

# The Law and Policy of Trade in Services

**Semester:** Spring semester- FS 2020

**Root Number:** 446641

**ECTS:** 3

**Lecturer:** Jan Bohanes & Pierre Sauvé

**Dates:** 10 - 14 February 2020

**Room:** Silva Casa Auditorium, World Trade Institute, Hallerstrasse 6, Bern

**Audience:**

- Master of Advanced Studies of International Law and Economics (MILE) Students – Optional
- Joint LL.M. / Diploma of Advanced Studies Trade and Investment Law (TRAIL+) Students - World Trade Institute / Faculty of Law, Unibe - Optional
- Certificate of Advanced Studies / Diploma of Advanced Studies in International Law and Economics (CAS ILE & DAS ILE) Students - World Trade Institute, Unibe – Optional
- MILE à la Carte

## Course Description

The course addresses the law, economics and policy of services trade, explores negotiating challenges in selected sectors and addresses key political economy challenges arising from services rule-making and market opening, including in preferential settings. It describes the legal architecture of agreements governing services trade and distils key lessons from evolving jurisprudence.

## Lecturers

### Jan Bohanes

Mr. Jan Bohanes is senior counsel at the Advisory Center on WTO Law (ACWL). As a member of the ACWL's team of lawyers, he provides advice on all matters of WTO law to governments of developing countries, assists them in dispute settlement proceedings before WTO panels and the Appellate Body, and participates in training activities for government officials. Previously, Jan was a member of the Secretariat of the WTO's Appellate Body from 2002 to 2006, where he acted as legal advisor to Appellate Body Members in appeals of WTO panel reports. From 2006 to 2010, Jan was associate attorney in the Geneva office of Sidley Austin LLP, where he advised both governments and commercial stakeholders on all issues related to WTO law and dispute settlement proceedings before both WTO panels and the Appellate Body.

Jan is a Czech and Austrian national. He holds a law degree from the University of Vienna; a doctorate in European law from the University of Vienna; a Master of Laws (LL.M.) from Columbia University; as well as a Master of Arts (M.A.L.D.) degree in international relations from the Fletcher School of Law and Diplomacy. He has extensive teaching experience in both academic and executive settings, in particular as visiting lecturer at the Graduate Institute of International and Development Studies in Geneva since 2015, and has previously taught also at the Universities of Barcelona (IELPO), at the World Trade Institute in Bern, at the St. Petersburg State University, at Harvard University and at Jiaotong University in Xi'an (China). He speaks regularly at conferences and has published on a wide range of issues in international trade law and trade policy. He is fluent and works in English, French, German, Portuguese and Spanish; he also speaks Czech (native), intermediate Mandarin Chinese (HSK 4), and intermediate Russian.

For a complete publication list, see <https://www.acwl.ch/team/mr-jan-bohanes/>.

### Pierre Sauvé

Pierre Sauvé is Senior Trade Specialist in the Geneva office of the World Bank's Trade and Competitiveness Global Practice Group, where he lead-coordinates the Bank's work on trade governance with key stakeholder organizations in Geneva and Paris. Previously, he served as Director of Studies and Director of External Programs and Academic Partnerships at the University of Bern's World Trade Institute (WTI), in Switzerland. He holds visiting professor appointments at the College of Europe in Bruges, Belgium and at the University of Barcelona, whose LL.M. program in international economic law and policy (IELPO) he advises. He held Visiting Professor

appointments at the Institut d'Etudes Politiques (Sciences-Po) in Paris, France, and at the London School of Economics and Political Science in 2003-05. He served as a senior economist in the OECD Trade Directorate from 1993-2002, a period during which he also taught at the John F. Kennedy School of Government at Harvard University and was appointed Non-resident Senior Fellow at the Brookings Institution in Washington, D.C. (1998-2000). Prior to joining the OECD, he served as services negotiator within the Canadian Department of Foreign Affairs and International Trade's Office of North American Free Trade Negotiations (1991-93). He was previously a staff member of the General Agreement on Tariffs and Trade in Geneva, Switzerland (1988-91) as well as the Bank for International Settlements, in Basel, Switzerland (1987-88). Mr. Sauvé was educated in economics and international relations at the Université du Québec à Montreal and Carleton University in Canada and at Cambridge and Oxford universities in the United Kingdom. He has advised the governments of a number of OECD and developing countries and served as a consultant to leading regional and multilateral agencies involved in trade, finance and development. He serves on the Editorial Board of the Journal of International Economic Law, the Journal of World Trade and the Latin American Journal of International Trade Law, is a Member of the Review Committee of UNCTAD's Series on International Investment and Development, and serves on the Advisory Board of the World Trade Organization's Academic Chairs Program. His principal research interests lie in the areas of trade in services, the regulation of foreign direct investment, comparative regional integration and the political economy of the multilateral trading system, issues on which he has published extensively in leading academic outlets. His latest book, co-edited with Martin Roy and entitled "Research Handbook on Trade in Services", was published by Edgar Elgar 2016.

## Learning Objectives

- To appreciate the conceptual complexities of trade in services and its liberalization.
- To gain a keener understanding of how the economic characteristics of services transactions have shaped the law of services trade.
- To explain current patterns of commitments across countries, sectors and modes of supply.
- To identify the drivers of preferential liberalization of services markets and the WTO+ and WTO-X nature of PTA advances to date in the services realm.
- To identify some of the key lessons of a political economy nature emerging from the first two decades of rule-making and market-opening in services trade.
- To understand the legal structure of the GATS, including its Annexes and schedules of commitments.
- To gain a better understanding of the differing modalities of market opening in the GATS and in PTAs.
- To review GATS case law and the key lessons emerging from nascent jurisprudence in services trade.

- To reflect on how the non-discrimination obligation is interpreted under the GATS relative to case law under the GATT-1994 and TBT Agreements.
- To explain the challenges in interpreting WTO Members' schedule of specific commitments, in view of the persistent "fog" in schedules and rapid technological progress.
- To assess the legal implications of overlaps in the scope of application of the GATS with that of other covered agreements and Bilateral Investment Treaties (BITs).
- To understand the challenge of initiating a GATS case, especially in view of emerging "new" services.

## Exams and Grades

- Students' knowledge will be assessed on the basis of an open book, take home exam which needs to be completed on an individual basis. The exam will consist of two case studies.
- Take home assignment made available on Thursday 13 February 2020, 16:00 and to be submitted before Friday 14 February 2020, 20:00
- One case study from Pierre Sauvé, carries 50% weight in the final course grade
- One case study from Jan Bohanes carries 50% weight in the final course grade

## Course Overview

Date	Day	Time	Lecturer/s	Topic
10 Feb.	Monday	9:00 12:00		
		14:00 16:00		
11 Feb.	Tuesday	9:00 12:00		
		14:00 16:00		
12 Feb.	Wednesday	9:00 12:00		
		14:00 16:00		
13 Feb.	Thursday	9:00 12:00		
		14:00 16:00		
14 Feb.	Friday	9:00 12:00		
		14:00 16:00		

**MONDAY, FEBRUARY 10, 2020 AND TUESDAY, FEBRUARY 11, 2020****Lecturer: Pierre Sauvé****Topics:** Trade in Services: Insights from Economics and Political Economy**Compulsory reading materials**

- Francois, J. and Hoekman, B. (2010), Services Trade and Policy, in Journal of Economic Literature, 48 (September), pp. 642-92.
- Ghani, E. (2014), Growth Escalators and Growth Convergence, Vox- EU, (17 August), available at <http://www.voxeu.org/article/growth-escalators-and-growth-convergence>
- Rentzhog, M. and Anér, E. (2014), The New Services Era – Is GATS up to the Task? E15Initiative. Geneva: International Centre for Trade and Sustainable Development (ICTSD) and World Economic Forum, 2014. [www.e15initiative.org/](http://www.e15initiative.org/)

**Suggested Reading Materials**

- See Chapters 1 to 7 and 20-21 in Sauvé, Pierre and Martin Roy, eds. (2016) Research Handbook on Trade in Services, London: Edward Elgar.
- Adlung, R. (2006), 'Services Negotiations in the Doha Round: Lost in Flexibility?', Journal of International Economic Law 9, 865-93.
- Copeland, B. and Mattoo, A. (2008), 'The Basic Economics of Services Trade', In Mattoo, A. et al., A Handbook of International Trade in Services, Washington D.C.: The World Bank.
- European Parliament (2015), Economic Significance of Trade in Services: Background to a Trade in Services Agreement (TISA), Brussels: European Parliament Research Service, (February), Available at: [http://www.europarl.europa.eu/RegData/etudes/IDAN/2015/549000/EPRS\\_IDA\(2015\)549000\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/IDAN/2015/549000/EPRS_IDA(2015)549000_EN.pdf)
- Ghani, Ejaz and Homi Kharas (2010), The Service Revolution, PREM Economic Premise, No. 14 (May), Washington, D.C.: The World Bank.
- Ghani, Ejaz, Arti Grover Goswami and Homi Kharas, (2012), Service with a Smile, PREM Economic Premise, No. 96, (November), Washington, D.C.: The World Bank. Available at <http://siteresources.worldbank.org/EXTPREMNET/Resources/EP96.pdf>
- Hoekman, B. (2006) Liberalizing Trade in Services: A Survey, World Bank and CEPR.

- Marconini, M. and P. Sauvé, "Negotiating Trade in Services: A Practical Guide for Developing Countries, in Saez, S., ed. Trade in Services Negotiations: A Guide for Developing Countries, Directions in Development: Trade, Washington, D.C. The World Bank, pp. 19-85. Available only online at <http://issuu.com/World.Bank.Publications/docs/9780821383537>
- Mattoo, A. (2006), 'Services in a Development Round: proposals for overcoming inertia', in Newfarmer, R. (ed.), Trade, Doha and Development: a Window into the Issues, Washington, DC: The World Bank, pp. 161-74. Available at: [http://www0.gsb.columbia.edu/ipd/pub/Aaditya\\_Mattoo.pdf](http://www0.gsb.columbia.edu/ipd/pub/Aaditya_Mattoo.pdf)
- Mattoo, A. and Payton, L. (2007) Services Trade & Development – The Experience of Zambia, Washington D.C.: The World Bank.
- Mattoo A. and P. Sauvé, "Services" in Chauffour, Jean-Pierre and Jean-Christophe Maur, (2011). Preferential Trade Agreement Policies for Development : A Handbook, Washington, D.C.: The World Bank, pp. 235-274. <https://openknowledge.worldbank.org/handle/10986/2329>.
- Maurer, A. et al. (2008) 'Measuring Trade in Services', In Mattoo, A. et al. (eds.), A Handbook of International Trade in Services, Washington D.C.: The World Bank.
- Rodrik, Dani (2013), The Perils of Premature Deindustrialization, Project Syndicate, (October 11), available at <https://www.project-syndicate.org/commentary/dani-rodrikdeveloping-economies--missing-manufacturing?barrier=accessreg>
- Saez, S. (2010), "The Strategic Development Role of Trade in Services", in Saez, S., ed. Trade in Services Negotiations: A Guide for Developing Countries, Directions in Development: Trade, Washington, D.C.. The World Bank, pp. 1-17. Available only online at <http://issuu.com/World.Bank.Publications/docs/9780821383537>
- Sauvé, P. and A. Shingal, (2011), Reflections on the Preferential Liberalization of Services Trade, in Journal of World Trade, Vol. 45, No. 5 pp. 953–963. Available at: [http://mpira.ub.uni-muenchen.de/32816/1/MPRA\\_paper\\_32816.pdf](http://mpira.ub.uni-muenchen.de/32816/1/MPRA_paper_32816.pdf)
- Sauvé, P. and A. Shingal, (2016), 'Why do countries enter into preferential agreements on trade in services? Assessing the potential for negotiated regulatory convergence in Asian services markets', Asian Development Review 33(1) March 2016.
- Shingal, A. (2014), 'Revisiting the trade effects of services agreements' in A. Dür and M. Elsig eds. (2014) Trade Cooperation: The Purpose, Design and Effects of Preferential Trade Agreements, Cambridge University Press.

**WEDNESDAY, FEBRUARY 12, 2020**

**Lecturer: Jan Bohanes**

**Topics: The Legal Architecture Governing Services Trade: GATS Law and Evolving Jurisprudence**

The class discussion on Wednesday and Thursday will revolve around the most salient disputes decided under the GATS. These disputes will help us understand the following core legal elements of the GATS: (1) applicability of the GATS and the interpretation of the Schedules of Commitments; (2) the most-favoured nation (MFN) obligation under Article II; (3) the national treatment obligation under Article XVII; (4) market access obligations under Article XVI and (5) general exceptions under Article XIV and the Annex on Financial Services.

On Wednesday, we will focus more specifically – although not exclusively – on elements (1), (2), and (3).

**Compulsory reading materials**

- The General Agreement on Trade in Services: An Introduction, WTO Secretariat. Available at [www.wto.org](http://www.wto.org);
- Guidelines for the Scheduling of Specific Commitments under the GATS, S/L/92, March 28, 2001 (pp. 1 – 13);
- See the GATS-related relevant sections in Peter van den Bossche and Werner Zdouc, *The Law and Policy of the World Trade Organization*, London: Cambridge University Press, Fourth Edition (see chapters 4:3, 5:3, 8:3 and 10:4). **(It is sufficient to skim this);**
- Appellate Body Report, EC – Bananas III, Sections IV.C.1 – IV. C. 6 (paras. 217 – 239);
- Appellate Body Report, Argentina – Measures Relating to Trade in Goods and Services, paras. 6.18 – 6.80 and paras. 6.85 – 6. 154;
- White & Case summary of the Appellate Body Report in Argentina – Financial Services;
- Panel Report, China – Electronic Payment Services, paras. 2.1 – 3.2; 7.11 – 7.207; 7.507; 7.637 - 7.748;
- Appellate Body Report, US – Gambling, Section V (paras. 158 – 213); and
- WTO 1 page summary: US – Gambling

**Suggested reading materials**

- Adlung, R. (2007) 'Negotiations on Safeguards and Subsidies in Services: A Never-Ending Story?', *Journal of International Economic Law* 10, pp. 235-65.



- Adlung, R. , Morrison, P. , Roy, M. , and Zhang, W. (2013), 'Fog in GATS Commitments – Why WTO Members Should Care', *World Trade Review*, 2013, 12( 1), pp. 1– 27.
- Adlung R. and Zhang, W. (2013), 'Trade Disciplines with a Trapdoor: Contract Manufacturing', *Journal of International Economic Law*, Volume 16, Issue 2, 1 June 2013, pp. 383–408.
- Cossy, M. (2006), "Determining Likeness Under the GATS: Squaring the Circle?", WTO Staff Working Paper 2006-08, available at
- [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=935213](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=935213)
- Bronckers, M. C. and Larouche, P. (2004), 'The WTO Regime for Telecommunications Services' in Bronckers, M. C. and Horlick, G. (eds.), *WTO Jurisprudence and Policy: Practitioners' Perspectives*, London: Cameron May, 2004, pp. 519-90.
- De Meester, B. (2010), 'The Global Financial Crisis and Government Support for Banks: What Role for the Gats?', *Journal of International Economic Law*, Volume 13, Issue 1, 1 March 2010, Pages 27–63.
- Footer, M. and George, C. (2005) 'The General Agreement on Trade in Services', in Macrory, P., Appleton, A. and Plummer, M. (eds.), *The World Trade Organization: Legal, Economic and Political Analysis Vol. 1*, Springer Science+Business Media, Inc.: New York, pp. 799-953.
- Krajewski, M. (2003), *National Regulation and Trade Liberalization in Services: The Legal Impact of the General Agreement on Trade in Services (GATS) on National Regulatory Autonomy*, Kluwer Law International: The Hague, pp. 41-74.
- Leroux, E. (2007), 'Eleven Years of GATS Case Law: what have we learned?', *Journal of International Economic Law*, Volume 10, Issue 4, 1 December 2007, pp. 749–793.
- Leroux, E. (2016), "Twenty Years of GATS Case Law: does it taste like good wine?", in Sauvé, P. and M. Roy, eds., *Research Handbook on Trade in Services*, London: Edward Elgar, pp. 191-215.
- Mattoo, A. and Sauvé, P. (eds.) (2003) *Domestic Regulation and Service Trade Liberalization*, Washington DC: Oxford University Press for the World Bank, pp. 1-6.
- Sauvé, P. (2002) 'Completing the GATS Framework: Safeguards, Subsidies, and Government Procurement', In Hoekman, B. et al. (eds.), *Development, Trade and the WTO: A Handbook*, Washington D.C.: The World Bank, Chapter 32, Part IV.
- Weiss, F. (1995), *The General Agreement on Trade in Services 1994*, *Common Market Law Review* 32, pp. 1177-225.



- Zhang, R. (2015), 'Covered or Not Covered? That Is the Question – Services Classification and Its Implications for Specific Commitments under the GATS', WTO Working Paper ERSD-2015-11.

**THURSDAY, FEBRUARY 13, 2020**

**Lecturer: Jan Bohanes**

**Topics:**

The class discussion on Wednesday and Thursday will revolve around the most salient disputes decided under the GATS. These disputes will help us understand the following core legal elements of the GATS: (1) applicability of the GATS and the interpretation of the Schedules of Commitments; (2) the most-favoured nation (MFN) obligation under Article II; (3) the national treatment obligation under Article XVII; (4) market access obligations under Article XVI and (5) general exceptions under Article XIV and the Annex on Financial Services.

On Thursday, we will focus more specifically – although not exclusively – on elements (4) and (5).

**Compulsory reading materials**

- Panel Report, China – Electronic Payment Services, paras. 7.508 - 7.636;
- Appellate Body Report, US – Gambling, Sections VI and VII (paras. 214 – 372);
- Appellate Body Report, Argentina – Financial Services, Sections 6.3 and 6.4 (paras. 6.155 – 6.272);
- Appellate Body Report, China – Publications and Audiovisual Products, Section VII (paras. 338 – 413);
- WTO 1 page summary China – Publications and Audiovisual Products;
- Appellate Body Report, EC – Bananas III, Section IV.C.7 (paras. 240 – 248); and
- Hoekman, B. and Meagher, N. (2013), " China – Electronic Payment Services: Discrimination, Economic Development and the GATS, EUI Working Papers, RSCAS 2013/68.

**Suggested Reading Materials**

- Same as for Wednesday

**FRIDAY, FEBRUARY 14, 2020****Case Studies****Instructions**

Working in teams of 3, students will be confronted with the real-life policy choices and negotiating strategy dynamics that a recently acceded WTO Member faced in opening up its retail distribution sector. A short (1 page and a half) case will be distributed on Tuesday afternoon when the composition of teams is announced by the MILE coordinating team. Students will be asked to answer 4 questions linked to the case study. The cases will be debriefed by each lecturer on Friday, April 13<sup>th</sup>.

**CASE STUDY 1****LIBERALIZING TRADE IN DISTRIBUTION SERVICES****Mandatory Reading**

- Arkell, Julian, (2010), "Market Structure, Liberalization and Trade: The Case of Distribution Services", in Cattaneo, O., et al, *International Trade in Services*, Washington, D.C.: The World Bank. Available at:  
[http://www.joachimandassociates.com/WriteFolder/pics/cmitemvalue\\_103\\_0\\_Arke ll\\_Marke tStructureLiberalizationandTrade.pdf](http://www.joachimandassociates.com/WriteFolder/pics/cmitemvalue_103_0_Arke ll_Marke tStructureLiberalizationandTrade.pdf)

**Additional Readings**

- *The General Agreement on Trade in Services: An Introduction*, WTO Secretariat. Available at:  
[http://www.wto.org/english/tratop\\_e/serv\\_e/gsintr\\_e.doc](http://www.wto.org/english/tratop_e/serv_e/gsintr_e.doc)
- WTO, *Guidelines for the Scheduling of Specific Commitments under the GATS*, S/L/92, 28 March 2001, pages 1-13 and classification list on pages 34-40.

**CASE STUDY 2****UTOPIA – MEASURES AFFECTING ONLINE RETAIL SERVICES (DS 2030X)****Indicative List of Relevant Case Law**

- Appellate Body Report, *China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*.
- Panel Report, *China – Certain Measures Affecting Electronic Payment Services*.
- Appellate Body Report, *Argentina – Measures Relating to Trade in Goods and Services*.