

AN INTRODUCTION TO THE GATS

I.1 OVERVIEW

The agreement on trade in services reached in the Uruguay Round is perhaps the most important single development in the multilateral trading system since the GATT itself came into effect in 1948. The new General Agreement on Trade in Services (GATS) for the first time extends internationally-agreed rules and commitments, broadly comparable with those of the GATT, into a huge and still rapidly growing area of international trade. Although reliable statistics on services are few, conventionally measured trade in services is generally agreed to be equivalent in value to about one-quarter of international trade in goods. A further unmeasured, but undoubtedly very large, proportion of international trade in services does not cross national frontiers, because the service supplier (such as a branch of a foreign bank) or the service consumer (such as a foreign tourist) does so instead. The reach of the GATS rules extends to all forms of international trade in services. This means that the GATS agreement represents a major new factor for a large sector of world economic activity. It also means, because such a large share of trade in services takes place *inside* national economies, that its requirements will from the beginning necessarily influence national domestic laws and regulations in a way that has been true of the GATT only in recent years.

In looking at the GATS agreement, as well as at the significance of the specific services commitments undertaken by WTO members, it must be borne in mind that the Uruguay Round services package is only a beginning. The GATS rules are not quite complete, and are largely untested. The process of filling the gaps will require several more years of negotiations, and experience will no doubt show a need to improve some of the existing rules. Each government's schedule of liberalization commitments for trade in services is also only a first step, comparable not with its GATT schedule of 1994, but rather with the initial limited tariff-cutting undertaken when the GATT was launched. Among the most important elements in the GATS package is the promise that successive further rounds of negotiations will be undertaken to continue opening up world trade in services.

In broad outline, and to some extent also in substance, the Uruguay Round services package resembles the package for goods. There is a central set of rules, the GATS, which to a great extent was directly modelled on the GATT and relies on many of the same principles. There are supplementary agreements -- some in the form of annexes to the GATS, others embodied in Ministerial decisions -- which deal with specific sectoral and other issues. And there are national schedules, one for each WTO member, which set out commitments not to impose greater restrictions than are specified on the supply of services by other members. However, some of the similarities are misleading. The principle of "national treatment", for instance, is fundamental to the GATS, as it is to the GATT, but is applied very differently. Whereas obligations under the GATT can to a great extent be understood by reference only to the general rules set out in its Articles, the GATS obligations of each member depend significantly on what it has specifically undertaken, in its own schedule, to do. The fact that the GATS rules are still necessarily untested, and that the services schedules are much more complex than those for goods, adds to the difficulty of assessing exactly what rights and obligations WTO members have assumed under the services package.

The immediately following pages look in turn at the GATS agreement itself; the five annexes which set out some supplementary rules; and the further annexes and Ministerial decisions which establish the basis for continuing negotiations. Finally, they explain how to understand the national

schedules of commitments. The second section of Part Three considers the extent and significance of those commitments, as well as of specific limitations attached to them.

I.2 THE GATS: THE BASIC AGREEMENT

The 29 Articles (32, if three *bis* Articles are counted separately) of the GATS agreement amount together to barely half the length of the GATT's 38 Articles. The agreement as a whole has six parts. An opening section sets out the scope and definition of the agreement. Part II, the longest, deals with general obligations and disciplines: that is, with rules that apply, for the most part, to all services and all members. Part III sets out rules governing the specific commitments in schedules. Part IV concerns future negotiations and the schedules themselves. Parts V and VI cover institutional and final provisions.

A preamble to the agreement essentially states three considerations that shaped to its negotiation. First, the establishment of a multilateral framework of principles and rules, aimed at progressively opening up trade in services, should help this trade to expand and to contribute to economic development worldwide. Second, WTO members, and particularly developing countries, will still need to regulate the supply of services to meet national policy objectives. And third, developing countries should be helped to take a fuller part in world trade in services, particularly through strengthening the capacity, efficiency and competitiveness of their own domestic services.

Part I (Article I) defines the scope and coverage of the GATS. The agreement applies to *measures by WTO members which affect trade in services*. As in the case of the GATT (where the relevant and similar rule is Article XXIV:12), the reach of this definition goes beyond central governments to include measures taken by regional and local governments, and includes those of non-governmental bodies exercising powers delegated to them by governments. Also as under the GATT, member governments are required to do their best to ensure that these sub-national governments observe GATS obligations and commitments¹ All services are covered, except those "supplied in the exercise of governmental authority", these being defined as services (such as central banking and social security) which are neither supplied on a commercial basis nor in competition with other service suppliers²

Article I sets out a comprehensive definition of trade in services in terms of four different *modes of supply*: cross-border, consumption abroad, commercial presence in the consuming country, and presence of natural persons³ This definition is crucially important, and must be examined more closely. It helps in understanding the special problems and regulatory issues that arise in international trade in services, and that have shaped the principles and rules embodied in the GATS, as well as the specific commitments that WTO members have undertaken in their schedules. (It is also the key to much of the jargon habitually used by negotiators and others at home with the GATS.) *Cross-border supply of services*, or "Mode 1" in the jargon, corresponds with the normal form of trade in goods. It is in many ways the most straightforward form of trade in services, because it resembles the familiar subject-matter of the GATT, not least in maintaining a clear geographical separation between seller and buyer: only the service itself crosses national frontiers.

"Mode 2" is *consumption abroad*, or in the words of Article I the supply of a service "in the territory of one Member to the service consumer of another Member". Typically, this will involve the consumer travelling to the supplying country, perhaps for tourism or to attend an educational

¹ Article I:1 and I:3(a).

² *Ibid.*, Article I:3 (b) and (c), and *Annex on Financial Services*, 1(b).

³ *Ibid.*, Article 1:2.

establishment. Another example of consumption abroad would be the repair of a ship or aircraft outside its home country. Like cross-border supply, this is a straightforward form of trade which raises few problems, since it does not require the service supplier to be admitted to the consuming country.

"Mode 3" is the supply of a service through the *commercial presence* of the foreign supplier in the territory of another WTO member. Examples would be the establishment of branch offices or agencies to deliver such services as banking, legal advice or communications. This is probably the most important mode of supply of services, at least in terms of future development, and also raises the most difficult issues for host governments and for GATS negotiations. A large proportion of service transactions require that the provider and the consumer be in the same place. But rules governing commercial presence are very different from the tariffs and other border measures that principally affect trade in goods. GATT has only gradually become involved in some sensitive domestic policy issues such as subsidies and technical standards. Right from the beginning, however, the GATS has been forced to grapple with internal policy issues such as rights of establishment that are inherent in the commercial presence of foreign interests. In doing so, and establishing multilateral rules that guarantee the opportunities for firms and individuals to establish themselves in a foreign market, the GATS has broken new ground.

Mode 3 does not necessarily require the presence of foreigners (the foreign supplier's office may be staffed entirely by local personnel). However, the supplier may well feel a need to employ some foreign managers or specialists. When this is the case, Mode 3 will be found together with "Mode 4": the *presence of natural persons*, or in less opaque language, the admission of foreign nationals to another country to provide services there. Mode 4 may also be found alone, with no permanent commercial presence, and the visiting persons involved may be employees of a foreign service supplier, or may be providing services as independent individuals. An Annex to the GATS makes it clear, however, that the agreement has nothing to do with individuals looking for employment in another country, or with citizenship, residence or employment requirements. Even if members undertake Mode 4 commitments to allow natural persons to provide services in their territories, they may still regulate the entry and stay of the persons concerned, for instance by requiring visas, as long as they do not prevent the commitments from being fulfilled⁴

Commitments covering roughly 150 different forms of service activity are, as discussed below, embodied in the schedules resulting from the Uruguay Round negotiations. Some of these services can be supplied in several of the four ways, while many others by their nature cannot. For instance, the services of a professional adviser may possibly be supplied through a visit to him by his foreign client, by mail, through an office maintained in the client's country, or by a personal visit to that country. On the other hand, a tourist can only enjoy a foreign country's beaches by going there, and street-cleaning services obviously must be provided on the spot. Unlike market access for a shipment of goods going from one country to another, which is principally a matter of customs duties and other formalities at the border, the ability to provide a service to another country depends crucially on government regulations that may be quite different for one of the four modes of supply than for another.

Part II sets out "general obligations and disciplines". These are basic rules that apply to all members and, for the most part, to all services. (It is simply not true, as is sometimes suggested, that because a member has left out of its schedule any access commitments for a service sector it has no obligations affecting that sector.) Many of the key provisions of the GATT have a close equivalent in this part of the GATS.

⁴ *Ibid.*, Annex on Movement of Natural Persons Supplying Services under the Agreement.

GATS Article II, on most-favoured-nation treatment, thus directly parallels the centrally important Article I of the GATT. Its first paragraph states that "with respect to any measure covered by this Agreement," (coverage which of course has just been defined very widely in Article I) "each Member shall accord immediately and unconditionally to services and service suppliers of any other Member treatment no less favourable than it accords to like services and service suppliers of any other country". This classical statement of the MFN principle is, however, qualified. A member is permitted to maintain a measure inconsistent with the general MFN requirement if it has established an exception for this inconsistency⁵ During the Uruguay Round, it became clear that unqualified liberalization in some service sectors could not be achieved, and that liberalization subject to some temporary MFN exceptions would be preferable to no liberalization at all. The result was that more than 70 WTO members made their scheduled services commitments subject to a further list of exemptions from Article II.

These exemption lists are governed by conditions set out in a separate annex to the GATS. The annex makes it clear that no new exemptions can be granted, at least by this route: any future requests to give non-MFN treatment can only be met through the WTO waiver procedures described in Part I of this study. Some listed exemptions are subject to a stated time limit. For those that are not, the annex provides that in principle they should not last longer than ten years (that is, not beyond 2004), and that in any case they are subject to negotiation in future trade-liberalizing rounds. Meanwhile, all remaining exemptions will be reviewed in the Council for Trade in Services before the end of 1999 to see whether they are still needed⁶

Apart from services specified in individual MFN exemption lists, the only permitted departure from most-favoured-nation treatment under the GATS is among countries that are members of regional trading arrangements. The GATS rules on "Economic Integration", in Article V, are modelled on those in Article XXIV of the GATT, although the absence of a services equivalent to import duties means that there is no distinction comparable to that between customs unions and free trade areas. Article V permits any WTO member to enter into an agreement to further liberalize trade in services only with the other countries that are parties to the agreement, provided the agreement has "substantial sectoral coverage", eliminates measures that discriminate against service suppliers of other countries in the group, and prohibits new or more discriminatory measures. Recognizing that action to open up services markets may well form part of a wider process of economic integration, the article allows the liberalization achieved to be judged in this light. (Thus members of a free trade area or customs unions recognized under GATT could probably expect understanding if efforts to extend their relationship into trade in services were initially incomplete.) The drafting of these rules improves on their GATT equivalents in some respects: for instance, "substantial sectoral coverage" is much more carefully defined, since it disqualifies agreements that exclude any of the four modes of supply. Some other provisions are carried over from Article XXIV with little change. An approved agreement must be designed to help trade among its members, and must not result, for non-members, in an overall increase in the barriers they face in trading with the group in the service sectors or sub-sectors covered. If the establishment of the agreement, or its subsequent enlargement, leads to the withdrawal of commitments made to non-members, there must be negotiations to provide appropriate

⁵ *Ibid.*, Article II:2. This provision provides justification for giving more favourable treatment to the country or countries specified in the exemption. It does not give the right to deny certain countries treatment as favourable as specified in a member's schedule of commitments.

⁶ *Ibid.*, Annex on Article II Exemptions. A limited exception to the rule that no new exemptions could be listed after the entry into force of the WTO applied to financial services, maritime transport and basic telecommunications: GATS annexes (described below) providing for continuing negotiations on these subjects allowed exemptions to be listed only at the end of the negotiations. The individual lists of exemptions are legally part of the GATS agreement, in the same way as the national schedules of concessions. They have been issued as separate GATS documents in the series GATS/EL/... . They are described more fully in section II, below.

compensation. No compensation, on the other hand, is due from non-members for any trade benefits they may gain from the agreement⁷

A second basic principle carried over from the GATT is that of transparency. Traders will be badly handicapped in doing business in a foreign country unless they know what laws and regulations they face. This problem is particularly serious for trade in services, because so many of the relevant government rules are domestic regulations. The GATS requires each member to publish promptly "all relevant measures of general application" (that is, measures other than those which involve only individual service suppliers) 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 affect trade in services covered by their specific commitments under the agreement. By the end of 1996, each member should have established an enquiry point, to respond to requests from other members for information on these matters. This requirement is carried further as far as enquiries from developing countries are concerned. In this case, developed countries (and other members, if possible) are to establish contact points to which the service suppliers --not just the governments-- of developing countries can turn for information about commercial and technical aspects of the supply of services, professional qualifications required, and the technology available⁸

Other rules in Part II are intended to ensure that benefits under the GATS are not blocked by domestic regulations. Generally-applied measures that affect trade in service sectors for which a country has made commitments must be applied reasonably, objectively and impartially. Applications to supply services under such commitments must receive a decision within a reasonable period of time. There must also be tribunals or other procedures to which service suppliers can apply for a review of administrative decisions affecting their trade. The Council for Trade in Services is called on to develop rules to prevent requirements on qualifications for service suppliers, technical standards or licensing from being unnecessary barriers to trade. (A separate Ministerial Decision has launched this programme by establishing a GATS working party to prepare rules for the requirements that governments impose on professional service suppliers. The first disciplines to be drawn up applied to technical standards, qualification and licensing requirements for accountancy services.) Until such multilateral rules are ready in other areas, governments are to follow the same principles in applying their requirements and standards, so that these do not nullify or impair specific commitments they have made⁹ The GATS also urges members to recognize the educational or other qualifications of service suppliers of other countries. It allows governments to negotiate agreements among themselves for mutual recognition of such qualifications, provided other countries with comparable standards are given a chance to join. Qualification requirements are not to be applied in a way that discriminates between countries or constitutes a disguised restriction on trade in services, and should be based wherever appropriate on internationally agreed standards¹⁰

⁷ A related exception from the MFN rule, as far as the movement of persons is concerned, is permitted by Article V *bis* of the GATS. This allows countries to take part in agreements which establish full integration of labour markets.

⁸ *Ibid.*, Articles III, III*bis* and IV. Article IV also calls on members to negotiate specific commitments, in current and future services negotiations, to help developing countries strengthen their domestic services, improve their access to distribution networks and information, and gain better access to markets for their service suppliers.

⁹ *Ibid.*, Article VI, and *Decision on Professional Services* adopted by Ministers in Marrakesh on 15 April 1994.

¹⁰ *Ibid.*, Article VII.

Several more Articles in Part II of the GATS have clear GATT parallels.

Article VIII is particularly close to GATT's Article XVII on state trading. A monopoly supplier of a service must not be allowed to act inconsistently with a member's MFN obligations or its specific commitments, nor to abuse its monopoly position. If a country that has made specific commitments to allow supply of a service later grants monopoly rights for that supply, and thus negates or impairs the commitments, it will have to negotiate compensation.

Article XII, on restrictions to safeguard the balance of payments, sets out provisions similar to those in GATT Articles XII and XVIII:B. It permits members in serious balance-of-payments difficulties (or threatened by such difficulties) to restrict trade in services for which it has undertaken commitments. Developing countries, or countries in transition, may use such restrictions to maintain a level of reserves adequate for their development or transition programmes. However, such restrictions must not discriminate among members, cause unnecessary damage to the interests of other members or be more restrictive than necessary in the circumstances, and must be temporary and phased out as the situation improves. Priority may be given to essential services, but the restrictions must not be adopted or maintained to protect a particular sector. Periodic consultations which members maintaining Article XII restrictions must undertake in the WTO are governed by rules effectively the same as those for goods, and will take place in the single WTO Balance-of-Payments Committee which examines all restrictions introduced for this purpose. Except as permitted by Article XII, a member may not restrict international transfers and payments for current transactions related to the specific services commitments it has undertaken¹¹

As under the GATT, governments' purchase of services for its own use is exempt from the basic GATS obligations. However, the same GATS provision that makes the MFN, market access and national treatment rules inapplicable to such purchases also provides that negotiations on government procurement in services shall start before the end of 1996. These negotiations are expected to lead to commitments to open up some government purchases to foreign service suppliers¹²

The GATS provisions on general and security exceptions are perhaps the closest of all to their GATT equivalents. This reflects the fact that the overriding considerations which are recognized as allowing a country to ignore specific international obligations will apply as strongly to one aspect of its trade as to another. The general exceptions are, as in the GATT, preceded by a headnote that makes the right of a member to adopt or enforce measures for the purposes listed subject to the condition that they not be applied as a means of "arbitrary or unjustifiable discrimination between countries where like conditions prevail, or as a disguised restriction on trade in services". The list that follows includes some purposes that apply also to trade in goods, such as the protection of public morals and human, animal or plant life or health, and some which are particularly applicable to services. Among the latter are the prevention of deceptive and fraudulent practices, the protection of individual privacy in the handling of personal data, and equitable and effective taxation. A lengthy footnote spells out a number of ways in which a country's taxation practices may treat foreigners differently from its own nationals. The security exceptions are virtually identical with those of the GATT: nothing in the GATS requires a member to give information, or take action, against its essential security interests concerning services for a military establishment, related to fissionable or

¹¹ *Ibid.*, Article XI.

¹² *Ibid.*, Article XIII. The equivalent GATT provisions are Article III:8(a), which excludes government procurement from the national treatment requirement, and Article XVII:2, which permits governments to base their purchases of foreign goods on non-commercial considerations. A "plurilateral" agreement on government procurement was negotiated and signed at the same time as the Uruguay Round agreements, and is summarized briefly in Annex I of the present study.

fusionable materials, or in time of war or international emergency or in pursuit of obligations under the United Nations Charter for peace and security¹³

Two of the other provisions in Part II of the GATS represent unfinished business, and are a reminder that the services negotiations in the Uruguay Round were completed under extreme pressure of time. These are the Articles dealing with safeguards and with subsidies. On safeguards, Article X provides that multilateral negotiations on the question of emergency safeguard measures, based on the principle of non-discrimination, shall be completed by the beginning of 1998. (This deadline was extended later to 15 December 2000.) Until then, a member may modify or withdraw a specific commitment, in spite of the normal rule that such commitments cannot be changed for three years, if it can show the Council for Trade in Services that the action is necessary. The negotiations will have to deal with some difficult issues, different from those which arise with the more straightforward emergency safeguard action against imports of goods. For instance, what form should safeguard action take if the services concerned are essentially being supplied by a branch of a foreign company established in the consuming country¹⁴ Article XV provides that negotiations shall take place also on subsidies affecting services, and on the possible need for countervailing duties. No date is set in the Article for these negotiations. The Article recognizes that subsidies can distort trade in services, but says that the negotiations should recognize the role of subsidies in developing countries. Echoing the original GATT provisions on subsidies that stood almost alone until requirements were tightened up in later negotiations, Article XV for the time being provides only that a member adversely affected by another member's subsidy may request consultations, and that the request "shall be accorded sympathetic consideration". The absence of further GATS provisions on subsidies does not mean that, under the general rules, WTO members are entirely free to use them to help only their own service suppliers. The obligation of national treatment would normally mean that certain foreign suppliers would also be entitled to receive any subsidies given to a competing domestic supplier. Many countries have in fact specifically excluded this possibility by stating in their schedules of services commitments that certain subsidies will not be available to foreign suppliers.

One general obligation of the GATS has no GATT counterpart. This is Article IX, which pioneers in a multilateral trade agreement in recognizing that "certain business practices" of service suppliers may restrain competition and thereby restrict trade in services. Members agree to consult on such practices, when so requested by another member, and to exchange information with a view to eliminating them.

Part III sets out the rules which, together with the basic categorization of services according to the four modes of supply in Article I, have shaped each WTO member's individual commitments to admit foreign suppliers of services to its market. Its two main articles deal with market access and national treatment. Both set out requirements that apply *only to scheduled sectors*.

Article XVI starts by stating that each member is to give no less favourable treatment to the services and service suppliers of other members than is provided in its schedule of commitments. This provision makes it clear that service commitments resemble those in a GATT schedule at least in one very important respect: they are bindings which set out the minimum, or worst permissible, treatment of the foreign service or its supplier, and of course in no way prevent better treatment from being given in practice.

The remainder of the article sets out six forms of measure affecting free market access that *may not be applied to the foreign service or its supplier unless their use is clearly provided for in the*

¹³ *Ibid.*, Article XIV, *General Exceptions*, and its footnote, and Article XIV *bis*, *Security Exceptions*.

¹⁴ *Ibid.* Article X:2 and X:3. For the normal requirement that no commitments be modified or withdrawn until at least three years after they have entered into force, see the discussion of Article XXI, below.

schedule. Between them, the six elements cover all the aspects of limitation of market access that may be specified in national schedules. They are:

- limitations on the number of service suppliers;
- limitations on the total value of services transactions or assets;
- limitations on the total number of service operations or the total quantity of service output;
- limitations on the number of persons that may be employed in a particular sector or by a particular supplier;
- measures that restrict or require supply of the service through specific types of legal entity or joint venture; and
- percentage limitations on the participation of foreign capital, or limitations on the total value of foreign investment.

Article XVII deals very similarly with national treatment, although it does not follow Article XVI in setting out a list of measures that would be incompatible with such treatment. It states that *in the sectors covered by its schedule, and subject to any conditions and qualifications set out in the schedule*, each member shall give treatment to foreign services and service suppliers treatment, in measures affecting supply of services, no less favourable than it gives to its own services and suppliers. The basic obligation is stated in terms very similar to those of the national treatment rule in GATT's Article III, but of course is limited in the case of the GATS to services sectors for which commitments have been given in the schedule of the country concerned. As in the case of market access, the requirement that any limitations on national treatment be specified in the schedule gives these limitations the same character as a GATT-bound tariff: the stated conditions or qualifications represent the worst treatment that may be given, and there is nothing to prevent better treatment being given in practice.

At first sight, it may be difficult to understand why the right to national treatment is restricted under the GATS to services for which commitments have been undertaken, whereas under the GATT it applies to all goods. The reason lies in the nature of trade in services. Universal national treatment for goods is possible, without creating free trade, because the entry of foreign goods into a national market can still be controlled by import duties, quantitative restrictions and other border measures. By contrast, a foreign supplier of most services, particularly if those services are supplied by commercial or personal presence in the importing country's market, will in practice enjoy virtually free access to that market if given national treatment, since this by definition will remove any regulatory advantage enjoyed by the domestic service supplier.

The remaining provision in Part III, Article XVIII, says that members may also negotiate additional commitments (*not* additional restrictions) with respect to other measures affecting trade in services, such as those on required qualifications, standards and licensing.

Part IV puts liberalization into practice. Two of its three articles are essentially technical. The third has a much broader sweep.

One of the technical articles, Article XX, simply spells out the procedural implications of Part III which, as we have just seen, prescribes the rules for specific commitments on services. The article lists the elements to be covered in each member's schedule and, in the same way as Article II of the GATT, provides that the schedules form "an integral part" of the GATS agreement itself. This wording underlines that the detailed commitments in each schedule are international obligations on the same level as the GATS (and indeed of the WTO package as a whole).

The other technical article provides rules for modifying or withdrawing commitments in schedules. The GATT has similar rules. Circumstances may well arise in which a government may wish to take back something it has given in past negotiations. It can do so, but only at a price, and after due notice. As far as notice is concerned, no commitment can be modified or withdrawn until at

least three years after it entered into force¹⁵ At least three months' notice must be given of the proposed change. The price to be paid will be a readjustment of the balance of advantage in commitments with any WTO member affected by the change. This will normally be settled by negotiation, to be undertaken at the request of the affected member as soon as notice has been given of the proposed change. If all goes well, agreement will be reached on new commitments to offset those being withdrawn, so that the general level of commitments between the countries concerned is no less favourable to trade than before. These compensatory adjustments are to be applied on an MFN basis. All of the foregoing is much the same as under GATT. However, the GATS has added two new elements. In the event that the negotiations do not lead to agreement, a country which believes it has a right to compensation may take the matter to arbitration. If the arbitrator finds that compensation is due, the proposed changes in commitments may not be put into effect until the compensatory adjustments are made. Should this requirement be ignored, and the changes be made without compliance with the arbitrator's findings, the affected country will have the right to retaliate by withdrawing commitments "substantially equivalent" to those findings -- and in this case the withdrawal will apply only to the country making the change¹⁶

The most important element in Part IV of the GATS, however, is clearly Article XIX. This provides that, starting not later than January 2000, WTO members shall enter into "successive rounds of negotiations with a view to achieving a progressively higher level of liberalization" of trade in services. The article has no counterpart in GATT or in the other Uruguay Round agreements except, to a more limited extent, the Agreement on Agriculture. In committing governments to repeated efforts to enlarge opportunities for international trade in services, it goes far beyond the agreements to negotiate on specific questions left unsettled by the Uruguay Round, such as the rules on safeguards or subsidies for services, or the commitments on financial services or basic telecommunications. Although in practice the signatories of GATT engaged in similar rounds of negotiations to liberalize world trade in goods, they were under no compulsion to do so. Article XIX is a guarantee that the present GATS package is only the first fruit of a continuing enterprise, to be undertaken jointly by all WTO members, to raise the level of their services commitments towards one another. Moreover, the article gives explicit assurance that, in setting the guidelines for future negotiations, the Council for Trade in Services will decide how to handle two issues of great concern to developing countries. One, an issue essentially unsettled in the Uruguay Round, where it came up in the context of trade in goods as well as in services, is the question of how countries should be given negotiating credit for efforts they may have undertaken to open up their markets to foreign service suppliers since the previous round of multilateral negotiations. The other concerns the special treatment to be given to least-developed countries.

Parts V and VI contain little that is different from the institutional and final provisions of other agreements in the Uruguay Round package. Dispute settlement will take place under the central WTO rules and mechanisms. One special provision excludes resort to these provisions for disputes over matters covered by double taxation agreements between the countries concerned¹⁷ A separate Ministerial decision provides for specialized experts to be available to serve as panellists for disputes on services questions, and a provision of the agreement's Annex on Financial Services calls for panels on prudential issues and other financial matters to have relevant expertise. The other institutional provisions essentially repeat provisions (such as the establishment of the Council for Trade in

¹⁵ Note, however, the exception to this rule provided temporarily by Article X on safeguards, discussed above.

¹⁶ *Ibid.*, Article XXI. The equivalent rules in the GATT are in Article XXVIII. In accordance with Article XXI:5, the Council for Trade in Services has established detailed procedures for changes to schedules, including the timetable for negotiations on compensation and the choice and tasks of arbitrators.

¹⁷ *Ibid.*, Article 22:3.

Services) that are in the articles of the World Trade Organization¹⁸ In Part VI, Article XXVII allows a member to deny benefits under the agreement to services originating in the territory of a non-member, and Article XXVIII defines some key terms used in the GATS. The definitions, which could have an important bearing on whether GATS rules were applicable in a particular case, include "supply of a service" ("production, distribution, marketing, sale and delivery of a service") and "juridical person" (the definition would not count a legal entity as being owned by nationals of a particular member unless they held 50 per cent of its equity or controlled by nationals of a Member unless they had the power to name a majority of its directors or otherwise to legally direct its actions).

I.3 GATS ANNEXES AND MINISTERIAL DECISIONS

No less than eight annexes attached to the GATS, eight Ministerial decisions adopted in Marrakesh on the same day that the GATS was signed, and an Understanding attached separately to the Uruguay Round Final Act, bear on the GATS rules and on negotiations on services. Some, and particularly those five annexes whose provisions will continue to apply in the longer term, are integral and important parts of the package of agreements on trade in services reached in the Round.

Two of the most important and permanent annexes, those on Article II exemptions and on the movement of natural persons, have already been discussed in conjunction with the provisions of GATS Articles II and I respectively. The others concern four specific sectors of trade in services: air transport, financial services, telecommunications and maritime transport services.

The *annex on air transport* in some ways resembles that on the movement of natural persons: it is largely concerned with making clear that major aspects of the subject fall outside the coverage of the GATS. International air transport services are for the most part governed by arrangements negotiated under the Chicago Convention¹⁹ The annex specifically excludes this complex network of bilateral agreements on air traffic rights from the new services rules. In consequence, the GATS, as far as the air transport sector is concerned applies at present only to aircraft repair and maintenance services, the selling and marketing of air transport services (a function defined as not including the pricing or conditions of transport services), and computer reservation systems. The WTO dispute settlement procedures can be invoked only in respect of obligations specifically assumed by members, and even then only after any bilateral or other procedures have been exhausted. A provision for periodic reviews of developments in the air transport sector, to be undertaken at least once in every five years, leaves the door open for a possible future extension of GATS commitments in the sector²⁰

In negotiating the GATS, it was generally recognized that the very important sector of *financial services* would need some special treatment. Governments everywhere feel the need to regulate banks, insurance companies and other providers of finance or financial information closely. One reason is that a country's economic growth and development are linked to the stability of its financial institutions. The other is that users of financial services need protection against providers of these services who lack sufficient financial backing or are badly managed or dishonest. The main GATS *Annex on Financial Services* is designed to meet these needs. One of its principal provisions

¹⁸ Decision on Certain Dispute Settlement Procedures for the General Agreement on Trade in Services adopted in Marrakesh on 15 April 1994, and General Agreement on Trade in Services, Annex on Financial Services deal with the issue of panellists. A separate Decision on Institutional Arrangements for the General Agreement on Trade in Services, adopted in Marrakesh on 15 April 1994, provides for the establishment of subsidiary bodies to the Council on Trade In Services, and enumerates responsibilities of committees set up to deal with trade in a particular sector. The decision established in particular a Committee on Trade in Financial Services.

¹⁹ International Air Services Transit Agreement, done at Chicago, 7 December 1944.

²⁰ General Agreement on Trade in Services, Annex on Air Transport Services.

has already been mentioned, in the discussion of GATS Article I. This is its exclusion from the coverage of the GATS, as "services supplied in the exercise of governmental authority", the activities of central banks or other authorities carrying out monetary or exchange rate policies. The exclusion of foreign service suppliers also extends to activities which form part of statutory social security or public retirement plans, or other activities that are carried out by a public entity for the account or using the financial resources of the government, provided domestic non-governmental financial suppliers are also not allowed to take part in these activities²¹ The central provision of the Annex is what is generally known as the "prudential carve-out", a further exception from the GATS rules designed to ensure that governments can protect the financial system and its users. "Notwithstanding any other provisions" of the GATS, WTO members are free to take prudential measures to protect investors, depositors, policy holders or persons to whom a fiduciary duty is owed by a financial service supplier, or to ensure the integrity and stability of the financial system. This exception can perhaps be regarded as similar to the general exceptions in both the GATS and the GATT and, like them, is subject to the condition that it is not to be used as an escape route from obligations under the agreement. The Annex allows a member to recognize the prudential measures of another member (by implication thereby giving preferred treatment to financial service suppliers of that member), but must give other members the chance to demonstrate that their prudential measures may be equally effective²² The remainder of the Annex, apart from a provision requiring panel members in disputes on financial services to have relevant expertise, is concerned with definitions. It identifies sixteen forms of financial services covered by its special rules, describing them in considerable detail, and distinguishing between insurance and insurance-related services on the one hand and all banking and other financial services on the other²³

While this Annex is of continuing significance, the brief Second Annex on Financial Services is not. This was approved, along with a separate and more detailed Ministerial Decision, to permit negotiations on financial services to continue for some months after the end of the Uruguay Round, when most other services commitments became final. Because governments believed that broader commitments could be achieved if negotiations lasted a little longer, up to the end of June 1995, they agreed that, until then, members could maintain some measures that were inconsistent with the MFN requirement of Article II, without formally listing these measures as MFN exemptions, and would be free to change scheduled commitments on financial services²⁴

One further text dealing with financial services should be mentioned at this point. The Uruguay Round package included a separate Understanding which sets out the basis on which a number of developed countries agreed to draw up their scheduled commitments on financial services. These countries followed an approach which went beyond the liberalization requirements of Part III of the GATS (Articles XVI, XVII and XVIII) in a number of respects. They adopted a "standstill" principle, whereby their commitments were at least as liberal as the measures they actually applied.

²¹ *Ibid.*, Annex on Financial Services, 1(b) and 1(c).

²² *Ibid.*, Annex on Financial Services, Paras. 2 and 3. The comparison is with the headnotes to GATS Article XIV and GATT Article XX.

²³ *Ibid.*, Annex on Financial Services, Paras. 5 and 6.

²⁴ *Ibid.*, Second Annex on Financial Services, and *Decision on Financial Services* adopted by Ministers in Marrakesh on 15 April 1994. The negotiations in fact continued for a further month, following agreement (*Decision on the Application of the Second Annex on Financial Services* (S/L/6) adopted by the Council for Trade in Services on 30 June 1995) to extend the deadline to 28 July 1995. Additional commitments negotiated during that period were then incorporated into the GATS (*Decision Adopting the Second Protocol to the GATS*, adopted by the Committee on Financial Services on 21 July 1995). At the same time, a decision similar in content to the Second Annex was taken to encourage a further round of negotiations on financial services ending not later than December 1997 (*Second Decision on Financial Services* (S/L/9) adopted by the Council for Trade in Services on 21 July 1995).

They also agreed to open up government procurement of financial services, to try to reduce the scope of monopoly rights affecting the sector, and to permit cross-border trade, without the need for a commercial presence, in several forms of insurance and related services, as well as in financial information and auxiliary services. Other financial service commitments under this approach concerned commercial presence, the provision of new services by established suppliers, transfers of information, temporary entry of personnel, non-discrimination and national treatment²⁵

The remaining permanent annex to the GATS concerns *telecommunications*, another service sector which in itself is exceptionally large and dynamic and, at the same time, vital to the delivery of many other services. This annex is independent of specific commitments that individual WTO members may have made to open up their markets for telecommunications services. Essentially, it focuses on one issue, important to the supplier of almost any service: the right to make use of public telecommunications networks and services. The annex establishes this right. Each member is required to ensure that all service suppliers seeking to take advantage of any commitments included in its GATS schedule are allowed access to, and use of, public basic telecommunications "on reasonable and non-discriminatory terms". "Non-discriminatory" is defined to mean not only that the foreign service supplier will receive MFN and national treatment but will also be able to use the telecommunications network or service on terms and conditions as good as those enjoyed by any other user in like circumstances²⁶ Rights under the annex apply to all available public services such as telephone, telegraph, telex and data transmission, but not to the transmission of radio or television programming. The annex spells out in some detail the implications of the basic right of access and use. These include rights to buy or lease equipment needed to connect to the public telecommunications network, to connect private circuits with the public system or with other circuits, and to use the public network to transmit information, including information from computerized data bases, both within the country concerned and to or from any other WTO member. The annex allows developing countries to place some limitations on access and use if this is necessary in order to strengthen their telecommunications capacity, but any such limitations have to be specified in their GATS schedules²⁷ Other provisions call for technical cooperation with developing countries, for support for international standards for the compatibility of telecommunication networks, and for publication of information about conditions for access to, and use of public networks and services.

This is a convenient point to refer to two other Uruguay Round texts which concern telecommunications, although in this case their significance is temporary, and is confined to the telecommunications sector alone. In the Uruguay Round, many countries made commitments to permit the supply of what are defined as "value-added" telecommunications services -- that is, services which make use of telecommunications networks, for instance electronic mail services and on-line data retrieval services. In general, however, they did not make commitments on the supply of "basic telecommunications", the networks and other services that allow telephone messages and other traffic to be transmitted. Negotiations to liberalize basic telecommunications were taken up after the Round, with the aim of completion in April 1996. An Annex on Negotiations on Basic Telecommunications played a similar role for these negotiations as the Second Annex on Financial

²⁵ *Understanding on Commitments in Financial Services*. The approach was used largely by OECD countries, and is reflected in the specific commitments that each has made for financial services in its schedule. The original purpose of the understanding was somewhat similar to that of the unpublished document *Modalities for the establishment of specific binding commitments under the reform programme*, referred to in Part Two, section I.2 of the present study, which governed commitments on trade in agricultural products. However, it differs from the agricultural document in setting out general policy guidelines for measures affecting foreign suppliers of financial services. The countries ("interested members") which used this approach agreed that the Understanding should be placed on record. For this reason, it was included in the Final Act, and is reproduced in *The Results of the Uruguay Round of Multilateral Trade Negotiations*.

²⁶ *General Agreement on Trade in Services*, Annex on Telecommunications, para. 5(a).

²⁷ *Ibid.*, Para.2 (a) and (b) and Para.5.

Services did for the 1994-95 negotiations on that subject: it postponed the need to specify exceptions to MFN treatment for basic telecommunications until the negotiations were over. A related Ministerial decision set out detailed arrangements for the negotiations²⁸

The remaining annex to the GATS is another which allowed negotiations to continue after the end of the Uruguay Round to liberalize the supply of services in a particular sector, in this case maritime transport. The brief Annex on Negotiations on Maritime Transport closely resembles that on negotiations on basic telecommunications. There is also a similar Ministerial Decision which specified arrangements for the maritime transport services negotiations, to be concluded by June 1996²⁹

Two further Ministerial Decisions related to services remain to be mentioned. One concerns negotiations on the movement of natural persons. Because developing countries were dissatisfied with the commitments made for this mode of delivery of services, in which they felt they had particular competitive strengths, it was agreed to resume negotiations after the end of the Uruguay Round with the aim of achieving higher commitments. The decision provided for these negotiations by stating their objectives, establishing a negotiating group, and setting a deadline of 30 June 1995 for their completion³⁰. The other decision ensured that the Committee on Trade and the Environment set up in Marrakesh to carry out a work programme on the relationship between trade measures and environmental measures would deal with trade in services and not only with trade in goods³¹

I.4 HOW TO READ A GATS SCHEDULE

The services obligations of each WTO member cannot be understood by reference only to the general rules of the GATS. As explained in the opening section of this chapter, a member's obligations -- even in such fundamental respects as treating a foreign service supplier on the same basis as a national supplier -- depend largely on the specific commitments it has undertaken in its national schedule. The services schedules are complex, and very different from GATT schedules, which consist of little more than long lists of numbers identifying different products and specifying a maximum import duty chargeable on each. The easiest way of understanding how a services schedule works is to look at one. The following paragraphs will examine the brief schedule, shown in Box 3.1, of an imaginary WTO member we shall call Arcadia.

We have already met most of the ingredients of a services schedule in the preceding sections of this chapter. The most important are probably the distinction between four modes of delivery of a service (cross-border, consumption abroad, commercial presence and movement of natural persons), and the basic requirements in Part III of the GATS on market access (Article XVI), national treatment (Article XVII) and possible additional commitments (Article XVIII). Not much remains to be added

²⁸ *General Agreement on Trade in Services*, Annex on Negotiations on Basic Telecommunications, and *Decision on Negotiations on Basic Telecommunications* adopted by Ministers in Marrakesh on 15 April 1994.

²⁹ *Ibid.*, Annex on Maritime Transport Services, and *Decision on Negotiations on Maritime Transport Services*, adopted by Ministers in Marrakesh on 15 April 1994.

³⁰ *Decision on Negotiations on Movement of Natural Persons* adopted by Ministers in Marrakesh on 15 April 1994. The negotiations were in fact prolonged to 28 July 1995 (Decision S/L/7 of the Council for Trade in Services of 30 June 1995). New commitments achieved in the negotiations were annexed to the Third Protocol to the GATS, adopted by the Decision on Movement of Natural Persons Commitments (Decision S/L/10 of the Council for Trade in Services of 21 July 1995).

³¹ *Decision on Trade in Services and the Environment* adopted by Ministers in Marrakesh on 15 April 1994. The decisions on the WTO's work programme on Trade and the Environment are discussed more fully in Annex II of the present study.

now. The most important further element is the classification of services used in making commitments. The GATS schedules largely follow a classification, based on the United Nations Central Product Classification (CPC) system, which identifies 11 basic service sectors (plus a twelfth category for miscellaneous services). These sectors are subdivided into some 160 sub-sectors or separate service activities. (The number of activities actually covered by GATS commitments is a little smaller.) The 12 sectors are:

- business (including professional and computer) services
- communication services
- construction and related engineering services
- distribution services
- educational services
- environmental services
- financial (insurance and banking) services
- health-related and social services
- tourism and travel-related services
- recreational, cultural and sporting services
- transport services and
- other services not included elsewhere

As an example, the tourism category breaks down into sub-sectors for hotels and restaurants, travel agencies and tour operators, and tourist guide services.

The services schedule of "Arcadia" is divided into four columns. The first specifies the sector or sub-sector covered by the notations in the other columns. The second sets out any limitations to market access for the sector or sub-sector concerned, when the service is provided by a particular mode of delivery, that fall within the six types of restriction mentioned in Article XVI. (The need for a separate column endlessly listing the four individual modes is avoided by simply placing a number from (1) to (4) in front of each entry. A note at the top of the schedule reminds us that, for instance, (1) refers to cross-border supply of the service.) The third column specifies in the same way limitations that are placed, in accordance with the rules in Article XVII, on national treatment for foreign suppliers of the service. A final column is provided to enter any further binding commitments that have been offered, as envisaged in Article XVIII. Arcadia's final column is empty, like that of most non-fictitious WTO members. The schedule as a whole is divided into two parts. Part I lists "horizontal commitments": in other words, provisions that apply to foreign suppliers of any service that has been scheduled. Part II sets out the commitments undertaken for each listed sector or sub-sector. No specific commitments have been undertaken for any sector or sub-sector that is not listed in the schedule.

Arcadia's schedule includes examples of the three kinds of annotation to be found in all schedules. At one extreme, the entry "none" means that the scheduling member has undertaken to place no limitation on market access (or, as the case may be, on national treatment) for foreign supply of that service by the mode concerned. At the opposite extreme, "unbound" means that the member has undertaken no commitment, and therefore retains full freedom to act as it may desire. In between is the annotation which sets out in detail the nature of a market access or national treatment limitation. These limitations operate in exactly the same way as a GATT binding affecting a particular product: they represent a bound commitment that, when the service concerned is supplied by the specified mode, it will receive treatment not less favourable than is stated in the schedule³²

³² One potential complication must, however, be borne in mind. It remains possible, if the member concerned has listed an MFN exemption which covers the service concerned, that it may be able to give *better* treatment to certain WTO members. See the explanation of GATS Article II, above, and the discussion of MFN exemptions in section II, below.

Arcadia's schedule can now be easily read and understood. The horizontal commitments show that any foreign service supplier wishing to establish a commercial presence in Arcadia for delivery of any scheduled service will have to meet notification and examination requirements, and will need authorization to buy land. Arcadia accepts no commitments, except as specified, to allow entry of foreigners to its national territory to deliver services. Foreign suppliers of retailing services are completely free to offer such services to Arcadians who go to the foreign countries concerned, or to supply them by mail order, but for other modes of supply they face the limitations indicated.

This example of a GATS schedule of specific commitments on services is artificially short, with its commitments for only one sub-sector, although those for some developing countries are not much longer. Otherwise, it is realistic. The next section of this study turns from fiction to fact, and examines the content of the services schedules of the WTO's real-life membership.

ARCADIA - SCHEDULE OF SPECIFIC COMMITMENTS

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	(3) Notification and examination in accordance with Arcadia's Law on Foreign Investment 1993. (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 sale 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) Economic needs test for supermarkets over 1,500 sq. metres. (4) Unbound, except as indicated in horizontal section.	(1) Unbound (except for mail order: none). (2) None. (3) Certain tax incentives are available only to companies controlled by Arcadian nationals. (4) Unbound.	