Interpreting the General Agreement on Trade in Services and the WTO Instruments Relevant to the International Trade of Financial Services: The Lawyer's Perspective

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Cover Page Footnote
International Law; Commercial Law; Law

This article is available in North Carolina Journal of International Law and Commercial Regulation: http://scholarship.law.unc.edu/ncilj/vol25/iss1/1
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J. Steven Jarreau

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† B.A. 1980, Loyola University; J.D. 1986, Louisiana State University School of Law; LL.M. International and Comparative Law, The George Washington University National Law Center. Mr. Jarreau was a trial attorney for eight years with the New Orleans, Louisiana firm Borella, Huber & Dubuclet, and former law clerk to Jerome E. Domengeaux, Chief Judge, Louisiana Third Circuit Court of Appeals.
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I. Introduction

Financial services play an increasingly prominent role in the economies of all developed and developing nations and in the daily lives of most of the world’s people. The importance of financial services worldwide accentuates the entry into force of the first truly multilateral agreement establishing criteria for the international trade of banking, securities, and insurance services. The Fifth Protocol to the General Agreement on Trade in Services, commonly referred to as the Financial Services Agreement, came into effect on March 1, 1999, and the General Agreement on Trade in Services (GATS) came into effect with the inception of the World Trade Organization (WTO) on January 1, 1995. Together these agreements will, for the first time, establish a degree of predictability and stability in the international trade of services.

1 It is recommended that the reader obtain a copy of the General Agreement on Trade in Services, including the Annex on Article II Exemptions and the Annex on Financial Services, and the Understanding on Commitments in Financial Services prior to proceeding with Section IV of this article. These documents are available on the World Wide Web site of the World Trade Organization, <http://www.wto.org/wto/services/services.htm>.


trade of financial services. Given the significance of banking, securities, and insurance services, it is surprising that only on the eve of the next millennium will there be a measure of uniformity in their international trade.

Equally surprising is the arduous and winding road of negotiations that culminated in the GATS and the Fifth Protocol. Almost four decades ago, it was recognized that there was something about the trade of “invisibles” that warranted international attention, but the lack of understanding of precisely what that something was hindered the process of achieving an agreement. Compounding that lack of understanding was an absence of statistical data that would have supported the expenditure of time and resources. That lack of data continues to impede progress today.

The GATS and the Fifth Protocol, much like the Code of Hammurabi, constitute more of a beginning than an end of a process. Now that the negotiations have produced an international agreement, the implementation of the GATS and the trade liberalizing commitments in financial services will commence. During this implementation stage, a previously lesser involved group of specialists will become essential.

The GATS and the commitments of the WTO Members to open their domestic financial services markets were primarily negotiated by diplomatic trade specialists and economists. Decisions concerning the liberalization of each nation’s financial services sector, and the terms and conditions under which liberalization would occur, focused on domestic policy considerations with due regard for the potential domestic economic ramifications. Now, with liberalization commitments

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8 See Ruggiero, supra note 2.
9 See Jonathon Aronson, Negotiating to Launch Negotiations: Getting Trade in Services onto the GATT Agenda, in PEW CASE STUDIES IN INTERNATIONAL AFFAIRS 1, 3 (Institute for the Study of Diplomacy, School of Foreign Service, Georgetown Univ. 1992) (stating that the British referred to trade in services as “invisibles trade” because of difficulty in detecting and accounting for services trade).
11 See generally 5 THE NEW ENCYCLOPEDIA BRITANNICA, MICROPEDIA 668-69 (15th ed. 1995) (noting that the Code of Hammurabi was once considered to be the oldest promulgation of laws and revolutionary for its day).
and rules and disciplines of an international dimension in place, lawyers from both the public and private sectors will enter the picture. WTO Members, as well as businesses, labor organizations, and other specialized interests, will enlist lawyers to interpret the provisions of WTO instruments that govern the international trade of financial services and to address disputes concerning the implementation of such provisions.

The GATS and the other WTO instruments that bear on trade in financial services are not traditional legal instruments in the domestic sense. The terms of these agreements have been influenced by legal, economic, and diplomatic considerations. Diplomats and economists will continue to perform important roles both in the execution of the agreements and in negotiating progressively greater liberalization, but lawyers, skilled in the art of statutory interpretation, will be relied on more frequently. Lawyers will construe the intentions of WTO Members from the inevitable ambiguities in the instruments.

The principal objective of this article is to analyze the GATS and the other legal instruments of the WTO financial services trading regime from the perspective of a lawyer. The instruments will be studied and their interrelationship emphasized. This article will identify resultant ambiguities and suggest some practical interpretations.

Beginning with the proposition that knowledge of the subject matter and the negotiating history will help counsel interpret the instruments and formulate more persuasive arguments, this article will initially discuss the concepts of services in general and of financial services in particular. A survey of the negotiating history that culminated in the GATS and the Fifth Protocol will follow. This historical review will commence with the 1950s and 1960s, when most countries expressed indifference to negotiations concerning trade in services, and will continue into the 1970s,

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13 See infra Part IV.A.

14 See infra Part II.A-B.

15 See infra Part III.
when some countries expressed hostility. The examination of the negotiating history will then proceed through March 1, 1999, when decades of negotiating culminated in the entry into force of the Fifth Protocol.

II. Services and Financial Services

A. The Concept of “Services”: An Overview

Service industries are essential components of contemporary society, but because of the intangible nature of their “products,” the scope and economic impact of such industries are difficult to fully appreciate. As a result, the accumulation of service sector data is deficient in proportion to the increasing importance of this economic sector.

Identifying and defining distinct types of services have proven to be complex tasks. During the Uruguay Round of Multilateral Trade Negotiations (MTN), the Secretariat of the General Agreement on Tariffs and Trade (GATT) drafted the “Services Sectoral Classification List” (SSCL) to facilitate the services negotiations. The SSCL identifies twelve service sectors: (1) Business Services; (2) Communication Services; (3) Construction and Related Services; (4) Distribution Services; (5) Educational Services; (6) Environmental Services; (7) Financial Services; (8) Health Related and Social Services; (9) Tourism and Travel Related Services; (10) Recreational, Cultural and Sporting

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16 See infra Part III.
17 See infra Part III.
19 See infra Part III.E.
20 The GATT Secretariat, like the present WTO Secretariat, was an administrative office that provided support for the functioning of the Agreement. See generally WORLD TRADE ORGANIZATION, supra note 6, at 66.
22 See GATT Secretariat, Services Sectoral Classification List, MTN.GNS/W/120 (July 10, 1991).
Services; (11) Transport Services; and (12) Other Services Not Included Elsewhere.\textsuperscript{23} The twelve service sectors are then divided into sub-sectors and some of the sub-sectors are further subdivided.

The service sector of the United States' economy encompasses “all economic activity other than agriculture, mining, and manufacturing.”\textsuperscript{24} It is the largest component of the United States’ economy, accounting for approximately 80% of the United States’ gross domestic product and private non-farm employment.\textsuperscript{25} With this in mind, it is not surprising that the United States is the world’s predominant exporter of such services. In 1997, the United States exported $239 billion in commercial services, accounting for 18% of global services exports.\textsuperscript{26} The United States has experienced a balance of trade surplus in services for almost three decades, despite also being the world’s largest importer of services.\textsuperscript{27} The United States’ balance of trade surplus in services reached $88 billion in 1997, offsetting 44% of the domestic merchandise trade deficit.\textsuperscript{28}

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{23} See id.
\item \textsuperscript{26} See Chart 2, supra note 25.
\item \textsuperscript{27} See U.S. SERVICES TRADE HIGHLIGHTS, supra note 25.
\end{itemize}
\end{footnotesize}
B. Financial Services

Financial services are the backbone of all modern economies. The sector’s significance is greater than its direct impact might suggest, as every other economic sector that engages in domestic or international trade relies on financial services to conduct business. The financial services sector consists broadly of banking, securities, and insurance services. The GATS Annex on Financial Services identifies two sub-sectors of financial services: “[i]nsurance and insurance related services” and “[b]anking and other financial services (excluding insurance).” These sub-sectors are further sub-divided into sixteen more precise categories of financial or financially related services. The services provided by financial service suppliers include: (1) the acceptance of deposits and extension of loans; (2) the issuance and management of credit cards, bank drafts, and guarantees; (3) the issuance of and trading in securities; (4) asset management; and (5) the issuance of insurance and reinsurance. Financial services also include services considered “auxiliary” to banking, securities, and insurance transactions, such as credit reference and analysis, financial advisory services, and actuarial, risk management, and claim adjustment services.

The international financial services industry is a multi-trillion dollar industry with exponential anticipated future growth. Global bank lending totals approximately $38 trillion, while global securities activities are valued at approximately $18 trillion and worldwide insurance premiums are estimated to amount to $2.5 trillion. The world’s largest exporters of financial services in cross-border trade are Germany, the United Kingdom, France,

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29 See KONO, supra note 18, at 7.
30 See id.
31 GATS, supra note 5, Annex on Financial Services, § 5.
32 See id.
33 GATS, supra note 5, Annex on Financial Services, §§ 5(a)(iv), (xvi).
34 See id. (stating that the figures represent the value of the financial services commitments in the Fifth Protocol, which encompass 95% of the world’s financial service markets). See generally Richard Evans, Inside AXA, BARRON'S, Nov. 23, 1998, at 25 (reviewing the world’s largest insurance company, French based AXA).
35 Cross-border trade is the supplying of a financial service by a service supplier in the territory of one country to a service consumer in the territory of another country. See KONO ET AL., supra note 18, at 13.
the United States, Switzerland, and Belgium-Luxembourg. The world's largest importers of financial services in cross-border trade are Germany, France, the United States, Belgium-Luxembourg, Austria, and Japan.

The financial services sector of the United States' economy includes the most competitive industries in the country. Financial services accounted for 4% of the U.S. gross domestic product (GDP) in 1970, a figure that rose to 7.3% by 1993. Employment in this sector represented 3.8% of all U.S. employment in 1970 and rose to 4.7% in 1993. The United States is currently a net exporter of banking and securities services and a net importer of insurance services in cross-border and commercial presence trade.

III. Negotiating the GATS and Trade in Financial Services

The process of bringing services within the realm of international trade negotiations has been long and complicated. The term "international trade" has historically been confined to trade in agricultural products and manufactured goods. The importance of trade in services to international and domestic economies was not appreciated, particularly in the early years of the services discourse in the 1970s. At that time, trade in services was yet undefined and without data to demonstrate its significance.

36 See id. (figures from Belgium and Luxembourg are combined in descending order).

37 See id.


39 See KONO, supra note 18, at 8.

40 See id.

41 Supplying financial services through a commercial presence involves the establishment of physical facilities in the country in which the services are provided. See id. at 16.

42 See id. at 13.

43 See Aronson, supra note 9, at 3.

44 See id. at 7.
Begrudgingly, trade in services became a more frequent topic in international trade negotiations. Trade negotiations from the 1980s and into the Uruguay Round included extensive discussions over whether there should be an international agreement concerning services trade and, if there were to be such an agreement, whether it should be a part of the GATT.\textsuperscript{45} When the likelihood of developing a services agreement became apparent, the contentiousness of the debate did not subside, the focus of the debate merely shifted. The United States and other previously vocal advocates of a trade in services agreement began to reverse course and sought to exclude certain sectors, such as financial services, from the negotiations.\textsuperscript{46} Ultimately, the GATS and the Fifth Protocol were attained. Neither came easily and neither was a certainty until the very end.

A. Services Agreements Before the Concept of Trade in Services

The earliest agreements involving trade in services were isolated efforts undertaken by the GATT Contracting Parties\textsuperscript{47} in the 1950s and by Members of the Organization for Economic Co-operation and Development (OECD)\textsuperscript{48} in the early 1960s. The GATT Contracting Parties, then numbering thirty-four nations,\textsuperscript{49} adopted a report in 1955 that acknowledged “discrimination in transport insurance.”\textsuperscript{50} The Contracting Parties, recognizing that “measures ... which restricted the freedom of buyers and sellers of goods to place transport insurance ... create, in certain instances, obstacles to international trade,” issued a recommendation in

\textsuperscript{45} See infra Part III.C-D.

\textsuperscript{46} See infra Part III.E.2.

\textsuperscript{47} The signatory countries to the GATT are designated “Contracting Parties.” See GATT, supra note 21, at 7.

\textsuperscript{48} The Organization for Economic Co-operation and Development is the successor to the Organization for European Economic Co-operation. It has 29 Members and provides a platform for the exchange of information and ideas on economic and social policy. The World Wide Web site of the OECD is <http://www.oecd.org>.


1959. This recommendation, a non-binding agreement, called on the Contracting Parties to “avoid measures that would have a restrictive effect on international trade” when they formulated national policies in transport insurance.

The OECD, an organization composed primarily of developed countries, enacted the Code of Liberalization of Current Invisible Operations in 1961. Annex A of the Code, although not employing the term “services,” called on Members to engage in the international trade of specifically identified services, including insurance, banking, and financial services, pursuant to a codified set of principles and rules. The OECD Code was the first agreement to establish criteria governing the international trade of “invisibles.” Many provisions of the GATS find their origin in the OECD Code.

B. The Emergence of Trade in Services on the United States Trade Agenda

Trade in services emerged as a significant issue on the United States trade agenda during the 1970s. On the domestic front, the United States legislature addressed trade in services for the first time. Internationally, the United States carried the debate over services into the Tokyo Round of Multilateral Trade Negotiations (MTN) and brought it before the OECD.

Through the Trade Act of 1974, the United States enacted legislation addressing trade in services. The Act, in understated terms, defined “international trade” to include “trade in both goods

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52 Id. at 27.
54 See OECD Code, supra note 53, Annex A.
55 See infra
and services.\footnote{Id. at 2112(g)(3).} This extended the provisions of U.S. trade law, which were previously applicable only to trade in goods, to trade in services. Congress, however, failed to define the term "services."\footnote{But see GATS, supra note 5, art. I(3)(b) (defining "services" to include "any service in any sector except services supplied in the exercise of governmental authority").} This theme of statutory ambiguity carried over into the GATS.

The Tokyo Round of MTN, the seventh round of negotiations conducted under the auspices of the GATT, was launched in 1973 and continued through 1979.\footnote{See Aronson, supra note 9, at 5.} U.S. efforts to place the issue of trade in services on the Tokyo Round agenda failed to receive the support of other developed nations and was actively opposed by many developing countries.\footnote{See id. at 15.} One reason for the overall lack of support was that data demonstrating the importance of trade in services was either unavailable or unreliable.\footnote{See id. at 7.}

Developing countries, led by Brazil and India, opposed the inclusion of trade in services negotiations on the GATT agenda for a number of reasons. Developing countries argued that the rules and procedures of the GATT were drafted for trade in goods and that it was beyond the competence of the GATT to address trade in services.\footnote{See id. at 15.} They contended that trade in services involved investment issues because of major investments in developing countries made by foreign service suppliers.\footnote{See id.} The developing countries maintained that such investment issues were not within the province of the GATT.\footnote{See id.}

Developing countries also asserted that the inclusion of negotiations concerning trade in services would overwhelm the Tokyo Round GATT agenda and that other issues were of greater importance.\footnote{See Geza Feketekuty, Setting the Agenda for the Next Round of Negotiations on
restrictions (quotas), and agricultural issues were of greater significance and warranted more attention from the Contracting Parties than trade in services.67

The final argument advanced by the developing countries was motivated primarily by self-interest rather than GATT principles. This final argument asserted that services negotiations would probably focus on high technology services, in which developed countries had a competitive advantage, and would likely ignore labor intensive services that were of greater interest to developing countries.68

The developing countries also had serious domestic concerns about opening their service markets to international competition. The service industries in many developing countries were inefficient.69 It was feared that competition from more efficient foreign service industries might cause the failure of domestic service suppliers and displace a significant segment of the domestic workforce. The developing countries were concerned that unemployed workers might then become politically active and threaten the stability of their governments.70

The efforts to address trade in services in the OECD in the 1970s proved only slightly more productive. In 1979, the OECD Trade Committee agreed to study trade in services but failed to provide guidelines to direct the study.71 Different OECD Members suggested other areas of concentration for the study, ranging from comparative examination of regulatory regimes and existing international agreements to the collection of statistics.72 The United States contended that the study should focus on barriers

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68 See Aronson, supra note 9, at 15.

69 See id.

70 See id.

71 See id. at 13.

72 See id.
impeding trade in services.\textsuperscript{73} The actual goal of many OECD Members, however, was to retard or entirely obstruct the process of removing barriers to trade in services.\textsuperscript{74}

\textbf{C. The Early 1980s: Progress Against Adversity}

During the early 1980s, proponents of liberalizing trade in services encountered two significant obstacles: The world economy was in a "deep and prolonged"\textsuperscript{75} economic recession,\textsuperscript{76} and the stability of the GATT system seemed in jeopardy. Consequently, attention was diverted from trade in services to topics that appeared more urgent.

The GATT, along with the International Monetary Fund (IMF) and the International Bank for Reconstruction and Development (the World Bank), was established following World War II to encourage the increased flow of international commerce, thereby fostering growth and stability in the world's economy.\textsuperscript{77} The GATT was designed to promote economic efficiency through the reduction of high tariffs, the abolition of quotas, and the elimination of protectionist economic alliances.\textsuperscript{78} The GATT system was premised on four primary assumptions: (1) trade issues are best negotiated multilaterally; (2) economic efficiency is fostered by unrestricted and nondiscriminatory trade; (3) competitive markets maximize economic efficiency when permitted to function according to the laws of supply and demand; and (4) governmental measures which manipulate market forces should be avoided.\textsuperscript{79}

The GATT trading system was considered "seriously endangered" in the early 1980s.\textsuperscript{80} The Contracting Parties were routinely ignoring GATT rules and disciplines, and only about one-third of all international trade was being conducted pursuant

\textsuperscript{73} See id.
\textsuperscript{74} See id.
\textsuperscript{75} Ministerial Declaration, Nov. 29, 1982, GATT B.I.S.D. (29\textsuperscript{st} Supp.) at 9 (1983).
\textsuperscript{76} See Aronson, supra note 9, at 35.
\textsuperscript{77} See id. at 1.
\textsuperscript{78} See id.
\textsuperscript{79} See id. at 1-2.
\textsuperscript{80} Ministerial Declaration, supra note 75, at 9.
Agriculture, textiles, and steel, previously governed by the GATT, were being traded almost entirely outside of the GATT. Focusing attention on shoring up the existing GATT trading system was easier than seeking its expansion.

United States trade negotiators acting under the leadership of President Reagan’s Trade Representative (USTR), William E. Brock, continued to raise the issue of trade in services before the international community. Ambassador Brock strongly supported the liberalization of trade in services and believed in the “bicycle theory,” which posits “that unless you continue to move forward you will fall off.”

Anticipating the GATT Ministerial Meeting scheduled for November 1982, the USTR sought to focus the world’s attention on the need for an international agreement covering trade in services. Ambassador Brock’s strategy included publishing an article entitled A Simple Plan for Negotiating Trade in Services (A Simple Plan) immediately before the Ministerial Meeting. In A Simple Plan, Ambassador Brock declared that “technological advances in the services sector” would have “far-reaching social, economic and political consequences,” and that most government officials and private commentators had failed to recognize the importance of services to international commerce. The Ambassador also pressed the need for an international mechanism to resolve differences between nations concerning treatment accorded foreign services and service suppliers.

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81 See Aronson, supra note 9, at 2.
82 See id.
84 See id.
85 A Ministerial Meeting is a meeting in which the highest designated trade official from each participating country, the Trade Minister or, in the case of the United States, the Trade Representative, represents the country. See THE AMERICAN SOCIETY OF INTERNATIONAL LAW, MANAGING TRADE RELATIONS IN THE 1980S: ISSUES INVOLVED IN THE GATT MINISTERIAL MEETING OF 1982 36 (Seymour J. Rubin & Thomas R. Graham eds. 1983).
86 See William E. Brock, A Simple Plan for Negotiating on Trade in Services, 5 WORLD ECON. 229 (Nov. 1982).
87 Id. at 229-30.
88 See id. at 231.
The centerpiece of Ambassador Brock’s *A Simple Plan* was a three-point program. The program initially called on all nations to generate a “common political commitment to improve international cooperation” in the area of services.\(^8\) Secondly, Ambassador Brock sought to discourage nations from legislating new barriers to trade in services.\(^9\) Lastly, the Ambassador suggested that nations should prepare for future negotiations “aimed at the development of a comprehensive international framework of principles and rules for trade in services.”\(^9^1\) This final point of Ambassador Brock’s program was to be accomplished by collecting, organizing, and analyzing existing measures restricting trade in services and by exploring options to reduce or eliminate such measures.\(^9^2\)

The Ministerial Declaration issued at the conclusion of the 1982 Ministerial Meeting took the first important step toward initiating negotiations on trade in services according to GATT procedures.\(^9^3\) Despite ardent opposition led by Brazil and India,\(^9^4\) the seventeenth and final item in the Ministerial Declaration addressed trade in services.\(^9^5\) The weak resolution merely “recommended” that Contracting Parties “with an interest in services” undertake examinations of national issues.\(^9^6\) The resolution “invited” the Contracting Parties to exchange information among themselves and to avail themselves of international organizations, including the GATT, to facilitate this exchange.\(^9^7\) The Contracting Parties concluded the three-paragraph resolution with an agreement to further review trade in services issues at their 1984 session. The purpose of the 1984 review was not to adopt a liberalized policy regarding services trade, but simply to “consider whether any multilateral action in

\(^{8} \text* Id. at 235.\)

\(^{9} \text* See id.\)

\(^{10} \text* Id.\)

\(^{11} \text* See id.\)

\(^{9^1} \text* See Ministerial Declaration, supra note 75, at 21.\)

\(^{9^2} \text* See Aronson, supra note 9, at 15.\)

\(^{9^3} \text* See Ministerial Declaration, supra note 75, at 21.\)

\(^{9^4} \text* Id.\)

\(^{9^5} \text* Id.\)
these matters [would be] appropriate and desirable."98 A commitment to enter into formal negotiations concerning trade in services was conspicuously absent from the resolution.

D. Anticipating the Uruguay Round

While the resolution that emerged from the 1982 Ministerial Declaration was a progressive step, it did not represent a total surrender of the developing nations' opposition. Efforts undertaken by the OECD persuaded most developed nations that services should be a part of the GATT process,99 but the developing countries were not convinced. The attitude of most developing countries was that, although they had relented and agreed to a weak Resolution, the establishment of a preparatory committee to review service issue negotiations had been prevented, and formal negotiations continued to remain outside the GATT negotiating process.100 Prior to the Uruguay Round of GATT negotiations in September 1986, trade in services was more frequently addressed through the GATT, and many developing nations were gradually persuaded of the benefits of such trade.101

The GATT Contracting Parties met for their fortieth session in November 1984.102 The Contracting Parties, building upon the services resolution in the 1982 Ministerial Declaration, agreed that the Chairman of the Contracting Parties should organize an exchange of information based on the resolution. The Contracting Parties also charged the GATT Secretariat with "provid[ing] support necessary for this process."103 This was a significant accomplishment as the developing countries had engaged in procedural debates throughout this period in an attempt to preclude the use of any GATT resources for trade in services issues. The developing countries argued against holding service-related meetings on GATT premises and objected to any member

98 Id. at 22.
99 See Aronson, supra note 9, at 14.
100 See id. at 35; see generally John Parry, GATT Accepts Compromise on Services, WASH. POST, Dec. 1, 1984, available in 1984 WL 2004839.
102 See id.
103 Id. at 16.
of the Secretariat’s staff being present during or documenting discussions on services. A footnote in the 1984 Services Conclusion stated that before the Contracting Parties agreed to the Conclusion, the Chairman advised that it should not be interpreted as "prejudging...whether any multilateral action in [services would be] appropriate or desirable." The United States also pursued a bilateral strategy while seeking a multilateral forum for the negotiation of service issues. The United States-Israel Free Trade Agreement executed in April of 1985 marked the initial bilateral success of the United States. Article 16 of the Agreement acknowledged the importance of services to both nations and obligated the United States and Israel to "cooperate on trade in services pursuant to a Declaration to be made." The United States continued to pursue bilateral negotiations with other nations and threatened to extend most-favored nation (MFN) treatment and the benefits of liberalized trade in services only to those countries that participated in services negotiations.

While the United States was seeking to negotiate bilateral services trade agreements, the GATT Contracting Parties moved forward, if not at a pace that satisfied the U.S. negotiators. The exchange of information recommended in the 1982 Ministerial Declaration resulted in fourteen national studies by 1985. The United States was the first to produce its study, followed by Canada, Denmark, the European Economic Community (EEC), Finland, the Federal Republic of Germany, Italy, Japan, the Netherlands, Norway, Sweden, Switzerland, and the United

104 See Aronson, supra note 9, at 35.
105 See Decisions and Reports, supra note 101, at 16.
106 See Stuart Auerbach, U. S. Going its Own Way on Trade, WASH. POST, July 29, 1984, available in 1984 WL 2025269 (reporting that Deputy U.S. Trade Representative Michael B. Smith described the U.S. trade strategy as "à la carte").
108 See id.
109 See Aronson, supra note 9, at 36.
Kingdom. The studies were circulated to the GATT Contracting Parties, and eight meetings were held in 1985 to address the various findings.

The Report of the Chairman of the Contracting Parties, which followed the Forty-First Session conducted in November of 1985, noted these findings. The chairman indicated that services had been found to be “very heterogeneous” and that most national examinations acknowledged the difficulty of defining which types of activities should be considered services. The Chairman’s Report found some progress, as it recognized that a number of the national studies offered classification schedules for service activities.

As the Uruguay Round of MTN negotiations loomed in the immediate future, the developed countries pressed for the inclusion of services negotiations. Singapore, Hong Kong, the Philippines, Columbia, and Uruguay were the first developing nations to be persuaded. The EEC sought to persuade African and Latin American nations to join the negotiations by intimating that Brazil and India opposed the inclusion of services negotiations for purely self-interested reasons. The EEC suggested that Brazil and India had sizable service trade surpluses as a result of services trade with other developing countries, and thus, Brazil and India did not want to disturb the beneficial status quo.

The developing country opposition had been reduced to the “Group of Ten” shortly before the Uruguay Round began. These countries, led by Brazil and India, included Argentina, Cuba, Egypt, Nicaragua, Nigeria, Peru, Tanzania, and Yugoslavia.

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111 See id. at 72.
112 See id.
113 Id.
114 See id.
115 See Arsonson, supra note 9, at 36.
116 See id.
118 See Arsonson, supra note 9, at 37.
119 See id.
E. The Uruguay Round

The Uruguay Round was an exhaustive exercise in international trade negotiations. It commenced on September 20, 1986, and was scheduled to last only four years. It continued for almost twice that long. When it concluded, the negotiations produced: (1) the WTO, an entirely new entity; (2) the GATS, a services agreement; and (3) some initial commitments in financial services trade. A comprehensive pact governing the international trade of financial services had not yet been achieved, and years of additional negotiations would be required before that goal was reached.

1. Services on the GATT Agenda

It was unclear whether negotiations on trade in services would take place during the Uruguay Round until shortly before the round began. The developing countries partially relented on the question of negotiating services issues. The Punta del Este Ministerial Declaration (Declaration) that launched the round reflects the compromise that brought services into the GATT negotiations.

Pursuant to the Declaration, negotiations on trade in goods and trade in services were to be conducted along two separate and distinct tracks. In Part I, the representatives of the GATT Contracting Parties agreed to "enter into Multilateral Trade Negotiations ... within the framework and under the aegis of the General Agreement on Tariffs and Trade." In Part II, the representatives of the Contracting Parties agreed to negotiate on trade in services as the Trade Ministers of their respective governments but not in their capacity as representatives of GATT Contracting Parties. While Part I of the Declaration, relating to trade in goods, was set forth in extensive detail, Part II, referring


121 The Uruguay Round of MTN was conducted in Punta del Este, Uruguay.

122 Uruguay Round Ministerial Declaration, supra note 120, at 19.

123 See id. at 28; see also P.S. Randhawa, Punta del Este and After: Negotiations on Trade in Services and the Uruguay Round, 21 J. WORLD TRADE L. 163 (1987) (elaborating on the role of negotiators as trade ministers).

124 See Uruguay Round Ministerial Declaration, supra note 120, at 19-27.
to trade in services, consisted of only four paragraphs.\(^{125}\)

In a final effort to quash the agreement on trade in services by those countries opposed to it, the Declaration provided that negotiations concerning goods and negotiations addressing services would not be linked until a “Special Session” of the Contracting Parties was held.\(^{126}\) The Contracting Parties would not decide “the international implementation of the respective results” until this Special Session.\(^{127}\) It was anticipated that only after negotiations on both goods and services had concluded, would concessions be traded between the two sectors.\(^{128}\)

Despite the semantics and posturing that preceded the Uruguay Round, the process of achieving an international consensus on the regulation of trade in services had made great strides. Annex 4 of the Declaration announced that the “aim” of the Group of Negotiations on Services (Group), the body designated to manage the services negotiations,\(^{129}\) was to “establish a multilateral framework of principles and rules for trade in services.”\(^{130}\) To further this goal, The Group was to study existing international agreements and domestic measures that both inhibited and fostered trade in services.\(^{131}\) A broad set of principles governing all service sectors was to be sought, and the need to accommodate unique service sectors, such as financial services, was to be examined.\(^{132}\)

In light of the terms of reference supplied by the Ministers in the Annex, it might have been expected that the early results of the Uruguay Round negotiations would be promising. The outcome, however, was disappointing. The first draft of the framework agreement on trade in services was not produced until December 1989, more than three years after the negotiations had begun.\(^{133}\)

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\(^{125}\) See id. at 28

\(^{126}\) Id.

\(^{127}\) Id.

\(^{128}\) See Randhawa, supra note 123, at 163-64. The author was the First Secretary at the Permanent Mission of India to the United Nations Offices in Geneva, Switzerland. He expresses the position of India, although not writing on behalf of his government. Id.

\(^{129}\) Uruguay Round Ministerial Declaration, supra note 120, at 48.

\(^{130}\) Id.

\(^{131}\) See id.

\(^{132}\) See id.

\(^{133}\) See Center Stage for Services?, ECONOMIST, May 5, 1990, at 88, available in
The draft was only fifteen pages long, yet contained 167 points of contention.\textsuperscript{134} Furthermore, a small office unrelated to the GATT Secretariat was identified as the body expected to administer the trade in services agreement.\textsuperscript{135} Nevertheless, a consensus was growing among the Contracting Parties that services were important to the entire international community, not just to a small group of developed countries.

2. A Reversal of Positions

During the early 1990s, opposition among developing countries to a trade in services accord gradually diminished.\textsuperscript{136} The concern of the developing countries, that larger and more efficient service suppliers from developed countries would overtake their smaller, less competitive service companies, was being addressed.\textsuperscript{137} Negotiators proposed that developing countries be afforded grace periods to liberalize their service regimes, during which time their domestic service industries could become more efficient and competitive.\textsuperscript{138}

The developing countries also began to appreciate the leverage that negotiations on trade in services could lend to their positions in the parallel goods negotiations.\textsuperscript{139} Developed countries desired that goods and services be negotiated in tandem and sought a dispute resolution system that would address both types of trade.\textsuperscript{140}

\textsuperscript{134} See id.

\textsuperscript{135} See id.


\textsuperscript{138} See \textit{Closer, supra} note 137.

\textsuperscript{139} See id.

\textsuperscript{140} See id.
The developing countries initially opposed the idea of a single dispute resolution mechanism, fearing the use of "cross-sanctions."\(^\text{141}\) They were particularly concerned that cross-sanctions might be imposed against their important agricultural and textile industries in retaliation for their erecting barriers to trade in services.\(^\text{142}\) Uneasiness regarding cross-sanctions was allayed by their realization that concessions could be offered in services negotiations in exchange for more favorable treatment in goods negotiations.

The EEC, adamantly opposed to any agreement that did not include financial services, proposed with the United States that a "non-application" clause be included in the framework agreement.\(^\text{143}\) The purpose of the non-application clause was to force reciprocity.\(^\text{144}\) The clause would have permitted signatory countries to deny MFN treatment to the services and service suppliers of any other signatory if the market-opening commitments of the other signatories were deemed inadequate. While the non-application clause was not adopted, the Annex on Article II Exemptions contains similar provisions.\(^\text{145}\)

Around the same time that developing countries began to accept a services agreement, the United States began to reverse, or at least alter, its position.\(^\text{146}\) Although the United States had been the most fervent advocate of a services agreement, it began to "steadily whittle down" the service sectors in which it was willing to negotiate.\(^\text{147}\) Domestic pressures motivated U.S. negotiators to indicate that financial services, telecommunications, marine and air transport services, and the issue of workers crossing borders might be withdrawn from the negotiating table.\(^\text{148}\)

\(^{141}\) Id.

\(^{142}\) See id.

\(^{143}\) Center Stage for Services, supra note 133.

\(^{144}\) See id.

\(^{145}\) See GATS, supra note 5, Annex on Article II Exemptions.

\(^{146}\) See Center Stage for Services, supra note 133.

\(^{147}\) U.S. Blocks Adding Telecommunications, supra note 136, at 1614.

Throughout 1991, the United States continued to maintain that financial services might not be a part of the final agreement. The United States took the position that only a worldwide and truly enforceable agreement would be acceptable. The U.S. negotiators harbored serious doubts regarding foreign market access and sought to ensure global market access for U.S. financial services companies. The United States made it clear that its approach to financial services was a negotiating tactic prompted by domestic pressures designed to elicit more significant market-access commitments from its trading partners.

The Group of Negotiations on Services conducted a “stock-taking” exercise in March 1992. This assessment revealed that forty-seven participants in the services negotiations had tabled initial commitments on market access and national treatment, and thirty-two countries had submitted MFN exemption lists. Japan and the developing countries of Asia and Latin America, however, had failed to offer commitments in financial services that met the minimum U.S. expectations. This prompted the United States to reserve its right to exercise a MFN exemption in financial services.

3. The Close of the Uruguay Round

The Uruguay Round came to a close on December 15, 1993. President Clinton notified Congress of his Administration’s intent to enter into the agreements reached at Punta del Este within hours of the Round’s conclusion. The President’s eagerness to notify Congress and the Round’s abrupt conclusion stemmed from the same source: “fast track” trade negotiating authority. Fast track is a procedure by which the U.S. Congress waives its customary


150 See id.


153 Id.

154 See id.

155 See id.

role in implementing trade legislation. Congress agrees in advance of the signing of a trade agreement by the President that the future agreement will be accepted or rejected in its entirety but not amended.

The Congressional grant of fast track negotiating authority applicable to the Uruguay Round negotiations was set to expire at midnight on December 15, 1993. If the Uruguay Round had not concluded or the President had failed to notify Congress by the deadline, Congress would have reacquired the right to amend the final agreements. Amendments would have required renegotiation that would have signaled the demise of the agreements.

With less than seventy-two hours remaining before the December 15 deadline, the negotiators were locked in almost intractable positions, and the results of seven years of hard work hung in the balance. Among other issues, the United States and the European Union (EU) disagreed over financial services. The United States was primarily dissatisfied with the level of market-opening commitments in banking and securities offered by many of the negotiating partners.

In the final months of 1993, the United States proposed a “two-tier” schedule of commitments in banking and securities. The two-tier approach would have authorized different treatment for the banking and securities services and service suppliers of different Members depending on how each WTO Member perceived its banking and securities services and service suppliers

See id. § 2903.

See id.

See id. § 2902(e)(3)(A).


See id.

See id.

were being treated. Pursuant to the proposed two-tier schedule, the Members would not have been obligated to extend unconditional MFN treatment in banking and securities. Commitments in banking and securities could have been made contingent on the treatment accorded to respective domestic banking and securities services and service suppliers by other WTO Members. U.S. trading partners rejected the two-tier proposal, like the earlier non-application clause, on the basis that it would have destroyed the MFN principle.

Almost at the last moment, the United States and the EU, the primary negotiators at this stage, agreed to strike the “best possible deal” rather than extend negotiations and lose congressional fast track authority. The GATS framework agreement and the Annexes were concluded, as was the Understanding on Commitments in Financial Services. Initial commitments were scheduled and lists of Article II exemptions were made. Since no ultimate consensus was achieved on whether MFN treatment in financial services should be extended to foreign services and service suppliers on a conditional or unconditional basis, the parties agreed to a compromise.

The compromise was set forth in the Decision on Financial Services, which extended the negotiating period for financial services. This prevented the United States and the EU, at least temporarily, from taking broad MFN exemptions and essentially withdrawing their financial services from the negotiating table. Pursuant to the Decision on Financial Services which became applicable when the WTO came into effect on January 1, 1995, the negotiations on financial services that had been postponed during the Uruguay Round would be resumed for an additional six months. The additional six-month negotiating window was to

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164 See id.
165 See id.
166 Uruguay Round Agreement is Reached, supra note 160, at 2103 (addressing the comments of many delegates).
169 See id.
commence with the inception of the WTO and continue until June 30, 1995.\textsuperscript{170}

\textbf{F. The Interim Agreement: "A Second Best Result"\textsuperscript{171}}

The WTO replaced the 1947 GATT on January 1, 1995, marking a substantial step forward in international trade relations. The United States and the EU entered into a series of bilateral negotiations with a number of other countries throughout 1994 and into 1995 to generate momentum for the resumption of the financial services negotiations.\textsuperscript{172} The negotiations centered on Japan and approximately fourteen other Asian and Latin American nations.\textsuperscript{173} The domestic laws of these countries, as written or as implemented, contained measures viewed by the United States and the EU as barriers to trade in financial services.\textsuperscript{174}

As the negotiations approached the July 1, 1995 deadline, it became apparent that the United States would not sign a broad financial services agreement. The United States sought more significant market-opening commitments than were forthcoming from its negotiating partners and was concerned about a situation it termed "free-rider."\textsuperscript{175} "Free-riders," in the eyes of the U.S. negotiators, would be those WTO Members who made weak or no commitments to open their financial services markets. Application of the Article II MFN principle would accord "immediate and unconditional"\textsuperscript{176} access to the U.S. market to the free-riders if the United States extended market-opening commitments to other WTO Members. U.S. financial services and

\textsuperscript{170} See id.


\textsuperscript{173} See THE YEAR IN TRADE: 1994, supra note 172.

\textsuperscript{174} See id.

\textsuperscript{175} Negotiators Clear Path to GATT Pact by Sweeping Away Remaining Differences, 10 Int’l Trade Rep. (BNA) at 2106-2107 (1993).

\textsuperscript{176} GATS supra note 5, art. II.
financial services suppliers would not be accorded the same treatment, however, because of the minimal or non-existent financial services commitments tabled by the free-riders.\textsuperscript{177}

WTO Director-General Ruggiero sought to persuade the United States to sign on to the proposed accord with an article published in the \textit{Wall Street Journal} on June 22, 1995.\textsuperscript{178} The Director-General maintained that the anticipated U.S. approach toward negotiating bilateral financial services agreements would not prove successful.\textsuperscript{179} Ruggiero additionally suggested that the U.S. concern over free-riders was not well-founded and that failure to reach an agreement on financial services could detrimentally impact other sectoral negotiations important to the United States, principally telecommunications.\textsuperscript{180}

The Director-General was unable to persuade the United States, resulting in two significant events at the end of June of 1995. First, the United States announced on June 30, 1995, that it was withdrawing its offer of unconditional MFN treatment in financial services and that it was withdrawing from the negotiations.\textsuperscript{181} The United States reiterated that it considered the commitments offered by many countries, particularly a number of Asian\textsuperscript{182} and Latin American countries, insufficient to permit non-reciprocal access to the U.S. market.\textsuperscript{183} The second major event occurred when the EU sought a one-month extension to the financial services negotiations.\textsuperscript{184}


\textsuperscript{179} See id.

\textsuperscript{180} See id.


\textsuperscript{183} See Yerkey, supra note 181, at 1265; \textit{Financial Services: An Overview}, supra note 155.

\textsuperscript{184} See Japan, South Korea Sign on to Financial Services Accord, 12 \textit{Int'l Trade Rep.} (BNA) at 1266 (1995) [hereinafter \textit{Japan, South Korea Sign on}].
With the United States no longer participating in the financial services negotiations, the EU took the lead. The result of the EU-led negotiations was the Second Protocol to the GATS, commonly referred to as the “Interim Agreement.”\textsuperscript{185} Thirty WTO Members, including the EU, strengthened their Uruguay Round commitments.\textsuperscript{186} The agreement was termed “interim” because it was anticipated that it would only be temporary and ultimately would be replaced by a permanent financial services accord still to be negotiated.

G. The Financial Services Agreement: The End of One Road and the Beginning of the Next

The Second Protocol or “Interim Agreement” was, as Director-General Ruggiero described it, a “second best result.”\textsuperscript{187} The U.S. financial services market was too important to the international economy not to be open on an unconditional MFN basis, and only seventy-six of the more than one hundred WTO Members had even extended commitments.\textsuperscript{188} The negotiations had proven to be more contentious than had been foreseen and had produced fewer results than expected. Nonetheless, the process continued.\textsuperscript{189}

The Members of the new WTO met for the first time at the ministerial level in Singapore during December 1996.\textsuperscript{190} It was agreed in the Singapore Ministerial Declaration that negotiations in the financial services sector would resume in April 1997.\textsuperscript{191} The goal of these negotiations, which would address only financial services issues, would be to achieve “significantly improved market access commitments with a broader level of participation.”\textsuperscript{192}

These negotiations proved to be as contentious as the previous


\textsuperscript{186} See Japan, South Korea Sign on, supra note 184.

\textsuperscript{187} WTO Proceeds With Interim Agreement, supra note 171.

\textsuperscript{188} See Yerkey, supra note 181.

\textsuperscript{189} See Singapore Ministerial Declaration, 36 I.L.M. 218 (1997).

\textsuperscript{190} See id. at 220.

\textsuperscript{191} See id.

\textsuperscript{192} Id.
negotiations, and difficulties were compounded by the Asian financial crisis. The results, however, were substantial. The Fifth Protocol to the GATS, known as the Financial Services Agreement, was completed in the early morning hours of December 13, 1997. One hundred two WTO Members extended commitments in financial services, as compared with the seventy-six commitments of the Interim Agreement.

At this point, the United States withdrew its broad MFN exemptions in banking and securities, but exercised an Article II exemption for insurance services. The MFN exemption in insurance services was narrowly drawn in direct response to measures taken by Malaysia. Malaysia attempted to force two U.S. insurance companies, Aetna and American International Group, to reduce their 100% holdings in operations in Malaysia to not more than 51%. The United States, in accordance with its MFN exemption, will extend reciprocal, but not unconditional MFN treatment to Malaysian insurance services providers and to insurance services providers of any other WTO Member with measures similar to those of Malaysia.

Seventy countries participating in the Fifth Protocol improved or made initial commitments in financial services, and thirty-two maintained the commitments extended in the Uruguay Round or in the Interim Agreement. Seven countries, Brazil, Canada, India, Japan, Senegal, Slovakia, and Slovenia, along with the EU, made improvements on their offers in the final hours before the negotiations concluded. Bolivia, Costa Rica, Mauritius, Senegal, and Sri Lanka tabled their first commitments in financial

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193 See Fifth Protocol, supra note 3.
195 See id. The number of Members that have scheduled commitments in financial services now totals 104 with the accession of the Kyrgyz Republic and Latvia into the WTO on December 20, 1998, and February 10, 1999, respectively.
196 See Japan, South Korea Sign on, supra note 184.
197 See Pruzin, supra note 194.
198 See id.
200 See Pruzin, supra note 194.
services.\textsuperscript{201} The commitments by India, Malaysia, and South Korea were the most significant disappointments.\textsuperscript{202} India and Malaysia maintained significant restrictions in the insurance services subsector, and South Korea declined to schedule as part of its WTO financial services commitments all of the concessions it had made to obtain accession into the OECD.\textsuperscript{203}

The ratification process called for the Fifth Protocol to be open for acceptance until January 29, 1999, with the Protocol’s entry into force scheduled for March 1, 1999.\textsuperscript{204} Only fifteen countries had completed domestic implementation by December 23, 1998, and it did not appear that the ratification deadline would be met.\textsuperscript{205} On February 15, 1999, the WTO announced that the fifty-two governments that had completed domestic implementation had agreed that the Financial Services Agreement should enter into force on schedule on March 1, 1999.\textsuperscript{206} The Members also agreed that the opportunity for the other WTO Members to accept the Fifth Protocol should remain open until June 15, 1999.\textsuperscript{207}

IV. Understanding and Interpreting the GATS and the WTO Instruments Relevant to Trade in Financial Services

A. Overview of the Legal Instruments

Trading financial services internationally under the auspices of


\textsuperscript{203} See 1999 NATIONAL TRADE REPORT, supra note 202.

\textsuperscript{204} See Fifth Protocol, supra note 3; Pruzin, supra note 194.

\textsuperscript{205} See Daniel Pruzin, WTO Financial Services Pact Shadowed by Signer’s Failure to Hit Ratification Date, 15 Int’l Trade Rep. (BNA) at 2141 (Dec. 23, 1998).

\textsuperscript{206} See WTO’s Financial Services Commitments Will Enter into Force, supra note 4.

\textsuperscript{207} See id.
the WTO requires an understanding of seven interrelated instruments. The instruments, which must be understood and interpreted collectively, consist of: (1) the GATS framework agreement;\(^{208}\) (2) the GATS Annex on Article II Exemptions;\(^{209}\) (3) the GATS Annex on Financial Services;\(^{210}\) (4) the Understanding on Commitments in Financial Services\(^{211}\) (Understanding); (5) the Schedules of Specific Commitments\(^{212}\) and Lists of Article II Exemptions\(^{213}\) made at the conclusion of the Uruguay Round; (6) the Second Protocol to the General Agreement on Trade in Services,\(^{214}\) also known as the "Interim Agreement;" and (7) the Fifth Protocol to the GATS,\(^{215}\) the Financial Services Agreement.\(^{216}\)

1. The Framework Agreement

The GATS framework agreement establishes the core rules and disciplines applicable to all service sectors.\(^{217}\) It is divided into six Parts: (1) Scope and Definition; (2) General Obligations and Disciplines; (3) Specific Commitments; (4) Progressive Liberalization; (5) Institutional Provisions; and (6) Final Provisions.\(^{218}\) The six parts are further divided into thirty-two articles,\(^{219}\) reflecting the influence of WTO Members with civil law

\(^{208}\) See GATS, supra note 5 (referring to the articles of the GATS); infra Parts IV.A.1, B.3.

\(^{209}\) See GATS, supra note 5, Annex on Article II Exemptions; infra Part IV.A.2.

\(^{210}\) See GATS, supra note 5, Annex on Financial Services; infra Parts IV.A.3, B.4.

\(^{211}\) See Understanding, supra note 167; infra Part IV.A.4.

\(^{212}\) See GATS, supra note 5; infra Part IV.A.5.

\(^{213}\) See GATS, supra note 5, Annex on Article II Exemptions; infra Part IV.A.5.

\(^{214}\) See Second Protocol, supra note 185; infra Part IV.A.5.

\(^{215}\) See Fifth Protocol, supra note 3; infra Part IV.A.5.


\(^{218}\) See GATS, supra note 5.

\(^{219}\) See id. The GATS framework articles are numbered I through XXIX, but include Articles III bis, V bis and XIV bis. See id.
traditions. The articles, which reflect the influence of common
law statutory drafting techniques, are more encompassing than
customary civil law legislation.

The framework agreement constitutes the foundation on which
all trade in services between WTO Members is to be conducted
and reveals the interplay of law and diplomacy. Article I is the
sole article in Part I, Scope and Definition. Article I defines
“trade in services” and establishes the legal parameters for
services trade pursuant to the WTO regime. Part II, General
Obligations and Disciplines, encompasses Article II through
Article XV. The principal obligations of Part II, their primacy
demonstrated by their location, are Articles II and III. Articles II
and III bring to the GATS the GATT prescripts of “Most-
Favoured Nation” (MFN) treatment and transparency. Articles
XVI, Market Access, XVII, National Treatment, and XVIII,
Additional Commitments, form Specific Commitments, Part III of
the framework agreement. Part III sets forth guidelines for
making specific commitments to open domestic markets and for
treating the services and service suppliers of other WTO Members
as if they were domestic. Part IV, Progressive Liberalization,
containing Articles XIX through XXI, was drafted with future
negotiations in mind. The purposes of these articles are two-
fold. The initial purpose, diplomatic in nature, is to provide for
built-in rounds of successive negotiations with the aim of further
liberalizing trade in services. The second purpose, essentially a
shake-out provision, is to review how the GATS works in practice,
with the aim of entering into future negotiations to reconcile

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220 See id. art. I.
221 See id.
222 See id. arts. II-XV.
223 See id. art. I; infra Part IV.B.6.
224 See GATT, supra note 21, art. II; infra Part IV.B.7.
225 See infra Part IV.B.6.
226 See GATS, supra note 5, arts. XVI-XVIII.
227 See id.
228 See id. arts. XIX-XXI; infra Part IV.B.10.
229 See WENDY DOBSON & PIERRE JACQUET, FINANCIAL SERVICES LIBERALIZATION IN THE WTO 73 (1998). The term “built-in” rounds of negotiations is used because the drafters included in the General Agreement an obligation to engage in future negotiations.
practice with expectations.\textsuperscript{230}

The \textit{Institutional Provisions} of Part V seek to facilitate the implementation of the GATS.\textsuperscript{231} Article XXII, \textit{Consultations}, is diplomacy of the highest order. The parties appreciated that WTO Members are independent sovereigns and that there are limits on the extent to which one sovereign may compel another to act or desist. Therefore, Article XXII calls for the Members to engage in discussions "with respect to any matter affecting the operation of this Agreement."\textsuperscript{232} Under Article XXIII, \textit{Recourse to the WTO Understanding on Rules and Procedures Governing the Settlement of Disputes} (DSU),\textsuperscript{233} the "judicial" aspect of the WTO is made available should consultations prove unsuccessful.\textsuperscript{234} Articles XXIV and XXV establish the Council for Trade in Services to address issues regarding the overall operation of the Agreement, and call for the Members to provide "contact points"\textsuperscript{235} through which foreign service suppliers may obtain information about conducting business in that Member's territory.

The \textit{Final Provisions}, Part VI, consists of only three articles: Article XXVII, \textit{Denial of Benefits}, Article XXVIII, \textit{Definitions}, and Article XXIX, \textit{Annexes}.

Article XXVII addresses the specific circumstances under which a WTO Member may decline to extend the benefits of the GATS to services or service suppliers that have only a tenuous connection to another WTO Member.\textsuperscript{237} Article XXVIII provides an extensive list of definitions essential to interpreting the Agreement and Article XXIX confirms that the accompanying annexes are "integral"\textsuperscript{238} components of the GATS.

\begin{itemize}
\item \textsuperscript{231} See GATS, supra note 5, arts. XXII-XXVI.
\item \textsuperscript{232} Id. art. XXII.
\item \textsuperscript{234} See infra Part IV.B.9.
\item \textsuperscript{235} See GATS, supra note 5, art. IV(2); infra Part IV.B.7.
\item \textsuperscript{236} See GATS, supra note 5, arts. XXVII-XXIX.
\item \textsuperscript{238} See GATS, supra note 5, art. XXIX; see generally Hoekman & Sauve, supra
\end{itemize}
2. The Annex on Article II Exemptions

The Annex on Article II Exemptions is the first of eight annexes deemed to be “integral” parts of the GATS. The annexes, although part of the GATS, are essentially supplemental agreements relating to the articles of the framework agreement. The Annex on Article II Exemptions supplements the WTO Members’ obligation to extend Article II MFN treatment to the services and service suppliers of other WTO Members and, as with the framework agreement, applies to all service sectors.

A WTO Member may maintain measures that are inconsistent with the obligation to accord immediate and unconditional treatment that is “no less favourable” to the services and service suppliers of other Members than the treatment extended to the services and service suppliers of any other country. Absent this annex, a Member that accords a special privilege or right to the services or service suppliers of any other country, whether or not a WTO Member, would be obligated to extend the same trade in services measure to the services and service suppliers of all WTO Members. This annex permits WTO Members to breach, under prescribed conditions, one of the basic tenets of the GATS and provides Members with the flexibility to withhold liberalization commitments from those Members that fail to offer reciprocal market access.

A Member’s inconsistent measure, to be applicable, must be inscribed in its List of Article II Exemptions. The United States maintains a MFN exemption relating to trade in insurance services in its List. As previously stated, this exemption or “carve-out,” was taken by the United States in direct response to Malaysia’s decision to force the partial divestiture of foreign insurance companies. The exemption, though drafted with the actions of

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239 Hoekman & Sauve, supra note 217, at 37–40.


241 GATS supra note 5, art. II(1). See supra note 12. The WTO web site provides a list of the countries that are not WTO Members. They include, among others, the People’s Republic of China, Russia, and Saudi Arabia.

242 See Collins, supra note 237, at 821.

243 See Hoekman, supra note 216, at 94.

244 See Fifth Protocol, supra note 3.
Malaysia in mind, is written in general terms and is applicable to all WTO Members.

3. The Annex on Financial Services

The Annex on Financial Services, like the Annex on Article II Exemptions, is an integral part of the GATS. The financial services annex is, however, applicable only to trade in financial services. It is a financial services supplement to the framework agreement designed to provide greater specificity with regard to trade in financial services.

The Annex on Financial Services is divided into five numbered sections, each relating to a specific article or articles of the framework agreement. Section 1 of the annex corresponds to Article I of the framework agreement, Scope and Definition. Section 1 provides in part, that the annex “applies to measures affecting the supply of financial services.” The second section of the annex corresponds to Article VI of the framework agreement, Domestic Regulation. It authorizes each WTO Member to establish “prudential” regulatory measures to protect purchasers and beneficiaries of financial services, as well as its domestic financial system.

Section 3 of the Annex on Financial Services corresponds to and significantly expands on the provisions of Article VII, Recognition, relating to authorization, licensing, and certification of service suppliers. Section 3 addresses recognition by WTO Members of the prudential measures of other countries, irrespective of whether the other country is a WTO Member.

Section 3 of the annex provides in part, that a “Member may recognize prudential measures of any other country in determining

245 See GATS, supra note 5, Annex on Financial Services; see generally Collins, supra note 237, at 817 (discussing the Annex on Financial Services).

246 See GATS, supra note 5, Annex on Financial Services; Collins, supra note 237, at 817.


248 GATS, supra note 5, Annex on Financial Services, § 2(a); see Collins, supra note 237, at 817.

249 See Collins, supra note 237, at 817.
how the Member’s measures relating to financial services shall be applied.”\textsuperscript{250} The decision by a Member to recognize another country’s prudential measures may be undertaken independently by the Member or may be the result of an agreement.\textsuperscript{251} The United States and Canada, for example, entered into an agreement of this nature in the United States–Canadian Multijurisdictional Disclosure System (MJDS).\textsuperscript{252} The MJDS provides that U.S. and Canadian securities regulators will reciprocally recognize securities registration statements prepared in accordance with the other nation’s domestic disclosure requirements.\textsuperscript{253}

Once a WTO Member extends recognition to another country’s prudential measures, the Member must “afford adequate opportunity for other interested Members to negotiate their accession to such agreements or arrangements, or to negotiate comparable ones.”\textsuperscript{254} If recognition has been accorded autonomously, WTO Members must be afforded the opportunity to establish that similar circumstances exist in their countries warranting recognition of their prudential measures.\textsuperscript{255}

Section 4 of the annex supplements Article XXIII of the framework agreement, \emph{Dispute Settlement and Enforcement}. Section 4 acknowledges the complexity of the financial services industry and mandates that panelists hearing disputes regarding “prudential issues and other financial matters” have specific

\textsuperscript{250} GATS, supra note 5, Annex on Financial Services, § 3(a) (emphasis added).


\textsuperscript{253} See Geiger, supra note 252, at 1792.

\textsuperscript{254} GATS, supra note 5, Annex on Financial Services, § 3(b). See Case, supra note 251, at 221; Fontecchio, supra note 247, at 130-31. See also Fifth Protocol, supra note 3, List of Article II (MFN) Exemptions-Insurance (which appears to reserve an exemption designed to permit the U.S. to decline requests by other WTO Members to accede to the U.S.–Canadian Multijurisdictional Disclosure System).

\textsuperscript{255} See Fontecchio, supra note 247, at 130-31.
expertise to enable them to render well-reasoned decisions.\footnote{GATS, supra note 5, Annex on Financial Services, § 4.}

Section 5, *Definitions*, the final section of the Annex on Financial Services, is arguably the Annex’s most important section.\footnote{See infra Part IV.B.4.} Section 5 supplements the definitions in Articles I and XXVIII of the framework agreement and defines those financial services that the WTO Members have agreed to trade pursuant to the GATS. Section 5(a) lists sixteen financial services under two broad categories: (1) “[i]nsurance and insurance-related services”; and (2) “[b]anking and other financial services (excluding insurance).” \footnote{GATS, supra note 5, Annex on Financial Services, § 5(a). Financial services, pursuant to the GATS, include:

*Insurance and insurance-related services* (i) Direct insurance (including co-insurance): (A) life (B) non-life (ii) Reinsurance and retrocession; (iii) Insurance intermediation, such as brokerage and agency; (iv) Services auxiliary to insurance, such as consultancy, actuarial, risk assessment and claim settlement services. *Banking and other financial services (excluding insurance)* (v) Acceptance of deposits and other repayable funds from the public; (vi) Lending of all types, including consumer credit, mortgage credit, factoring and financing of commercial transaction; (vii) Financial leasing; (viii) All payment and money transaction services, including credit, charge and debit cards, travellers cheques and bank drafts; (ix) Guarantees and commitments; (x) Trading for own account or for account of customers, whether on an exchange, in an over-the-counter market or otherwise, the following: (A) money market instruments (including cheques, bills, certificates of deposit); (B) foreign exchange; (C) derivative products including, but not limited to, futures and options; (D) exchange rate and interest rate instruments, including products such as swaps, forward rate agreements; (E) transferable securities; (F) other negotiable instruments and financial assets, including bullion. (xi) Participation in issues of all kinds of securities, including underwriting and placement as agent (whether publicly or privately) and provision of services related to issues; (xii) Money brokering; (xiii) Asset management, such as cash or portfolio management, all forms of collective investment management, pension fund management, custodial depository and trust services; (xiv) Settlement and clearing services for financial assets, including securities, derivative products, and other negotiable instruments; (xv) Provision and transfer of financial information, and financial data processing and related software by suppliers of other financial services; (xvi) Advisory, intermediation and other auxiliary financial services on all the activities listed in subparagraphs (v) through (xvi), including credit reference and analysis, investment and portfolio research and advice, advice on acquisitions and on corporate restructuring and strategy.

*Id.*}
4. The Understanding on Commitments in Financial Services

The Understanding on Commitments in Financial Services (Understanding) is another instrument encompassed by the Final Act of the Uruguay Round, but it is not as integral a part of the GATS as are the annexes. The Understanding, similar to the WTO Plurilateral Agreements, is optional. WTO Members are not required to adhere to the Understanding as they must to the dictates of the GATS. The Understanding is binding only on those countries that specifically incorporate into their schedules of commitments in financial services that their commitments are to be interpreted in accordance with the Understanding. Thirty-one Members of the WTO have scheduled the Understanding as a commitment.

The Understanding is an “alternative approach” to applying the obligations of Part III, Specific Commitments, of the GATS for those “interested Members” that have referenced the Understanding in their schedules. Part III of the GATS includes Articles XVI, XVII, and XVIII, Market Access, National Treatment and Additional Commitments, respectively. The aim of the Understanding is to expand the trade liberalizing reach of the GATS framework agreement and Annex on Financial Services.

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259 See Understanding, supra note 167; see generally Trachtman, supra note 251, at 69-71, 78-79 (discussing the Understanding).

260 See GATS, supra note 5, art. XXIX; infra Part IV.B.5.

261 See WTO Agreement, supra note 5, Annex 4, at 1225. The WTO Plurilateral Agreements are: (1) Agreement on Trade in Civil Aircraft; (2) Agreement on Government Procurement; (3) International Dairy Agreement; and (4) International Bovine Meat Agreement. Participation in these accords is not mandated for membership in the WTO. See generally WORLD TRADE ORGANIZATION, supra note 6, at 36 (explaining the WTO Plurilateral Agreements).

262 See Financial Services Background, supra note 10. Inscriptions indicating a WTO Member’s adoption of the Understanding are generally located in the horizontal commitments or head notes preceding the Member’s commitments in financial services. It would be wise to review the fourth column of the Schedule of Specific Commitments, the Additional Commitments column, as there is no mandated uniform structure for the scheduling of a Member’s commitments.

263 Understanding, supra note 167, Preamble.

264 Id.

265 See Trachtman, supra note 251, at 70. Generally, such Members are developed countries with established financial service industries.
and the Members' Schedules of Specific Commitments. The Understanding offers greater predictability in the trade of financial services than the GATS alone by further refining the market access and national treatment obligations. "Commercial presence," for example, is defined more broadly in the Understanding than in the GATS.

5. The Schedules of Specific Commitments and the Lists of Article Exemptions

a. The Schedules and Lists: An Overview

The Schedules of Specific Commitments and Lists of Article II Exemptions contribute substance to the general rules and disciplines of the GATS. The GATS, which addresses all service sectors, stands in contrast with the Schedules and Lists which establish the specific market-opening undertakings or limitations on a country-by-country and sector-by-sector basis. WTO Members' service sectors are open to other WTO Members to the extent provided in their respective Schedules and Lists, but then only as implemented by the General Agreement.

The Schedules and Lists are in one sense a single compilation of documents and in another sense three distinct documents. Each WTO Member has only one Schedule of Specific Commitments and only one List of Article II Exemptions, if any Article II exemptions have been exercised; the Schedules and Lists are in this sense a single compilation. The Schedules and Lists, however, may be seen as three distinct documents in so far as the current and effective Schedule and List, depending on when they were initially tabled and whether they have subsequently been amended, may be found in one of three documents. In addition to the Members' respective copies, the Schedule and List may be found following the GATS framework agreement and annexes

266 See id. § B.
267 See id. § C.
268 Compare Understanding, supra note 167, §§ B(5), (B)(6), D(2), with GATS, supra note 5, art. XXVIII(1).
269 See Kennedy, supra note 240, at 490-92.
270 See Hoekman, supra note 216, at 111 (suggesting that a great deal of dispute settlements in the GATS will involve interpretation of the Members' Schedules of Specific Commitments).
produced at the conclusion of the Uruguay Round in 1993. They may also be found either in the Second or the Fifth Protocol to the GATS.

If a WTO Member scheduled commitments in financial services and listed MFN exemptions relating to its financial service commitments during the Uruguay Round and has not subsequently amended its Schedule or List, then the Schedule and List produced in the Uruguay Round are the current and effective Schedule and List. The Second and Fifth Protocols both provide that the Schedules and Lists annexed to them replace the financial services sections of the Schedules of Specific Commitments and List of Article II Exemptions of that Member, upon their respective entry into force. If a Member's initial or amended schedule is annexed to either the Second or Fifth Protocol, then the most recently submitted Schedule and List would be the current and effective Schedule and List for that Member.

A review of the Schedules and Lists annexed to the Second and Fifth Protocols indicates that Morocco was the only Member to table a Schedule of Specific Commitments in the Second Protocol but not in the Fifth Protocol. A number of nations tabled Schedules and Lists during the Uruguay Round and have not since amended them in either of the two subsequent rounds of financial services negotiations. The current and effective Schedules and Lists for those Members are the Schedules and Lists tabled during the Uruguay Round.

Article XX of the framework agreement calls for Members’

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271 The Schedules of Specific Commitments tabled during the Uruguay Round are available on the WTO web site <http://www.wto.org/wto/services/22-specm.htm>. The index to the List of Article II Exemptions tabled during the Uruguay Round is available on the WTO web site <http://www.wto.org/wto/services/23-iiexm.htm>. The Exemptions may be obtained by accessing the WTO Document Dissemination Facility (DDF) <http://www.wto.org/wto/ddf/ep/public.htm> and searching by the index symbol.

272 The Schedules of Specific Commitments and Lists of Article II Exemptions which encompass the Fifth Protocol are available at the WTO web site <http://www.wto.org/wto/services/finsched.htm>.

273 See Second Protocol, supra note 185; Fifth Protocol, supra note 3.

274 See Second Protocol, supra note 185; Fifth Protocol supra note 3.

275 See Fifth Protocol, supra note 3.

276 See Second Protocol, supra note 185.
Schedules to be annexed to the GATS.\textsuperscript{277} The Annex on Article II Exemptions provides that the Lists of Article II Exemptions are to be attached to the Annex, "in the treaty copy of the WTO Agreement."\textsuperscript{278} The Schedules and Lists, in practice, accompany one another. The Members' Schedules of Specific Commitments precede their Lists of Article II Exemptions. This organizational method has been used for the Schedules and Lists produced in the Uruguay Round, the Second Protocol, and in the Fifth Protocol. It enables easy reference between the Member's Schedule and List to determine if any commitments made in the Schedule are limited by MFN exemptions in the List.

Each WTO Member's Schedule of Specific Commitments and List of Article II Exemptions, if any, are unique. The current and effective Schedule and List of each Member must be read carefully to determine precisely those opportunities afforded foreign services and service suppliers. Since the Schedules and Lists of each Member are \textit{sui generis}, they will not be individually interpreted.

\textit{b. The Schedules of Specific Commitments}

The Schedules of Specific Commitments consist of four columns and a single row directly beneath the column subtitles. The column subtitles are: (1) Sector or subsector; (2) Limitations on market access; (3) Limitations on national treatment; and (4) Additional commitments.\textsuperscript{279} Members identify the specific service sectors or subsectors in which a commitment is being made in the sector or subsector column. Limitations on market access and national treatment, corresponding to the service sectors or subsectors, are inscribed in their respective columns to the right of the sector or subsector column. The column to the far right provides a place for Members to inscribe additional trade liberalizing commitments that may have been negotiated.

The service sectors and subsectors tend to be consistent from Member Schedule to Member Schedule. The most frequently followed methods use the Service Sectoral Classification List (SSCL) drafted by the GATT Secretariat during the Uruguay

\textsuperscript{277} See GATS, supra note 5, art. XX(3).
\textsuperscript{278} GATS, supra note 5, Annex on Article II Exemptions.
\textsuperscript{279} See supra note 271 and accompanying text.
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or a combination of the SSCL and the Central Product Classification (CPC) of the United Nations Statistical Office. A CPC number describes a particular service sector or subsector. The CPC number may be used in conjunction with the SSCL to provide a more detailed description of the service sector or subsector in which the Member has made a commitment.

Commitments in financial services are generally scheduled pursuant to the definitions describing financial services in the GATS Annex on Financial Services. This is not mandated in the GATS, however, and thus there are exceptions. Financial services commitments of some Members employ a combination of financial services definitions in the Annex on Financial Services and the use of CPC descriptions.

When read together, articles XX, Schedules of Specific Commitments, XVI, Market Access, and XVII, National Treatment, suggest that WTO Members must be regarded as having made commitments only in those service sectors or subsectors identified in their Schedules. Article XX(1) provides, in part, that "[e]ach Member shall set out in a schedule the specific commitments it undertakes under Part III [Specific Commitments] of this Agreement." Article XVI(1) references each Member’s market access commitments “specified in its Schedule,” and Article XVII(1) mandates that each WTO Member provide national treatment “[i]n the sectors inscribed in its schedules.” Although Article XVII only references sectors, a fair reading of the three articles together confirms that a WTO Member should not be assumed to have made commitments in any service sector or subsector, unless that sector or subsector is specifically inscribed in its Schedule of Specific Commitments.

See Kennedy, supra note 240, at 487-88.

See STATISTICAL OFFICE, UNITED NATIONS, STATISTICAL PAPERS SERIES M No. 77, UNITED NATIONS PROVISIONAL CENTRAL PRODUCT CLASSIFICATION (1991).

See GATS, supra note 5, Annex on Financial Services, § 5(a).

See Fifth Protocol, supra note 3.

See Snape, supra note 216, at 285.

GATS, supra note 5, art. XX(1) (emphasis added).

Id. art. XVI(1).

Id. art. XVII(1).

Id. art. XXVIII(e) (defining “sector” to include subsectors).
Once a Member has elected to schedule a commitment in a specific service sector or subsector, any limitations on market access or national treatment also must be inscribed in its Schedule. Article XX(1) requires each Member’s Schedule to specify the “terms, limitations and conditions on market access” and the “conditions and qualifications on national treatment.” Article XVI(2) clarifies the types of market access limitations that must be specifically inscribed in a Member’s Schedule. Those limitations, which are specifically prohibited unless indicated for each mode of supply, include limiting: (1) the number of suppliers; (2) the total value of service transactions or assets; (3) the total number of service operators or the total quantity of service output; (4) the number of natural persons that may be employed; (5) the type of legal entity through which service suppliers may supply a service; and (6) the participation of foreign capital. The language of Article XX is broader and more general than that used in Article XVI, suggesting that “terms, limitations and conditions” beyond those identified in Article XVI may be, or perhaps must be, inscribed in a Member’s Schedule.

Members’ inscriptions of market access and national treatment limitations for each service sector or subsector inscribed should be made for each of the four modes of supplying services. Article I defines the modes of supplying services as: (1) Cross-border; (2) Consumption abroad; (3) Commercial presence; and (4) Presence of natural persons. Each sector or subsector commitment should, therefore, consist of eight entries: four addressing any limitations on market access (one for each mode of supply) and four addressing any limitations on national treatment (again, with one for each mode of supply).

Standard terminology is used to identify market access and national treatment limitations, but it is not entirely uniform. If a

289 See Collins, supra note 237, at 814.
291 See GATS, supra note 5, art. XVI(2)(a)–(f); Collins, supra note 237, at 814.
292 GATS, supra note 5, art. XX(1).
293 See GATS, supra note 5, art. I(2)(a)–(d); infra Part IV.B.3.
294 See generally Hoekman, supra note 216, at 98-99 (discussing the scheduling of specific commitments and providing an illustration).
Member intends to include no limitations on market access or national treatment for a particular sector or subsector, the word “NONE” is entered in the respective limitations column for the mode of supply being addressed. If a Member inscribes a service sector or subsector in its schedule but intends to retain the option to maintain or introduce measures that limit market access or national treatment for any or all of the modes of supply, “UNBOUND” is entered. “UNBOUND” must be inscribed for each mode of supply in the respective market access and national treatment columns, as is applicable. “UNBOUND” is entered if a scheduled commitment is not technically feasible through a particular mode of supply. An explanatory footnote would contain information explaining why a scheduled commitment is considered not technically feasible.

The terminology employed in Articles XX, XVI, and XVII indicates that only those limitations on market access and national treatment that are specifically inscribed in the Member’s Schedule may be maintained or introduced. Article XX, which addresses both market access and national treatment limitations, addresses the limitations that Members “shall specify” in their Schedules. Article XVI(2) identifies “the measures which a Member shall not maintain or adopt . . . unless otherwise specified in its schedule.” Article XVII mandates national treatment for the services and service suppliers of other WTO Members “subject to any conditions and qualifications set out” in the Member’s Schedule. A fair interpretation of these articles suggests that if any limitations on market access or national treatment are not specifically inscribed in the Member’s Schedule, any attempt by the Member to impose such limitations would violate the GATS. The GATS is intended to liberalize trade in services; thus, a narrow reading of these articles supports the spirit of the Agreement.

295 See, e.g., GATS, supra note 5, The Kingdom of the Netherlands With Respect to Aruba, 11 Transport Services, F. Road Transport (mode of supply 1).
296 This position does not apply if the Member inscribed “UNBOUND.”
297 GATS, supra note 5, art. XX(1).
298 Id. art. XVI(2).
299 Id. art. XVII(1).
300 See Vienna Convention on the Law of International Treaties, Jan. 27, 1980, 1155 U.N.T.S. 331, arts. 26, 31(1) (calling for obligations to be performed in good faith and
The fourth column, to the far right of a Member’s Schedule, is intended for inscription of any “Additional Commitments” that do not fall within the parameters of Articles XVI or XVII. The term “commitment” is not defined in the GATS. The context in which the term is used, particularly in Part III, Specific Commitments, and Part IV, Progressive Liberalization, indicates that additional commitments are to be trade liberalizing commitments, as opposed to inscriptions that create or constitute additional barriers to trade in services.

Article XVIII offers an illustrative listing of the types of additional commitments that must be inscribed in a Member’s Schedule. Those “measures affecting trade in services” that come within the requirements of Article XVIII include “qualifications, standards or licensing matters.” Financial services measures negotiated with one or more WTO Members that would not properly be described as market access or national treatment measures also should be inscribed as additional commitments. No definition is provided in the GATS to assist in the determination of when a measure is to be considered as “affecting” trade in services.

A review of the Schedules of Specific Commitments reveals that few Members have made inscriptions in the additional commitments column. Many of the inscriptions that currently appear in the additional commitments column note the intention of a Member to take affirmative action in the future to liberalize trade in a particular sector or subsector.

Horizontal commitments apply across the board to all commitments made by a Member in all sectors or, if specifically indicated, only to those made in a specific subsector. These commitments, if any have been made, are generally located in one...
of two places in a Member’s Schedule of Specific Commitments. They may be located at the very beginning of a Member’s Schedule, in which case they will probably be applicable to all service sectors in which commitments have been tabled.  

They may also be located at the beginning of a particular sector of commitments, such as at the beginning of a Member’s commitments in financial services. Horizontal commitments may also be indicated at the beginning of subsector commitments.

It is necessary to review the current and effective schedule of commitments tendered by a Member to determine whether the Member has scheduled any horizontal commitments applicable to any or all service sectors. It would also be advisable, with reference to financial services, to review the Member’s current and effective schedule of commitments in financial services to make note of all horizontal commitments directly related to financial services. A Member’s current and effective schedule of commitments in financial services, as previously indicated, may be the commitments tabled during the Uruguay Round, the commitments in the Second Protocol or the commitments in the Fifth Protocol. The Member also may have current and effective horizontal commitments of a general nature in its Schedule from the Uruguay Round.

Horizontal commitments are generally entered in a row that spans all four columns. This is not uniformly mandated, however, and some Schedules include commitments applicable to all sectors in the columns. Malaysia employs the use of both the row and columns in financial services to indicate commitments or provisions applicable to all commitments in financial services. Once again, the scheduling of horizontal commitments in a particular service sector or subsector should not be interpreted as obviating the need to determine whether horizontal commitments

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307 See GATS, supra note 5, Austria. Schedules tabled during the Uruguay Round are annexed to the General Agreement pursuant to GATS art. XX(3).

308 See id. Australia; Fifth Protocol, supra note 3, Australia.

309 See Fifth Protocol, supra note 3, Indonesia, Banking Subsector.

310 See supra notes 273-74 and accompanying text.

311 See GATS, supra note 5, Turkey.

312 See Fifth Protocol, supra note 3, Malaysia.
applicable to all services sectors, including financial services, have been scheduled at the beginning of a Member’s Schedule of Specific Commitments.\footnote{313}{See GATS, supra note 5, European Communities and Their Member States.}

Horizontal commitment may be a misnomer.\footnote{314}{See Hoekman, supra 216, at 98.} Frequently, matters scheduled as horizontal commitments are not actually commitments, but are limitations, explanatory notes or definitions on scheduled commitments that the Member intends to apply to all sector and subsector commitments. Mauritius, at the beginning of its financial service commitments, entitled the row “Head notes.”\footnote{315}{Fifth Protocol, supra note 3, Mauritius.} Malta also has a row with an inscription, but it is not designated as horizontal commitments or head notes.\footnote{316}{See id. Malta.} It is essential to review the notations in the row to determine a Member’s intention and to fully understanding the Member’s scheduled commitments.

Members have considerable autonomy regarding the manner in which their commitments are scheduled, particularly at this early stage in the international regulation of trade in services. It should be anticipated that future schedules will become more uniform, to the advantage of all WTO Members and their service consumers and suppliers.

c. The Lists of Article II Exemptions

Pursuant to GATS Annex on Article II Exemptions, the List of Article II Exemptions “specifies the conditions under which a Member … is exempt from its [MFN] obligations under paragraph 1 of Article II.”\footnote{317}{GATS, supra note 5, Annex on Article II Exemptions, para. 1.} The Lists are organized using five columns.\footnote{318}{See GATS, supra note 5, Annex on Article II Exemptions, Switzerland. (Pursuant to the Annex on Article II Exemptions, lists of Article II exemptions tabled during the Uruguay Round are appended to the Annex on Article II Exemptions).} The columns include: (1) the sector or subsector to which the exemption is applicable; (2) a description of the MFN inconsistent measure indicating its inconsistency; (3) the names of the countries to which it applies; (4) the intended duration of the exemption; and (5) the conditions which created the need for the
exemption.

The Lists submitted pursuant to the Annex on Article II Exemptions are derogations from the MFN principle and the trade liberalizing spirit of the GATS. Thus, exemptions should be narrowly interpreted to advance the "object and purpose" of the GATS. The burden of establishing that a measure maintained or introduced is within the Member’s Article II Exemption should be on the Member asserting the exemption.

Exemptions currently included in many Members’ Lists have durations intended to be "indefinite." Nothing in the GATS framework agreement or in the Annex on Article II Exemptions expressly prohibits exemptions of an indefinite duration, but aspects of the annex offer evidence that exemptions should be of a specific, limited duration. Paragraph 3 of the annex, calling on the Council for Trade in Services to review exemptions of greater than five years in duration, refers to those exemptions as having been "granted." The granting of an exemption by the WTO membership suggests that exemptions are more like a privilege than an absolute right. It may reasonably be understood that WTO Members should not abuse this privilege by exercising exemptions of unlimited duration.

The Annex on Article II Exemptions further provides that an exemption from an Article II obligation "with respect to the particular measure terminates on the date provided in the exemption." Ambiguous exemptions with indefinite durations do not comport with the spirit of the GATS. They do not provide a basis on which an objective decision may be reached to determine whether the circumstances that necessitated the exemption continue to exist. If a Member has a legitimate need for an exemption, the Member should be able to draft its exemption with particularity. A Member’s reason for invoking an exemption also may be better understood if an exemption is drafted in detail.

Paragraph 6 of the annex does contain significant diplomatic overtones, as opposed to legal dictates, that may allow for

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319 Vienna Convention, supra note 300, art. 31(1).
320 See, e.g., Fifth Protocol, supra note 3, Philippines.
321 GATS, supra note 5, Annex on Article II Exemptions, ¶ 3.
322 Id. ¶ 5 (emphasis added).
ambiguously worded exemptions and exemptions of indefinite duration. Paragraph 6 provides that, "in principle," exemptions should not exceed ten years and establishes that they "shall be subject to negotiation in subsequent trade liberalizing rounds." The use of the term "in principle" in Paragraph 6, in conjunction with the review procedures of the Council for Trade in Services set forth in Paragraphs 3 and 4, implies that ambiguous exemptions and exemptions of extended duration may be technically permissible, though not encouraged. Ultimately, persuasive diplomatic pressure may be the only recourse to limit a Member's exercise of the exemption privilege.

A final consideration should be recognized when reading a Member's List of Article II Exemptions. The Lists, along with the Schedules, the GATS and the Understanding, should not be interpreted in isolation. A Member that has determined that the need exists to exercise an exemption from its Article II MFN obligation may also be a Member that has extended extensive market-opening commitments in its Schedule. The need to exercise an exemption, particularly a narrowly drawn exemption of a specific, limited duration, may be the result of significant trade-liberalizing commitments made in the Member's Schedule of Specific Commitments. The only alternative available to the Member might have been scheduling less extensive market-opening commitments. Encouraging broad commitments from WTO Members may explain the need of some Members to exercise narrow exemptions.

B. Interpretation of Selected Aspects of the GATS, The Annex on Financial Services and The Understanding on Commitments in Financial Services

1. Scope of the GATS

Article I(1) provides that "[t]his Agreement applies to measures by Members affecting trade in services." It is impossible, without reiterating numerous definitions in detail, to adequately address the scope of the GATS. Such a wide-ranging analysis is beyond the scope of this article. A number of issues

323 Id. ¶ 6.
324 GATS, supra note 5, art. I(1). See Collins, supra note 237, at 809.
warrant attention, however. It must be noted at the outset that the Agreement does not include the Understanding. The applicability of the Understanding depends on a Member’s voluntarily acceptance, acknowledged in its Schedule.

The Agreement applies to “measures by Members affecting trade in services.” A “measure” is broadly defined as “any measure by a Member, whether in the form of a law, regulation, rule, procedure, decision, administrative action, or any other form.” The phrase “measures by Members affecting trade in services” is defined, as is the phrase “trade in services.” The only word of consequence for which no definition is provided is “affecting.” The listing of measures in the definition of “measures by Members affecting trade in services” may be consulted to give meaning to the word “affecting.” The definition of “measures by Members affecting trade in services” states that it “includes measures in respect of” the accompanying list. This supports the conclusion that the list is illustrative rather than exclusive.

The WTO Dispute Settlement Panel (Panel) interpreted the meaning of the term “affecting” in European Communities-Regime for the Importation, Sale, and Distribution of Bananas. Relying on Article 31 of the Vienna Convention, the Panel noted

325 See supra Part IV.A.
326 See Understanding, supra note 167, at 1260.
327 GATS, supra note 5, art. I(1), at 1168.
328 Id. art. XXVIII(a), at 1184.
329 Id. art. XXVIII(c), at 1184-85.
330 Id. art. I(2), at 1169.
331 Id.
332 Id. art. XXVIII(c), at 1184-85.
333 Id. (emphasis added).
that the GATS, like the GATT, is an "umbrella agreement" applicable to all sectors of trade in services and all types of regulations. In its efforts to determine the ordinary meaning of the term "affecting," the Panel stated that Article I(1) of the GATS does "not convey any notion of limiting the scope of the GATS to certain types of measures or to a certain regulatory domain." The Panel concluded that the term "affecting" should be "interpreted broadly." Therefore, the GATS broadly applies to all "measures by Members affecting trade in services."

The GATS specifically applies only to "measures by Members," another defined phrase. "[M]easures by Members" includes measures taken by "central, regional and local governments and authorities" and measures taken by "non-governmental bodies in the execution of powers delegated by central, regional or local governments or authorities." Members are responsible for the actions of their sub-federal governing bodies and authorities and are obligated to take "such reasonable measures as may be available" to ensure observance of federal obligations and commitments by their sub-federal and non-governmental authorities.

Whether the U.S. federal government could be compelled by the WTO to enact legislation which, pursuant to the Commerce Clause and the Supremacy Clause of the U.S. Constitution, would ensure observance of its federal commitments by state and local governments and non-governmental bodies is an important

\[\text{EC-Bananas, supra note 334, at *370.}\]
\[\text{Id.}\]
\[\text{Id. at *380.}\]
\[\text{GATS, supra note 5, art. I (1), at 1168. See Vanessa P. Sciarra, The World Trade Organization: Services, Investments, and Dispute Resolution, 32 INT'L LAW. 923, 926 (1998).}\]
\[\text{Id. art. I(3)(a), at 1169.}\]
\[\text{Id. See Collins, supra note 237, at 809; Fontecchio, supra note 247, at 125-26.}\]
\[\text{GATS, supra note 5, art. I(3), at 1169.}\]
\[\text{See Dispute Settlement Understanding, supra note 233, art. 22(9), at 1241 (providing that the Dispute Settlement Understanding may be invoked in respect of measures affecting the observance of the WTO Agreements by regional and local governments or authorities).}\]
\[\text{See U.S. CONST. art. I, § 8, cl. 3.}\]
\[\text{See id. art. VI, cl. 2.}\]
question. It is not likely that U.S. negotiators failed to consider this scenario or that the United States or any other Member of the WTO would casually surrender such significant sovereignty to the WTO. Legislation of this nature, from the perspective of the federal government, should not be considered a reasonable measure to ensure sub-federal and non-governmental observance.

2. Definitions

The language of the GATS and the other legal instruments relevant to trade in financial services emerged from years of contentious negotiations. The words and phrases with unique significance are usually defined, subject to some exceptions. The meanings of words that are not defined must be gleaned from the instruments and inferred from common usage.

Definitions relevant to the trade in financial services are found in at least four, and possibly six, different places in the instruments. Such definitions are found in: (1) Article I, Scope and Definition; (2) Article XXVIII, Definitions; (3) The Annex on Financial Services, Section 5, Definitions; and (4) The Understanding, Section D, Definitions. Definitions of particular importance to the interpretation of an individual Member’s Schedule or List may also be included in the horizontal commitments in the Member’s Schedule of Specific Commitments and in the Member’s List of Article II Exemptions.

3. Services Defined: The GATS Framework

Much like prior agreements, the GATS does not define the words “service” and “services.” The GATS does define “trade

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348 See supra text accompanying note 58; Collins, supra note 237, at 809.
in services” as the “supply of a service.”\textsuperscript{349} The “supply of a service” includes, but is not limited to “the production, distribution, marketing, sale and delivery of a service.”\textsuperscript{350}

Pursuant to Article I(2), services may be supplied by four different methods or modes.\textsuperscript{351} A service supplied “from the territory of one Member into the territory of another Member” is referred to as cross-border supply.\textsuperscript{352} Cross-border supply would include a consumer in one Member country purchasing insurance from an insurance company located in the territory of another Member.

A service supplied “in the territory of one Member to the service consumer of any other Member” is referred to as consumption abroad.\textsuperscript{353} The purchase of a financial instrument by a resident of one Member nation while temporarily in the territory of another Member is consumption abroad. A “service consumer” is “any person that receives or uses a service”\textsuperscript{354} while a “person” may be a “natural or a juridical person.”\textsuperscript{355} Both terms are defined in extensive detail.\textsuperscript{356}

The third mode of supplying a service, commercial presence, is the most significant. Commercial presence is defined as supplying a service “by a service supplier of one Member, through commercial presence in the territory of any other Member.”\textsuperscript{357} “[S]ervice supplier”\textsuperscript{358} and “commercial presence”\textsuperscript{359} both are specifically defined terms. A foreign securities firm that establishes a branch or subsidiary in the territory of another Member and offers securities services would be supplying those services through a commercial presence.

\textsuperscript{349} GATS, supra note 5, art. I(2), at 1169. See Collins, supra note 237, at 809.
\textsuperscript{350} GATS, supra note 5, art. XXVIII, at 1184. See EC–Bananas, Appellate Body, supra note 334, at *68.
\textsuperscript{351} See Kennedy, supra note 240, at 485-86; MATTOO, supra note 290, at 2.
\textsuperscript{352} GATS, supra note 5, art. I(2)(a), at 1169.
\textsuperscript{353} Id. art. I(2)(b).
\textsuperscript{354} Id. art. XXVIII(i), at 1185.
\textsuperscript{355} Id. art. XXVIII(j).
\textsuperscript{356} Id. art. XXVIII(k)–(n), at 1185-86.
\textsuperscript{357} Id. art. I(2)(c), at 1169.
\textsuperscript{358} Id. art. XXVIII(g), at 1185.
\textsuperscript{359} Id. art. XXVIII(d).
The final mode of supply is providing a service through the presence of natural persons. Mode four is defined as the supply of a service "by a service supplier of one Member, through the presence of natural persons of a Member in the territory of any other Member." This method of supplying services encompasses the presence of employees of juridical persons, as well as natural persons functioning as independent agents. It is recommended that the GATS Annex on the Movement of Natural Persons Supplying Services Under the Agreement and the Third Protocol to the General Agreement on Trade in Services be reviewed, in addition to the commitments set forth in a Member’s Schedule. The Third Protocol includes the Schedules of Specific Commitments of twenty-one countries pertaining to the movement of natural persons.

4. Financial Services Defined: The Annex on Financial Services

The Annex on Financial Services further defines to the term "supply of a service." The annex applies to all WTO Members and provides that it is applicable to “measures affecting the supply of financial services.” Again, the term “affecting” is not defined. Relying on the EC–Bananas Panel Report, however, the term “affecting” should be broadly interpreted.

"Financial service[s]” under the GATS are subdivided into sixteen enumerated types of services organized under the following two categories: “[i]nsurance and insurance-related services” and “[b]anking and other financial services (excluding

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360 Id. art. I(2)(d), at 1169.
361 See id. Annex on the Movement of Natural Persons Supplying Services Under the Agreement 1187-88.
363 See id. 4-2.2.
364 See GATS supra note 5, Annex on the Movement of Natural Persons Supplying Services Under the Agreement 1187-88.
365 Id. Annex on Financial Services § (1)(a), at 1189-91.
366 See id.
367 See EC–Bananas, supra note 334; supra text accompanying notes 334-37.
The definition provides that financial services “include” those services specifically listed, suggesting that the list is illustrative rather than exclusive. The definition does not employ language such as “includes, but is limited to” which would clearly indicate that the listing is meant to be exhaustive.

The detail provided in the description of the itemized financial services is, however, rather specific, which might support the contrary conclusion that the listing is exclusive. Two references to “new financial services” in the Understanding also lend credence to the position that only those financial services specifically enumerated in the Annex may be offered by service suppliers of Members that have not scheduled the Understanding as a commitment. This reasoning only applies when neither Member has scheduled the Understanding as a commitment. If a Member has scheduled the Understanding then, pursuant to the MFN principle of Article II, even a service supplier of a Member that has not scheduled the Understanding may take advantage of the other Member’s Understanding commitment.

The term “financial service supplier” is defined by the annex to include both natural and juridical persons, irrespective of whether they are currently supplying financial services or simply “wishing to supply” financial services. The inclusion of the phrase “wishing to supply” financial services is suggestive of the investigatory or exploratory stage of foreign direct investment. As financial services may be supplied through a commercial presence, foreign service suppliers may be accorded additional protections through the GATS. Use of the phrase “wishing to

368 GATS, supra note 5, Annex on Financial Services, § (5)(a), at 1190-91. See supra note 258 and accompanying text.

369 Id. § 5. See generally WORLD TRADE ORGANIZATION, supra note 10, § II, ¶ 8 (providing background information on the GATS); Collins, supra note 237, at 817 (discussing the GATS regime).

370 Cf. GATS, supra note 5, Annex on Financial Services, § 5(a)(x)(C), at 1191 (defining “derivative products”).

371 Understanding, supra note 167, ¶¶ B(6), D(3).

372 GATS, supra note 5, Annex on Financial Services, § 5(b), at 1190.

373 Id.

374 See DOBSON & JACQUET, supra note 229, at 100 (suggesting that future WTO negotiations address foreign direct investment because of its importance to market access, particularly in the trade of financial services).
supply” financial services indicates that the rights and privileges which flow from the Agreement are available to natural persons and financial institutions not yet offering financial services in the territory of the prospective host Member or even in the territory of the Member where they reside. A comparison of the rights and privileges afforded by the GATS and those granted by any bilateral investment treaty (BIT) with the country at issue, if such exists, also is advisable.

5. Financial Services Defined: The Understanding on Commitments in Financial Services

The Understanding further expounds on the definition of “supplying financial services.” It furnishes additional specification for each mode of supply: cross-border, consumption abroad, commercial presence, and the presence of natural persons. The specificity of the Understanding provides Members and their service suppliers with a higher level of predictability in the international trade of their services.

a. The Understanding and the Cross-Border Supply of Financial Services

Cross-border trade in financial services, pursuant to the Understanding, specifically permits “non-resident suppliers of financial services” to supply financial services beyond those enumerated in the Annex on Financial Services “as a principal, through an intermediary or as an intermediary.” The Understanding includes financial services relating to maritime shipping insurance, commercial aviation insurance, space launch, and freight insurance, which includes satellite payloads, the transfer of financial information, and financial data processing.

The term “non-resident supplier of financial services” is also

375 See Understanding, supra note 167, ¶ B(3).
376 See id. ¶ B(4).
377 See id. ¶ B(5)-(6).
378 See id. ¶ B(9).
379 See MATTOO, supra note 290, at 5.
380 Understanding, supra note 167, ¶ D(1).
381 Id. ¶ B(3).
382 See id.
defined. It may be inferred from this definition that a financial service supplier located in the territory of one Member is not required to establish a commercial presence in the territory of another Member before offering financial services to persons who are residents of the second Member. The words “principal” and “intermediary” are not defined, yet their respective meanings can be gleaned from the context of the Understanding. It appears that the drafters’ intent was to make the cross-border supply of the financial services, as enumerated in the Understanding, broadly available to the service suppliers of other WTO Members.

b. The Understanding and Consumption Abroad

Section B(4) of the Understanding further elaborates on “supplying financial services” through the second mode, consumption abroad. Sections B(3)(a) and (b) mandate that “Members shall permit [their] residents to purchase in the territory of any other member” the insurance, reinsurance, and retrocession services set forth the in the Understanding. These services may be supplied in addition to the insurance, reinsurance, and retrocession services listed in the Annex on Financial Services.

Members must also permit all of the banking and other financial services listed in the annex to be purchased by their residents through consumption abroad. Section B(4)(c) expressly affirms the authority of financial institutions located in any Member to offer banking and other financial services to the residents of other Members through this mode. This provision was apparently included to avoid any misunderstanding regarding the permissibility of supplying these financial services through consumption abroad. It should be recalled that the Member in

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383 Id. § D(1).
384 Compare Understanding, supra note 167, §§ B(3)(a)-(c), with GATS, supra note 5, Annex on Financial Services, §§ 5(a)-(b).
385 See Understanding, supra note 167, § B (4).
386 See THE RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 1645 (2nd ed. 1987) (“retrocede, retrocession: ... 2. Insurance. (of a reinsurance company) to cede (all or part of a reinsured risk) to another reinsurance company”).
387 Understanding, supra note 167, §§ B(3)(a)-(b).
388 See id. §§ B(4)(a)-(b).
389 See id § B(4)(c).
whose territory the consumers of these services reside must have
scheduled the Understanding as a commitment for these provisions
to apply.

c. The Understanding and Commercial Presence

The ability of financial service suppliers to supply financial
services through a commercial presence is significantly broader in
the Understanding than in the GATS. The GATS defines
“commercial presence” to include “business or professional
establishment[s].” The Understanding broadens the definition of
“commercial presence” to include “enterprise[s],” including
“wholly- or partially-owned subsidiaries, joint ventures,
partnerships, sole proprietorships, franchising operations,
branches, agencies, representative offices, or other
organizations.”

The Understanding also “grant[s]” to financial service
suppliers of other Members “the right to establish or expand” their
operations, including the rights to establish or expand their
operations via the acquisition of an existing enterprise. Members
may impose terms, conditions, and procedures for authorization on
the establishment or expansion of a commercial presence but only
to the extent that they do not “circumvent” the obligations they
accepted in the Understanding.

The Understanding does not define the term “circumvent” and
offers no list of terms, conditions, or procedures that might be
considered as circumventing a Member’s obligation. Article
XXIII of the GATS, Dispute Settlement and Enforcement, which
grants recourse to the DSU, refers to another Member’s failure to
carry out its scheduled commitments or the nullification or
impairment of a benefit a Member could have reasonably expected
to accrue upon a fair reading of another Member’s Schedule. The

390 GATS, supra note 5, art. XXVIII(d).
391 See Office of the United States Trade Rep., 1997 National Trade
Estimate Report on Foreign Trade Barriers 253, 255 (noting that Malaysia
"considers automated teller machines to be bank branches").
392 Understanding, supra note 167, § D(2).
393 Id. § B(5).
394 Id. § B(6).
395 See id.
GATS and the Understanding offer no guidance as to whether the failure to carry out a GATS obligation or the nullification or impairment of a commitment is equivalent to the circumvention of a commitment.\(^{396}\) A non-scientific survey of WTO and GATT dispute settlement records suggests that "circumvent" essentially means "avoid."\(^{397}\) It may be argued that Members may impose terms, conditions, and procedures on the establishment or expansion of a commercial presence but only to the extent that they do not "avoid" the obligations they assumed in the Understanding.

d. The Understanding and the Presence of Natural Persons

Section B(9) of the Understanding addresses the temporary entry of "personnel" of a financial services supplier that "is establishing or has established a commercial presence" in the territory of another Member.\(^{398}\) The length of time deemed to be "temporary" is not specified but appears to be directly related to the nature of the work in which the personnel are to engage.\(^{399}\) If the personnel enter a Member's territory to establish an enterprise, the temporary period should be deemed to have expired once the enterprise is operational. If the personnel enter the territory of a Member to perform services for an enterprise that is already operational, the temporary entry authority should terminate at the conclusion of the specific circumstance that necessitated their presence.

Two types of personnel are permitted temporary entry. The first type of personnel must meet three requirements: (1) they must be "senior managerial personnel"; (2) they must possess "proprietary information"; and (3) the propriety information must be "essential to the establishment, control and operation" of the

\(^{396}\) Cf. id.§ B(8) (which also employs the term "circumvent").


\(^{398}\) Understanding, supra note 167, § B(9).

\(^{399}\) See id. §§ B(9)(a)-(b).
The second type of personnel permitted temporary entry must be "specialists in the operations of the financial service supplier." 401

"Specialists" in computer services, telecommunication services, accounting, actuarial, and legal services shall also be permitted temporary entry "subject to the availability of qualified personnel" in the host Member's territory. 402 The inclusion of the phrase "subject to the availability of qualified personnel" 403 seems to compel the use of local talent when it is available. It should be assumed that the host Member will be given latitude when making the availability determination. It should also be assumed that the Member's conclusion must be founded on objectively verifiable information.

Two aspects of this section of the Understanding warrant additional attention. Section B(9) refers to "personnel." 404 It does not expressly exclude independent contractors retained by a service supplier, but the term "personnel" may denote an employer-employee relationship. This section also refers to "legal specialists." 405 It does not employ the term lawyer or attorney or any similar terminology which might imply the possession of a license. As such, it would be wise to refer to all foreign counsel as legal "specialists." It would also be advantageous to examine the host Member's Schedule under Professional Services to determine whether any specific commitments have been made in legal services.

6. Most-Favoured Nation Treatment and National Treatment

GATS Articles II and XVII introduce two important trading principles to the international regulation of trade in services: Most-Favoured Nation Treatment and National Treatment. Subject to the Annex on Article II Exemptions, Article II mandates that a Member accord the services and service suppliers of other

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400 ld. § B(9)(a)(i) (emphasis added).
401 ld. § B(9)(a)(ii) (emphasis added).
402 ld. § B(9)(b).
403 ld. § B(9).
404 Id.
405 ld. § B(9)(b)(ii).
Members “treatment no less favourable than it accords to like services and service suppliers of any other country.” Article II incorporates the GATT MFN principle into the GATS. It is a rule of non-discrimination that governs how WTO Members must treat the services and service suppliers of other WTO Members. The objective of the MFN principle is to treat comparable or “like” services and services suppliers of WTO Members as favorably as the most favorable treatment offered by a WTO Member to the services or service suppliers of any other WTO Member or any other country.

The MFN issues are three-fold, subsequent to a review of the Member’s Article II exemptions. The issues are: (1) is the Member at issue extending any treatment of the service in question to the services or service suppliers of any other country?; (2) is the service or service supplier at issue like the service or service supplier that has been accorded treatment of any nature by the desired host Member?; and (3) are the services or service suppliers of any other country, whether a WTO Member or not, accorded more favorable treatment?

Article II of the GATS is complemented by Article XVII, the GATS National Treatment obligation. National Treatment, pursuant to the GATS, mandates that in sectors in which a Member has inscribed a commitment, the Member must treat the services and service suppliers of other WTO Members no less favorably that it treats its own domestic services and service suppliers. National Treatment calls for a comparison of the treatment accorded domestic and foreign services and service suppliers. A WTO Member is deemed to be in violation of its National Treatment obligation if it “modifies the conditions of

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406 GATS, supra note 5, art. II(1) (emphasis added).
407 Cf. GATT, supra note 21, art. I.
408 See Trachtman, supra note 251, at 98-103.
409 See id.
410 See GATS, supra note 5, art. II(1).
411 See id. art. XVII; see also Trachtman, supra note 251, at 98; cf. GATT, supra note 21, art. III.
412 See GATS, supra note 5, art. XVII(1); HOEKMAN & SAUVE, supra note 217, at 33.
competition" in favor of domestic services or services suppliers.413

The EC–Bananas Panel was called on to interpret the GATS MFN obligation and in doing so demonstrated the complementary nature of Articles II and XVII.414 The Panel sought to determine when another country, whether or not a WTO Member, should be considered as receiving more favorable treatment than that accorded to other WTO Members under the National Treatment obligation. The Panel initially determined that the obligations of Article II(1) and Article XVII(1) to provide "treatment no less favorable" should be similarly interpreted.415 The Panel concluded that the MFN obligation of Article II(1), like the National Treatment obligation of Article XVII, "should be interpreted to require no less favorable conditions of competition."416 Relying on Article XVII, the Panel Report stated that the conditions of competition should be comparable, "regardless of whether that is achieved through the application of identical or formally different measures."417 Therefore, the GATS MFN obligation, like its National Treatment requirement, contemplates a level, competitive playing field for the services and service suppliers of WTO Members.

7. Transparency

The transparency obligation of Article III requires all Members to promptly publish "all relevant measures of general application which pertain to or affect the operation" of the GATS.418 Article III has a number of shortcomings, however.

The initial obligation is to "publish."419 Publication places other Members and the service consumers and suppliers of other Members on notice of the measure.420 Article III does not state where the publication is to occur or the duration of the publication,

413 See GATS, supra note 5, art. XVII(3).
414 See EC–Bananas, supra note 334.
415 See id.
416 Id.
417 Id. ¶ 7.301.
418 GATS, supra note 5, art. III(1).
419 Id.
420 See Collins, supra note 237, at 810.
however. There is also no requirement to notify the WTO Secretariat or the Council on Trade in Services of these measures.

The GATS does not define “relevant measures of general application” nor is there any explanation of when a measure should be considered as “pertaining to or affecting” the operation of the Agreement. Reference to the definition of “measure” is recommended. The use of the phrase “general application” also suggests that the measure in issue is applicable to all service sectors.

The introduction or amendment of any law, regulation, or administrative guideline which “significantly affects” a Member’s Schedule of Specific Commitments is treated differently from a measure of general application which pertains to or affects the General Agreement. Notification of measures that significantly affect a Member’s scheduled commitments must be made annually to the Council for Trade in Services.

The GATS does not define when a measure significantly affects a Member’s scheduled commitments. It may be argued, however, that a measure that falls short of denying or nullifying a scheduled benefit to another Member significantly affects the other Member. It might also be contended that significantly affects is comparable to the impairing of a reasonably expected benefit pursuant to Article XXIII(3). This interpretation permits Members to enact or amend measures that affect their commitments but enables other Members to challenge those measures through dispute resolution. If significantly affects is not comparable to the impairing of an expected benefit, the dispute settlement mechanism may not be available to resolve the controversy. Recourse to WTO dispute settlement for controversies that fall short of maintaining that a Member failed to carry out or nullified a specific commitment is only available

421 See DOBSON & JACQUET, supra note 229, at 73.
422 GATS, supra note 5, art. III(1).
423 Id. art. XXVIII(a).
424 Id. art. III(1).
425 Id. art. III(3).
426 Id.
427 Id. art. XXIII(1)-(3).
428 Id. art. XXIII(3).
when it is alleged that a reasonably expected benefit has been “impaired.”

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The transparency of the WTO Members’ legal and regulatory systems, as they impact trade in services, is facilitated through the use of inquiry and contact points. 430 Article III(4) mandates the establishment of inquiry points for Members while Articles XXV and IV require the creation of contact points for the service consumers and suppliers of WTO Members. This informs the Members and their service consumers and suppliers of relevant information regarding the purchasing and offering of services in the territories of other WTO Members. The GATS does not indicate whether the inquiry points for Members and the contact points for service consumers and suppliers are the same. Members are not precluded from combining them in the same office, but inquiry points appear to be for Member to Member or government to government relations. The World Wide Web site of the WTO provides inquiry and contact point information about WTO Members online. 431

8. Domestic Regulation

Article VI of the GATS framework agreement, as supplemented by Section 2 of the Annex on Financial Services, addresses the implementation of domestic regulations affecting trade in services generally and financial services in particular. The framework agreement provides that “Members shall ensure that all measures of general application affecting trade in services are administered in a reasonable, objective, and impartial manner” in sectors where commitments have been undertaken. 432 The obligation on Members pursuant to Article VI does not require that

429 Id. art. XXIII(1)-(3).

430 See id. arts. III(4), IV, XXV (addressing inquiry points for Members and contact points for the service consumers and suppliers of Members).

431 Access the WTO Document Dissemination Facility <http://www.wto.org/wto/ddf/ep/public.htm> and search by symbol “S/ENQ.” The information available online has been provided to the WTO by the respective Members and generally includes the title of the individual to contact, an address, a telephone number and a facsimile number.

432 GATS, supra note 5, art. VI(1) (emphasis added); cf. GATT, supra note 21, art. X(3)(a) (mandating that all laws, regulations, judicial decisions and administrative rulings of general application be administered “in a uniform, impartial and reasonable manner”).
they enact or maintain reasonable, objective, and impartial domestic regulations. It only mandates that domestic measures be administered in a reasonable, objective, and impartial fashion. The obligation on Members to introduce and maintain only those domestic regulations that are consistent with the GATS derives primarily from Article II, *Most-Favoured Nation Treatment*, Article XVI, *Market Access*, Article XVII, *National Treatment* and Article XX, *Schedules of Specific Commitments*.

Article VI is intended to prevent Members from denying, nullifying, or impairing GATS benefits to other WTO Members through the use of onerous domestic administrative measures. For example, a scheduled commitment to permit the establishment of a foreign bank is of no value if the GATS-compliant licensing regulations are administered in a manner that makes it impossible to obtain the required authorization.

Implementation of the GATS privileges and obligations is almost exclusively the province of the WTO Members. Article VI(2) and (3) provide minor exceptions. Article VI(2) does not provide service suppliers of Members with an entitlement to demand rights pursuant to the Agreement, but it does obligate WTO Members to establish and maintain “judicial, arbitral or administrative tribunals or procedures” to which foreign service suppliers may avail themselves. These tribunals are to provide “prompt review” and, under proper circumstances, “appropriate remedies” to the decisions of domestic administrative bodies. An “objective and impartial” review procedure is to be available when the agency that implements the measures at issue also makes the initial administrative decision.

Article VI(3) obligates the appropriate domestic authorities of WTO Members to render decisions concerning the authorization of a foreign service supplier to supply a service “within a

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433 *See Collins, supra* note 237, at 811.
434 *See Snape, supra* note 216, at 287 (stating that barriers to trade in services are seldom price-based and frequently subject to “bureaucratic interpretation”).
435 *See GATS, supra* note 5, arts. VI(2)-(3).
436 *Id.* art. VI(2); *see Collins, supra* note 237, at 811.
437 GATS, *supra* note 5, art. VI(2)(a).
438 *Id.*
reasonable period of time.\textsuperscript{439} No guidance is offered by the GATS to determine what period of time would be considered reasonable, so it is presumed that the determination of this issue will be fact-intensive. Though it offers no criteria regarding the length of time that may be reasonable, Article VI establishes when the time period begins to run. The period commences within a reasonable period of time after the submission of an application is complete under domestic laws and regulations.\textsuperscript{440} Article VI(3) also entitles service suppliers to request and receive, “without undue delay,” information concerning the status of their application.\textsuperscript{441}

Section 2 of the Annex on Financial Services is referred to as the “prudential carve-out.”\textsuperscript{442} Notwithstanding any other provision of the GATS, Section 2 of the Annex permits Members to enact measures for “prudential reasons.”\textsuperscript{443} Measures that may be deemed prudential are not defined\textsuperscript{444} but may include measures taken for “the protection of investors, depositors, policy holders or persons to whom a fiduciary duty is owed by a financial service supplier or to ensure the integrity and stability of the financial system.”\textsuperscript{445} This section of the Annex affords Members considerable autonomy to enact financial regulatory measures. The freedom afforded by Section 2 may be subject to protectionist abuse as prudential measures are not considered limitations on market access or national treatment and, therefore, need not be inscribed in a Member’s Schedule.\textsuperscript{446}

9. Dispute Resolution

Article XXIII, Dispute Settlement and Enforcement,\textsuperscript{447} brings trade in services disputes within the ambit of the WTO dispute

\textsuperscript{439} Id. art. VI(3).
\textsuperscript{440} Id.
\textsuperscript{441} Id.
\textsuperscript{442} DOBSON & JACQUET, supra note 229, at 76.
\textsuperscript{443} GATS supra note 5, Annex on Financial Services, § 2(a).
\textsuperscript{444} See MATTOO, supra note 290, at 6.
\textsuperscript{445} Id. (emphasis added). See generally KONO, supra note 18, at 27-33 (explaining prudential regulation and supervision of financial institutions).
\textsuperscript{446} See Trachtman, supra note 251, at 71-72; MATTOO, supra note 290, at 6.
\textsuperscript{447} See GATS, supra note 5, art. XXIII.
resolution mechanism. Recourse to the Dispute Settlement Understanding (DSU) is available to WTO Members under two situations. A Member may pursue formal dispute settlement when another Member “fails to carry out its obligations or specific commitments” or when a Member has “nullified or impaired” any benefit which another Member could have reasonably expected to accrue pursuant to the first Member’s specific commitments.

A subtle distinction exists between Paragraph (1) and Paragraph (3) of Article XXIII. Paragraph (1) relates to failures to carry out obligations under the General Agreement or pursuant to a scheduled commitment. Paragraph (3), which addresses a Member’s actions that nullify or impair another Member’s reasonably expected benefit, only relates to benefits that derive from specifically scheduled commitments. A Member’s action that nullifies an obligation under the General Agreement does, however, appear analogous to a failure to carry out a General Agreement responsibility.

The nullification or impairment of an expected benefit is referred to as a “non-violation” violation. A scheduled commitment is nullified or impaired “as a result of the application of any measure which does not conflict with the provisions” of the GATS, but which annuls or devalues a Member’s reasonably expected benefits.

The Annex on Financial Services modifies Article XXIII of the GATS as the dispute resolution mechanism relates to financial

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448 Id. See Dispute Settlement Understanding, supra note 233.
449 See GATS, supra note 5, art. XXIII(1).
450 See id. XXIII(3); cf. GATT, supra note 21, art. XXIII (addressing the nullification or impairment of any direct or indirect benefit accruing to a Member in the trade of goods).
451 See Collins, supra note 237, at 816.
452 See GATS, supra note 5, art. XXIII(1).
453 See id. art. XXIII(3).
455 GATS, supra note 5, art. XXIII (3).
services. Dispute settlement panels called on to address "prudential issues" and "other financial matters" must have expertise in the specific financial service at issue. The nature of this "expertise" is not defined, but it must be assumed to be significant practical experience, arguably not less than five to seven years, or a combination of academic qualifications and practical experience.

Article XXIII addresses a Member's entitlement to obtain recourse before a WTO Dispute Settlement Body. The only Members of the WTO are the Member-Countries. Private parties, whether they are natural or juridical persons, have no entitlement to appear before WTO panels or appellate bodies. The only recourse currently available to private parties is to petition their governments. Member-countries are accorded unfettered autonomy in determining which claims to pursue.

10. Progressive Liberalization and the Mount Vernon Conference

Article XIX binds the respective sovereign Members of the WTO to "enter into successive rounds of negotiations." The first of these rounds for the GATS, the Millennium Round, is to be instituted before the year 2000. These rounds are to be entered into "with a view to achieving a progressively higher level of

457 See id.
458 See WTO Agreement, supra note 5, arts. XI-XII.
460 See generally 143 CONG. REC. H10809, H10845 (daily ed. Nov. 13, 1997). House conferees suggested that the U.S. Trade Representative permit private U.S. party participation in the development of government positions and in the preparations for consultations and dispute settlement. See id. The House conferees indicated that the private U.S. party should have a "direct interest" in the dispute, that the private U.S. party bear its own expenses and that the USTR conclude that private U.S. party participation would assist the government in the prosecution or defense of the proceedings. See id.
461 GATS, supra note 5, art. XIX(1).
Article XIX is highlighted because of a unique relationship between the GATS and American history.

George Washington, in the early years of the United States, had a passion for developing a network of water bodies that would extend commercial navigation from the Ohio River to the Atlantic Ocean. Washington's network of rivers and canals would include the Potomac River. A unique situation arose concerning navigating the Potomac River because it flows along the shores of both Maryland and Virginia. The Mount Vernon Conference was convened to address issues requiring the cooperation of both states. The Conference, which included delegates from both states, met annually "for the purpose of keeping up harmony in the commercial relations." The future GATS rounds will be successful if entered into with the same spirit.

C. General Interpretative Considerations

The GATS, the accompanying Annexes, the Understanding, the Members' Schedules of Specific Commitments, and Lists of Article II Exemptions are unique instruments. The WTO is itself unique. The WTO, with 134 Members, is comprised of nations with various legal systems and economic policies, diverse historical and cultural backgrounds, and vastly different economic strengths and populations. These considerations, among others, must be appreciated when interpreting the GATS and the legal instruments relevant to the international trade in financial services.

Counsel should understand that for every reasonable interpretation one Member may have of a particular aspect of the instruments, another Member may urge an equally reasonable but contrary interpretation. Counsel must also appreciate the blend of legal, economic, and diplomatic dimensions of the instruments and, to be successful, seek an interpretation that accommodates all interests. These initial considerations, if assimilated into the interpretative process, will serve counsel well.

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462 Id.
464 Id. at 199.
465 See generally Feketekuty, supra note 67, at 91-110 (raising issues for the GATS agenda in the Millennium Round).
The most persuasive argument that may be offered concerning any interpretation of the WTO instruments is one that proposes a resolution to which all Members would have agreed had the matter been contemplated during the drafting process. This will likely prove impossible. The alternative is to acknowledge the infeasibility of all Members being in complete agreement, and suggesting an interpretation that reasonably represents a compromise acceptable by all Members.

It should always be remembered that the drafters may have intentionally excluded certain issues from the agreements. Some matters may have been deemed beyond the scope of the agreements, and other issues may have been too contentious to achieve a compromise. The WTO does not have legislative histories, in the domestic sense, on which these positions may rest or be countered. Reference to the archives of respected trade periodicals may be a beneficial, secondary source of authority.

The Preamble offers interpretative insight into the GATS. It precedes the GATS, but concludes with the statement that the Members “[h]ereby agree as follows,” leading to the conclusion that it is not part of the General Agreement. The Preamble does, however, offer evidence of the general motivations of the Members. The Dispute Settlement Panel in Brazil-Measures Affecting Desiccated Coconuts held that the “central objects and purposes” of the WTO Agreements are reflected in the preambles to the Agreements.

Language considerations may create another hurdle in the interpretative process. The GATS, which includes the Annexes, and the Understanding are authentic in three languages, English, Spanish, and French. This situation lends itself to two possible problems. First, there may be subtle differences in translation between the three official languages. Secondly, countries like

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467 GATS, supra note 5, Annex 1B.


Brazil, Germany, Kuwait, and others similarly situated must employ translations of the instruments that are not in their native languages. Thus, the potential for different translations and interpretations to arise is omnipresent.

The Schedules and Lists present a similar difficulty. The Schedules and Lists are authentic in any of the official languages of the WTO, unless limited to a language or languages stated by the Member. A statement acknowledging the authentic language or languages generally precedes the Members' Schedules and Lists. Some Members have authentic versions in more than one language. Any discrepancy between a Member’s two or more authentic versions should be interpreted against the Member in a trade-liberalizing fashion.

A general source for the interpretation of international agreements, such as the GATS, is the Vienna Convention on the Law of International Treaties. The Convention has not been ratified by the United States or by a number of other WTO Members, but its universal acceptance and logical reasoning is recognized. Thus, the Convention is a solid secondary source of interpretation.

Article 3(2) of the DSU brings the Vienna Convention into the interpretative sphere of the WTO. Article 3(2) provides that one of the purposes of the WTO dispute settlement mechanism is to "clarify the existing provisions of [WTO Agreements] in accordance with customary rules of interpretation of public international law." The Vienna Convention is clearly recognized as incorporating customary rules of interpreting public international law.

Convention, supra note 300, art. 33(1) (providing that a treaty authentic in two or more languages is equally authentic in each language).

470 See Second Protocol, supra note 185; Fifth Protocol, supra note 3 (providing that the Schedules and Lists are authentic in English, French, and Spanish, except as otherwise stated by each Member).

471 See Fifth Protocol, supra note 3, Canada.


473 See Dispute Settlement Understanding, supra note 233, art. 3(2).

474 Id.

V. Conclusion

International trade has changed considerably since 1948 when twenty-three nations joined together to form the GATT. The economic prosperity previously derived from the international trade of agricultural products and manufactured goods is now significantly influenced by trade in services, particularly financial services.

The GATS and the Fifth Protocol to the GATS, the Financial Services Agreement, will bring a measure of predictability and stability to the international trade in financial services, but only to a degree. Many aspects of the GATS framework agreement, the Annexes and the Understanding on Commitments in Financial Services are ambiguous. The Schedules of Specific Commitments and the Lists of Article II Exemptions are also difficult to comprehend.

As the WTO instruments become more legalistic and the dispute resolution system becomes more judicial, lawyers will play a more prominent role in resolving WTO-related issues. Lawyers trained in statutory interpretation will be needed to ascertain the intentions of Members in light of ambiguities in the instruments. Lawyers will also be called on to decide how best to address controverted matters, be it through consultation, dispute resolution, future multilateral negotiations, or a combination of these three avenues.

The opportunity for lawyers to address these challenges and to participate alongside economists and trade specialists in the maturation of the WTO’s financial services trading system also carries additional responsibilities. The WTO’s financial services trading regime, particularly as it involves the prudential measures of Members, is a blend of law, economics, and diplomacy. Advocacy in the context of the WTO system must take this into consideration. The WTO system does not function in the vacuum of the typical domestic legal system designed with the expectation that advocates will singularly assert the narrow interests of their clients. Lawyers privileged to participate in the WTO trading

arena must approach their practice with the same sense of obligation as domestic “Officers of the Court.”

Facilitating economic prosperity through international trade is no longer the exclusive province of economists and diplomats. Responsibility for cultivating respect for the WTO’s financial services trading system, which will in turn engender confidence in such trade, now rests on the shoulders of lawyers as well.