

GENERAL DISTRIBUTION

OCDE/GD(94)123

**THE GENERAL AGREEMENT ON TRADE IN SERVICES (GATS):
AN ANALYSIS**

ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT

Paris 1994

COMPLETE DOCUMENT AVAILABLE ON OLIS IN ITS ORIGINAL FORMAT

This paper has been prepared by the OECD Secretariat in order to provide an in-depth description of the new world-wide rules which will govern trade in services as of 1 January 1995.

Applications for permission to reproduce or translate all or part of this material should be made to:
Head of Publications Services, OECD, 2 rue André-Pascal, 75775 Paris Cedex 16, France.

Copyright OECD 1994

Table of contents

I.	INTRODUCTION	5
II.	GENERAL PRINCIPLES AND OBLIGATIONS	6
	1. Coverage of the agreement	6
	a) What are "Services"?	6
	b) What is "Trade in Services"?	7
	c) What is a "Measure by a Member"?	8
	d) When does a measure "affect" trade in services?	9
	2. Obligations applying from the outset to all Members	9
	a) The most-favoured-nation clause	9
	b) Exceptions to the most-favoured-nation clause	10
	c) Transparency	13
	d) Progressive liberalisation	13
	e) Generally applicable exceptions	14
	3. Obligations applying where specific commitments have been undertaken	15
	a) Market access	16
	b) National treatment	17
	c) Domestic regulations	18
	d) Payments and transfers	19
	e) Balance-of-payments exception	19
	4. Institutional provisions	20
	5. Dispute settlement	20

III.	SPECIFIC SECTORAL PROVISIONS	22
1.	Financial services	22
a)	Annex on financial services	22
b)	Understanding on commitments in financial services	23
c)	Second annex and ministerial decision on financial services	25
2.	Professional services	26
3.	Telecommunications	27
4.	Maritime transport	27
5.	Air transport	28
IV.	SCHEDULES OF COMMITMENTS	28
V.	MFN EXEMPTION LISTS	29
	Notes and references	32

THE GENERAL AGREEMENT ON TRADE IN SERVICES (GATS): AN ANALYSIS

**by
Ursula Knapp**

I. INTRODUCTION

1. On 15 April 1994, at the Marrakech Ministerial Meeting, Ministers from over 100 countries¹ signed the Final Act of the Uruguay Round of Multilateral Trade Negotiations. This concluded the eighth Round of GATT Trade Negotiations, which had been launched in September 1986 in Punta del Este, Uruguay. Under the umbrella of the Agreement establishing the World Trade Organisation (WTO), the package comprises agreements on such diverse issues as agriculture, textiles, intellectual property and trade-related investment measures. And, for the first time, parties established worldwide rules on trade in services through the General Agreement for Trade in Services (GATS). It is expected that the GATS, together with the WTO, will enter into force on 1 January 1995.

2. The initiative for including services in the Uruguay Round came from OECD countries. In view of the growing importance of services trade in world economic relations, the need for a rules-based framework which would in particular incorporate the most advanced non-Members of OECD had become apparent². Now that this goal has been achieved, the present paper is intended to provide an in-depth description of the new worldwide rules governing trade in services.

3. The GATS, like all other Uruguay Round agreements, is an annex to the Agreement establishing the World Trade Organisation (WTO). It therefore does not have its own signature and ratification process, but will enter into force at the same time as the WTO Agreement and all other Annexes. There is no opting out of the GATS: those who want to benefit from the other elements of the Uruguay Round have to adhere also to the GATS.

4. The GATS consists of two main parts: The "General Framework" with its annexes, on the one hand, and participating countries' individual "Schedules of Commitment", on the other hand. This construction resembles somewhat that of the OECD Codes of liberalisation which consist of a body of Articles and individual country "schedules" of reservations attached. As is the case under the Codes, it is only possible to define an individual GATS participant's obligations by reading both elements together.

5. The General Framework of GATS is composed of a preamble and 28 Articles, followed by eight annexes, eight ministerial declarations and decisions, and one "understanding" on financial services. Most of the annexes contain specific provisions applying to certain sectors, whereas the declarations and decisions address general institutional issues, such as the setting up of working parties, work programmes, mandates etc. The individual country schedules of commitment, plus a consolidated European Union schedule, are grouped in an "Appendix" to the Framework. Several countries have also submitted lists of MFN exemptions together with their schedule. Finally, certain instruments outside the GATS, such as the

Understanding on Settlement of Disputes and certain institutional provisions of the WTO Agreement itself, also apply as part of the WTO package.

6. The presentation of the GATS below is organised as follows: Section II deals with the general principles and obligations, including dispute settlement and institutional rules. Section III analyses, sector by sector, the specific sectoral provisions contained in the annexes, decisions, declarations and understanding. Sections IV and V contain some brief remarks on schedules of commitments and MFN exemption lists, respectively.

II. GENERAL PRINCIPLES AND OBLIGATIONS

7. The 28 Articles of the GATS agreement itself are grouped in six parts: Scope and Definition, General Obligations and Disciplines, Specific Commitments, Progressive Liberalisation, Institutional Provisions, Final Provisions. However, while covering all major provisions of the agreement, the description below will follow a different path for easier understanding. After defining the coverage of the agreement, it will be based on one of the main features of the GATS, the distinction between obligations applying "from the outset", i.e. to every party and all sectors, regardless of individual commitments, and obligations which apply only where a party makes a specific commitment in a given sector. Institutional provisions and dispute settlement will be addressed last.

1. Coverage of the agreement

8. Before entering into the analysis of obligations, it is important to define the agreement's general coverage: To what do the obligations apply? The answer is given in one short sentence in Article I, paragraph 1: "The Agreement applies to measures by Members affecting trade in services."

a) What are "Services"?

9. "Services" are defined in paragraph 3 b) of Article I as including any service in any sector. It is thus not true, as some press reports have implied, that certain sectors are excluded from the agreement. All sectors are covered, including possible future services, but there are some sectors where not all major players have made specific commitments, such as audiovisual services.

10. In order to help countries negotiate and schedule their commitments, the GATT Secretariat has issued a services sectoral classification list. It is neither binding nor exhaustive. But, even though not all countries have followed it, the list gives an indication of what is generally considered as an existing service. The list comprises eleven sectors, each divided in several subsectors:

- Business services, including professional services
- Communication Services, including telecommunication and audiovisual services
- Construction and related engineering services
- Distribution services
- Educational services
- Environmental services

- Financial services, including insurance and banking services
- Health related and social services
- Tourism and travel related services
- Recreational, cultural and sporting services
- Transport services, including maritime, waterways, air and road transport services

11. A category of services which is excluded from the coverage of the GATS are, in any of the above sectors, services supplied in the exercise of government authority. This exception is, however, limited: where a Government acts on a commercial basis and/or as competitor with other suppliers, its activities are treated like those of any private supplier. This also includes State-owned commercial enterprises which are covered by GATS general obligations such as MFN, as well as by specific commitments on market access and national treatment.

12. Furthermore, services purchased by governmental agencies for governmental, non-commercial purposes (government procurement) are not covered by the principal provisions of the GATS, i.e. MFN, market access and national treatment. However, one of the plurilateral agreements which are an optional part of the Uruguay Round package is specifically devoted to government procurement. It is expected to enter into force on 1 January 1996. Article XIII of the GATS stipulates that multilateral negotiations on government procurement shall take place within two years; these negotiations are to address any specificities of government procurement in the services sector.

13. The GATS obligations also apply to services supplied by monopolies. In accordance with Article VIII, Members must ensure that monopoly suppliers of services in its territory act in conformity with GATS obligations, including MFN. Monopolies must also be prevented from abusing their monopoly position when supplying services outside their monopoly.

b) What is "Trade in Services"?

14. Article I provides also a definition of what should be considered as "trade in services" by listing four different ways in which services can be traded internationally³. They are usually referred to as the "four modes of delivery":

- . In Mode 1, the service crosses the border, with neither the consumer moving nor the supplier establishing himself abroad. The service may be supplied, for instance, through telecommunications or mail, or through transmission of a computer diskette.
- . In Mode 2, the consumer (or his property, such as in ship repair) crosses the border to consume the service abroad. This can apply to almost any service, but is especially relevant in the tourism sector.
- . In Mode 3, the supplier crosses the border to establish a "commercial presence" abroad, through which he intends to provide a service. Commercial presence is defined in Article XXVIII(d) as "any type of business or professional establishment, including through (i) the constitution, acquisition or maintenance of a juridical person, or (ii) the creation or maintenance of a branch or representative office". Thus, while an explicit "right of establishment" was considered too sensitive by some countries, the concept of "commercial presence" retained appears, in fact, to be equivalent to the concept of establishment. In particular, it should be noted that the examples of forms of establishment are only illustrative

("including through"), and are apparently not meant to be exhaustive. The concept covers matters relating to both pre- and post-establishment. The only restriction: the "commercial presence" is only authorised for the purpose of supplying a service. It would no longer be protected if, and to the extent that, an established foreign enterprise wished to move into a non-services sector (or a services sector not covered by the host-country's specific commitments).

In Mode 4, the supplier crosses the border to provide a service abroad through the presence of natural persons. This mode of delivery is a rather sensitive issue, because it interferes with countries' sovereign rights to control entry of individuals into their territory. At the same time, its inclusion was of great importance particularly for developing countries. An Annex on Movement of natural persons clarifies that the natural persons referred to may either themselves be service suppliers, for instance self-employed, or be employees of a foreign service supplier. The Annex also reserves countries' rights to regulate immigration and access to the employment market, and expressly recognises that visa requirements may be applied in a discriminatory manner. Since specific commitments on Mode 4 have not yet been very forthcoming (except on intra-company transferees), a Ministerial Decision provides for the creation of a negotiating group. This group will work beyond the conclusion of the Uruguay Round to obtain more commitments on the movement of natural persons.

15. The rules of origin applying to the foreign service traded or service supplier trading under any of the above modes of supply are set out in Article XXVIII. A foreign service originates in the place where, or from where, it is supplied, except for services provided by an established foreign enterprise, which are equally considered foreign. A supplier who is a natural person is a service supplier of another Member if he is a national of that Member. A supplier who is an enterprise and provides services from abroad is recognised as a juridical person of another Member if he is engaged in "substantive business operations" in the territory of a Member, excluding the mere "mailbox" variety of firm. The definition of origin for a foreign enterprise operating through a commercial presence focuses on both ownership and control.

c) What is a "Measure by a Member?"

16. Article XXVIII(a) on Definitions is the starting point for clarifying the meaning of a "measure". It stipulates that a measure by a Member may take the form of a law, regulation, rule, procedure, decision, administrative action or any other form. This concerns of course only laws, regulations etc. which are in force.

17. Article I adds to this definition by stipulating that the GATS applies also to non-governmental measures, if they are taken by delegation of powers, such as, for example access to a profession regulated by the professional associations themselves. While other private practices are not "measures" covered by the general obligations of the GATS, Article IX recognises that certain business practices may be of an anti-competitive and thereby of a trade-restrictive nature. It calls on Members to enter into consultations with a view to eliminating such practices.

18. Subsidies to the services industry are considered "measures" within the meaning of the GATS. They are therefore subject to its general obligations, such as MFN, and can be covered, if desired, by a Member's specific commitments on Market access and National Treatment. In addition, Article XV encourages Members to enter into negotiations with the aim of eliminating the potentially trade-distortive effects of subsidies.

19. In accordance with Article I, all measures by subnational entities are covered by the GATS. Members must take all reasonable measures available to ensure observance of their general obligations (such as MFN) or specific commitments (such as National Treatment) by subnational entities. A Member may of course inscribe limitations with respect to subnational measures in its schedule of commitments. Paragraph 22.9 of the Understanding on the Settlement of Disputes makes it clear that violations of obligations regarding subnational measures are subject to dispute settlement. If a Member's central government shows that it has exhausted all reasonable measures available and still is unable to ensure observance by its subnational entities, it will not be considered as violating its obligations under the agreement. Nevertheless, it must then offer compensation in the form of a new concession. If it does not offer satisfactory compensation, the Member offended by a subnational measure may be authorised to suspend application of a commitment to the offending Member.

20. Finally, the GATS applies to measures by all Members alike, whether they are developed or developing countries. While some rules such as those on transparency in Article II, economic integration in Article V or progressive liberalisation in Article XIX may be applied with greater flexibility by developing countries, there is no two-tier system of obligations as existed in the GATT.

d) When does a measure "affect" trade in services?

21. Article XXVIII(c) makes clear that a measure affects trade in services not only if it relates to the provision of a service as such, but also, in particular, if it relates to the payment for a service and to access to local support facilities. Furthermore, Article XXVIII(b) confirms that any measure affecting production, distribution, marketing, sale and delivery of a service is covered by the GATS. Obligations applying from the outset, such as MFN and transparency, therefore extend all these measures automatically. Specific commitments made in a sector or subsector equally extend to these measures, unless specifically excluded.

2. Obligations and principles applying from the outset to all Members

a) The Most-Favoured-Nation Clause

22. The Most-Favoured-Nation (MFN) clause in Article II forbids any discrimination between foreign services and service suppliers originating in different GATS Members. MFN is the main substantive obligation that applies across the board to all Members. It is applicable to all measures affecting trade in services, as defined in Article I, in all sectors irrespective of whether specific commitments are undertaken or not, in any form such measures might take.

23. The following example may serve as an illustration: A GATS Member has not made any specific commitments on, say, accounting services. It may therefore maintain or introduce in this subsector any restrictions it considers necessary with regard to accounting services; there is no standstill and no rollback obligation. But if this Member removes a restriction with regard to the provision of accounting services from one other country (Member or non-Member of GATS), it has to remove it for all Members of the GATS, by virtue of Article II. The Member concerned is under no obligation to allow, for instance, international payments and transfers relating to accounting services, as it would be in accordance with Article XI of the GATS, had it made specific commitments for that subsector. But if it applies, in that subsector, the privileges of Article XI on payments and transfers to suppliers from just one other country (Member or non-Member of the GATS), even in the absence of a specific commitment, it has to extend,

as regards accounting services, the privileges of Article XI on freedom of payments and transfers to all Members - by virtue of Article II.

b) Exceptions to the Most-Favoured-Nation Clause

24. The wholly unqualified MFN some countries had been aiming at during the Uruguay Round negotiations has, however, not been achieved. The MFN obligation in the GATS final text is in fact qualified by certain exceptions. Two kinds can be distinguished:

- Individual MFN exemptions which Member countries may list in accordance with paragraph 2 of Article II and the Annex on Article II exemptions.
- Cases where MFN does not apply by virtue of certain GATS provisions, such as paragraph 3 of Article II (preferential treatment for trade in frontier areas), Article V (Economic Integration), Article XIII (Government Procurement), Article XIV and XIV bis (General and Security exceptions), as well as exceptions specified in certain sectoral annexes, in particular paragraph 2.1 of the Financial Services Annex (Prudential carveout). Article VII on mutual recognition is by some also considered as belonging in this group.

i) Individual MFN exemption lists

25. At the outset of negotiations, many had hoped that the GATS would avoid individual MFN exemptions altogether. The formula which has been retained in the end allows Members to lodge exemptions to the MFN principle once, before the entry into force of the agreement⁴. The list is not necessarily limited to existing measures, but can include future measures constituting exemptions to MFN, as long as they are described clearly. In that sense, despite the list being in principle a "closed" one, there is no complete standstill on discriminatory measures in the GATS. If, however, a country wishes to introduce discriminatory measures after the entry into force, and if they have not been envisaged in its MFN exemption list, they can only be admitted under the heavy procedure set out in Article IX of the WTO Agreement: Approval by a three-fourths majority of the Members of the WTO Ministerial Conference.

26. An essential feature of MFN exemptions under the GATS is that they can only apply where a Member has not made specific commitments. This is so because paragraph 2 of Article II only allows exemptions from the MFN obligation, but not from the obligation set out in Articles XVI and XVII to grant market access and national treatment in accordance with a Member's schedule of commitments. What appears in a country's schedule of commitments has to be granted to all Members without exception. Therefore, an MFN exemption does not justify granting to certain countries treatment which is less favourable than that specified in the Member's schedule of commitments. It only makes it possible for the Member taking the MFN exemption to extend to certain countries treatment which is more favourable than that specified in its schedule. In other words, if a Member wants to maintain or introduce discriminatory treatment with respect to a certain liberalisation measure, it cannot include that measure in its schedule of commitments (and therefore - that is the disincentive - it cannot offer that measure as a concession in the negotiation process).

27. It should be noted that MFN exemptions may cover existing or planned reciprocity requirements which are considered exceptions to MFN. It has been argued, however, that such reciprocity requirements, even if formally legalised as MFN exemptions through inclusion in a Member's list, run counter to the GATS spirit: reciprocity should consist in an overall balance of commitments, and not be sought measure

by measure. Furthermore, on the side of Members who maintain laws containing reciprocity requirements, the argument has been used that such laws could stay on the books, even if not inscribed in the country's MFN exemption list, as long as they provide for administrative discretion with regard to the application of sanctions. In other words, if authorities retain the option to act in a manner which conforms with the GATS through not applying discriminatory sanctions at the end of the procedure, the law as such would not be contrary to the GATS.

28. MFN exemptions are to be reviewed after five years. "In principle", they should not be maintained for more than ten years. However, the addition of the words "in principle" is seen by many as eliminating most of the value of the ten year limitation. Indeed, many countries have indicated in their lists that the duration of a given MFN exemption was "indefinite".

ii) Economic Integration

29. Among the provisions of the GATS which allow exceptions in certain cases from the MFN principle - without the need of listing them in a MFN exemption list - the first is Article V on Economic Integration. This provision had been supported in particular by the European Union, Switzerland, Austria, Australia and New Zealand. It started out as a clause very similar to Article XXIV of the GATT. Any reference to formal structures, such as free trade areas or customs unions was eventually dropped. Similarly, there is no longer any need for economic integration to be "regional".

30. The text of Article V now has a fairly wide coverage. It stipulates that the GATS "shall not prevent any of its Members from being a party to or entering into an agreement liberalising trade in services between or among the parties", on condition that the agreement has "substantial sectoral coverage" and provides for rollback and/or standstill as regards "discriminatory measures". The latter term, within the context of the GATS, is equivalent to "restrictions", since it concerns discrimination between nationals and non-nationals. Developing countries have been granted "flexibility" in applying the conditions for an agreement to benefit from Article V, particularly as concerns the need for the agreement to provide for standstill and/or rollback.

31. It should be noted that the text avoids any explicit reference to what is nevertheless its effect: to provide an exception from the MFN principle if the Article V agreement liberalising trade in services comprises obligations for additional/more advanced liberalisation between the parties to it. Paragraph 4 of Article V makes it clear, however, that such additional liberalisation shall only be designed to facilitate trade between the parties and not raise "the overall level of barriers" within a sector or sub-sector. This clearly admits new restrictive measures against third countries as long as they are compensated by some new liberalisation of which they may benefit, and provided they do not run counter to a Member's specific commitments.

32. An interesting feature of Article V is its paragraph 6, which appears basically to copy Article 58 of the EC Treaty into the GATS: it accords the benefit of the provisions of any economic integration agreement covered by Article V to established foreign subsidiaries from third countries, "provided that it engages in substantive business operations in the territory of the parties of such agreement". It is recalled that, in accordance with the rules of origin described in paragraph 15 above, an established foreign-controlled enterprise is one that is owned and controlled by another GATS Member. Developing countries have been granted an exception to this rule in accordance with paragraph 3(b) of Article V.

33. Members party to an Article V agreement need to notify that agreement and any significant enlargement or modification to the WTO (Council for Trade in Services) if they want to invoke the MFN exception provided by Article V. There is no precise time limit for accomplishing that notification, but it is nevertheless stipulated that it should occur "promptly". A working party on such agreements may well be established.

iii) Recognition

34. Article VII on Recognition is treated here because it could be classified as another exception, or at least qualification, to the MFN principle. It must be stressed, however, that in reality it has a double character. Indeed, it contains additional obligations regarding recognition. To a certain extent, the recognition process must be opened up to other interested countries. Thereby, Article VII seeks to promote recognition as a means of sound liberalisation. One should further point out that the heading of Article VII is "Recognition" rather than "Mutual Recognition", because it concerns not only recognition through bilateral or multilateral agreements, but also autonomous, unilateral and, presumably, informal "de facto" recognition.

35. Article VII allows Members to recognise selectively qualifications obtained, requirements met or licences granted in one or several other Member countries. Such recognition may then provide the basis for selectively granting authorisations, licenses etc. to service suppliers from these countries, but not to service suppliers from other countries. In accordance with Article VII, Members may recognise, for instance, a foreign law degree as equivalent, and therefore sufficient for obtaining the authorisation to practice, and they may discriminate between other Members in pronouncing such recognition.

36. Paragraphs 2 to 5 of Article VII erect safeguards against the possibility of abusing the right to selective recognition. Paragraphs 3 and 6 stipulate that a country should base its recognition policy on objective criteria (preferably multilaterally agreed) and not discriminate between countries in applying these criteria. In other words, selective recognition should not be a means of arbitrary discrimination, but based on effective differences between foreign countries as regards standards for qualifications, licenses etc. Nor should alleged inferiority of standards of any foreign country be used as a pretext for what would really amount to a disguised trade restriction.

37. In the same spirit, paragraph 2 introduces a right for third countries, where mutual recognition agreements or unilateral recognition exist, to try and demonstrate that their education, licensing etc. requirements should be recognised as equivalent to those of the parties to a mutual recognition agreement or the beneficiaries of unilateral recognition. In order to enable countries to exercise this right, paragraph 4 of Article VII introduces a transparency requirement for recognition measures: such measures, whether based on agreements or on unilateral action, need to be notified to the Council for Trade in services within 12 months from the entry into force of the GATS if they exist already, and "promptly" for those adopted in the future. Even the opening of negotiations on mutual recognition agreements has to be notified, so as to enable other interested Members to express their interest in participating in these negotiations.

38. The development of multilaterally agreed criteria for recognition, and of common international standards for the practice of services and professions, by relevant intergovernmental and non-governmental organisations outside the GATS is encouraged by paragraph 5 of Article VII. Such organisations may have a limited membership.

c) Transparency

39. Transparency is considered, together with MFN, as a major accomplishment of the GATS applicable to all. It is usually referred to as an obligation which applies from the outset, regardless of specific commitments. This is, however, only partly true, which limits somewhat the transparency value of Article III.

40. Indeed, the only "transparency" requirement applicable from the outset is the obligation to publish "all measures of general application" relevant to the GATS. Publication can be anywhere or by any means, nationally, regionally or just locally. In particular, there is no obligation for a Member to notify these measures to the GATS or to make them otherwise known internationally. It may be noted, though, that other Members are entitled to notify to the Council of Trade in Services of such measures - which they are likely to do only if they consider them as violating the agreement. Members are committed to establish "enquiry points" within their territory for the purpose of providing information to other Members. Logically, because there is no notification requirement they could rely on, the GATT (future WTO) Secretariat is not planning any publication listing all measures affecting trade in services.

41. It should be noted that the general transparency requirement is one of the few GATS obligations which apply to government procurement of services.

42. An effective notification requirement exists only for measures concerning sectors or sub-sectors for which a Member has inscribed specific commitments in its schedule. Here, Members have to promptly and at least annually inform the WTO (Council for Trade in Services) of new measures "significantly" affecting trade in services covered by that Member's specific commitments.

d) Progressive Liberalisation

43. Members will be free to decide in which sector they want to continue to liberalise and to what extent. In particular, there is no obligation to progressively liberalise unilaterally. In accordance with Article XIX, however, Members are obliged to at least come and sit down at the negotiation table in successive rounds of negotiation, with the purpose of achieving progressively a higher level of liberalisation. The first round shall start no later than five years after the entry into force of the agreement. While the process does not aim at reciprocity in the strict sense, it seeks to secure "an overall balance of rights and obligations" between participants. It is here that the GATS approach to further liberalisation becomes most obvious, in that it is based on mutual exchanges of concessions rather than on the idea that unilateral liberalisation is beneficial per se for the liberalising country.

44. This being said, unilateral liberalisation by Members between rounds is not at all excluded. They remain free to consider that it is more in their interest to remove barriers unilaterally than to hold back in the hope for possible counterparts. Indeed, paragraph 3 of Article XIX even foresees that negotiating guidelines for each round "shall establish modalities for the treatment of liberalisation undertaken autonomously by Members since previous negotiations". In other words, it is entirely possible to stipulate that unilateral liberalisation measures undertaken between rounds shall be taken into account as concessions for the negotiations of the current round.

45. Article XIX requires each Member to attach a schedule of specific commitments to the agreement; a Member must thus make a commitment in at least one sector or subsector. Further details on scheduling of specific commitments are given below, but one interesting point should be mentioned here: Article XXI of the agreement provides that three years after entry into force, any commitment may be unilaterally withdrawn. There is, consequently, no absolute standstill even for commitments bound in a schedule. The

intended withdrawal must be notified in advance; if no other Member complains, nothing happens. If another Member does complain, the withdrawing Member has to offer another commitment as acceptable compensation. That commitment may however be in a different sector or subsector, provided that the overall level of the Member's commitments is not less favourable. While thereby the general level of liberalisation should not be reduced, such flexibility in exchanging commitments may introduce a non negligible element of insecurity for service suppliers.

e) Generally applicable exceptions

46. The agreement contains a number of exceptions which apply to general obligations as well as to obligations resulting from specific commitments. They are divided, following the example of the GATT, into two groups: general exceptions and security exceptions. It may be noted that the GATS does not yet contain rules on emergency safeguards which are to be negotiated within three years, in accordance with Article X.

i) General exceptions

47. Provided that they do not discriminate arbitrarily, nor constitute a disguised restriction to trade, Members, in accordance with Article XIV, are not prevented by any of their GATS obligations from taking the necessary measures to

- protect public morals
- maintain public order
- protect human, animal or plant life or health⁵
- prevent deceptive or fraudulent practices or deal with the effect of defaults on services contracts
- ensure data protection
- ensure safety.

48. Exceptions from national treatment commitments only are allowed for the purpose of ensuring the equitable or effective imposition or collection of direct taxes⁶. Exceptions from MFN treatment only are allowed if motivated by the application of a double taxation agreement. Both these exceptions taken together provide a rather far-reaching carveout of tax measures from the GATS. This is motivated by an assumption that they will be adequately dealt with through international cooperation between tax authorities.

ii) Security exceptions

49. Article XIV bis copies the rules of Article XXI of the GATT 1994 concerning essential security interests into the GATS. The exception covers the military, nuclear materials, war and the maintenance of international peace and security under the UN Charter.

3. Obligations applying only where specific commitments have been undertaken

50. Apart from the few general obligations described above, all other GATS obligations depend on the specific commitments each Member has been willing to enter into. The way countries have in the end defined their commitments under the GATS is a mixture between the "top-down" and "bottom-up" approaches which were discussed in Geneva at length. Under the "top-down" approach, similar to that of the OECD Codes, the agreement would have fixed maximum obligations in all sectors - a kind of ideal standard of liberalisation to strive for -, and countries would have lodged negative "reservation lists". Under the "bottom-up" approach, no standards would be set, and countries would have simply listed positive commitments - whatever positive action towards liberalisation they are prepared to undertake.

51. The GATS system now adopted is based on the idea that full liberalisation of trade in services requires, beyond MFN and transparency, the presence of three elements:

- Market access (Article XVI)
- National treatment (Article XVII)
- Domestic regulations which are not unnecessarily burdensome (Article VI)

These elements are completed by certain rules concerning capital movements and payments and transfers necessarily related to trade in services.

52. The GATS does not, however, set any precise aims for liberalisation, including the above elements, to be achieved generally for trade in services. Obligations in respect of these elements do not exist per se, but only where a Member has chosen explicitly to make commitments in a specific services sector, and, for market access and national treatment, subject to the conditions inscribed in its schedule. The GATS approach to scheduling commitments is thus a hybrid one: a mixture between the top-down and bottom-up approaches described above. It is also interesting to note that Members have the free choice through which mode of delivery they want to grant market access and national treatment; they can make commitments only on one Mode and may thereby effectively be encouraged to impose on foreign suppliers a particular mode of delivery.

53. The rules on market access, national treatment and domestic regulations are intended to capture the full spectrum of restrictions potentially affecting trade in services. According to the analysis prevailing under the GATS, and inspired at least partly by the GATT, restrictions are either quantitative or qualitative, discriminatory or non-discriminatory⁷. Country limitations on market access are deemed to cover all quantitative restrictions, whether discriminatory or non-discriminatory. Limitations on national treatment should cover all qualitative discriminatory restrictions. The rules on domestic regulation are aimed at qualitative non-discriminatory measures.

	Quantitative restrictions	Qualitative restrictions
Discriminatory regulations	Market Access Article XVI	National Treatment Article XVII
Non-discriminatory regulations	Market Access Article XVI	Domestic Regulations Article VI

a) Market Access

54. It is remarkable that the GATS does not provide any definition of the concept of market access⁸. Article XVI 1. obliges Members to grant market access, through the four modes of supply identified in Article I, if, and to the extent, provided for in their individual schedules. Paragraph 2 (a) to (f) of Article XVI contains a list of measures considered as limitations to market access. This list is intended to be exhaustive⁹, i.e. full market access is deemed to exist if there are no quantitative restrictions of the kind enumerated in Article XVI. Finally, a footnote clarifies that certain capital movements necessary for market access have to be allowed.

55. A Member having decided to make commitments on market access in a given sector for one or more modes of supply therefore needs to inscribe in its schedule under the market access column any quantitative limitations classified according to:

- mode of supply according to Article I, subparagraphs 2(a) to (d)
- nature of limitation according to Article XVI, subparagraphs 2(a) to (f).

56. The first four types of quantitative restrictions, listed in sub-paragraphs (a) to (d) all take the form of an economic needs test, or can be expressed in absolute numbers. It is recalled that they can, but do not have to, discriminate against foreigners. They concern:

- a) limitations on the number of service suppliers (such as established quotas on the number of taxi drivers, but also nationality requirements which amount to a zero quota for foreigners);
- b) limitations on the total value of transactions or assets (such as foreign banks being limited to x percent of total domestic assets of all banks);
- c) limitations on the total number of service operations or quantity of services output (such as restrictions on broadcasting time available for foreign films)
- d) Limitations on the total number of natural persons (such as foreign labour being restricted to x percent of total workhorse in a sector).

57. The last two types of market access limitations listed refer more specifically to foreign direct investment and establishment - without using either of these terms. Sub-paragraph (e) covers in particular limitations on the form of commercial presence: for instance, a country may make a commitment in a sector to allow commercial presence, but only admit it in the form of subsidiaries, or impose a partnership with a local supplier. Sub-paragraph (f) relates in particular to restrictions on foreign capital participation, whether in the form of a ceiling of x percent or in the form of a total interdiction for foreigners to acquire an existing enterprise.

58. A footnote to Article XVI on market access deals with certain capital movements relating to the supply of a service. Obligations under this footnote may not be made subject to limitations, but exist only where a specific commitment has been made. They apply only in two of the four modes of supply: (i) in the cross-border mode of supply (Mode 1), capital movements, whether into or out of the Member's territory, must be allowed if they are an essential part of the service provided, such as payment of an insurance claim; (ii) in the commercial presence mode of supply (Mode 3), related capital inflows must be admitted¹⁰. It should be noted that restrictions on capital movements not mentioned in this footnote, for instance repatriation of liquidation proceeds on other capital outflows, may be covered where they "affect trade in services", particularly foreign suppliers' equal competitive opportunity.

b) National Treatment

59. As mentioned above, all restrictions discriminating between domestic suppliers and foreign suppliers, other than those relating to market access, are to be treated as restrictions to national treatment¹¹. Specific commitments and limitations relating to national treatment may be scheduled under any of the four modes of supply; the GATS concept of national treatment is not limited to services suppliers having established a presence in the territory. Contrary to the case of market access, the GATS does provide a definition of national treatment: According to Article XVII, a Member accords full national treatment in a given sector and mode of supply when it accords in that sector and mode conditions of competition no less favourable to services suppliers of other Members than those accorded to its own like services and services suppliers.

60. The benchmark for national treatment under the GATS is the equality of competitive opportunities, otherwise defined as de facto national treatment. Members may thus treat foreign services providers differently, as long as this does not affect their competitive opportunities. Inversely, a Member may have to accord formally different treatment to foreign services or services suppliers, in order to achieve de facto national treatment¹². This concerns cases where formally identical treatment would put a foreign supplier in a less favourable situation than a domestic supplier and therefore amount to de facto discrimination.

61. It should already be stressed here that there is a fine, and indeed not always clear line between de jure non-discriminatory regulations which may be scheduled as limitations to national treatment under Article XVII because of their de facto discriminatory effect, and those which are to be treated as contrary to Article VI on domestic regulations because they are "unnecessarily burdensome" (see more on that provision below. For instance, if the issuing of a licence requires prior residency, such a requirement might have to be scheduled under Article XVII as a de facto discrimination, being less likely to be met by foreign nationals¹³. But it could also be assessed, depending on the circumstances, as "unnecessarily burdensome" under Article VI (5) - in which case it might have to be abandoned all together.

62. It is recalled that subsidies are not excluded from the coverage of the GATS. If subsidies may be granted only to domestic services and services suppliers, such limitations must be scheduled for the sector concerned.

c) Domestic Regulations

63. The introduction of rules on non-discriminatory domestic regulations in Article VI of the GATS is based on the acknowledgement that in the field of services, national treatment may not always be enough to remove all unjustifiable barriers to international trade in services. Domestic regulations concerning conditions for the supply of services - qualifications of the service supplier, rules concerning the exercise of his activity etc. - are often considered indispensable for reasons principally relating to consumer protection. They may, however, whether intentionally or unintentionally, have at the same time the effect of restricting trade in the sector concerned.

64. Article VI is aimed at establishing safeguards against such domestic regulations operating to keep foreign services and service suppliers out of a domestic market, while at the same time recognising the right of domestic regulators to impose minimum standards and conditions, which relate to qualification requirements and procedures, technical standards, licensing and authorisation requirements etc. To that end, Article VI first establishes the general principle that domestic measures must be administered in a reasonable, objective and impartial manner, that foreign suppliers must be able to challenge administrative decisions before a tribunal and that they must be clearly informed if an application for an authorisation is rejected.

65. More importantly, Article VI attempts to define standards to which domestic regulations aimed at the supply of services should conform. The key conditions imposed by Article VI are that any requirements should be:

- a) based on objective and transparent criteria
- 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 a service.

66. As a way of achieving compliance of domestic regulations with these criteria, Article VI (4) provides that the WTO's Council for Trade in Services should create specialised bodies to develop international disciplines "aimed at ensuring that measures relating to qualification requirements and procedures, technical standards and licensing requirements do not constitute unnecessary barriers to trade in services". Awaiting accomplishment of this task (for which no timeframe is set), Members are asked in paragraph 5 to apply their existing requirements and standards in a manner which complies with the above three criteria anyway, in particular if they would otherwise "nullify or impair" their specific commitments in a given sector. Members can show the conformity of their domestic regulations with the requirements of Article VI 5 by pointing out that the regulations fulfil standards set by other "relevant" international organisations.

67. It should be noted that Members are not allowed to schedule limitations to the obligations of Article VI. Domestic regulations which do not conform to the requirements of Article VI must be brought into compliance; otherwise the Member concerned violates its obligations under the GATS. However, the criteria in Article VI are so broad and so much subject to interpretation that - at least until the disciplines

foreseen in paragraph 4 have been developed - the question of whether a given domestic regulation conforms to Article VI may be extremely difficult to answer.

d) Payments and Transfers

68. Article XI protects payments and transfers relating to services covered by specific commitments, i.e. inscribed in a Member's schedule, whatever the mode of supply. Except for balance of payments reasons (see Article XII), Members are required to allow "international transfers and payments for current transactions relating to its specific commitments." No limitations to this obligation can be inscribed in Members' schedules, once the service transaction as such is covered. Exchange control restrictions are not excluded from the scope of Article XI, unless justified by the balance-of-payment exception. According to paragraph 2 of Article XI, rights and obligations of IMF members shall not be affected, as long as no restrictions on capital transactions covered by specific commitments are imposed. The Fund may, however, request that a Member impose such restrictions. Paragraph 2 of Article XI also applies to capital movements covered by the footnote to Article XVI.

69. What is the coverage of Article XI? Article XXVIII (c) makes it clear that measures affecting payment for a service are covered by the GATS in general; therefore, all such payments are at least subject to MFN. It is thus logical that Article XI and its reference to "international transfers and payments" must go further where a Member has made specific commitments.

70. Article XI should apply in the case of a foreign service supplier present in the country - be it in Mode 3 as commercial presence or in Mode 4 as a natural person - who wishes to have payments for services provided directly transferred abroad, for instance foreign workers wishing to have their wages directly transferred to their home country, or foreign branches wishing to have payments by clients directly made to the mother company abroad. Another question is whether Article XI prohibits any restrictions on currency exports intended to pay for consumption abroad under Mode 2, such as maximum amounts of national currency which tourists are allowed to take with them, restrictions on the use of credit cards abroad etc.

71. The scope of "payments and transfers" relating to "current transactions" protected by Article XI appears to extend also to transfers such as repatriation of profits, earnings, dividends and interests accumulated by a foreign service supplier in the host country. It might equally stand in the way of restrictions on transfers into a country unrelated to the establishment of a commercial presence and not constituting an investment, but concerning operating expenditures of an established foreign service supplier, such as contributions to joint costs.

e) Balance-of-payments exception

72. Article XII recognises "the particular pressure on the balance of payments of a Member in the process of economic development or economic transition". It allows members to adopt restrictions contrary to their specific commitments in the event of "serious" balance of payments difficulties. Such measures shall be temporary, non-discriminatory and avoid unnecessary damage to other Members. They shall be notified to and monitored by the WTO's General Council and Committee on Balance-of Payments-Restrictions.

4. Institutional provisions

73. The GATS will be administered, like all other elements of the Uruguay Round package, by the future World Trade Organisation (WTO). The WTO will have a Secretariat and a Director-General. Furthermore, Article IV of the WTO Agreement establishes a number of bodies consisting of government representatives. In accordance with Article IX, all bodies shall make decisions by consensus, but "where a decision cannot be arrived at by consensus, the matter at issue shall be decided by voting".

74. The supreme body of the WTO will be a Ministerial Conference meeting at least every two years. In between, a General Council on which each Member has a seat and a vote shall direct the WTO. It will make "appropriate arrangements for effective cooperation with other intergovernmental organisations that have responsibilities related to those of the WTO", including those concerned with services (Article XXVI of the GATS). The General Council shall also, with a different chairman and in a different composition, discharge the responsibilities of (a) the Dispute Settlement Body (DSB) and (b) the Trade Policy Review Body, which will also cover trade in services policies. Under the general guidance of the General Council, there shall be a Council on Trade in Goods, a Council for TRIPS and a Council for Trade in Services.

75. The Council for Trade in Services is responsible for overseeing the GATS. It is open to representatives of all Members, meets as necessary and establishes its own rules of procedure. In accordance with Article XXIV of the GATS, the Council on Trade in Services has a very large mandate: it may do anything to facilitate the operation of the agreement and further its objectives. It may establish subsidiary bodies; these will include, inter alia, the Committee on Trade in Financial Services, the Working Party on Trade in Services and the Environment, the Working Party on Professional Services, the Negotiating Group on Movement of Natural Persons etc. There might also be working parties on issues such as economic integration or MFN exemptions. Last but not least, the Council for Trade in Services has its own role in the early stages of dispute settlement: Members feeling prejudiced by another Member's action may ask the Council for Trade in Services to "consult" with the offending Member to find a satisfactory solution through consultation in accordance with Article XXII, before they enter formal dispute settlement.

5. Dispute Settlement

76. Article XXIII provides that the Understanding on Rules and Procedures Governing the Settlement of Disputes (which is part of the Uruguay Round package) shall apply to the GATS. Two different cases are envisaged by paragraphs 2 and 3 of Article XXIII:

- Either a Member is accused of violating its obligations (MFN) or specific commitments under the agreement, in which case the provisions on compensation and retaliation of the Dispute Settlement Understanding (DSU) may apply directly after determination by the Dispute Settlement Body (see below);
- Or the Member is accused of having "nullified or impaired" another party's benefits under the agreement, through a measure which does not formally violate the agreement; in that case, the offended Member has first to try and negotiate a "mutually satisfactory adjustment" under Article XXII 2. of the GATS (Modification of Schedules).

77. The DSU contains rather sophisticated rules which cannot be discussed here in full detail. The main stages, all subject to time-limits, are as follows:

- Consultation on a measure alleged to be contrary to the agreement (e.g. GATS). If no solution
- Establishment of a Panel by the DSB¹⁴
- Transmission of Panel Report to DSB, possibly with recommendations on how to bring measure into conformity with agreement
- Possibility of Appeal to an Appellate Body
- Quasi-automatic adoption by DSB of Panel Report or Appellate Body Report, i.e. report can only be rejected by consensus
- If recommendations not implemented, negotiations between parties on compensation (for instance offering of a different commitment)
- If no agreement on compensation, DSB may authorise offended party to retaliate by suspending concessions with regard to offending party¹⁵. Retaliation should preferably occur in the same sector as the measure by the offending party. If this is not practicable or effective, there may be cross-sectoral retaliation within the same agreement (e.g. within GATS). Only if this is not feasible and if the circumstances are serious enough should retaliation occur under a different agreement of the WTO package (TRIMS, TRIPS or Trade in Goods).

78. A central feature of the DSU reaffirms that Members shall not themselves make determinations of violations or decide on retaliation, but shall make use of the dispute settlement rules and procedures of the DSU (see paragraph 23.1 of the DSU). The question has frequently been asked whether, therefore, there was still any room to apply unilateral sanctions, such as those contained, for instance, in the United States Section 301 provisions¹⁶, or the proposed Fair Trade in Financial Services Act.

79. The existence of such provisions appears not of itself incompatible with GATS, and they could certainly be used against non-Members of the GATS. Furthermore, the DSU applies principally, as concerns the GATS, if a country acts contrary to its specific commitments or MFN obligations. If a country feels offended by a measure which is not covered by another country's specific commitments, and if that measure is applied without discrimination, the DSU could probably not be invoked to resolve the dispute. Sanctions which the offended Member might then wish to take on the basis of its national laws would of course have to be consistent with its own specific commitments and MFN obligations under the GATS. In sum, national sanctions such as those mentioned above could presumably still be GATS-compatible if (a) no specific commitments are concerned on either side, and (b) the country applying the sanctions has taken a MFN exemption covering the measures withdrawn as a sanction.

III. SPECIFIC SECTORAL PROVISIONS

80. The annexes to the GATS and related instruments (but also some provisions of the agreement itself) set out specific rules applying to certain sectors. The text below will deal mainly with Financial Services, but also briefly address Professional Services, Telecommunications, Maritime Transport and Air Transport.

1. Financial Services

81. There are several additional instruments under the GATS regarding Financial Services: Two Annexes on Financial Services, a Ministerial Decision on Financial Services, and an Understanding on Commitments in Financial Services.

- The first Annex on Financial Services contains some specific additions to the GATS articles regarding financial services, such as a far-reaching prudential carveout and a detailed list of what should be considered financial services.
- The Understanding on Commitments in Financial Services was initiated by OECD countries¹⁷. Its legal status is unclear; but at the minimum, it offers an optional "alternative approach" to scheduling commitments and sets certain explicit standards for liberalisation of financial services.
- The Second Annex and the Ministerial Decision are both procedural instruments ensuring that negotiations on financial services may continue until July 1995, i.e. six months after entry into force of the WTO.

a) Annex on Financial Services

82. This sectoral Annex applies to all Members. It is intended to take account of the special and sensitive nature of the financial sector. First, in paragraph 1, it clarifies that central bank activities and activities forming part of a statutory system of social security or public retirement plan and all other activities conducted by a public entity for the account or with the guarantee or using the financial resources of the Government are excluded from the coverage of the GATS. It does not matter whether such activities occur on a commercial basis. Only if a Member allows its own domestic suppliers to compete with the public institutions in these fields, activities are subject to GATS obligations.

83. Under paragraph 2.1 of the Annex, a Member is free to take any prudential measures for investor protection or measures aimed at ensuring the integrity of its financial system. Such measures do not need to conform to the MFN clause and may otherwise be contrary to GATS obligations, but this provision should not be used for the purpose of escaping from these obligations.

84. Paragraph 3 reaffirms that recognition of another country's domestic prudential measures (such as banking supervision, for instance) may be used "in determining how the Member's measures relating to financial services may be applied". This appears to go further than Article VII of the GATS, inasmuch as liberalisation measures themselves may be applied in a different manner, depending on where the financial service or services supplier has its origin. While, as in Article VII of the GATS, opportunity must be

provided for other interested Members to obtain similar recognition by proving that their standards are equivalent, the prior information requirement regarding negotiations set out in Article VII 4(b) does not apply.

85. As regards the list of financial services included in the Annex (which is almost identical to, but has more formal status than, the list contained in the GATS Services Sectoral Classification List, see above), it is notable that, under the GATS, insurance services are not treated separately, but as part of financial services. Indeed, the list is divided in two parts, one devoted to "insurance and insurance-related services", the other to "all banking and other financial services". The list is apparently not deemed to be exhaustive.

b) Understanding on Commitments in Financial Services

86. This Understanding is the result of an initiative by OECD countries. Its application is optional. Members do not formally "adhere" to it, but may use it without further formality as an "alternative approach" to scheduling specific commitments on financial services. The Understanding aims at pushing further liberalisation with respect to financial services. Application of the approach must not conflict with the provisions of the Agreement; under no circumstances can it, therefore, reduce or eliminate an obligation which would result from the agreement itself. Furthermore, and this is important, the MFN obligation of the GATS will apply for the benefit of all Members, including those who have not adhered to the Understanding. The two main characteristics of the Understanding are:

- an explicit standstill obligation;
- a top-down approach, through the formulation of ideal standards of liberalisation from which Members are expected to take only limited reservations.

The Understanding thus provides some indication of what developed countries considered to be the standard of liberalisation negotiating partners should aim at.

87. The aim of the Understanding is more ambitious liberalisation commitments in financial services by those who schedule in accordance with it¹⁸. As mentioned, it is much more explicit in setting positive standards. But only few of its provisions actually contain additional obligations, and theoretically, a Member could reach almost the same standard of liberalisation commitments by scheduling in accordance with the general approach. The main feature of the Understanding is certainly the standstill obligation which those who choose the "alternative approach" must respect. It is set out as the first provision of the text, and may not be made the subject of limitations. It applies to the commitments specifically mentioned in the Understanding.

88. The Understanding contains the obligations set out below, almost all of them grouped under the heading "market access". Members may lodge limitations to these obligations for existing measures, but must then respect the standstill. In this context, it should be noted that liberalisation measures which are not expressly mentioned in the Understanding can of course be the subject of specific commitments scheduled, in addition, under the general approach.

Monopolies

89. Each Member accepting the alternative approach must, to achieve complete transparency, list in its schedule existing monopolies, including activities conducted by a public entity "for the account or with the guarantee or using the financial resources of the Government" (which would normally be excluded as services supplied in the exercise of government authority under paragraph 1.2 of the Annex on Financial services). Members further endeavour to eliminate or reduce such monopolies. This goes well beyond Articles III and VIII of the Agreement.

Government Procurement

90. Members must accord MFN and national treatment to established foreign suppliers, concerning purchase of financial services by public entities. This too is a clear "plus" as regards standards set by the Understanding, government procurement being normally excluded from the coverage of the agreement.

New financial services

91. This is another additional obligation which appears to aim at according better than national treatment to foreign service suppliers (presumably in order to let them fully exploit their comparative advantage). "New" financial services are defined as services which exist in other countries but not in the host country. Members commit themselves to allowing foreign established service suppliers from such other countries to provide these "new" services in their territory, even if their domestic suppliers can not (yet) provide them. Prudential measures could of course still be imposed.

Cross-border Trade

92. Under this heading, the Understanding sets standards and provides for standstill with regard to cross-border trade (Mode 1: only the service crosses the border) in certain financial services. Different rules apply, depending on whether the initiative for the transaction comes from the supplier or from the consumer.

- An explicit right to offer and provide services cross-border (right of non-establishment) is spelled out for non-resident suppliers of insurance services in the field of maritime and air transport, goods in international transit, reinsurance, retrocession and for suppliers of certain information, advisory and other auxiliary financial services.
- Residents should be entitled to purchase abroad the foregoing services plus all other banking and financial services, excluding direct insurance and insurance intermediation. This appears, prima facie, to amount as well to a right of non-establishment for the supplier. The difference could be that this provision does not comprise a right for the non-resident service provider to solicit business, but only to provide it if solicited by the resident consumer.

Establishment

93. The Understanding spells out a right of establishment, and of further investment by established foreign firms, subject to standstill. While the setting of an obligation in this respect is certainly of great importance, the Understanding's concept of establishment appears to be the same as the agreement's

concept of "commercial presence". The Understanding further requires Members not to use authorisation procedures as a means to circumvent their obligations regarding the right of establishment.

Temporary Entry of Personnel

94. This obligation relates mainly to intra-company transferees, i.e. senior managers and specialists needed for the setting up and operation of a commercial presence by a foreign supplier. Somewhat lesser obligations exist when it comes to the entry of people who are not employees of the foreign firm. Only computer, telecommunications, accounting, actuarial and legal specialists have a right to entry, and only if no qualified personnel are available in the country concerned.

Non-discrimination

95. Under this heading appear somewhat odd provisions, regarding the need to remove or limit adverse effects of certain, mostly non-discriminatory, measures. One paragraph refers, for instance, to measures imposing dual banking systems. They might lead to lesser commitments than under the agreement to the extent that they suggest only "best endeavours" by Members to remove or limit certain non-discriminatory measures. It needs to be recalled that they were in fact drafted before the market access/national treatment provisions of the agreement, and it needs to be recalled also that the Understanding may only be applied to the extent it does not conflict with the agreement. Whether this plays any role in practice, given that under the agreement Members can practically schedule, not schedule, or limit as they like, is, however, rather doubtful.

National treatment

96. This, too, is a rather strange leftover from previous texts which were drafted before the agreement's own national treatment provision. It addresses two distinct subjects:

- Established foreign suppliers shall be entitled to access to public payment and clearing systems, and to official funding and refinancing facilities, but not to lender of the last resort facilities¹⁹;
- Members shall ensure that foreign suppliers resident in their territory have access to self-regulatory bodies, such as stock exchanges, professional associations etc., if necessary for supplying a service.

c) Second Annex and Ministerial Decision on financial services

97. These two short documents both deal with the same issue: negotiations on financial services are not yet final. They may in fact continue until six months after the entry into force of the agreement, i.e. presumably until 1 July 1995. The programme is as follows:

- Member countries' present schedules of commitment and lists of MFN exemptions regarding financial services enter into force normally, together with the agreement, on 1 January 1995.
- Until six months after the entry into force, i.e. until 1 July 1995, Members may continue to negotiate possible modifications to schedules of commitments and MFN exemption lists²⁰.

- Between 1 May and 1 July 1995, any Member is free to improve (if it is satisfied by the negotiations) or withdraw (if it is dissatisfied with the outcome) some or all of its commitments. It may equally withdraw (if it is satisfied) or maintain, or increase (if it is dissatisfied) its MFN exemptions. In other words, everything is up for change again.
- During the six-month-period between 1 January and 1 July 1995, those MFN exemptions motivated by dissatisfaction with the level of commitments of other Members shall not be applied. This is presumably in order to have some kind of truce while the negotiations go on.
- On 1 July 1995, schedules of commitment and MFN exemption lists definitely enter into force with the content they have at that date.

2. Professional Services

98. Professional services are particularly affected by Articles VI (Domestic Regulations) and Article VII (Recognition) of the agreement. In addition, they have their own Ministerial Decision in the annex, setting out priorities for further work.

99. Domestic regulations are numerous in the field of professional services. Governments, at the national and subnational level, - and professional associations - tend to be particularly sensitive about maintaining their standards of qualification and experience for the liberal professions, such as accountants, lawyers, architects etc. For that very reason, domestic regulations may constitute very important barriers for foreign providers of professional services. Therefore, in addition to the general disciplines of Article VI described above (see paragraphs 63 to 67), paragraph 6 of Article VI contains a specific reference to professional services: Whatever the standards and criteria of competence for a given profession are, Members must at least provide "adequate" procedures allowing foreign professionals to have their competences verified.

100. Mutual recognition plays an important role in allowing for selective admission of foreign professionals. It is based not on verification of individual competence, but on acceptance as equivalent of the standards of their home country regarding qualification and experience. Paragraph 5 of Article VII expressly mentions the professions when pointing out the need for international organisations to work on developing common international standards for recognition and for practice.

101. It is also interesting in this context to note that developed countries have promised, in Article IV of the agreement, to establish special contact points which are intended to help service suppliers from developing countries to gain market access by, inter alia, providing information on registration, recognition and obtaining of professional qualifications.

102. The Ministerial Decision establishes a Working Party on Professional Services, and asks it to give priority to the accountancy sector²¹. The Working Party's mandate is to develop the multilateral disciplines foreseen in Article VI, i.e. it should draft rules applicable to domestic regulations and aiming to ensure that the latter not constitute unnecessary barriers to trade. The Working Party should also develop guidelines for the recognition of qualifications, in order to facilitate application of paragraph 6 of Article VI on adequate procedures to verify the competence of foreign professionals. The Decision expressly imparts on the Working Party to take account of the role played by professional associations.

3. Telecommunications

103. Two annexes and a ministerial decision deal with telecommunications:

- The Annex on Telecommunications concerns access to public telecommunications transport networks and services. It recognises thereby the function of the telecommunications sector not only as an economic activity of its own, but also as a support necessary for other economic activities. The main provision of the Annex calls on Members to ensure that foreign service suppliers have access to their public telecommunications network and services "on reasonable and non-discriminatory terms and conditions, for the supply of a service included in its schedule."
- The Annex on negotiations on basic telecommunications exempts from the MFN obligation - until further negotiations have been concluded - the whole sector of basic telecommunications. This exemption was motivated by the public monopolies which exist in many countries for this sector, regarding telephone services etc. While, therefore, negotiations on specific commitments still continue, countries were not prohibited from scheduling commitments on basic telecommunications already at the conclusion of the Uruguay round (which commitments may however be modified or withdrawn in the light of the outcome of the negotiations). Value-added telecommunications, on the other hand, were not singled out for special treatment together with basic telecommunications.
- The Ministerial Decision on negotiations on basic telecommunications provides for negotiations to be entered into on a voluntary basis. 16 countries and the European union have so far declared their willingness to work on commitments in this sector. Participants have promised a sort of standstill while negotiations last, inasmuch as they will not "apply any measure affecting trade in basic telecommunications in such a manner as would improve its negotiating position and leverage." The deadline for concluding the negotiations is set at 30 April 1996.

4. Maritime transport

104. This sector, too, has its own Annex and Ministerial Decision. They were added to the GATS package at the last minute, after negotiations on commitments in the field of maritime transport had failed. In particular, both the United States and the European Union withdrew their offers in the end²². Arrangements now provide for further negotiations, with procedures largely similar to those established for basic telecommunications:

- The Annex exempts the maritime transport sector from MFN obligations until the conclusion of further negotiations, and allows any commitments which may have been made to be changed in the light of the outcome of these negotiations.
- The Decision provides for negotiations on a voluntary basis, to be concluded by June 1996, "aiming at commitments in international shipping, auxiliary services and access to and use of port facilities, leading to the elimination of restrictions within a fixed time scale". Participants agree to the same kind of standstill as for basic telecommunications aimed at preventing any increase of leverage.

5. Air transport

105. An Annex on air transport makes it clear that the GATS does not apply to measures affecting traffic rights. Furthermore, dispute settlement may only be invoked where commitments have been made and after exhaustion of all other bi- and multilateral procedures.

IV. SCHEDULES OF COMMITMENTS

106. As mentioned above, it is only possible to define an individual GATS participant's obligations through the schedule of its specific commitments. A Member schedules in accordance with the following steps: First, it takes a positive decision to accord some market access and/or national treatment in one or more sectors or sub-sectors (the bottom-up element of the GATS-approach). For that purpose, it will inscribe the title of the sector or subsector as a line in its schedule. The Member then specifies at the same time the modes of delivery within the sector/subsector for which it does not accept obligations, by designating that mode as "unbound". Finally, regarding the mode(s) within a sector/subsector for which it does accept to be bound, it lists all limitations, if any, to market access and/or national treatment (the top-down element of the GATS-approach).

107. Limitations applying across several sectors - relating for instance to foreign investment or the movement of natural persons - appear usually in a separate part at the beginning of a country's schedule under the heading "Horizontal commitments". A country's obligations in a specific sector can therefore only be determined by reading its sectoral limitations and any applicable horizontal limitations inscribed at the beginning of its schedule. While this scheduling technique may reduce the length of schedules by avoiding repetitions, it does not enhance transparency for the reader.

108. Countries are not normally required to schedule domestic regulations (unless they affect national treatment, see above). In accordance with Article XVIII of the agreement, Members have, however, the option of scheduling additional commitments with respect to measures not subject to scheduling under market access and/or national treatment. Additional commitments are expressed in the form of undertakings, not limitations. These undertakings may concern, for instance, qualifications, technical standards, licensing requirements or procedures, and other domestic regulations that are consistent with Article VI.

109. The volume of schedules and difficulty of interpretation (due to the complicated, and sometimes differing, scheduling techniques) are such that they do not allow for a description of individual commitments within the framework of this general analysis of the GATS. In addition, schedules of commitments in several sectors important for OECD, i.e. financial services, including insurance, basic telecommunications and maritime transports are subject to further negotiations and therefore do not warrant analysis yet.

IV. MFN EXEMPTION LISTS

110. MFN exemptions should, ideally, be identified as clearly as possible. Article II does not envisage MFN exemptions for entire sectors or subsectors, but for precise measures. The GATT Secretariat has circulated a note to participants in which it proposed that countries should indicate for every MFN exemption listed:

- Sector or subsector
- Description of (preferential) measure
- Country or countries to which preferential treatment applies
- Intended duration of exemption
- Conditions creating need for exemption]

111. Most OECD countries have, for the time being, used the possibility of attaching MFN exemption lists to their schedules (with the notable exception of Japan). To illustrate the types of measures covered, a summary of the major exemptions is given below for Australia, Canada, the European Union and the United States:

1. Australia

112. MFN exemptions have been listed in two sectors: Audiovisual services and financial services. The exemptions concern:

- Any measures taken to respond to "unreasonable" measures imposed on Australian audiovisual services or services suppliers. No limitation for duration is indicated, the justification given is "to protect Australia from any unreasonable unilateral actions from other Members". An MFN exemption with such potentially wide application was possible because Australia has inscribed no commitments in its schedule regarding audiovisual services.
- Preferential treatment of some other Members in the framework of film and television coproduction programmes (for the time being Italy, UK, Canada and France). The exemption is of unlimited duration and justified by the need "to promote collaborative efforts between Australian and foreign film producers and general cultural links.
- Access to the Australian Stock Exchange is based on a condition of reciprocity. The exemption is of unlimited duration and justified by the desire "to promote non-discriminatory liberalisation of access to stock exchange membership".

2. Canada

113. Canada has inscribed MFN exemptions in the following sectors: Audiovisual services, fishing-related services, financial services, air and maritime transport and services incidental to agriculture. In addition, Canada has inscribed an MFN exemption applicable to all sectors, covering compulsory arbitration of investor/state investment disputes within the framework of bilateral investment agreements. Other MFN exemptions of particular interest are:

- Preferential treatment of some other Members in the framework of film, video and television coproduction agreements concluded either by Canada as a whole or by Quebec. The exemption is of unlimited duration and justified by "reasons of cultural policy".
- In the financial services sector, Canada has inscribed a reciprocity requirement applying to the establishment of suppliers of banking, trust and insurance services. This is one of the MFN exemptions referred to in the ministerial decision on financial services (see above paragraph 97) which are motivated by dissatisfaction with the level of commitments undertaken by other Members and the application of which will be suspended during the negotiation period of six months after entry into force of the WTO. The measure is "designed to enhance access of Canadian financial service suppliers to foreign financial markets".
- Other MFN exemptions in the financial services sector relate to preferential access for US insurance agents to the Ontario market, solely justified by "reciprocity", and preferential allocation of licenses to UK and Irish loan and investment companies in Quebec, justified as an "existing historical preference".

3. European Union

114. The Member States of the European Union have submitted a consolidated list of MFN exemptions. It includes MFN exemptions, based on national measures as well as on EC measures, in the following sectors and subsectors: Audiovisual services (EC, Spain, Italy and Denmark), road transport (EC, Spain), air transport (EC), internal waterways transport (EC), ship rental (Germany), publishing services (Italy), newsagency services (France), press agency services (France), direct non-life insurance (EC), financial services (Italy).

115. Furthermore, the list includes the following MFN exemptions applying to all sectors: Measures to promote Nordic cooperation (Denmark), purchase of real estate (Italy), and a number of preferential arrangements between certain EC Members and selected third countries with regard to the movement of persons, in particular with regard to work permits. These arrangements are mostly justified by historic or cultural links (for instance between Portugal and its former colonies).

116. MFN exemptions in the audiovisual sector appear to be particularly extensive. They include, at the EC level:

- Duties which may be imposed in order to respond to unfair pricing practices by certain third country distributors, and, more generally, measures to respond to "adverse, unfair or unreasonable" actions by other Members in the entire audiovisual sector. The exemptions are of indefinite duration.
- An entry in the list is reserved for the Council of Europe Convention on Transfrontier Television, another one for European programmes to support television and cinematographic productions, and another for coproduction agreements with third countries. All these exemptions are of indefinite duration and justified by "cultural" or "regional identity" considerations.

117. The MFN exemption on direct non-life insurance covers the agreement between the EC and Switzerland. The only other entry relating to financial services covers an Italian measure granting favourable tax treatment for services trade with all countries of the former Soviet bloc. This exemption is notable because it is one of the very few for which a time limit - 10 years - is indicated.

4. United States

118. The United States have listed MFN exemptions applying to all sectors with regard to the movement of natural persons and, in particular, tax measures. Two specific entries applying to all sectors cover a reciprocity requirement for land acquisition in Wyoming and preferential treatment for the registration of Canadian small businesses. All of the foregoing measures are of indefinite duration. Sectoral MFN exemptions have been listed for financial services (excluding insurance), air transport, road transport, pipeline transport and space transport.

119. MFN exemptions in the field of financial services comprise the following entries (all except the first are of indefinite duration):

- A general exemption justifying differential treatment in the entire financial services sector. As in the case of Canada, this is an MFN exemption motivated by dissatisfaction with the level of commitments by other countries. It will be suspended during the six-months negotiation period after the entry into force of the WTO, in accordance with the relevant ministerial decision. It is motivated by the desire "to protect existing activities of US services suppliers abroad and to ensure substantially full market access and national treatment in international financial markets".
- Canadian broker-dealers registered in the US may maintain their required reserves (which normally must be deposited in a bank in the US) in a bank in Canada under Canadian supervision.
- Reciprocity requirements for the establishment of branches or the ownership of commercial bank subsidiaries exist in several States.
- Equally, reciprocity requirements exist with respect to the right to act as primary dealer in US government debt securities, and to the right to act as a trustee of an indenture for a bond offering in the US. The reciprocity requirements are justified by the need to ensure market access for US suppliers abroad.

Notes and references

1. Among the most notable absentees for the time being are Russia, China and Taiwan.
2. Efforts were undertaken within OECD from 1987 onwards to develop a "Conceptual Framework" for trade in services.
3. It is important to note that Article I does not spell out an obligation to allow trade in services through these modes of delivery. Article I is only relevant for defining obligations entered into for instance under Article XVI with respect to market access and under Article XVII with respect to national treatment.
4. In practice, Article II exemption lists had to be submitted at the same time as a country's schedule of commitments as part of the negotiated package agreed in Geneva on 15 December 1993 and signed at Marrakech on 15 April 1994.
5. A Ministerial Decision concerning Article XIV(b) sets up a Working Party on trade in services and the environment to consider whether this exception needs to be extended to cover more generally measures to protect the environment.
6. Direct taxes comprise all taxes on total income, on total capital or on elements of income or capital, including taxes as gains from the alienation of property, taxes on estates, inheritances and gifts, and taxes on the total amounts of wages and salaries paid by enterprises, as well as taxes on capital appreciation.
7. The OECD Codes define measures restricting trade in services only through the fact that they discriminate between residents and non-residents. The advantage of excluding quantitative discriminatory measures - such as limitations on foreign capital participation - from the general concept of national treatment in order to fit them under a special "market access" category is not obvious.
8. This is all the more regrettable since the term "market access" has become very popular in recent years, but is not always used with the same meaning. For instance, when discussed in the OECD some years ago as an objective justifying certain reciprocity measures, the concept appeared as "effective market access" and was understood rather as aiming at the removal of informal barriers, not of explicit numeric quotas.
9. The question of what should happen if nevertheless a country were to identify quantitative measures not fitting any element of the list is apparently unresolved.

10. It is not clear whether further capital inflows, occurring after the establishment of a commercial presence, would be covered too by the provisions of this footnote.
11. The Dunkel draft of the GATS in December 1991 still contained an explicit footnote to Article XVI, according to which it was "understood that all discriminatory measures can be challenged as a violation of Article XVII."
12. This does, however, not extend to an obligation for that Member to compensate foreign suppliers for the fact that nationals of a given country may, for psychological, political or other reasons, prefer to buy services from a domestic supplier; see explicit footnote to Article XVII.
13. It would seem a bit odd though to grant de facto national treatment then by maintaining a residency requirement only for nationals.
14. A Ministerial Decision on certain dispute settlement procedures for the GATS provides that a special roster of panellists for GATS disputes shall be established. Panellists should be experts on trade in services (including regulatory matters) and may be chosen from the private sector as well as from government agencies.
15. This is to be distinguished from "non-application", a concept set out under Article XIII of the WTO. It allows a Member to declare non-application to another Member only under the following conditions:
 - Non-application must relate to the whole Uruguay Round package (except for the plurilateral agreements)
 - The declaration must be made at or before entry into force of the WTO agreement
 - Non-application must already have been invoked between these Members under Article XXXV of the GATT 1947.
16. Under these rules, a firm alleging to be harmed by illegal or unfair actions of a foreign government is enabled to petition the USTR to obtain redress, and, as a last resort, to retaliate against the foreign country concerned. One could of course imagine that such redress, including the possibility to retaliate, would be sought by the USTR through the DSU process, i.e. there might be a way to apply S 301 in a GATS-conforming manner.
17. It may be recalled that there had been some support at one point for a wholly separate Agreement on Financial Services.
18. It has been suggested that the Understanding should be considered as a sort of benchmark also for non-OECD countries: A country which schedules in accordance with the Understanding is serious about liberalisation of financial services.
19. This has been clarified as well in the context of the revision of the OECD's Current Invisibles Code (see "Introduction to the Codes" DAF/INV(93)38).

20. It is no secret that the negotiating situation is such that some Members' (in particular the United States') MFN exemption list may be shortened, if other Members' (in particular Japan's and certain DNME's) schedules of commitment are changed.
21. Apparently, the US, the EC, the Nordic countries, Australia, and, among the developing countries, India have expressed interest in the Working Party's activities.
22. Disagreement subsisted, for instance, on issues such as access to port and ancillary services in some Asian countries (Korea), or offers considered insufficient with regard to the removal of preferential treatment for domestic shippers in international transport of certain goods (United States).