The Law and Policy of Trade in Services

Semester: Spring semester- FS 2021

Root Number: 446641

ECTS: 3

Lecturers: Jan Bohanes & Martin Roy

Dates: 15 - 19 February 2021

Room: In response to the COVID-19 pandemic and following the guidelines established by the University of Bern, all courses of the 2021 WTI Winter Academy will only be held online. This course will have live sessions on Zoom.

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 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/.

Martin Roy

Dr. Martin Roy is Counsellor in the Trade in Services and Investment Division of World Trade Organization. With the WTO since 2002, he has been involved in various functions relating to negotiations, technical assistance, dispute settlement, and policy research. Between 2014 and 2016, he was senior advisor at the Office of the Chief Trade Advisor for Pacific Island Countries where he advised the 14 developing countries of the region in their trade negotiations with Australia and New Zealand. Dr. Roy has published widely on such topics as trade in services, foreign investment, and regional economic integration. He also co-edited the Research Handbook on
Trade in Services, published by Edward Elgar (2016), and Opening Markets for Trade in Services; Countries and Sectors in Bilateral and WTO Negotiations, published by Cambridge University Press (2008). Dr. Roy has taught at the College of Europe in Bruges, the University of Barcelona and the World Trade Institute in Bern. He holds a Ph.D. from Johns Hopkins University’s School of Advanced International Studies.

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 will be available on Friday 19 February 2021 at 16:00, deadline for submission: Saturday, 20 February at 16:00. Please see Annex 1 for further instructions.

- The assignment will consist of two case studies: one each from Martin Roy and Jan Bohanes, with both carrying a 50% weight in the final course grade.

Course Overview

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<th>Lecturer/s</th>
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<td>15 Feb.</td>
<td>Monday</td>
<td>10:00 - 12:00</td>
<td>Martin Roy</td>
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<td>13:00 - 15:00</td>
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<td>16 Feb.</td>
<td>Tuesday</td>
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<td>17 Feb.</td>
<td>Wednesday</td>
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<td>13:00 - 15:00</td>
<td>Jan Bohanes</td>
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<td>18 Feb.</td>
<td>Thursday</td>
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<td>19 Feb.</td>
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<td>20 Feb.</td>
<td>Saturday</td>
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Monday, 15 February, Tuesday, 16 February, and Wednesday, 17 February (AM) 2021

Lecturer: Martin Roy

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

These sessions will address key characteristics of trade in services, underscoring its economic significance, recent trends, and impact of government policies. Participants will discuss the manner in which the specificities of services trade have been addressed in the General Agreement on Trade in Services (GATS) and will review existing patterns of commitments and challenges faced in negotiations. The sessions will also discuss the motivations, achievements, and particularities associated with preferential agreements on trade in services, and consider the impact of the COVID-19 pandemic.

Compulsory reading materials


Suggested Reading Materials


• Marchetti, J. and M. Roy (2008), Opening Markets for Trade in Services; Countries and Sectors in Bilateral and WTO Negotiations, Cambridge University Press and WTO, Cambridge (UK); Chapter 2 only.


**Wednesday, 17 February (PM), 2021**

**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 and on Thursday, we will focus more specifically 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

**Suggested reading materials**


THURSDAY, 18 FEBRUARY 2021

Lecturer: Jan Bohanes

The class discussion on Wednesday afternoon, Thursday and Friday 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 and Thursday, we will focus more specifically – although not exclusively – on elements (1), (2) and (3).

The compulsory and recommended reading list is the same as set out for Wednesday.
FRIDAY, 19 FEBRUARY 2021

Lecturer: Jan Bohanes

Topics:

The class discussion on Wednesday afternoon, Thursday and Friday 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 Friday, 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

Suggested Reading Materials

- Same as for Wednesday
SATURDAY, 20 FEBRUARY 2021

Take-home assignment

Martin Roy

Students will be assigned a case study describing the conditions under which liberalization is 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 four (4) 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 Friday.
Annex 1

Assessment

The deadline for submission is Saturday, 20 February 2021 at 16:00 (Swiss time)
Please answer the part from Martin Roy and the part from Jan Bohanes individually, resulting in two different files.

Please submit the exam by email to masters@wti.org with CC to: karin.rosenberg@wti.org and Zoe.Pauli@wti.org

The following penalties will be applied for late submission:

• Up to 1 hour late – 0.5 grade deduction
• Between one and two hours late - 1 grade deduction
• Between two and four hours late – 1.5 grade deduction
• Five hours or more - Your submission will not be valid for the transcript

Format and Structure:
• Only MS Word files, i.e. files with the extensions .doc or .docx, are accepted.
• Font: Arial 11pt or Times New Roman 12pt
• Line Spacing: 1.5 or double space.
• The exam should be answered individually. Students may use their notes, slides, reading materials, as well as any information publicly available in the Internet. However, seeking assistance from a third person or communicating with other students is not allowed.

Evaluation criteria:
• This is an open book exam, meaning that you can, and are encouraged to use all the materials you have studied with this week.
• The exam should be answered individually. Students may use their notes, slides, reading materials, as well as any information publicly available in the Internet. However, seeking assistance from a third person or communicating with other students is not allowed.
• Please pay attention to style and grammar. Sloppy style and/or grammar will negatively affect your grade.
• Please answer concisely and to the point but refer to relevant legal provisions and/or case law. Lengthy irrelevant answers may negatively impact your grade.