

The Law and Policy of Trade in Services

Semester: Spring 2024

Root Number: 446641

ECTS: 3

Lecturers: Jan Bohanes & Pierre Sauvé

Dates: 12-15 February 2024 (take home assessment on February 16)

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

Audience:

- Government officials; Embassy staff; people working for international organizations and NGOs, industry and in legal practice
- Master of Advanced Studies of International Law and Economics (MILE) Students
- Joint LL.M. / Diploma of Advanced Studies Trade and Investment Law (TRAIL+) Students - World Trade Institute / Faculty of Law, Unibe
- Certificate of Advanced Studies / Diploma of Advanced Studies in International Law and Economics (CAS ILE & DAS ILE) Students - World Trade Institute, Unibe
- Students from different universities across Switzerland

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 rule-making and market opening in services, including in preferential settings. It describes the legal architecture of agreements governing services trade and distills 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 lecturer at the World Trade Institute (WTI), visiting lecturer at the Graduate Institute of International and Development Studies in Geneva (2015 – 2022), University of Barcelona (IELPO), St. Petersburg State University and other academic and professional training institutions. 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), advanced Mandarin Chinese (HSK 5), and intermediate Russian.

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

Pierre Sauvé

Pierre Sauvé serves as a Senior Trade Specialist in the Geneva office of the World Bank's Trade and Regional Integration team, where he lead-coordinates the Bank's work on trade governance with key stakeholder organizations in Geneva and takes part in trade-related country operations on a global scale. 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 has held Visiting Professor appointments at the College of Europe in Bruges, Belgium, at the University of Barcelona (IELPO), the Institut d'Etudes Politiques (Sciences-Po) in Paris, France, and the London School of Economics and Political Science. 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 Montréal and Carleton University in Canada and at Cambridge and Oxford universities in the United Kingdom. He has advised OECD and developing country governments on trade policy matters 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 most recent book, co-authored with Martin Roy, *Trade in Services for Development: Fostering Sustainable Growth and Economic Diversification*, was co-published by the World Bank and the World Trade Organization in July 2023.

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 identify some of the key lessons of a political economy nature emerging from the first two decades of rulemaking 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 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 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 take home exam will be made available on Thursday 15 February 2024, 16:00 and is to be submitted before Friday 16 February 2024, 20:00 to masters@wti.org
- The assignment will consist of two parts: one exam will feature questions arising from the lectures of Pierre Sauvé alongside an exam with short hypothetical cases from Jan Bohanes, with both carrying a 50% weight in the final course grade.

Course Overview

Date	Day	Time	Lecturer/s	Topic
12 Feb.	Monday	9:00 12:00	Pierre Sauvé	Insights from Economics and Political Economy
		14:00 16:00		
13 Feb.	Tuesday	9:00 12:00	Pierre Sauvé	Insights from Economics and Political Economy
		14:00 16:00		
14 Feb.	Wednesday	9:00 12:00	Jan Bohanes	The Legal Architecture Governing Services Trade: GATS Law and Evolving Jurisprudence
		14:00 16:00		
15 Feb.	Thursday	9:00 12:00	Jan Bohanes	The Legal Architecture Governing Services Trade: GATS Law and Evolving Jurisprudence
		14:00 16:00		
16 Feb.	Friday	Assignment completed by 20:00		

MONDAY, FEBRUARY 12, 2024 AND TUESDAY, FEBRUARY 13, 2024

Lecturer: Pierre Sauvé

Topics: Trade in Services: Insights from Economics and Political Economy

Suggested reading materials

- Roy, Martin and Pierre Sauvé (2023), *Trade in Services for Development: Fostering Sustainable Development and Economic Diversification*, Geneva: World Bank and World Trade Organization. Available at https://www.wto.org/english/res_e/booksp_e/trade_in_services_and_development_e.pdf
- Sauvé, Pierre (2023), "Services offer a springboard to jobs and growth in developing countries", *The Trade Post*, (September 19), Washington: World Bank. Available at <https://blogs.worldbank.org/trade/services-offer-springboard-jobs-and-growth-developing-countries>
- Nayyar, Gaurav, Mary Hallward-Driemeier, and Elwyn Davies (2021), *At Your Service? The Promise of Services-Led Development*. Available at; <https://openknowledge.worldbank.org/handle/10986/35599> Read the overview chapter.
- IMF, OECD, UNCTAD, World Bank and WTO (2023), *Digital Trade for Development*, Geneva: IMF, OECD, UNCTAD, WB and WTO, available at https://www.wto.org/english/res_e/booksp_e/dtd2023_e.pdf. Read the executive summary at pp. 3-4.
- 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: https://mpira.ub.uni-muenchen.de/32816/1/MPRA_paper_32816.pdf
- Sauvé, P. and A. Shingal (2023), "LDC Services Trade: A story in Differentiation and Supply-Side Constraints", in *WTO, LDCs and the Multilateral Trading System*, Volume 2, Geneva: World Trade Organization, pp. 11-25. Available at https://www.wto.org/library/events/event_resources/devel_0311202310/ldc_and_multi_lateral_trade_digital.pdf

Useful Reading Materials

- Chapters 1 to 7 and 20-21 in Sauvé, Pierre and Martin Roy, eds. (2016) *Research Handbook on Trade in Services*, London: Edward Elgar. <https://www.worldcat.org/title/research-handbook-on-trade-in-services/oclc/973887436>
- Adlung, R. (2006), 'Services Negotiations in the Doha Round: Lost in Flexibility?', *Journal of International Economic Law* 9, 865-93. https://www.researchgate.net/publication/5213841_Services_Negotiations_in_the_Doha_Round_Lost_in_Flexibility

- 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. P. 84
<https://documents1.worldbank.org/curated/en/568351467995816402/pdf/105324-PUB-Box394886B-PUBLIC-978-0-1992-3522-3.pdf>
- 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: [https://www.europarl.europa.eu/thinktank/en/document/EPRS_IDA\(2015\)549000](https://www.europarl.europa.eu/thinktank/en/document/EPRS_IDA(2015)549000)
- 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), <https://cepr.org/voxeu/columns/growth-escalators-and-growth-convergence>
- Ghani, Ejaz and Homi Kharas (2010), The Service Revolution, PREM Economic Premise, No. 14 (May), Washington, D.C.: The World Bank. <https://openknowledge.worldbank.org/handle/10986/10187?locale-attribute=en>
- 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 <https://openknowledge.worldbank.org/bitstream/handle/10986/17068/735780BRI0EP960Box371956B00PUBLIC0.pdf;sequence=1>

- 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 <https://hvtc.edu.vn/Portals/0/files/636196430388929515TradeinServicesNegotiationsAGuideforDevelopingCountries.pdf>
- 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: <https://documents1.worldbank.org/curated/en/648441468141892998/pdf/396500PAPER0Tr10082136437501PUBLIC1.pdf>
- 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. <https://documents1.worldbank.org/curated/en/568351467995816402/pdf/105324-PUB-Box394886B-PUBLIC-978-0-1992-3522-3.pdf>
- 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/
- 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>
- 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 <https://hvtc.edu.vn/Portals/0/files/636196430388929515TradeinServicesNegotiationsAGuideforDevelopingCountries.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. https://www.worldscientific.com/doi/full/10.1162/ADEV_a_00061
- 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. <https://boris.unibe.ch/51608/3/D%C3%BCrElsig.pdf>

WEDNESDAY, FEBRUARY 14, 2024

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. We will also discuss (6) the recently agreed-upon disciplines on Domestic Regulation.

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;
- 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
- Declaration on the Conclusion of Negotiations on Services Domestic Regulation (WT/L/1129) and Reference Paper on Services Domestic Regulation (INF/SDR/2)

Suggested reading materials:

- The Legal Status of “Joint Statement Initiatives” and their negotiated outcomes (WT/GC/W/819/Rev.1)
- 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
- 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 15, 2024**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. We will also discuss (6) the recently agreed-upon disciplines on Domestic Regulation.

On Thursday, we will focus more specifically – although not exclusively – on elements (4), (5), and (6).

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.
- Declaration on the Conclusion of Negotiations on Services Domestic Regulation (WT/L/1129) and Reference Paper on Services Domestic Regulation (INF/SDR/2)

Suggested Reading Materials

- Same as for Wednesday

FRIDAY, FEBRUARY 16, 2024**Take-home assignments****Pierre Sauvé**

Students will be assigned a case study describing the conditions under which liberalization was conducted in a specific service sector and country context. They will be required to answer a series of short questions on the case study.

Jan Bohanes

Students will be required to answer two (2) out of three (3) questions dealing with the material covered in the Wednesday and Thursday sessions. The questions may require solving short hypothetical cases or analyzing particular aspects of the WTO disputes covered in class.

Both assignments will be distributed after class ends on Thursday.