. The need for guarantees of reasonable access by service suppliers of all kinds to public telecoms networks and services was recognized in the Telecom Annex at the inception of the GATS. As governments contemplated market-access commitments for telecoms, a need was identified for disciplines over interconnection among networks (particularly with the network of a dominant, usually former-monopoly operator), for more general safeguards against anti-competitive behaviour by the dominant providers of telecoms, and for achieving universal service objectives through novel, competition-neutral approaches. These issues are addressed in the Reference Paper on regulatory principles for telecommunications which has thus far been undertaken as "additional commitments" in the schedules of 68 WTO Member governments. GATS Article VIII could only address concerns related to monopoly providers; its disciplines would not apply to dominant providers. Moreover, the GATS Annex on Telecommunications was considered insufficient, in both level of detail and level of discipline, to deal with network access and competition issues in situations where the access would involve direct competitors to a network operator.

*a. Access to networks and "bottleneck" facilities*

One of the most compelling reasons for negotiating safeguards on access and competition for telecommunications under the GATS also exists in other industries with a history of monopoly provision. This is that effective competition with a dominant incumbent supplier, at least in the early years of liberalization, is impossible without access on commercially reasonable terms to a network owned by the dominant supplier itself. This is true for many segments of the energy distribution and transport sectors. In such sectors, if new entrants must first build entirely new networks, including ones that duplicate existing networks, in order to begin serving customers, the advent of competition and its benefits to consumers can be deferred indefinitely. The regulatory concept of "bottleneck" facilities has been applied by various governments undertaking sector reforms. It is based on the idea that, until competition has generated alternative facilities, new market entrants need access to facilities controlled

by the incumbent. Such issues are common in transport industries in which, for example, landing slots, port facilities and rail tracks can exhibit bottleneck characteristics. The telecommunications Reference Paper uses the term "essential" facilities to denote this regulatory concept.<sup>105</sup>

In telecommunications, the need for access to networks is especially acute because even when a service provider has developed its own network infrastructure, the service it provides to its customers frequently involves transmitting their call or fax to a customer of another network. As a result, the interconnection disciplines in the Reference paper are among the strongest and most detailed provisions developed in the GATS to date. They include, for example, a commitment to ensure that dominant or so-called "major" suppliers must charge cost-oriented interconnection rates.

Having decided to dismantle monopoly structures, policy makers have also sought means to shorten the time necessary to secure the economic and social benefits of competition. In telecommunications, and where reforms have been introduced in energy and transport services, this has often involved opening up the network infrastructure using both market-based and regulatory mechanisms. Sometimes, governments have elected to open markets for non-facilities supply of the services, in which the incumbent supplier is required to allow competing suppliers to use its rail or telecom network or energy grid to provide their own customers with services identical to that of the incumbent. In telecommunications, this form of service is referred to as simple resale. Although the idea fell out of favour in telecoms, another approach which has had an appeal in the energy sector and rail transport is to segment the industry into infrastructure vs. services, or generation vs. transmission and distribution services. Under this approach, the infrastructure providers or generators (in the case of energy) are not permitted to participate in retail supply of the service. Another means to kick-start competition has been to break up existing infrastructure and allocate it among a number of companies operating in competition with one another. Then, as new entrants join the market, they are perhaps at less of a disadvantage *vis-à-vis* the smaller network operators than they would have been in the face of a single large entity.

Regulatory options used to facilitate competition in a networked environment are equally varied. They can include requirements that operators must allow "co-location" of facilities such as switches or cables in ways that enhance network access. Also common are requirements on a dominant operator to "unbundle" access to its network so that competitors can access, and consequently only pay for, the portions of the network they really need. The Reference Paper includes certain of these regulatory approaches, e.g. requiring unbundled access, in its provi-

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<sup>105</sup> In the Reference Paper, essential facilities are defined as "facilities of a public telecommunications transport network or service that (a) are exclusively or predominantly provided by a single or limited number of suppliers; and (b) cannot feasibly be economically or technically substituted in order to provide a service".

sions on interconnection. In the energy sector, it has also been noted that those countries that have "ended the monopoly of vertically integrated public utilities, have had to introduce new complex regulation in order to ensure the creation of a competitive market" particularly in relation to electricity and gas.<sup>106</sup> GATS commitments to market access and regulatory disciplines in telecoms, and in other sectors as commitments become more common, can accommodate a fairly wide variety of the different market-based and regulatory approaches used to facilitate the transition to competition.

*b. Competition safeguards*

As mentioned earlier, the telecoms Reference Paper goes beyond the issue of network access alone; it addresses the need for competition safeguards more generally with respect to market power. In service sectors characterized by a history of monopolies, there is an inherent risk that former monopolies will exert their dominance to frustrate newcomers in ways other than control over network infrastructure. Accordingly, some of the principles in the Reference Paper take on relevance also to sectors, such as postal services, where physical network "bottle-necks" are not the main impediment to market access. The Reference Paper defines a "major" supplier as one that "has the ability to materially affect the terms of participation (having regard to price and supply) in the relevant market for basic telecommunications services as a result of: (a) control over essential facilities; or (b) use of its position in the market" (emphasis added). Furthermore, its general proviso on the prevention of anti-competitive practices calls for the maintenance of "appropriate measures" ... "for the purpose of preventing suppliers who, alone or together, are a major supplier from engaging in or continuing anti-competitive practices". It thereby recognizes the need to safeguard against anti-competitive behaviour of suppliers acting together. In an age of large mergers and alliances in many service industries, this concept may also be found to have importance beyond the telecom sector.

In the postal and express mail sector, GATS Article VIII injunctions against practices by monopolies that interfere with most-favoured nation obligations or scheduled commitments may continue to have wide validity so long as the sector remains segmented into delivery services reserved to postal monopolies and those which may be provided in competition with others. While some issues have emerged regarding anti-competitive practices and arrangements among postal administrations that may adversely affect the competitive services,<sup>107</sup> none of these has yet been raised in WTO dispute settlement. Some industry observers suspect, however, that even if GATS Article VIII were to remain broadly applicable for the sector,

it might still be beneficial to develop Reference Paper or Annex type provisions that spell out more clearly, and in greater detail, the Article's applicability to the postal/express mail sector. While it is unlikely in the near term that many postal monopolies will be dismantled, the trend in the sector is nevertheless to move an increasing number of services into the competitive realm. This may lead to the advent of service areas in which market dominance by postal administrations, rather than their monopoly position *per se*, is at the root of competition problems. At such a juncture, Article VIII would no longer be directly relevant.

*c. Competition and "private" network access: tourism and electronic commerce*

Because of the merging of computer and communications technologies and increasing availability and openness of transmission networks, industries today have greater access to better communications networks than ever before. This allows businesses and consumers to communicate much more effectively and widely with other businesses and consumers, but some concerns related to anti-competitive behaviour regarding access to networks have arisen.

In sectors such as Tourism, such concerns are not new. Developing countries have argued for many years that networked services such as computer reservation systems (CRS) for airlines and the more broadly-based global distribution systems (GDS)<sup>108</sup> which also include hotels and car rentals joined together large suppliers from industrialized countries at the expense of smaller suppliers, many from developing countries. They have complained that their suppliers either were not fully admitted or, when they were, obtained less visibility in the systems. Most such electronic transactions were and continue to be operated over private networks, set up by and dedicated to the activities of the participants concerned. In other words, these networks are not usually considered part of the "public" network or infrastructure upon which governments typically impose universal access obligations. Increasingly, such systems are being linked with the Internet resulting in broader accessibility by consumers. But this trend may not remedy the concerns of smaller suppliers and new market entrants. At the same time, Internet has made it easier for small companies and developing countries to set up websites or portals of their own for on-line reservations and purchasing.

Somewhat newer concerns of a similar nature have arisen in relation to electronic commerce. Large companies in industries such as airlines, auto-making and computer manufacturing, that are normally competitors, have begun to join together in business-to-business (B2B) Internet portals to conduct procurement, distribution and

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<sup>106</sup> "Energy Services", Background Note by the Secretariat, S/C/W/52, WTO, 9 September 1998, p. 16.

<sup>107</sup> See, for example, mention of such issues in "Postal and Courier Services", Background Note by the Secretariat, S/C/W/39, WTO, 12 June 1998.

<sup>108</sup> See further discussion of GDS networks in "Tourism Services," Background Note by the Secretariat, S/C/W/51, WTO, September 1998.

other transactions. B2B electronic transactions have taken place for many years over private, intracorporate networks similar to those described above. It might appear at first sight that moving such activities to an open network like the Internet would guarantee enhanced accessibility. But Internet sites can also be restricted to a select community of participants as well as users through password-protected access.

While such distribution networks and portals may not be inherently anti-competitive, there may be a fine line between constructive cooperation and actual collusion that can leave small players at an unfair disadvantage and discourage new market entry. Differences in perspective between developed and developing countries on these issues may be a matter of degree. Often, the industries concerned tend to be ones in which a relatively healthy competitive environment exists, such that competition policy authorities would be wary of unnecessary intervention. A large player is not necessarily dominant under the legal definitions which apply. While concerns about possible dominance and anti-competitive practices are understandable, the activities have rarely triggered action under traditional competition policy standards. One example is action that a number of governments and industry self-regulatory organizations have taken regarding CRS networks. Government regulatory measures and industry codes of conduct have included requirements for non-discrimination in screen displays, standards for the presentation of information, and, in some instances, controls on pricing of reservation bookings.<sup>109</sup> In relation to electronic commerce, competition authorities in some industrialized countries appear to be aware of and monitoring the development of B2B Internet portals shared by large competitors.

The GATS provides few disciplines regarding anti-competitive practices by suppliers who are neither monopolies nor dominant. GATS Article IX on "Business Practices" requires only consultations on business practices that "may restrain competition and thereby restrict trade in services".

*d. Universal service and competition safeguards*

Another distinguishing feature of most of the service sectors currently or formerly subject to monopoly supply is their status as "public" services or services upon which governments, explicitly or implicitly, confer obligations to provide access to the general public as broadly as possible. These are variously referred to as public service, universal service, or universal access obligations. Even after privatization or competition has been introduced, governments continue require that services like electricity,

telecommunications, and mail delivery are available to as many consumers as possible, including those with low incomes or in remote areas. This is also true of privatized systems for public transportation services such as buses, subways and railways.

Nothing in the GATS prohibits governments from imposing universal service obligations on any suppliers of services, public or private. In this sense, the provision in the telecommunications Reference Paper on universal service may be somewhat redundant.<sup>110</sup> But it does help to reiterate the idea of the importance of safeguarding competition and fostering competitive forces, even in relation to achieving important policy objectives. It may prove useful that the Reference Paper *explicitly* calls for the implementation of universal service policies and mechanisms in a "competitively neutral" manner. In telecoms, as well as other sectors subject to such requirements, it may encourage governments to re-examine traditional approaches and explore new ones to ensure that they do not offer unfair competitive advantages to incumbents. Otherwise, the potential for the widest possible cross-section of the public to benefit from market forces in basic services of all kinds can be undermined.

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#### 4. Development dimension

The debate about the inclusion of services in the agenda of the Uruguay Round in the early and middle 1980's had a strong flavour of North-South confrontation: a number of developing countries and lobbies opposed the negotiation of multilateral disciplines on services trade on the grounds that their service industries were too underdeveloped to enter into competition with those of the industrialized world. That controversy is now long past. The freedom to designate in GATS schedules those services on which commitments will be undertaken, and the basic GATS principle of progressive liberalization, have dispelled fears of the imposition of an unacceptable level of foreign competition. Services is now far from being a controversial issue—indeed, during preparations to the Seattle Conference, it was the least controversial issue on the agenda.

Nevertheless, there are important and worthwhile questions to consider relating to development. At several points in this study we have laid emphasis on the value of GATS commitments as an inducement to foreign direct investment, and on the role of competition in raising the efficiency of the national services sector. There is good evidence that developing countries are deliberately encouraging foreign competition in key sectors to upgrade their own services infrastructure. However, developing countries are not merely importers of services. Their increasing

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<sup>109</sup> See WTO Secretariat notes "Air Transport Services", *S/C/M/59*, November 1998 and "Developments in the Air Transport Sector since the Conclusion of the Uruguay Round", *S/C/M/163*, August 2000.

<sup>110</sup> It says "Any Member has the right to define the kind of universal service obligation it wishes to maintain. Such obligations will not be regarded as anti-competitive *per se*, provided they are administered in a transparent, non-discriminatory and competitively neutral manner and are not more burdensome than necessary for the kind of universal service defined by the Member."

participation in services trade and the expansion of their services exports are important objectives of the Agreement; Article IV contains provisions intended to promote these objectives and in the new round the negotiators of developing countries will certainly stress the common commitment in Article IV:1(c) to liberalization in sectors and modes of export interest to them. The importance attached to commitments under mode 4 is well known and has been discussed in subsection C above. It is important that developing countries should also identify the sectors which are of export interest to them, and the barriers which their exporters are confronted with in major markets.

Before turning to tourism, which is the industry generating the greatest export revenues for developing countries, it is necessary to underline once more that efficiency in the export of goods of all kinds depends critically upon the quality and cost of available services. Exporters of agricultural and other basic commodities all over the world suffer disabilities as a result of inefficient or expensive banking, insurance, telecoms and transport services. The export of services themselves may likewise be impeded: high telephone and interconnection charges are a serious obstacle to the growth of computer services in developing countries, though they may be extremely competitive in this field.

The case of tourism illustrates some of these issues, though its growth is also hindered by a number of factors over which developing countries have little control. Tourism is one of the largest and fastest-growing services sectors, accounting for over 35% of total world-wide services exports.<sup>111</sup> Highly labour-intensive, it is a critically important generator of employment, especially in remote and rural areas. International tourism has a very substantial impact on trade levels, as well on foreign exchange earnings. For developing countries, it is one area where they run consistent trade surpluses: in 1995, the net transfer from OECD to non-OECD countries was US\$23.5 billion, as compared with US\$6.2 billion in 1985. Tourism is a leading source of foreign exchange in many developing countries. Countries with the highest ratios of tourism receipts to GNP are typically small island nations. Although much of the gross tourism receipts (perhaps 50-70%) "leaks" out of these countries in order to pay for imported tourism inputs, the ratio of net receipts to GNP remains much higher than for most larger countries.

According to estimates of the World Travel and Tourism Council, tourism as a whole employs one in 10 workers world-wide, making it the world's largest employer. It is already a major employer in developing nations, and its importance is increasing, due to the high growth rate of the sector relative to the domestic economy as a whole. UNCTAD notes that the tourism trade has traditionally been concentrated in developed countries, but the share of developing countries has been rising gradually, and now accounts for about one third of the total. Least-developed-countries are enjoying strong in-

creases in tourist growth, but their share of international arrivals and tourism receipts remains very small.

Interestingly, increasing exports of tourism services is essentially a process of *domestic* liberalization, rather than of persuading trading partners to open their markets. It is not an industry beset by protectionism. As of August 2000 117 WTO Members, more than in any other sector, have made commitments in Tourism under the GATS. Among the most common restrictions appearing in schedules, an economic needs test is frequently required for new bars or restaurants; citizenship requirements are sometimes imposed for liquor licenses and tourist guide licenses. In regard to commercial presence, market access is often guaranteed only to hotels in excess of a certain size, e.g. 50 or 100 rooms, with access for hotels below that size subject to an economic needs test. In some cases licences are required for commercial presence, and in other cases commercial presence is restricted to fixed equity limits. In general, however, restrictions on the supply of tourist services *per se* are not a serious problem. In 1990, An OECD study concluded that, by comparison with other service sectors, the tourism sector in the OECD countries was "remarkably free from protectionist and discriminatory practices". Many of the regulations affecting tourism, such as equity limitations on foreign direct investment (FDI), tended to be by-products of general economic, political and social concerns applying to a number of sectors. In some cases, restrictions might be imposed by both the services importer and the exporter. Such measures notably included immigration and security controls, together with documentation requirements, as well as any restrictions on currency movements which might be applied to individual tourists or tourism businesses.

Problems in the development of tourism therefore do not arise in any significant measure from restrictions applying to tourism *per se*—which in the GATS context, is divided into three main sub-sectors: hotels and restaurants; travel agencies and tour operators services; and tourist guides services. But the great bulk of business and of revenue derives from other activities which feed into tourism—most notably many transport services, but also including certain business services, distribution services, and recreational, cultural and sporting services—which are classified elsewhere and many of which are subject to trade restrictions and distortions with serious negative effects on the tourist sector. Other important challenges facing the industry include environmental and infrastructure problems, as well as rapid technological change.

World Tourism Organization statistics indicate that arrivals by air account for more than 90% of total arrivals in a significant majority of developing countries. Since many of these countries are far distant from the rich markets which provide their customers, their export revenues are diminished by the high air-fares caused by low air traffic density and by protectionist aviation policies, which according to the World Travel and Tourism Council, severely constrain the development of tourism. Protectionism in

the air transport sector, at the expense of hotels and other tourist activities whose net revenues are likely to be far greater than those of national airlines, may be a very expensive strategy.

An MFN exemption affecting tourism has been taken by Mexico in regard to tax deductions for individuals attending business conventions. Under the Aviation category

in the Transport sector, Members have taken a significant number (16) of MFN exemptions for computer reservation systems (CRS); exemptions are also in place for a number of other aviation-related measures. In addition, a substantial number of Members have taken general MFN exemptions which may have an effect on the Tourism sector, most notably preferential access measures for natural persons.

#### Box IV.4. Proposed GATS Annex on Tourism

As part of the new round of services negotiations, three developing countries—the Dominican Republic, El Salvador and Honduras—have proposed to add a new Annex to the GATS, in order to help overcome the obstacles impeding tourism development.<sup>1</sup> The proposal addresses classification issues, anti-competitive practices, consumer safeguards, access to and use of tourism information, cooperation with other international organizations, and ensuring sustainable tourism development. The proposal is under discussion in the special sessions of the Services Council.

As noted above, the tourism sector is already relatively free of trade restrictions, and has the highest level of commitments. Nonetheless, the sector is narrowly defined in Members' GATS Schedules, and many believe this limited classification makes it difficult to address important issues affecting tourism, notably those related to air transport, financial services, etc.<sup>2</sup> For this reason, the Annex proposal uses the Tourism Satellite Account methodology, developed by the OECD, the World Tourism Organization and others, to provide a broader classification of tourism and tourism-related services.<sup>3</sup> A number of WTO Members are also concerned about rapid consolidation of the large tour operators, from the perspective of oligopoly behaviour and other anti-competitive practices, as well as conditions for access to global distribution systems (GDS) and other computerized networks used for supplying package tours, airline services, hotel services, car rentals, etc.

From a negotiating perspective, using a wider tourism definition may present some difficulties, especially regarding regulatory authority. For example, although a tourism bus might be used exclusively for supplying tourism services, in most cases regulations on bus services will be formulated in general terms, not with specific reference to tourism, and are likely to be under the jurisdiction of the transport ministry, not the tourism authorities. It is obviously desirable however that negotiators should have in mind the consequences for tourism, as a major revenue earner for so many of their countries, of restrictions in other sectors. The purpose of the approach suggested in the annex proposal is to ensure that this happens.

<sup>1</sup> This document (WT/GC/W/372, dated 14 October 1999), is available on the WTO Internet site.

<sup>2</sup> The classification issue is also addressed in the Secretariat background paper (S/C/W/51).

<sup>3</sup> In an effort to improve the definition and measurement of tourism, the "OECD Tourism Economic Accounts" were developed, and the International Forum on Tourism Statistics was established in 1993 by the OECD and Eurostat to further the exchange of views. Cooperation also occurs with the World Tourism Organisation.

## Appendix to Section IV

### List IV.1. WTO Secretariat services sectoral background papers

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Distribution Services	<i>S/C/W/37</i>
Construction and Related Engineering Services	<i>S/C/W/38</i>
Postal and Courier Services	<i>S/C/W/39</i>
Audiovisual Services	<i>S/C/W/40</i>
Legal Services	<i>S/C/W/43</i>
Architectural and Engineering Services	<i>S/C/W/44</i>
Computer and Related Services	<i>S/C/W/45</i>
Environmental Services	<i>S/C/W/46</i>
Advertising Services	<i>S/C/W/47</i>
Education Services	<i>S/C/W/49</i>
Health and Social Services	<i>S/C/W/50</i>
Tourism Services	<i>S/C/W/51</i>
Energy Services	<i>S/C/W/52</i>
Air Transport Services	<i>S/C/W/59</i>
Land Transport Services Part I - Generalities and Road Transport	<i>S/C/W/60</i>
Land Transport Services Part II - Rail Transport Services	<i>S/C/W/61</i>
Maritime Transport	<i>S/C/W/62</i>
Financial Services	<i>S/C/W/72</i>
Accountancy Services	<i>S/C/W/73</i>
Telecommunications Services	<i>S/C/W/74</i>

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## List IV.2. Services sectoral classification list

Sectors and sub-sectors	Corresponding CPC
<b>1. Business services</b>	<b>Section B</b>
A. <i>Professional Services</i>	
a. Legal Services	861
b. Accounting, auditing and bookkeeping services	862
c. Taxation Services	63
d. Architectural services	8671
e. Engineering services	8672
f. Integrated engineering services	8673
g. Urban planning and landscape architectural services	8674
h. Medical and dental services	9312
i. Veterinary services	932
j. Services provided by midwives, nurses, physiotherapists and para-medical personnel	93191
k. Other	
B. <i>Computer and Related Services</i>	
a. Consultancy services related to the installation of computer hardware	841
b. Software implementation services	842
c. Data processing services	843
d. Data base services	844
e. Other	845+849
C. <i>Research and Development Services</i>	
a. R&D services on natural sciences	851
b. R&D services on social sciences and humanities	852
c. Interdisciplinary R&D services	853
D. <i>Real Estate Services</i>	
a. Involving own or leased property	821
b. On a fee or contract basis	822
E. <i>Rental/Leasing Services without Operators</i>	
a. Relating to ships	83103
b. Relating to aircraft	83104
c. Relating to other transport equipment	83101+83102+83105
d. Relating to other machinery and equipment	83106-83109
e. Other	832
F. <i>Other Business Services</i>	
a. Advertising services	871
b. Market research and public opinion polling services	864
c. Management consulting service	865
d. Services related to man. consulting	866
e. Technical testing and analysis serv.	8676
f. Services incidental to agriculture, hunting and forestry	881
g. Services incidental to fishing	882
h. Services incidental to mining	883+5115
i. Services incidental to manufacturing	884+885 (except for 88442)
j. Services incidental to energy distribution	887
k. Placement and supply services of Personnel	872

## List IV.2. (cont'd.)

Sectors and sub-sectors	Corresponding CPC
l. Investigation and security	873
m. Related scientific and technical consulting services	8675
n. Maintenance and repair of equipment (not including maritime vessels, aircraft or other transport equipment)	633+ 8861-8866
o. Building-cleaning services	874
p. Photographic services	875
q. Packaging services	876
r. Printing, publishing	88442
s. Convention services	87909*
t. Other	8790
<b>2. Communication services</b>	
A. <i>Postal services</i>	7511
B. <i>Courier services</i>	7512
C. <i>Telecommunication services</i>	
a. Voice telephone services	7521
b. Packet-switched data transmission services	7523**
c. Circuit-switched data transmission services	7523**
d. Telex services	7523**
e. Telegraph services	7522
f. Facsimile services	7521**+7529**
g. Private leased circuit services	7522**+7523**
h. Electronic mail	7523**
i. Voice mail	7523**
j. On-line information and data base retrieval	7523**
k. Electronic data interchange (EDI)	7523**
l. Enhanced/value-added facsimile services, incl. store and forward, store and retrieve	7523**
m. code and protocol conversion	n.a.
n. on-line information and/or data processing (incl.transaction processing)	843**
o. other	
D. <i>Audiovisual services</i>	
a. Motion picture and video tape production and distribution services	9611
b. Motion picture projection service	9612
c. Radio and television services	9613
d. Radio and television transmission service	7524
e. Sound recording	n.a.
f. Other	
E. <i>Other</i>	
<b>3 Construction and related engineering services</b>	
A. <i>General construction work for buildings</i>	512
B. <i>General construction work for civil engineering</i>	513
C. <i>Installation and assembly work</i>	514+516

\*The (\*) indicates that the service specified is a component of a more aggregated CPC item specified elsewhere in this classification list.

\*\*The (\*\*) indicates that the service specified constitutes only a part of the total range of activities covered by the CPC concordance (e.g. voice mail is only a component of CPC item 7523).

## List IV.2. (cont'd.)

Sectors and sub-sectors	Corresponding CPC
D. <i>Building completion and finishing work</i>	517
E. <i>Other</i>	511+515+518
<b>4. Distribution services</b>	
A. <i>Commission agents' services</i>	621
B. <i>Wholesale trade services</i>	622
C. <i>Retailing services</i>	631+632 6111+6113+6121
D. <i>Franchising</i>	8929
E. <i>Other</i>	
<b>5. Educational services</b>	
A. <i>Primary education services</i>	921
B. <i>Secondary education services</i>	922
C. <i>Higher education services</i>	923
D. <i>Adult education</i>	924
E. <i>Other education services</i>	929
<b>6. Environmental services</b>	
A. <i>Sewage services</i>	9401
B. <i>Refuse disposal services</i>	9402
C. <i>Sanitation and similar services</i>	9403
D. <i>Other</i>	
<b>7. Financial services</b>	
A. <i>All insurance and insurance-related services</i>	812**
a. <i>Life, accident and health insurance services</i>	8121
b. <i>Non-life insurance services</i>	8129
c. <i>Reinsurance and retrocession</i>	81299*
d. <i>Services auxiliary to insurance (including broking and agency services)</i>	8140
B. <i>Banking and other financial services (excl. insurance)</i>	
a. <i>Acceptance of deposits and other repayable funds from the public</i>	81115-81119
b. <i>Lending of all types, incl., inter alia, consumer credit, mortgage credit, factoring and financing of commercial transaction</i>	8113

\*The (\*) indicates that the service specified is a component of a more aggregated CPC item specified elsewhere in this classification list.

\*\*The (\*\*) indicates that the service specified constitutes only a part of the total range of activities covered by the CPC concordance (e.g. voice mail is only a component of CPC item 7523).

## List IV.2. (cont'd.)

Sectors and sub-sectors	Corresponding CPC
c. Financial leasing	8112
d. All payment and money transmission services	81339**
e. Guarantees and commitments	81199**
f. Trading for own account or for account of customers, whether on an exchange, in an over-the-counter market or otherwise, the following:	
- money market instruments (cheques, bills, certificate of deposits, etc.)	81339**
- foreign exchange	81333
- derivative products incl., but not limited to, futures and options	81339**
- exchange rate and interest rate instruments incl. products such as swaps, forward rate agreements, etc.	81339**
- transferable securities	81321*
- other negotiable instruments and financial assets, incl. bullion	81339**
g. Participation in issues of all kinds of securities, incl. under-writing and placement as agent (whether publicly or privately) and provision of service related to such issues	8132
h. Money broking	81339**
i. Asset management, such as cash or portfolio management, all forms of collective investment management, pension fund management, custodial depository and trust services	8119+** 81323*
j. Settlement and clearing services for financial assets, incl. securities, derivative products, and other negotiable instruments	81339** or 81319**
k. Advisory and other auxiliary financial services on all the activities listed in Article 1B of MTN.TNC/W/50, incl. credit reference and analysis, investment and portfolio research and advice, advice on acquisitions and on corporate restructuring and strategy	8131 or 8133
l. Provision and transfer of financial information and financial data processing and related software by providers of other financial services	8131
C. <i>Other</i>	
<b>8. Health related and social services</b> (other than those listed under 1.A.h-j.)	
A. <i>Hospital services</i>	9311
B. <i>Other Human Health Services</i>	9319 (other than 93191)
C. <i>Social Services</i>	933
D. <i>Other</i>	
<b>9. Tourism and travel related services</b>	
A. <i>Hotels and restaurants (incl. catering)</i>	641-643

\*The (\*) indicates that the service specified is a component of a more aggregated CPC item specified elsewhere in this classification list.

\*\*The (\*\*) indicates that the service specified constitutes only a part of the total range of activities covered by the CPC concordance (e.g. voice mail is only a component of CPC item 7523).

## List IV.2. (cont'd.)

Sectors and sub-sectors	Corresponding CPC
B. <i>Travel agencies and tour operators services</i>	7471
C. <i>Tourist guides services</i>	7472
D. <i>Other</i>	
<b>10. Recreational, cultural and sporting services</b> (other than audiovisual services)	
A. <i>Entertainment services (including theatre, live bands and circus services)</i>	9619
B. <i>News agency services</i>	962
C. <i>Libraries, archives, museums and other cultural services</i>	963
D. <i>Sporting and other recreational services</i>	964
E. <i>Other</i>	
<b>11. Transport services</b>	
A. <i>Maritime Transport Services</i>	
a. Passenger transportation	7211
b. Freight transportation	7212
c. Rental of vessels with crew	7213
d. Maintenance and repair of vessels	8868**
e. Pushing and towing services	214
f. Supporting services for maritime transport	745**
B. <i>Internal Waterways Transport</i>	
a. Passenger transportation	7221
b. Freight transportation	7222
c. Rental of vessels with crew	7223
d. Maintenance and repair of vessels	8868**
e. Pushing and towing services	7224
f. Supporting services for internal waterway transport	745**
C. <i>Air Transport Services</i>	
a. Passenger transportation	731
b. Freight transportation	732
c. Rental of aircraft with crew	734
d. Maintenance and repair of aircraft	8868**
e. Supporting services for air transport	746
D. <i>Space Transport</i>	733
E. <i>Rail Transport Services</i>	
a. Passenger transportation	7111
b. Freight transportation	7112
c. Pushing and towing services	7113
d. Maintenance and repair of rail transport equipment	8868**
e. Supporting services for rail transport services	743

\*The (\*) indicates that the service specified is a component of a more aggregated CPC item specified elsewhere in this classification list.

\*\*The (\*\*) indicates that the service specified constitutes only a part of the total range of activities covered by the CPC concordance (e.g. voice mail is only a component of CPC item 7523).

## List IV.2 (cont'd.)

Sectors and sub-sectors	Corresponding CPC
F. <i>Road Transport Services</i>	
a. Passenger transportation	7121+7122
b. Freight transportation	7123
c. Rental of commercial vehicles with operator	7124
d. Maintenance and repair of road transport equipment	6112+8867
e. Supporting services for road transport services	744
G. <i>Pipeline Transport</i>	
a. Transportation of fuels	7131
b. Transportation of other goods	7139
H. <i>Services auxiliary to all modes of transport</i>	
a. Cargo-handling services	741
b. Storage and warehouse services	742
c. Freight transport agency services	748
d. Other	749
I. Other Transport Services	
<b>12. Other services not included elsewhere</b>	<b>95+97+98+99</b>