

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

Date	Day	Time	Lecturer/s
15 Feb.	Monday	10:00 - 12:00	Martin Roy
		13:00 - 15:00	Martin Roy
16 Feb.	Tuesday	10:00 - 12:00	Martin Roy
		13:00 - 15:00	Martin Roy
17 Feb.	Wednesday	10:00 - 12:00	Martin Roy
		13:00 - 15:00	Jan Bohanes
18 Feb.	Thursday	10:00 - 12:00	Jan Bohanes
		13:00 - 15:00	Jan Bohanes
19 Feb.	Friday	10:00 - 12:00	Jan Bohanes
		13:00 - 15:00	Jan Bohanes
20 Feb.	Saturday		Take-home assignment

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

- 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/

Suggested Reading Materials

- See Chapters 1 to 7 and 20-21 in Sauv e, 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.
- 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.
- 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. 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>.
- Roy, M. (2019), "Elevating Services: Services Trade Policy, WTO Commitments, and Their Role in Economic Development and Trade Integration", *Journal of World Trade* 53 (6) (2019) pp. 923 – 950.
- 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://mpra.ub.uni-muenchen.de/32816/1/MPRA_paper_32816.pdf
- 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.
- Shingal, A., M. Roy and P. Sauvé (2018), "Do WTO+ Commitments in Services Trade Agreements Reflect a Quest for Optimal Regulatory Convergence? Evidence from Asia", *World Economy* 41 (5): 1223–1250.
- WTO Secretariat (2020), "Trade in Services in the Context of COVID-19", Information Note. Available at:
https://www.wto.org/english/tratop_e/covid19_e/services_report_e.pdf

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

- 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 Sauv , P. and M. Roy, eds., *Research Handbook on Trade in Services*, London: Edward Elgar, pp. 191-215.
- Mattoo, A. and Sauv , P. (eds.) (2003) *Domestic Regulation and Service Trade Liberalization*, Washington DC: Oxford University Press for the World Bank, pp. 1-6.
- Sauv , 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, 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
- 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

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.