WTO
Trade in Services Division

31 January 2013

THE GENERAL AGREEMENT ON TRADE IN SERVICES

AN INTRODUCTION

The General Agreement on Trade in Services (GATS) is a relatively new agreement. It entered into force in January 1995 as a result of the Uruguay Round negotiations to provide for the extension of the multilateral trading system to services.

All Members of the World Trade Organization are signatories to the GATS and have to assume the resulting obligations. By the same token, they are committed, pursuant to Article XIX of the GATS, to entering into subsequent rounds of trade liberalizing negotiations. The first such Round started in January 2000 and was integrated later into the wider context of the Doha Development Agenda (DDA). So, regardless of their countries' policy stances, trade officials need to be familiar with this Agreement and its implications for trade and development. These implications may be far more significant than available trade data suggest.

Hopefully, this introduction will contribute to a better understanding of the GATS and the challenges and opportunities associated with commitments under the Agreement. For users who are familiar with the General Agreement on Tariffs and Trade (GATT) and the underlying concepts, similarities and differences will be pointed out where relevant.

The following text is based on a more comprehensive training module on the GATS which is available on the WTO website (www.wto.org). An Annex contains a glossary of the most frequently used terms, for ease of reference.

1. BASIC PURPOSE AND CONCEPTS

1.1 Historical Background

The General Agreement on Trade in Services (GATS) is the first multilateral trade agreement to cover trade in services. Its creation was one of the major achievements of the Uruguay Round of trade negotiations, from 1986 to 1993. This was almost half a century after the entry into force of the General Agreement on Tariffs and Trade (GATT) of 1947, the GATS' counterpart in merchandise trade.

The need for a trade agreement in services has long been questioned. Large segments of the services economy, from hotels and restaurants to personal services, have traditionally been considered as domestic activities that do not lend themselves to the application of trade policy concepts and instruments. Other sectors, from rail transport to telecommunications, have been viewed as classical domains of government ownership and control, given their infrastructural importance and the perceived existence, in some cases, of natural monopoly situations. A third important group of sectors, including health, education and basic insurance services, are considered in many countries as governmental responsibilities, reflecting their importance for social integration and regional cohesion, which should be tightly regulated and not be left to the rough and tumble of markets.

Nevertheless, some services sectors, in particular international finance and maritime transport, have been largely open for centuries - as the natural complements to merchandise trade. Other large sectors have undergone fundamental technical and regulatory changes in recent decades, opening them to private commercial participation and reducing, even eliminating, existing barriers to entry. The emergence of the Internet has helped to create a range of internationally tradable product variants - from e-banking to tele-health and distance learning - that were unknown only two decades ago, and has removed distance-related barriers to trade that had disadvantaged suppliers and users in remote locations (relevant areas include professional services such as software development, consultancy and advisory services, etc.). A growing number of governments has gradually exposed previous monopoly domains to competition; telecommunication is a case in point.

This reflects a basic change in attitudes. The traditional (monopoly) framework of public service increasingly proved inappropriate for operating some of the most dynamic and innovative segments of the economy, and governments apparently lacked the entrepreneurial spirit and financial resources to exploit fully existing growth potential.

Services have recently become the most dynamic segment of international trade. Since 1980, world services trade has grown faster, albeit from a relatively modest basis, than merchandise flows. Defying wide-spread misconceptions, developing countries have strongly participated in that growth. Whereas their share of world services exports, on a Balance of Payments (BOP) basis, amounted to about 20% in 1980, it had risen to 24.5% by 2000 to reach 31% in 2010. And this share would be far higher, in the order of 50%, if world trade was measured in net terms, disregarding imported content and considering only the value added (and traded) by individual economies.

Given the continued momentum of world services trade, as a result, not least, of the proliferation of international supply chains, the need for internationally recognized rules became increasingly evident.

1.2 Basic Purpose

As stated in its Preamble, the GATS is intended to contribute to trade expansion "under conditions of transparency and progressive liberalization and as a means of promoting the economic growth of all trading partners and the development of developing countries". Trade expansion is thus not seen as an end in itself, as some critical voices allege, but as an instrument to promote growth and development.

The link with development is further reinforced by explicit references in the Preamble to the objective of increasing participation of developing countries in services trade and to the special economic situation and the development, trade and financial needs of the least-developed countries.

The GATS' contribution to world services trade rests on three main pillars: (a) ensuring increased transparency and predictability of relevant rules and regulations, (b) providing a common framework of disciplines governing international transactions, and (c) promoting progressive liberalization through successive rounds of negotiations. Within the framework of the Agreement, the latter concept is tantamount to improving market access and extending national treatment to foreign services and service suppliers across an increasing range of sectors. It does not, however, entail deregulation. Rather, the Agreement explicitly recognizes governments' right to regulate, and introduce new regulations, to meet national policy objectives and the particular need of developing countries to exercise this right.

1.3 Definition of Services Trade and Modes of Supply

The definition of services trade under the GATS is four-pronged, depending on the territorial presence of the supplier and the consumer at the time of the transaction. Pursuant to Article I:2, the GATS covers services supplied

(a) from the territory of one Member into the territory of any other Member (Mode 1 - Cross-border trade);

(b) in the territory of one Member to the service consumer of any other Member (Mode 2 – Consumption abroad);

(c) by a service supplier of one Member, through commercial presence, in the territory of any other Member (Mode 3 - Commercial presence); and

(d) by a service supplier of one Member, through the presence of natural persons of a Member in the territory of any other Member (Mode 4 - Presence of natural persons).

Box A gives examples of the four modes of supply.

Box A: Examples of the Modes of Supply (from the perspective of an "importing" Member A)

Mode 1: Cross-border
Users in A receive services from abroad through the telecommunications or postal network. Such supplies may include consultancy or market research reports, tele-medical advice, distance training, or architectural drawings.

Mode 2: Consumption abroad
Nationals of A have moved abroad as tourists, students, or patients to consume the respective services.

Mode 3: Commercial presence
The service is provided within A by a locally-established affiliate, subsidiary, or office of a foreign-owned and -controlled company (bank, hotel group, construction company, etc.)

Mode 4: Movement of natural persons
A foreign national provides services within A as an independent supplier (e.g., consultant, health worker) or employee of a foreign service firm (e.g. consultancy, hospital, construction company).

1.4 Scope and Application

Article I:1 stipulates that the GATS applies to measures by Members affecting trade in services. It does not matter in this context whether a measure is taken at central, regional or local government level, or by non-governmental bodies exercising delegated powers. The relevant definition covers any measure, "whether in the form of a law, regulation, rule, procedure, decision, administrative action, or any other form, ... in respect of:

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

This definition is significantly broader than what governmental officials in trade-related areas may expect. It is thus important to familiarize staff at all levels with basic concepts of the GATS to prevent them from acting, unintentionally, in contravention of obligations under the Agreement and enable them to negotiate effectively with trading partners.

For purposes of structuring their commitments, WTO Member have generally used a classification system comprised of 12 core service sectors (document MTN.GNS/W/120):

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

These sectors are further subdivided into a total of some 160 sub-sectors. Under this classification system, any service sector, or segments thereof, may be included in a Member's schedule of commitments with specific market access and national treatment obligations. Each WTO Member has submitted such a schedule as required by the Agreement (Article XX:1).

There is only one sector-specific exception to the Agreement's otherwise comprehensive coverage. Under the GATS Annex on Air Transport Services, only measures affecting aircraft repair and maintenance services, the selling and marketing of air transport services, and computer reservation system (CRS) services have been included. Measures affecting air traffic rights and directly-related services are excluded. This exclusion is subject to periodic review.

Another blanket exemption applies to "services supplied in the exercise of governmental authority" (Article I:3b). The relevant definition specifies that these services are "supplied neither on a commercial basis, nor in competition with one or more service suppliers" (Article I:3c). Typical examples may include police, fire protection, monetary policy operations, mandatory social security systems, and tax and customs administration.

1.5 General Transparency and Other "Good Governance" Obligations

Sufficient information about potentially relevant rules and regulations is critical to the effective implementation and operation of an Agreement. Article III ensures that Members publish promptly all measures pertaining to or affecting the operation of the GATS. Moreover, there is an obligation to notify the Council for Trade in Services at least annually of all legal or regulatory changes that significantly affect trade in sectors where specific commitments have been made. Members are also required to establish enquiry points which provide specific information to other Members upon request. However, there is no requirement to disclose confidential information (Article III*bis*).

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

1.6 Most-Favoured-Nation Treatment

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

In the context of the GATS, the MFN obligation (Article II) is applicable to any measure that affects trade in services in any sector falling under the Agreement, whether specific commitments have been undertaken or not. Exemptions could have been sought at the time of entry into force of the Agreement (for acceding countries: date of acceptance). They are contained in country-specific lists, and their duration must not exceed ten years in principle.

1.7 Conditional Granting of Market Access and National Treatment

The GATS is a very flexible agreement that allows each Member to adjust the conditions of market entry and participation to its sector-specific objectives and constraints. Two sets of legal obligations – governing, respectively, Market Access and National Treatment – are relevant in this context. As already noted, Members are free to designate the sectors, and list them in their schedules of commitments, in which they assume such obligations with regard to the four modes of supply. Moreover, limitations may be attached to commitments in order to reserve the right to operate measures inconsistent with full market access and/or national treatment.

The market access provisions of GATS, laid down in Article XVI, cover six types of restrictions that must not be maintained in the absence of limitations. The restrictions relate to

(a) the number of service suppliers

(b) the value of service transactions or assets

(c) the number of operations or quantity of output

(d) the number of natural persons supplying a service

(e) the type of legal entity or joint venture

(f) the participation of foreign capital

These measures, except for (e) and (f), are not necessarily discriminatory, i.e. they may affect national as well as foreign services or service suppliers. The operation of the quota-type measures falling under (a) to (d) may be made contingent on an economic needs tests (ENT).

National treatment (Article XVII) implies the absence of all discriminatory measures that may modify the conditions of competition to the detriment of foreign services or service suppliers. Again, limitations may provide cover for inconsistent measures, such as discriminatory subsidies and tax measures, residency requirements, etc. It is for the individual Member to ensure that all potentially relevant measures are listed; Article XVII does not contain a typology comparable to Article XVI. (Examples of frequently scheduled national treatment restrictions are given in Attachment 1 to document S/L/92.) The national treatment obligation applies regardless of whether or not foreign services and suppliers are treated in a formally identical way to their national counterpart. What matters is that they are granted equal opportunities to compete.

The purpose of commitments, comparable to tariff concessions under GATT, is to ensure stability and predictability of trading conditions. However, commitments are not a straitjacket. They may be renegotiated in exchange for compensation of affected trading partners (Article XXI); and there are special provisions that allow for flexible responses, despite existing commitments, in specified circumstances. Under Article XIV, for example, Members may take measures necessary for certain overriding policy concerns, including the protection of public morals or the protection of human, animal or plant life or health. However, such measures must not lead to arbitrary or unjustifiable discrimination or constitute a disguised restriction to trade. If essential security interests are at stake, Article XIV*bis* provides cover. Article XII allows for the introduction of temporary restrictions to safeguard the balance-of-payments; and a so-called prudential carve-out in financial services permits Members to take measures in order, *inter alia*, to ensure the integrity and stability of their financial system (Annex on Financial Services, para. 2).

Commitments must not necessarily be complied with from the date of entry into force of a schedule. Rather, Members may specify in relevant part(s) of their schedule a timeframe for implementation. Such "phase-in commitments" are as legally valid as any other commitment.

2. MAIN BUILDING BLOCKS: AGREEMENT, ANNEXES AND SCHEDULES

2.1 Unconditional General Obligations

Each Member has to respect certain general obligations that apply regardless of the existence of specific commitments. These include MFN treatment (Article II), some basic transparency provisions (Article III), the availability of legal remedies (Article VI:2), compliance of monopolies and exclusive providers with the MFN obligation (Article VIII:1), consultations on business practices (Article IX), and consultations on subsidies that affect trade (Article XV:2). In several cases, the same Article contains both unconditional and conditional obligations.

Most-Favoured-Nation Treatment

As already mentioned before, the MFN principle applies across all sectors and all Members. However, under the Annex on Article II Exemptions, there is a possibility for Members, at the time of entry into force of the Agreement (or date of accession), to seek exemptions not exceeding a period of ten years in principle. Some 90 Members currently maintain such exemptions, which are mostly intended to cover trade preferences on a sectoral or modal basis between two or more Members. The sectors predominantly concerned are road transport and audiovisual services, followed by maritime transport and banking services.

The Annex on Article II Exemptions provides for a review of all existing measures that had been granted for periods of more than five years. The review is intended to examine whether the conditions that led to the creation of the exemptions still prevail. Three reviews have been conducted thus far, and the fourth one will be launched no later than the end of 2016.

More importantly, the Annex also requires that MFN exemptions be subject to negotiation in any subsequent trade round. Concerning the current Round, the Hong Kong Ministerial Declaration of December 2005 commits Members to removing or reducing their exemptions substantially and to clarifying the scope and duration of remaining measures.

Transparency

Under Article III, each Member is required to publish promptly "all relevant measures of general application" that affect operation of the Agreement. Members must also notify the Council for Trade in Services of new or changed laws, regulations or administrative guidelines that significantly affect trade in sectors subject to Specific Commitments. These transparency obligations are particularly relevant in the services area where the role of regulation – as a trade protective instrument and/or as a domestic policy tool – tends to feature more prominently than in most other segments of the economy.

Members also have a general obligation to establish an enquiry point to respond to requests from other Members. Moreover, pursuant to Article IV:2, developed countries (and other Members to the extent possible) are to establish contact points to which developing country service suppliers can turn for relevant information.

Domestic Regulation

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

Monopolies

Article VIII:1 requires Members to ensure that monopolies or exclusive service providers do not act in a manner inconsistent with the MFN obligation and commitments. Article XXVIII(h) specifies, in turn, that a "monopoly supplier" is an entity that has been established by the Member concerned, formally or in effect, as the sole supplier of a service.

Business Practices

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

Subsidies

Members that consider themselves adversely affected by subsidies granted by another Member may request consultations under Article XV:2. The latter Member is called upon to give "sympathetic consideration" to such requests.

2.2 Conditional General Obligations

A second type of general obligations applies only to sectors listed in a Member's schedule of commitments.

Domestic Regulation

Pursuant to Article VI:1, measures of general application are to be administered "in a reasonable, objective and impartial manner". If the supply of a scheduled service is subject to authorization, Members are required to decide on applications within a reasonable period of time (Article VI:3).

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

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

Monopolies

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

In addition, Article VIII:4 requires Members to report the formation of new monopolies to the Council for Trade in Services if the relevant sector is subject to specific commitments. The provisions of Article XXI (Modification of Schedules, see following section) apply.

Payments and Transfers

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

2.3 Other General Provisions

Economic Integration Agreements

Like GATT (Article XXIV) in merchandise trade, the GATS also has special provisions to exempt countries participating in integration agreements from the MFN requirement. Article V permits any WTO Member to enter into agreements to further liberalize trade in services on a bilateral or plurilateral basis, provided the agreement has "substantial sectoral coverage" and removes substantially all discrimination between participants. Recognizing that such agreements may form part of a wider process of economic integration well beyond services trade, the Article allows for the above conditions to be applied in this perspective. It also provides for flexibility in the event of developing countries being parties to such agreements.

While Economic Integration Agreements must be designed to facilitate trade among participants, Article V also requires that the overall level of barriers is not raised vis-à-vis non-participants in the sectors covered. Moreover, should parties to an agreement intend to withdraw or modify the commitments they had scheduled under the GATS, appropriate compensation must be negotiated with the Members affected. Such situations may arise, for example, if the new common regime in a sector is modelled on the previous regime of a more restrictive participating country.

Article V*bis* relates to, and provides similar legal cover for, agreements on labour markets integration. The main condition is that citizens of the countries involved are exempt from residency and work permit requirements.

Recognition

Notwithstanding the MFN requirement, Article VII of the GATS provides scope for Members, when applying standards or granting licenses, certificates, etc., to recognize education and other qualifications a supplier has obtained abroad. This may be done on an autonomous basis or through agreement with the Member concerned. However, recognition must not be exclusive, i.e. other Members are to be afforded an opportunity to negotiate their accession to agreements or, in the event of autonomous recognition, to demonstrate that their requirements should be recognized as well. Article VII:3 requires that recognition not be applied as a means of discrimination between trading partners or as a disguised trade restriction.

Exceptions

Part II of the GATS (General Obligations and Disciplines) further contains exception clauses for particular situations. Regardless of relevant GATS obligations, Members are allowed in specified circumstances to restrict trade in the event of serious balance-of-payments difficulties (Article XII) or of health and other public policy concerns (Article XIV), or to pursue essential security interests (Article XIV*bis*).

2.4 Specific Commitments

In addition to respecting the general obligations referred to above, each Member is required to assume specific commitments relating to market access (Article XVI) and national treatment (Article XVII) in designated sectors. The relevant sectors as well as any departures from the relevant obligations of Articles XVI and XVII are to be specified in the Member's Schedule of Commitments.

Article XVI (Market Access) and XVII (National Treatment) commit Members to giving no less favourable treatment to foreign services and service suppliers than provided for in the relevant columns of their Schedule. Commitments thus guarantee minimum levels of treatment, but do not prevent Members from being more open (or less discriminatory) in practice; the MFN requirement must be respected, of course.

At first sight, it may be difficult to understand why the national treatment principle under the GATS is far more limited in scope - confined to scheduled services and subject to possible limitations – than under the GATT where it applies across the board. The reason lies in the particular nature of services trade. Universal national treatment for goods does not necessarily imply free trade. Imports can still be controlled by tariffs which, in turn, may be bound in the country's tariff schedule. By contrast, given the impossibility of operating tariff-type measures across large segments of services trade, the general extension of national treatment could in practice be tantamount to providing free access. And virtually no Member may be ready to fully liberalize services trade across all sectors and modes of supply.

Additional Commitments

Members may also undertake additional commitments with respect to measures not falling under the market access and national treatment provisions of the Agreement. Such commitments may relate to the use of standards, qualifications or licenses (Article XVIII). Additional commitments are particularly frequent in the telecommunications sector where they have been used by some 70 Members to incorporate into their schedules certain competition and regulatory (self-)disciplines. These disciplines are laid out in a so-called Reference Paper, which an informal grouping of Members had developed during the extended negotiations in this sector.

Content of Schedules

Article XX requires each Member to submit a schedule of commitments, but does not prescribe the sector scope or level of liberalization. Thus, while some Members have limited their commitments to less than a handful of sectors, others have listed several dozens.

Further, the Article specifies some core elements to be covered in each Member's schedule. It also provides that the schedules form "an integral part" of the GATS itself.

Modification of Schedules

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

Should no agreement be reached, Article XXI allows for arbitration. If the arbitrator finds that compensation is due, the proposed changes in commitments must not be put into effect until the compensatory adjustments are made. Otherwise, in the event that the arbitrator's findings are ignored, affected countries have the right to retaliate by withdrawing commitments.

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

2.5 How Schedules are Structured

As noted above, the obligations of any WTO Member under GATS consist of the provisions of the Agreement and its Annexes as well as the specific commitments contained in the national schedule. The schedule is a relatively complex document, more difficult to read than a tariff schedule under GATT. While the latter, in its simplest form, lists one tariff rate per product, a schedule of commitments contains at least eight entries per sector: the commitments on market access and national treatment with regard to the four modes of supply.

The services schedule of "Arcadia", an imaginary WTO Member, displays the normal four-column format (Box B). While the first column specifies the sector or sub-sector concerned, the second column sets out any limitations on market access that fall within the six types of restrictions mentioned in Article XVI:2. The third column contains any limitations that Arcadia may want to place, in accordance with Article XVII, on national treatment. A final column provides the

opportunity to undertake additional commitments as envisaged in Article XVIII; it is empty in this case.

Any of the entries under market access or national treatment may vary within a spectrum whose opposing ends are full commitments without limitation ("none") and full discretion to apply any measure falling under the relevant Article ("unbound"). The schedule is divided into two parts. While Part I lists "horizontal commitments", i.e. entries that apply across all sectors that have been scheduled, Part II sets out commitments on a sector-by-sector basis.

Arcadia's horizontal commitments under mode 3, national treatment, reserve the right to deny foreign land ownership. Under mode 4, Arcadia would be able to prevent any foreigner from entering its territory to supply services, except for the specified groups of persons. Within the retailing sector, whose definitional scope is further clarified by reference to the United Nations provisional Central Product Classification (CPC), commitments vary widely across modes. Most liberal are those for mode 2 (consumption abroad) where Arcadia is bound not to take any measure under either Article XVI or XVII that would prevent or discourage its residents from shopping abroad.

Entries into schedules should remain confined to measures incompatible with either the market access or national treatment provisions of the GATS and to any additional commitments a Member may want to undertake under Article XVIII. Schedules would not provide legal cover for measures inconsistent with other provisions of the Agreement, including the MFN requirement under Article II or the obligation under Article VI:1 to reasonable, objective and impartial administration of measures of general application. MFN-inconsistent measures, that have not been included in the relevant list, need to be rescinded and the same applies to any inconsistencies with Article VI. The trade-impeding effects associated with non-discriminatory domestic regulation – qualification requirements for teachers, lawyers, or accountants; minimum capital requirements for banks; mandatory liability insurance for doctors; etc. – do not call for scheduling *per se*. As noted before, the Agreement clearly distinguishes between, on the one hand, trade liberalization under specific commitments and, on the other hand, domestic regulation for quality and other legitimate policy purposes. By the same token, there is no need to schedule access restrictions, such as sales bans on arms or pornographic material and the like, that fall under the General Exceptions of Article XIV or prudential measures aimed to ensure the stability and integrity of the financial services sector.

Box B: Sample Schedule of Commitments: Arcadia

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

Sector or sub-sector	Limitations on market access	Limitations on national treatment	Additional commitments
I. HORIZONTAL COMMITMENTS			
ALL SECTORS INCLUDED IN THIS SCHEDULE	(4) Unbound, other than for (a) temporary presence, as intra-corporate transferees, of essential senior executives and specialists and (b) presence for up to 90 days of representatives of a service provider to negotiate sales of services.	(3) Authorization is required for acquisition of land by foreigners.	
II. SECTOR-SPECIFIC COMMITMENTS			
4. DISTRIBUTION SERVICES C. Retailing services (CPC 631, 632)	(1) Unbound (except for mail order: none). (2) None. (3) Foreign equity participation limited to 51 per cent. (4) Unbound, except as indicated in horizontal section.	(1) Unbound (except for mail order: none). (2) None. (3) Investment grants are available only to companies controlled by Arcadian nationals. (4) Unbound.	

3. A CLOSER LOOK AT DOMESTIC REGULATION

3.1 Purpose and Effects of Regulation

As noted before, the GATS makes a clear distinction between domestic regulation and measures subject to trade liberalization. On the one hand, the Agreement explicitly recognizes the continued right (and, possibly, the need) of Members to enforce domestic policy objectives through regulation. On the other hand, it promotes the objective of progressive liberalization, consisting of expanding and/or improving existing commitments on market access and national treatment.

Effective regulation – or re-regulation – can be a pre-condition for liberalization to produce the expected efficiency gains without compromising on quality and other policy objectives. For example, the opening of a hitherto restricted market may need to be accompanied by the introduction of new licensing mechanisms and public service obligations for quality and social policy reasons. Since many services contracts involve customized, not yet existing products (medical intervention, legal advice, etc.), the need for regulatory protection is particularly evident.

It is thus widely understood that regulatory measures are necessary to correct market distortions, minimise externalities and information problems, ensure appropriate access to and supply of essential services, and address income-related and other inequalities.

Examples of public policy objectives that might require regulatory support:

- Equitable access, regardless of income or location, to a given service
- Consumer protection (including through information and control)
- Job creation in economically depressed regions
- Labour market integration of disadvantaged persons
- Reduction of environmental impacts
- Macroeconomic stability
- Avoidance of market dominance and anti-competitive conduct
- Avoidance of tax evasion, fraud, etc.

Governments remain free under the GATS to pursue such policy objectives even in sectors where they have undertaken full commitments on market access and national treatment. Nevertheless, while exercising their right to regulate, it may be in Members' common interest to reduce excessive diversity, simplify/clarify cumbersome or opaque criteria, and curtail administrative "red-tape".[1]

3.2 Disciplines on Domestic Regulation

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

The disciplines envisaged under Article VI:4 are intended to ensure that domestic regulations are, *inter alia*:

a) based on objective and transparent criteria, such as competence and the ability to supply the service;

[1] For a broader discussion see document S/WPDR/W/48 ('Regulatory Issues in Sectors and Modes of Supply').

b) not more burdensome than necessary to ensure the quality of the service;

c) in the case of licensing procedures, not in themselves a restriction on the supply of the service.

While it is difficult to predict the outcome of current work, there is already some sort of precedent which may provide guidance: The Disciplines on Domestic Regulation in the Accountancy Sector (document S/L/64), approved by the Services Council in December 1998. The relevant Council Decision (document S/L/63) provides that the "accountancy disciplines" are applicable only to Members who have scheduled specific commitments on accountancy. The disciplines are to be integrated into the GATS, together with any new results the WPDR may achieve in the interim, at the end of the current Round. A core feature of the disciplines is their focus on (non-discriminatory) regulations that are not subject to scheduling under Articles XVI and XVII.

Measures in scheduled sectors that entail restrictions or discriminations in the sense of Articles XVI or XVII would need to be covered by limitations.

Pending the entry into force of the disciplines under Article VI:4, Members are required not to apply their domestic regulations in a way that would: nullify or impair specific commitments; be incompatible with the three above criteria; and could not have reasonably been expected at the time when the relevant commitments were made.

4. OTHER RULE-MAKING AREAS

Apart from disciplines on domestic regulations, the GATS contains additional negotiating mandates in three rule-making areas: emergency safeguards (Article X), government procurement (Article XIII), and subsidies (Article XV). The negotiations are conducted in the Working Party on GATS Rules (WPGR). Although relevant work started relatively soon after the Uruguay Round, progress in all three areas has remained limited to date.

Emergency Safeguards

Emergency safeguards in services are intended by the proponents to allow for the temporary suspension of the commitments that Members may have assumed in individual sectors. The relevant scenario, inspired by the mechanism in goods trade (Agreement on Safeguards), may consist of an unforeseen surge in imports that causes, or threatens to cause, serious injury to domestic suppliers of like or directly competitive services. Any such mechanism, should it be agreed to by Members, would need to be based on the principle of non-discrimination. It would complement existing provisions under the GATS that already allow for temporary or permanent departures from general obligations or specific commitments, such as Article XII if a Member experiences serious balance of payments and external financial difficulties; Article XIV in the event of overriding policy concerns, including protection of life and health or of public morals; and Article XXI if a Member intends to withdraw or modify a commitment on a permanent basis.

There are two main schools of thought among Members. One group is not convinced that such a mechanism is desirable, given the scheduling flexibility under the GATS and the risk of undermining the stability of existing commitments through new emergency provisions. The sceptics also point to the scarcity of reliable trade and production data in many sectors, and the technical complexities associated with the multi-modal structure of the GATS. In turn, the proponents expect that the availability of safeguards in the event of unforeseeable market disruptions would encourage more liberal commitments in services negotiations. In their view, abuse could be avoided through strict procedural disciplines, and data problems should not be exaggerated, given the existence in many sectors of professional associations, regulators and licensing bodies that compile relevant information.

Government Procurement

The share of government purchases of services – from postal and communication services, to construction, transport and financial services – is significant in many markets, and so are the trade effects that may result from access restrictions. The GATS imposes no effective disciplines, however, on governments' use of such restrictions.

Article XIII provides that the MFN obligation (Article II) and any existing commitments on market access and national treatment (Articles XVI and XVII) do not apply to the procurement of services for governmental purposes. It is thus for the individual Member to balance the fiscal cost and structural inefficiencies that may arise from purchasing restrictions and/or preferences with their expected contributions to whatever policy objectives. While Article XIII provides for negotiations to be conducted under the GATS, it does not offer further guidance.

The only current procurement disciplines under WTO provisions are those contained in the Plurilateral Agreement on Government Procurement, whose scope is confined to a limited number of mostly economically advanced Members. The Agreement applies to purchases of goods and services and provides for transparency and, in specifically listed sectors, non-discrimination in the award process among signatories.

Subsidies

Like other measures affecting trade in services, subsidies are already subject to the GATS. The unconditional general obligations, including MFN treatment, thus apply. In scheduled sectors, these are complemented by the national treatment obligation, subject to any limitations that may have been inscribed, and a variety of conditional obligations. Article XV nevertheless provides for negotiations on disciplines that may be necessary to avoid trade-distortive effects. The appropriateness of countervailing measures shall also be addressed.

The WTO Agreement on Subsidies and Countervailing Measures Agreement was developed for goods trade. In services, Governments may want to retain broader scope for granting subsidies in the pursuit of social, cultural, or developmental objectives. While Article XV:1 of the GATS also provides for an information exchange on subsidies, only limited information has been submitted to date and Members are at pains to agree on the future course of the negotiations.

5. COMPLEXITY AS A CHALLENGE

The GATS is structurally more complex than the GATT. Among the most conspicuous differences are the existence of four modes of supply and of two negotiable parameters, market access and national treatment, determining the conditions of market entry and participation. This relatively complex structure of the Agreement is intended to enable Members to accommodate sector- or mode-specific constraints they may encounter in the scheduling process and to progressively liberalize their services trade in line with their national policy objectives and levels of development. Complexity can thus be viewed, in part, as a precondition for effectiveness and flexibility.

Nevertheless, national administrations, in particular in small developing countries, may harbour doubts. From their perspective, the complexity of the Agreement implies a formidable negotiating challenge. It not only complicates internal decision-making and consultation procedures with other Ministries and the private sector, but commands more attention (and resources) in the interpretation of requests received from, and the preparation of offers to be send to, trading partners.

The Agreement seeks to address such concerns. First, it expressly recognizes the situation of developing countries and provides individual Members with "appropriate flexibility" for opening fewer sectors and liberalizing fewer types of transactions in line with their development situation. While these provisions in Article XIX:2 may have been intended mainly to protect developing

countries from overly ambitious commitments that, especially in the absence of appropriate regulatory frameworks, may cause excessive adjustment pains, they also protect from undue negotiating pressure across too wide a range of sectors and policy areas. Moreover, Article XXV of the GATS expressly recognizes the need for the WTO Secretariat to provide technical assistance to developing countries. The Article needs to be read in conjunction with the emphasis repeatedly placed by Members on the role of technical cooperation and capacity building, including in the context of the Doha and the Hong Kong Ministerial Declarations.

6. TRADE LIBERALIZATION UNDER THE GATS: FROM DOHA TO HONG KONG TO …?

It is commonly accepted that, as far as services are concerned, the Uruguay Round marked a breakthrough insofar as it resulted in the creation of a completely new agreement. However, this also implied that Members' attention was almost entirely absorbed by definitional, structural and institutional issues, and little time and resources were left to negotiate liberalizing commitments within the newly created framework. In turn, this might have prompted the 'founding fathers (and mothers)' to inscribe a trade-liberalizing mandate directly into the GATS.

Pursuant to Article XIX:1, WTO Members are committed to enter into successive rounds of negotiations, the first of which was to start "not later than five years from the date of entry into force of the WTO Agreement". Accordingly, the negotiations commenced, with relatively little impetus, shortly after an inconclusive WTO Ministerial Meeting in Seattle, in January 2000. Guidelines and Procedures for the services negotiations, a two-page document (S/L/93), were approved only in March 2001, and some months later the negotiations were integrated into the wider context of the Doha Development Agenda (DDA). Over the years, 71 initial and 31 revised offers were submitted (one each for EC 25). Their content, in terms of new sector inclusions and improved levels of access, remained quite shallow, however, due in part to frictions in other areas, in particular agricultural and non-agricultural market access (NAMA).

The Hong Kong Ministerial Declaration of December 2005 reaffirmed key principles of the services negotiations and called on Members to intensify these in accordance with the objectives, approaches and timelines set out in an Annex (Annex C). It contained a more detailed and ambitious set of objectives than any previous such document and envisaged that the negotiations, hitherto conducted predominantly in a bilateral request/offer mode, be pursued on a plurilateral basis as well. The Declaration also acknowledged that LDCs are not expected to undertake new commitments in this Round.

In July 2008, interested Members met for an informal 'Signalling Conference' during a 'Mini-Ministerial' in Geneva to foreshadow what they might be able to come up with in the future course of the services negotiations. Based on subsequent statements and press reports, it appears that participants were generally satisfied with the indications provided. Nevertheless, the Mini-Ministerial foundered over disagreement on certain elements of the draft agricultural modalities.

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

The concluding statement of the Eighth Ministerial Conference, in December 2011, frankly acknowledged that the negotiations were "at an impasse". To facilitate swifter progress, Members were called upon "to more fully explore different negotiating approaches while respecting the principles of transparency and inclusiveness". At least one group of Members has since sought to

explore new avenues, regularly reporting back at meetings of the Council for Trade in Services. At the time of writing, discussions within the group were still ongoing.

In addition, acting upon previous declarations, Members decided on a waiver that allows for the extension of preferential treatment to services and service suppliers of least-developed countries (WT/L/847). The focus is on measures falling under Article XVI (market access), while other measures would need to be approved by the Council for Trade in Services.

Annex
Glossary

Term/Acronym	Meaning
BOP	Balance of Payments
CPC	United Nations Central Product Classification
CRS	Computer and related Services
CTS	Council for Trade in Services
DDA	Doha Development Agenda
DR	Domestic Regulation
DSU	Dispute Settlement Understanding
EIA	Economic Integration Agreement
ENT	Economic Needs Tests
FTA	Free Trade Agreement
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
LDCs	Least-developed countries
MA	Market Access
MFN	Most-Favoured Nation
MRA	Mutual Recognition Agreement
NT	National Treatment
PTA	Preferential Trade Agreement
Reference Paper	Document on regulatory principles in telecommunications
RTA	Regional Trade Agreement
S/L/92	Guidelines for the scheduling of specific commitments in document S/L/92
UR	Uruguay Round
W/120	Services Sectoral Classification in document MTN.GNS/W/120
WPDR	Working Party on Domestic Regulation