CHAPTER 12

TRADE IN SERVICES

OVERVIEW OF RULES

1. BACKGROUND OF RULES

The phrase “trade in services” applies to international transactions in a diverse array of fields, including financial services, transportation, communications, construction, and distribution. The trend toward a “softening” (or services) economy is becoming increasingly apparent. Since the 1970’s, the service industry share of the global GDP has increased steadily and the rate of employees in service industries vs. all industries is also increasing. When considering barriers to trade in services, domestic regulations governing their supply and consumption are more important than border measures (such as tariffs). (This contrasts with trade in goods, where border measures play a significant role.) It is desirable to eliminate domestic regulations that are potentially trade barriers. These domestic regulations are put in place for a variety of reasons -- sometimes to protect/promote domestic industries, but just as often to meet public/social objectives such as protecting culture and traditions, or protecting the interests of consumers. Frequently, the request for liberalizing multilateral disciplines regarding services is not as strong as these pressures.

The developed countries, including the US, which has pursued a policy of deregulation and has grown competitive in the sectors of financial services and telecommunications services and led efforts to establish international regulations governing trade in services, and Japan, argued that trade in services should be included in the Uruguay Round negotiations. The developing countries, including India and Brazil, initially objected to the inclusion of trade in services, claiming that it was beyond the jurisdiction of GATT, but eventually agreed that trade in services should be included in multilateral trade negotiations during the Uruguay Round.

At the beginning of the negotiations, the scope of the agreements; duties/general principles applied to the agreements; relations with the existing international rules; and special treatment for the developing countries, were among the main issues. The General Agreement on Trade in Services (GATS), stipulating most-favoured-nation treatment, market access commitments and national treatment, was agreed to at the end of the Uruguay Round negotiations as an Annex to the WTO Agreements. All WTO Members, including developing countries, are signatories to the GATS. The GATS covers a wide range of service industries, including financial services, transportation, communications, construction, and distribution. (It does not exclude certain sectors due to consideration of interests of specific countries, as in agriculture or textiles in GATT).

2. LEGAL FRAMEWORK

(1) FOUR MODES OF SUPPLY

The GATS covers governmental measures that affect trade in all services (excluding services supplied in the exercise of governmental authority). The GATS defines 155 service sub-sectors based on categories developed by the GATT Secretariat (WTO Secretariat) and specifies four modes of trade in services:

1) Cross-border supply (supply of services from the territory of one Member into the territory of another Member);

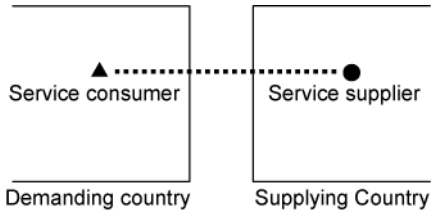
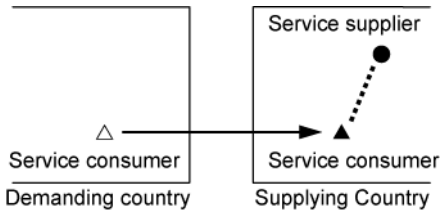
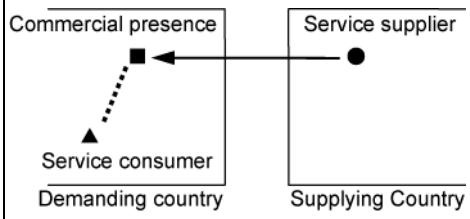
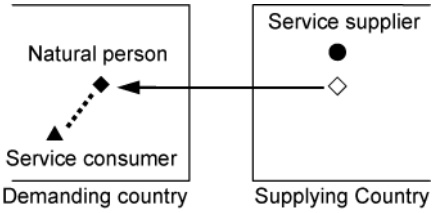
2) Consumption abroad (supply of services in the territory of one Member to a service consumer of another Member);

3) Commercial presence (supply of services by a service supplier of one Member through commercial presence in the territory of another Member); and,

4) Presence of natural persons (supply of services by a service supplier of one Member through the presence of natural persons of that Member in the territory of another Member.)

(*See* Figure II-12-1, below, for a more detailed overview of the four modes.)

Figure II-12-1 Four Modes of Trade in Services

Mode	Description	Example	Schematic Diagram
1. Cross-border supply	Supply of services from the territory of one Member into the territory of another Member (Border-crossing of services)	- Receiving legal advice by telephone from a lawyer living abroad - Outsourcing of telephone centers to abroad	
2. Consumption abroad	Supply of services in the territory of one Member to a service consumer of another Member (Border-crossing of consumers)	- Local consumption by a foreign tourist or business person (lodging, theatergoing, rental of electronic equipment, etc.) - Receiving repairs of ships and aircrafts, etc. abroad	
3. Commercial presence	Supply of services by a service supplier of one Member through commercial presence in the territory of another Member (Border-crossing of commercial presence)	- Financial services provided by a foreign branch - Distribution services provided by a foreign branch	
4. Movement of natural persons	Supply of services by a service supplier of one Member through the presence of natural persons of that Member in the territory of another Member (Border-crossing of supplies)	- Invitation of a foreign artist	

Note: Symbols in the Schematic Diagrams

●: Service supplier (natural or juridical person)

▲: Service consumer (natural person or juridical person)

■: Commercial presence ◆: Natural person
△: Service consumer before movement ◇: Natural person before movement
⟵ : Movement ⟵ : Supply of service

(2) OUTLINE OF MAJOR PROVISIONS

As shown below, obligations under the GATS include: (a) "obligations which apply to trade in services in all service sectors"; and (b) "obligations regarding trade in services in sectors where specific commitments have been undertaken."

GATS leaves to the future, post-Uruguay Round multilateral negotiations for providing discipline (c) “obligations to negotiate cross-cutting rules”; on Discipline of Domestic Regulation (Article VI), Emergency Safeguard Measures (Article X), Government Procurement (Article XIII) and Subsidies (Article XV)). Discussions on these issues have been taking place in the Working Party on GATS Rules established by the Council for Trade in Services.

Discipline of Domestic Regulation (Article VI) has also been discussed by the Working Party on Domestic Regulation (previously the Working Party on Professional Services), established in April 1999.

(a) Obligations which apply to Trade in Services in All Service Sectors

Most-Favoured-Nation Treatment (Article II)

Members must accord equal treatment (MFN treatment) to all other Members (*see* Chapter 1 of Part II for a discussion on MFN).

(MFN Exemption)

Trade in services, however, spans a wide range of fields that contain many measures that cannot be subject to MFN treatment for various historical or other reasons (e.g. reciprocal measures and favourable treatments based on bilateral agreement). Accordingly, the GATS stipulates that measures could be exempted from the MFN obligation subject to certain conditions, if such measures had been previously registered at the time the GATS entered into force. The Council for Trade in Services reviews all exemptions granted for a period of more than five years. In principle, such exemptions should not exceed a period of 10 years. These exemptions are subject to negotiation in subsequent trade liberalizing rounds.

(Cases in Which MFN Treatment Obligations Do Not Apply Under the GATS Provisions)

- Each Member is not prevented from taking part in an agreement liberalizing trade in services between or among the parties. (Article V)
- Each Member is not prevented from taking part in an agreement establishing full integration of the labour markets between or among the parties. (Article V *bis*)
- Each Member may recognize education, licenses, and certification granted in a particular country as domestically valid. (Article VII)
- MFN treatment shall not apply to the procurement by governmental agencies of services purchased for governmental purposes not with a view to use in the supply of services for commercial sale. (Article XIII)

Transparency (Article III)

The lack of transparency in laws, regulations and other measures pertaining to or affecting trade in services may constitute a barrier to trade in services. The GATS, therefore, provides a general

obligation to publish all such laws and regulations. This provision is designed to remove any barrier resulting from non-transparent procedures and to facilitate future negotiations on such procedures.

(b) Obligations Regarding Trade in Services in Sectors Where Specific Commitments Have Been Undertaken

The GATS requires Members to list in the "Schedule of Specific Commitments" the sub-sector in which it is making a liberalization commitment and the nature of the commitment. The GATS seeks to achieve progressively higher levels of liberalization through successive rounds of negotiations focused on expanding areas and enhancing the content of liberalization.

Under the GATS, Members schedule liberalization commitments by listing the applicable sector or sub-sector (one of the 155 sub-sectors) and mode of supply (one of the 4 modes), and the nature of the commitment. This method -- where a Member itself identifies those sub-sectors in which it has made a commitment -- is known as a "positive-list" (or "bottom-up") approach. Members are allowed to add conditions and restrictions to Market Access and National Treatment, where it is considered necessary, to their Schedules of Specific Commitments. They can also make "Additional Commitments" if they consider it appropriate to take on additional obligations apart from market access and national treatment. (Figure II-12-2 contains an example of a Schedule of Specific Commitments; Figure II-12-3 contains Specific Commitments of Major Trading Partners and Figure II-12-4 contains Overview of MFN Exemption Lists of Major Trading Partners.)

Japan made commitments in approximately 100 sectors and undertook MFN obligations in all areas without exemptions as a result of the Uruguay Round.

Market Access (Article XVI)

This article exhaustively stipulates six types of measures that each government should not undertake: (a) limitations on the number of service suppliers; (b) limitations on the total value of services transactions or assets; (c) limitations on total output; (d) limitations on the total number of natural persons that may be employed; (e) measures that restrict the types of legal entity through which a service is provided; and (f) limitations on the participation of foreign capital. (*See* Figure II-12-5, below, for examples of limitations on market access and national treatment.) Members may undertake commitment not to maintain these measures or reserve some or all of these restrictions by each sub sector and mode in each Schedule of Commitments. Member countries may not only take measures other than six types but also those have been reserved, unless they violate other articles in the GATS. In addition, this article does not guarantee specific market access results (in terms of market share or otherwise)

National Treatment (Article XVII)

The national treatment principle requires each Member to accord services and service suppliers of any other Member no less favourable treatment than that accorded to its own like services and service suppliers (*See* Chapter 2 of Part II for a discussion of National Treatment). The national treatment obligation is determined through specific commitments and each Member may decide through negotiations whether to undertake national treatment commitments in each sector and mode. (For example, a member may undertake no national treatment in the banking sector.) In undertaking a national treatment commitment, a Member may maintain some discriminatory measures by making reservations. (For example, in undertaking a national treatment commitment in the banking sector, a Member may promise national treatment in all sectors of banking except for deposit operations.) Any such reservation must be specified in the Schedule of Commitments.

Additional Commitments (Article XVIII)

Pursuant to Article XVIII of GATS, Members may agree at their own discretion through individual negotiations or other procedures to add conditions and restrictions that do not fit in the purview Market Access and National Treatment to their Schedules of Specific Commitments, in the form of "Additional Commitments". This is done where it is considered that active government measures are needed in the service sector in addition to the elimination of measures restricting market entry and measures discriminating against foreign services and service providers. The responsibility to implement these kinds of government measures is not covered by the obligations of market access or national treatment.

Domestic Regulations (Article VI)

In sectors where specific commitments are undertaken, each Member shall ensure that all measures of general application affecting trade in services are administered in a reasonable, objective and impartial manner.

Payments and Transfers (Article XI)

A Member may not restrict international payments and transfers for current transactions covered by specific commitments undertaken in the GATS except to safeguard its balance-of-payments. In addition, nothing in the GATS affects the rights and obligations of the Members of the International Monetary Fund under the IMF, unless a member impose restrictions above, except under safeguard its balance-of-payments or at the request of the Fund.

Figure II-12-2 Example of Schedule of Specific Commitments

Horizontal Commitments

Sector or Subsector	Limitations on market access	Limitations on national treatment	Additional commitments
All sectors included in this schedule	4) Unbound except for measure concerning the entry and temporary stay of a natural person who falls in the following category: i) Activities to direct a branch office as its head.	3) Unbound for research and development subsidies.	

Sector-Specific Commitments

Sector or Subsector	Limitations on market access	Limitations on national treatment	Additional commitments
d) Services related to management consulting *	1) Unbound 2) None 3) The number of licenses conferred to service suppliers may be limited 4) Unbound except as indicated in horizontal commitments	1) Unbound 2) None 3) None except as indicated in horizontal commitments 4) Unbound	 **

Modes of supply: (1) cross-border supply; (2) consumption abroad; (3) commercial presence; and (4) presence of natural persons.

Figure II-12-3 Specific Commitments of Major Trading Partners

Sectors		US	CH	EU	CA	KR	HK	SG	MY	ID	TH	AU	PH	IN	JP
Business Services	Professional	*	*	*	*	*	*	*	*	*	*	*		*	*
	Computer and related	*	*	*	*	*	*	*	*	*	*	*		*	*
	R & D			*	*	*			*	*		*		*	*
	Real estate	*	*	*	*		*					*			*
	Rental/leasing	*		*	*	*	*		*		*	*	*		*
	Other	*	*	*	*	*	*	*	*	*	*	*		*	*
Communication Services	Postal														
	Courier	*	*		*		*						*		
	Telecommunications	*	*	*	*	*	*	*	*	*	*	*	*	*	*
	Audio-visual	*				*	*	*	*		*			*	*
	Other														
Construction Services	Buildings	*	*	*	*	*		*	*	*	*	*			*
	Civil engineering	*	*	*	*	*		*	*	*	*	*		*	*
	Installation and assembly	*	*	*	*	*		*	*	*	*	*			*
	Completion and finishing	*	*	*	*	*	*	*	*			*			*
	Other	*	*	*	*	*	*	*	*	*					*
Distribution Services	Commission agents	*	*	*	*	*					*	*			*
	Wholesale trade	*	*	*	*	*						*			*
	Retailing	*	*	*	*	*	*					*			*
	Franchising	*	*	*	*	*						*			*
	Other				*										
Education Services	Primary		*	*							*				*
	Secondary		*	*								*			*
	Higher		*	*								*			*
	Adult	*	*	*							*				*
	Other	*	*									*			
Environmental Services	Sewage	*	*	*	*	*					*	*			*
	Refuse disposal	*	*	*	*	*					*	*			*
	Sanitation	*		*	*						*	*			*
	Other	*	*	*	*	*					*				*
Financial Services	Insurance	*	*	*	*	*	*	*	*	*	*	*	*	*	*
	Banking	*	*	*	*	*	*	*	*	*	*	*	*	*	*
	Other														
Health Services	Hospital	*		*					*					*	*
	Other human health											*			
	Social			*											
	Other														
Tourism and travel services	Hotels and Restaurants	*	*	*	*	*	*	*	*	*	*	*	*	*	*
	Travel agencies/Tour operators	*	*	*	*	*	*	*	*	*	*	*	*	*	*
	Tourist guides	*		*		*		*				*			*
	Other	*									*				
Recreational, cultural and sporting services	Entertainment	*		*					*						*
	News agency	*		*								*			*
	Libraries, archives, museums	*					*	*							*
	Sporting	*	*	*					*		*	*			*
	Other											*			

Transport Services	Maritime transport		*	*		*	*	*	*	*	*	*	*		*
	Internal waterways		*	*		*	*		*						*
	Air	*	*	*	*	*					*	*	*		*
	Space														
	Rail	*	*	*	*						*		*		*
	Road	*	*	*	*	*					*	*	*		*
	Pipeline			*								*			*
	Auxiliary		*	*	*	*	*				*	*	*		*
	Other			*		*									*
Other Services									*						

*Sector or subsector, when making liberalization available, shall be inscribed in this column. Articles XVI and XVII shall not apply to sectors or subsectors not indicated in this column. (However, Article II shall apply.)

**Commitments with respect to measures affecting trade in services but not covered by Articles XVI or XVII shall be inscribed in this column.

Notes:

1) Sectors for which liberalization commitments have been made are shown with symbols (*). However, there are many cases in which liberalization commitments cover only a part of the sector or in which measures that are inconsistent with national treatment or that restrict market access are reserved. This table should not, therefore, be interpreted as a direct indication of the level of liberalization. The WTO Secretariat Categories, defining 155 sub-sectors, are more detailed than those in this table.

2) CA: Canada; CH: China; KR: Korea; HK: Hong Kong; SG: Singapore; MY: Malaysia; ID: Indonesia; TH: Thailand; AU: Australia; PH: Philippines; IN: India; JP: Japan.

Figure II-12-4 Overview of Article II (MFN) Exemptions of Major Trading Partners

United States	1. Cross-sectoral (measures related to movement of natural persons, taxation measures, measures related to land use, measures regarding securities reporting by small businesses) 2. Telecommunications services (One-way satellite transmission) 3. Banking services 4. Insurance services 5. Air transport services 6. Space transport services 7. Road transport services 8. Pipeline transport services
EU	1. Cross-sectoral (measures related to movement of natural persons, measures related to land use, measures related to investment) 2. Rental/Leasing services 3. Audiovisual service 4. Insurance services 5. Internal waterways transport services 6. Air transport services 7. Road transport services

Canada	1. Business services (Fishing-related services) 2. Film, video and television programming 3. Insurance services 4. Air transport service 5. Maritime services
Korea	1. Air transport services.
Hong Kong	None
Singapore	1. Cross-Sectoral (Measures related to movement of natural persons, Measures related to investment, taxation measures) 2. Professional services (Legal services) 3. Audiovisual services 4. Banking services 5. Insurance services 6. Air transport services 7. Maritime services
Malaysia	1. Cross-Sectoral (measures related to movement of natural persons, measures related to foreign investment)
Indonesia	1. Cross-Sectoral measures related to movement of natural persons 2. Construction services 3. Banking services
Thailand	1. Professional services (auditing services, publishing newspapers) 2. Maritime services 3. Air transport services 4. Road transport services
Australia	1. Audiovisual services
Philippines	1. Cross-Sectoral (measures related to movement of natural persons, measures related to investment) 2. Banking services 3. Maritime services
India	1. Telecommunications services 2. Audiovisual services 3. Entertainment services 4. Maritime services
Japan	None

Figure II-12-5 Examples of Limitations On Market Access and National Treatment

(WTO document S/L/92)

GATS Article XVI measures which a Member shall not maintain or adopt	
(a)Limitations on the number of service suppliers	・License for a new restaurant based on an economic needs test. ・Annually established quotas for foreign medical practitioners. ・Government or privately owned monopoly for labour exchange agency services. ・Nationality requirements for suppliers of services (equivalent to zero quota)
(b)Limitations on the total value of transaction or assets	・Foreign bank subsidiaries limited to x percent of total domestic assets of all banks.
(c)Limitations on total output	・Restrictions on broadcasting time available for foreign films.
(d)Limitations on the total number of natural persons	・Foreign labour should not exceed x percent and/or wages by percent of total.
(e)Restrictions or requirements regarding type of legal entity or joint venture	・Commercial presence excludes representative offices. ・Foreign companies required to establish subsidiaries. ・In sector x, commercial presence must take the form of a partnership.
(f)Limitations on the participation of foreign capital	・Foreign equity ceiling of x percent for a particular form of commercial presence.

Figure II-12-6 Article XVII examples of limitations on national treatment

- Domestic suppliers of audiovisual services are given preference in the allocation of frequencies for transmission within the national territory. (Such a measure discriminates explicitly on the basis of the origin of the service supplier and thus constitutes formal or *de jure* denial of national treatment.)
- A measure stipulates that prior residency is required for the issuing of a license to supply a service. (Although the measure does not formally distinguish service suppliers on the basis of national origin, it *de facto* offers less favourable treatment to foreign service suppliers because they are less likely to be able to meet a prior residency requirement than like service suppliers of national origin.

(c) Obligations to Negotiate Cross-Cutting Rules

Domestic Regulation (Article VI)

Article VI: 4 aims to prevent procedural matters such as qualification requirements/procedures, licensing requirements/procedures or technical standards concerning the provision of services (e.g. procedures concerning the establishment of financial or construction service companies and acceptance of accountants) from being used as undue trade barriers by avoiding excessive regulations while securing regulatory transparency. To ensure that measures relating to qualification and licensing requirements and the like do not constitute unnecessary barriers to trade in services, the Council for Trade in Services shall, through such subsidiary bodies as it may establish, develop any necessary disciplines.

Emergency Safeguard Measures (Article X)

Article X provided for multilateral negotiations on the question of emergency safeguard

measures based on the principle of non-discrimination. The results of such negotiations were supposed to enter into effect on a date not later than three years from the date of entry into force of the WTO Agreement. Although discussions have continued at the Working Party on GATS Rules established based on this Article, to date agreements have not been reached.

Government Procurement (Article XIII)

Article XIII provides that major articles such as Article II (the MFN obligation); Article XVI (market access); and Article XVII (national treatment) do not apply to the procurement of services for governmental purpose. Article XIII also provided for multilateral negotiations on government procurement in services under this Agreement within two years from the date of entry into force of the WTO Agreement. This has also been discussed at the Working Party on GATS Rules, but agreements have not been reached.

Subsidies (Article XV)

Members recognize that, in certain circumstances, subsidies may have distortive effects on trade in services. Members should enter into negotiations with a view to developing the necessary multilateral disciplines to avoid such trade-distortive effects. This has also been discussed at the Working Party on GATS Rules, but agreements have not been reached.

(d) Other Provisions

Negotiation of Specific Commitments (Article XIX)

To further the objectives of the GATS, Members shall enter into successive rounds of negotiations aimed at achieving progressive liberalization of trade in services, beginning not later than five years from the date of entry into force of the WTO Agreement (1 January 1995), and periodically thereafter. Based on this article, negotiations for liberalization were started in 2000. The process of liberalization shall take place with due respect for national policy objectives and the level of development of individual Members, both overall and in individual sectors.

Annexes

Annex on Financial Services

Nothing in the GATS prevents a Member from taking measures for prudential reasons and to ensure the integrity and stability of its financial system.

Annex on Telecommunications

Members shall ensure that any service supplier of any other Member is accorded access to and use of public telecommunications networks and services on reasonable and non-discriminatory terms and conditions to supply a service included in its Schedule.

Annex on Air Transport Services

The Annex applies to measures affecting trade in air transport services and ancillary services. The GATS does not apply to measures affecting a Member's traffic rights, or services directly related to the exercise of those rights, as recognized under existing bilateral agreements.

Annex on Movement of Natural Persons Supplying Services under the GATS

The GATS does not prevent a Member from applying measures to regulate the entry of natural persons into, or their temporary stay in, its territory, provided that such measures are not applied in such a manner as to nullify or impair the benefits accruing to any Member under the terms of specific commitments regarding market access, national treatment, and similar issues. (*See*

Reference GATS and the "Movement of Natural Persons".)

Sector Specific Rules

In addition to the Annexes for specific sectors, for the financial services sector, there is also an Understanding on Commitments in Financial Services that provides more specific details regarding market access and national treatment provisions and provides for a higher degree of liberalization, which was agreed during the Uruguay Round negotiations. For basic telecommunications sector, there is a Reference Paper, which was formulated through post-Uruguay Round negotiations, on the regulatory framework for basic telecommunications services discussing interconnection, universal service, public availability of licensing criteria and other aspects of frameworks to promote competition. These additional commitments are attached to many Members' Schedule of Commitments as "Additional Commitments" on a voluntary basis. (*See* Reference: "Reference Paper on Regulatory Framework for Basic Telecommunications Services".)

REFERENCE

GATS AND THE "MOVEMENT OF NATURAL PERSONS"

1. GATS RULES

(1) Scope

The scope of the "movement of natural persons" in GATS is defined by Article I (Scope and Definition), and by the "Annex on Movement of Natural Persons Supplying Services under the Agreement."

Article I defines the "movement of natural persons" as the supply of a service "by a service supplier of one Member, through presence of natural persons of a Member in the territory of any other Member," one (mode 4) of the four modes of trade in services.

The "Annex on Movement of Natural Persons Supplying Services under the Agreement," recognizes the right of Members' immigration control measures, allowing Members to apply "measures to regulate the entry of natural persons into, or their temporary stay in, its territory." However, it does not apply to "natural persons seeking access to the employment market of a Member," that is to say, measures affecting workers who move to seek employment, nor does it apply to "measures regarding citizenship, residence or employment on a permanent basis."

(2) Outline of Disciplines

Mode 4 places the same obligations on all categories as other modes: (a) "Most-Favoured-Nation Treatment" (GATS Article II); (b) "Transparency" (GATS Article III); and (c) securing of tribunals or procedures for administrative decisions (GATS Article VI, Paragraph 2). In addition, it places on Members the obligation for commitment details based on GATS Article XVI: Market Access and Article XVII: National Treatment.

GATS "Annex on Movement of Natural Persons Supplying Services under the Agreement"

1. This Annex applies to measures affecting natural persons who are service suppliers of a Member, and natural persons of a Member who are employed by a service supplier of a Member, in respect of the supply of a service.
2. The Agreement shall not apply to measures affecting natural persons seeking access to the employment market of a Member, nor shall it apply to measures regarding citizenship, residence or employment on a permanent basis.
3. In accordance with Parts III and IV of the Agreement, Members may negotiate specific commitments applying to the movement of all categories of natural persons supplying services under the Agreement. Natural persons covered by a specific commitment shall be allowed to supply the service in accordance with the terms of that commitment.
4. The Agreement shall not prevent a Member from applying measures to regulate the entry of natural persons into, or their temporary stay in, its territory, including those measures necessary to protect the integrity of, and to ensure the orderly movement of natural persons across, its borders, provided that such measures are not applied in such a manner as to nullify or impair the benefits accruing to any Member under the terms of a specific commitment.

2. Mode 4 Commitment Methods of Individual Countries

The "movement of natural persons" was included in GATS during the Uruguay Round. However, as was detailed in 1. above, the actual level of recognition is determined by each Member individually in its Schedule of Commitments. The majority of countries has not scheduled Mode 4 commitments for individual service sectors, but rather has established comprehensive provisions in a table of "horizontal commitments." The types Japan committed to are as described below.

(1) Intra-corporate Transferees

A natural person who, for a period of more than one year immediately preceding the date of entry into Japan and application for temporary stay, has been employed by a corporation of a Member other than Japan and will be transferred to a Japan office of the same corporation for no more than five years, is permitted the following activities: (1) managing a branch office as the manager; (2) managing the corporation as a senior executive or auditor; (3) managing one or more corporate departments; (4) physics, engineering, and other natural science activities that require high levels of technical expertise and knowledge; and (5) law, economics, business administration, accounting, and other humanities activities that require a high level of knowledge.

(2) Business Contact (Business Visitors)

Business contacts (including negotiations for the sale of services) and other related activities are allowed for a period of up to 90 days. However, this is based on the conditions that: (i) no compensation is received within Japan; and (ii) that neither direct sales nor direct provision of services are rendered to the general public.

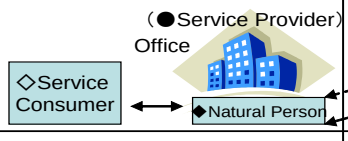
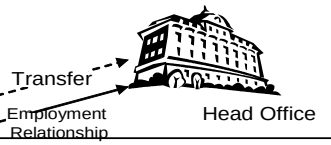
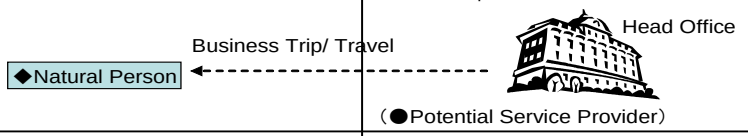
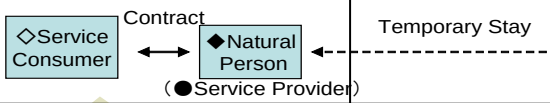
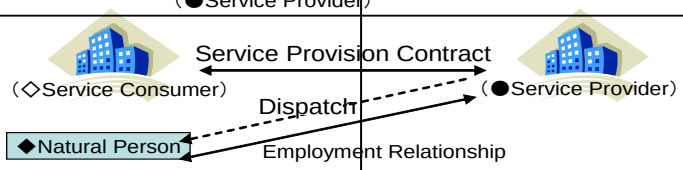
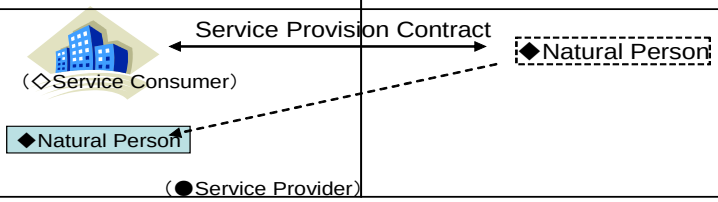
(3) Self-employed Service Providers (Independent Professionals)

A natural person who, for a period of more than one year immediately preceding the date of entry into Japan and application for temporary stay, has been employed by a corporation of a Member other than Japan and will work in Japan for no more than five years, is permitted to provide the following services: lawyer, foreign lawyer licensed in Japan, patent agent, marine procedure

commission agent, certified public accountant, and licensed tax accountant. However, necessary qualifications must be met. For instance, a “lawyer” is required to have received qualification to be a lawyer in Japan and also be registered as a lawyer in Japan.

Japan has the right to implement relevant measures for immigration control, provided that benefits rendered to Members from special commitments are not negated and there is no damage.

(Main Types of Horizontal Commitments)

Main Types of Horizontal Commitments		Consumer Country	Source Country	Examples
Intra-Corporate Transferees: ICT				CEO, Manager, Professional Engineer
Business Visitors: BV				Business negotiations (no activity receiving compensation at that time)
Independent Professionals: IP				Independent lawyer who enters foreign country through contract with foreign consumer
Contractual Service Suppliers	Contract between corporations			Computer engineer employed by corporation dispatched to Japan via contract between corporations
	Contract between a corporation and an individual			Independent computer engineer who enters Japan via contract between corporation and individual

REFERENCE

REFERENCE PAPER ON REGULATORY FRAMEWORK FOR BASIC TELECOMMUNICATIONS SERVICES

ITEMS OF THE REFERENCE PAPER

Scope of Application: These disciplines apply to major suppliers who have the ability to materially affect the terms of participation in the relevant market for basic telecommunications services as a result of control over essential facilities or use of its position in the market.

1. Competitive Safeguards

Appropriate measures shall be maintained for the purpose of preventing major suppliers from engaging in or continuing anti-competitive practices. (An example of anti-competitive practices: using monopolized profits of local telecommunications as capital of bargain price.)

2. Interconnection to be Ensured

Interconnection with a major supplier will be ensured at any technically feasible point in the network.

3. Universal Service

Any Member has the right to define the kind of universal service obligation it wishes to maintain. Such obligations will not be regarded as anti-competitive per se, provided that they are administered in a transparent, non-discriminatory and competitively neutral manner, and are not more burdensome than necessary for the kind of universal service defined by the Member. (Universal service means that service providers of public services such as telecommunication and electricity have obliged to supply demands of public services in certain area of supply.)

4. Public Availability of Licensing Criteria

Where a license is required, the following will be made publicly available: (1) all the licensing criteria and the period of time normally required to reach a decision concerning an application for a license, and (2) the terms and conditions of individual licenses.

5. Independent Regulators

The regulatory body shall be separate from, and not accountable to, any supplier of basic telecommunications services.

6. Allocation and Use of Scarce Resources

Any procedure for the allocation and use of scarce resources, including frequencies, numbers and rights of way, will be carried out in an objective, timely, transparent and non-discriminatory manner.

3. NEGOTIATION HISTORY

(1) EXTENDED NEGOTIATIONS

The Uruguay Round negotiations failed to reach agreement on three areas: maritime transport services, financial services and basic telecommunications services. Negotiations on these sectors, as well as the movement of natural persons (at the request of developing countries), were continued after the conclusion of the Round (*see* Figure II-12-6). With regard to movement of natural persons, the developed countries sought liberalization commitments on intra-corporate transferees while the developing countries strongly requested commitments on acceptance of natural persons on a contract basis. Extended negotiations took place and some developed countries amended their commitments. An agreement regarding movement of natural persons was quickly reached in July 1995.

In the maritime services negotiations, the Uruguay Round negotiations included international shipping, auxiliary services such as freight handling, and port usage. Cabotage, however, was not included in the negotiation because many countries restricted foreign service providers from domestic shipping. Negotiations on maritime transportation continued, but ultimately were suspended in June 1996, because the United States did not submit an offer. Negotiations in maritime services resumed when the Doha round of service negotiations began in 2000. MFN Treatment obligations of GATS Article II will not be applied until conclusion of negotiations; thus members are under a standstill agreement to maintain their present level of restriction.

Regarding financial services, a provisional agreement was reached in July 1995 and, in December 1997, an agreement was reached among 70 countries on a Most-Favoured-Nation basis. The 5th Protocol entered into effect and, had been ratified by 67 countries. As a result, permanent agreement was reached with the United States, EU and with major developing countries in Asia and Latin America.

The initial deadline for basic telecommunications was April 1996, but negotiations were subject to considerable delay. A successful agreement among 69 countries was finally reached on a Most-Favoured-Nation basis in February 1997. The agreement resulted in the signing and entering into effect of the 4th Protocol in February 1998 (which defines the deadline for ratification and the procedures for entering into effect; the additional liberalization commitments made by Members are annexed to this protocol).

Figure II-12-6 Framework of the Four Unfinished Areas

	Financial Services	Basic Telecommunications	Maritime Transport Services	Movement of Natural Persons
Present Situation	Concluded Dec 13, 1997 (came into force on Mar 1, 1999)	Concluded Feb 15, 1997 (came into force on Feb 5, 1998)	Suspended in June 1996 (negotiations resumed in 2000; a standstill agreement to maintain their present level of restriction)	Concluded July 28, 1995 (came into force on Jan 30, 1996)

The areas in which negotiations are still ongoing were priority areas for both developed and developing countries at the Uruguay Round. In such areas, Member States not only define specific measures regarding market access and national treatment, but also promise some elements which exceed market access and national treatment, such as relaxation of regulations relating to capital investment ratios, and preparation of the “Reference Paper” on the regulatory framework for basic telecommunications services, based on GATS Article XVIII additional agreements (See section 2 of this chapter, “Legal Framework”, 4) “Other Regulations”)

(2) The Uruguay Round and Before Seattle

GATS mandated the continued study of several issues without waiting for the start of the new negotiating round.

First, work on establishing disciplines for professional services was started. In professional services, work had begun in the accounting sector, where progress was being made toward standardization. The Working Party on Professional Services focused on establishing “Guidelines for Mutual Recognition Agreements in The Accountancy Sector” (May 1997) and “Disciplines on Domestic Regulation in The Accountancy Sector,” concerning of elimination trade barriers (December 1998). The disciplines included general, abstract and neutral provisions for transparency, licensing requirements, qualification requirements, qualification procedures and technical standards.

Later, in light of the three years that were required just for the accounting sector and the fact that Article VI:4 of the GATS is not limited to professional services only, some argued that a single organization should discuss disciplines for services as a whole, including professional services. This resulted in the reorganization of the Working Party on Professional Services in April 1999 into the new Working Party on Domestic Regulation, responsible for developing disciplines on domestic regulations for services as a whole, including professional services.

Working Party on GATS Rules has been discussing government procurement, safeguards and subsidies as they relate to services.

With regard to government procurement, issues had arisen relating to the mandates of GATS Article XIII (to what extent to include transparency, market access, national treatment and MFN), the relationship between government procurement rules and government procurement agreements under GATS, methods of specifying main categories in relation to government procurement spanning multiple categories, and threshold values, among other things.

Some developing countries have taken the position that safeguard measures are required as a safety valve when aiming for ambitious levels of liberalization, but most countries had been passive in negotiations because they are of the view that: existing rules provide sufficient flexibility, the large number of technical issues such as how to measure injury in service areas where there is no definition of domestic industry and statistical data available.

In regard to subsidies, it was agreed in Annex C of the Hong Kong Ministerial Declaration that, bearing in mind issues including the definition of subsidies, and their distorting effect on trade (definition methods, extent of impact on service sectors), etc., further efforts should be made to strengthen information exchange, and that the proposals of Member countries in regard to definitions required for consideration of the subsidy issue should be prioritized. Nevertheless, there was no agreement regarding the scope of subsidies to be considered, and the situation had remained in deadlock.

As described above, the deadline of the negotiations pursuant to the GATS has repeatedly been extended and discussions have continued.

In addition, the Committee on Specific Commitments is discussing development of the procedures for the modification of schedules and revision of the current classification. With regard to classification, the committee has been studying whether there is a need to revise the current classification, as well as the question of new services, and other issues.

4. Economic Aspects and Significance

In many developed countries, service industries account for about 60 to 70 percent of the gross domestic production and a similar percentage of the total labour force, making them a vital component of the national economy. Although to varying degrees, as mentioned in the opening parts in this chapter, this tendency toward a so-called soft economy or service economy is something that can be observed around the world.

(1) Movement of Production Factors

Unlike trade in goods, trade in services is usually accompanied by movement of production factors such as capital, labour, technology and managerial resources. Although trade in services can sometimes be accomplished without any movement of the service provider or consumer, as in the case of cross-border movement of visual and software products. Trade in services often requires relocation of the service provider to the place of consumption (*e.g.*, establishment of a business in the country of consumption, or relocation of natural persons to the country of consumption to provide services), or movement of the consumer to the place where the service is provided (*e.g.*, repair of machines abroad, or overseas trips for sight-seeing purposes). In addition, services have another characteristic distinct from that of goods: one cannot hold stock in services.

Since trade in services often requires movement of production factors, including capital, labour, technology and management expertise, liberalization of trade in services will create new relationships among production factors originating in different countries and opportunities of increasing productivity. The effects on the domestic economy tend to be large, although the degree differs according to the form it takes, such as direct investment and movement of labour.

Direct investment will, in many cases, take the form of market entry of high-quality competitive service providers. Their participation may, in turn, change business practices in the importing country, have a positive effect on efficiency in the service industry there and provide consumers with a wider range of choices. In this case, existing domestic service suppliers would be faced with increased competition and, at times, be subject to merger or be driven out. However, the negative effects on the labour market are often small, and where new services are created, it will have a positive effect.

Movement of labour will have a more direct effect on the labour market. For example, if there is movement of unskilled labour from a low-wage country to a high-wage country, service suppliers will benefit from the use of cheap labour and be able to supply more cost-effective services. On the other hand, foreign unskilled labour will directly compete with domestic unskilled labour. Significant social costs may arise, depending on scale of the movement of labour.

(2) EFFECTS OF INCREASED EFFICIENCY IN THE SERVICE SECTOR

We need to keep in mind that most services, such as financial services, transport and shipping, communications, distribution, construction, and energy, are inputs to other industries. Therefore, increased efficiency in a certain service sectors may benefit not only the specific service sector itself, but will often have a greater positive spill-over effect in other service and manufacturing sectors. Benefits of trade in a service sector are not limited to increased efficiency in that specific service sector.

To conclude, although the liberalization of trade in services may result in a short-term selection of some inefficient service providers, it will lead to improved economic welfare for consumers through increased competition over quality and prices. Over the long term, it will contribute to better productivity and competitiveness of service providers not only in the liberalized service sector, but also in industries that use that service as an input. The economic benefits gained from liberalizing trade in services are therefore immense. Thus, even in areas where regulation is required, steps must be taken to ensure transparency, procedural fairness and fair competitive conditions.

TRENDS OF TRADE IN SERVICES NEGOTIATIONS IN THE DOHA DEVELOPMENT AGENDA

1. BACKGROUND OF DISCUSSIONS

(1) ORIGINAL NEGOTIATION PERIOD (UNTIL JANUARY 1, 2005)

Services liberalization negotiations (Negotiation of Specific Commitments) were mandated by the final agreement of the Uruguay Round, which called for entering into successive rounds beginning in 2000 (GATS Article XIX); this so-called “Built-in Agenda” also applied to agriculture. Discussions after the Seattle Ministerial Conference did not progress smoothly. Following over one year of discussions, the “Guidelines and Procedures for the Negotiations on Trade in Services” was finalized in March 2001; it stipulates negotiating goals, principles, scope and modalities.

Later, at the Doha Ministerial Conference in November 2001, the deadline for the service negotiations along with other negotiation items was set as January 1, 2005, and became a subject of the single undertaking in the comprehensive round. The Ministerial Declaration requested Members to submit their first request (initial request) for elimination of trade barriers by the end of

June 2002, and to respond with the first reply (initial offer) by the end of March 2003.

Japan submitted its initial request to all of the Members; it included the areas voluntarily liberalized after the Uruguay Round. Japan additionally submitted comprehensive negotiation proposals and a joint proposal promoting maritime negotiations, movement of natural persons, and exemption of the Most-Favoured-Nation Treatment, energy and education. As regards the cross-cutting rules concerning trade in services, Japan submitted a proposal on discipline of domestic regulation (GATS Article VI: 4) and actively participated in negotiations. Despite the deadline for submitting initial offer being the end of March 2003, only a limited number of Members mainly from developed members submitted the offer. Further, the negotiation at the Fifth Ministerial Conference in Cancun in September the same year practically broke down. As a result, the deadline which was set as January 1, 2005 was virtually extended, causing the negotiation in services to practically stagnate.

Later in the “Framework Agreement” of July 2004, it was agreed to submit improved initial offer, the “Revised Offer” before May 2005. Actions for revitalization of negotiation had been taken including delivering a statement which emphasized the importance of progress in negotiation in each area of trade in services. However, even after the deadline, insufficient numbers of Revised Offers were submitted, which raised the issue that an ordinary request and offer approach would not work for achieving sufficient liberalization, and acknowledged the need for an alternative approach among the Members. Accordingly, objective approaches such as introduction of quantitative objectives, qualitative objectives, and plurilateral negotiations by sectors/modes were discussed.

(2) After the 6th Ministerial Conference (December 2005 in Hong Kong)

In December 2005 during the Hong Kong Ministerial Declaration, the Members agreed on: (a) setting a qualitative objective as goal of efforts on each of the Modes; (b) introduction of plurilateral negotiations by sectors / modes as a negotiation format; and (c) submission of joint requests from concerned Members by the end of February 2006 (or after as soon as possible), the second version of revised offers from each Member by the end of July, and the final offers by the end of October.

Huge difference in positions between the developed and developing countries toward negotiations in services was a cause of slow progress in the negotiations. In general the developed countries are active in the negotiations because they have competitive service industries in major service sectors such as finance and telecommunications, while the developing countries, which do not have developed service industries, have strong concerns about negotiations on liberalization of trade in services led by the developed countries. Such differences are also evident in interests of developed and developing countries toward the 4 Modes in trade in services; the developed countries are mostly interested in locating their commercial bases in the territory of another country (Mode 3), while the developing countries are highly interested in movement of natural persons (Mode 4).

Following the Hong Kong Ministerial Declaration, plurilateral requests were submitted in February and March 2006 and joint requests in 21 fields were submitted (including the request on tourism in 2007). Japan actively participated in negotiations of all fields, as a requesting Member in 15 fields (including computers, finance, telecommunications, maritime, construction and logistics) and as a non-requesting Member in the other 6 fields (including movement of natural persons and cross-border trade).

At the informal Ministerial Meeting on services hosted by the EU in July 2006, the importance of the field of services was recognized again at the ministerial level. Also the atmosphere was

extremely positive and regarding the contents of the second revised offer, for which the deadline was end of July, Members presented each other their revised offers. However, some developing countries associated the quality of the offers or timing of submitting them with the progress in agricultural field. Submission of all major Members' offers around the deadline was uncertain. Under such circumstances, following the result of Ministerial Meeting on agriculture/NAMA in late July 2006, the WTO Director-General declared suspension of the whole negotiating process, which resulted in the deadline for the revised offer becoming invalid.

Later at the informal committee on trade negotiation in November 2006, the WTO Director-General declared the resumption of negotiations at the working level under the chairman of each negotiating groups. Discussions on future process and contents of liberalization in the second revised offer were resumed. Negotiations meetings were held in January, April, September and November 2007. Discussions were carried out regarding creating guidelines for the liberalization content that should be included in the offer and re-setting the deadline for submission of the next revised offer.

(3) SIGNALLING MINISTERIAL CONFERENCE (JULY 2008)

By 2008, negotiations had further accelerated. The Senior Officers' Meeting (SOM) and the meeting at the Ambassador level, had been convened in Geneva, and also numbers of approaches had been taken in each Member's capital city and bilateral negotiations had been held. As a result, the "Chairman's Report" was issued and the "Signalling Ministerial Meeting" was convened. In February 2008, the Chair of the service negotiations presented the "Chairman's Report" to the Members. That report practically contained the draft text for the services, which should be agreed upon when agriculture/NAMA modalities were agreed upon. In May and July of the same year the revised report was presented. The report presented after the informal Ministerial Conference in July 2008 stipulated (a) the level of ambition in services; (b) liberalization standards for future Round offers; and (c) the deadline for the future Round offer and final schedule (depending on the trends of whole Doha Development Agenda). Also, at the WTO informal Ministerial Conference in July 2008, a "Signalling Ministerial Conference" was convened to share (signal) what should be included in the future Round liberalization offers. (This Conference was attended by the Japanese Minister of Economy, Trade and Industry). At this Conference, many countries (both developed and developing) made positive statements with regard to major service areas, and a statement was issued promising deregulation regarding foreign capital and expansion of market access in the sectors of finance, telecommunication, construction and distribution, and progress was acknowledged in service area negotiations. (As for the results of the conference, a summary was contained in the report by the WTO Director-General, who convened the Conference, without listing individual countries' names (WTO: JOB(08)/93)). However, the WTO informal Ministerial Conference failed to reach agreement on modalities because the United States and India/China were divided regarding special safeguard measures (SSM) for developing countries, mainly on imported agricultural products.

After the Signaling Ministerial Conference in July 2008, technical discussions regarding the GATS rules continued, but no progress was made in liberalization negotiations for services because of lack of progress regarding agriculture and NAMA modalities. (During this same period, the US fell into a financial crisis, and as a result the leaders of the G20 countries issued a statement agreeing that "within the next 12 months, we will refrain from raising new barriers to investment or to trade in goods and services, imposing new export restrictions, or implementing World Trade Organization (WTO) inconsistent measures to stimulate exports").

During the G8 Summit (in L'Aquila, Italy) in July 2009, there was Ministerial agreement on

promoting solutions within the year 2010, and negotiation meetings with experts in different service fields were held. However, the gap between the requesting and non-requesting Members did not diminish, and Members were even worn out as regards bilateral negotiation on market access. Practical progress was not evident after the Signaling Conference. In order to get out of the stagnation of such negotiations, and also to give a good indication to industry of progress in service negotiations, new negotiating approaches including the clustering approach, a negotiation of relevant fields as a whole based on actual business circumstances, had been proposed in mid-2010s and discussions were held by proponents.

(4) TOWARD BALI PACKAGE (DECEMBER 2013)

The leaders at the APEC meeting in Yokohama and the G20 meeting in Seoul at the end of 2010 committed to conclude the Doha Round, and negotiations accelerated since the beginning of 2011. Although intensive discussions on market access negotiations have been conducted, they have deadlocked, along with negotiations in other areas. Thus, the negotiations have stagnated once again. Progress was made in LDC Modality, the framework of preferential treatment for least developed country (LDC) Members. (GATS Articles IV: 3 and XIX: 3 provide that special treatment shall be provided to LDCs.) In June 2011, the WTO Director-General presented nine items in which prior agreement should be sought before the WTO Ministerial Conference to be held in December of the same year. Among the items included was the scheme for preferential treatment to services and services suppliers of LDCs.

At the 8th WTO Ministerial Conference in December 2011, after 10 years had passed since the Doha Round negotiations in 2001, Members acknowledged that the single undertaking, which the Doha Round had been seeking, could be unlikely achieved in the near future. They shared the necessity of exploring “different negotiating approaches” and agreed to proceed with discussions on sectors for which progress could be achieved. In addition, the content of LDC Modality was agreed upon as follows: (a) providing preferential treatment to services and service suppliers of all LDC member countries; (b) the country providing preferential treatment will determine sectors and modes of supply of any service; and (c) the preferential treatment period is 15 years from the date of its adoption.

Through subsequent negotiations, a common understanding was established that trade facilitation and the development of part of agriculture were the sectors for which progress could be made. At the 9th WTO Ministerial Conference held in Bali, Indonesia in December 2013, intense negotiations resulted in agreement on the Bali Package. In that Package, implementation of the LDC Modality was agreed upon, including holding a high-level meeting on LDC Modality six months after the submission of an LDC collective request identifying the sectors and modes of supply in which they were interested in moving toward achieving preferential treatment.

(5) DEVELOPMENTS AFTER THE BALI PACKAGE (POST-BALI WORK)

At the 9th WTO Ministerial Conference in 2013, it was agreed, as a post-Bali work program, to prepare clear work plans for the remaining issues of the Doha Development Agenda (DDA) within 12 months. However, at the General Council meeting in November 2014, while the significant outcome of the adoption of the protocol of the Trade Facilitation Agreement was achieved, the deadline for post-Bali work plans, including the services sector, was extended to the end of July 2015. However, a gap in viewpoints remained among Members, due to which they failed to complete any work plans by the deadline.

As for LDC Modality, LDCs submitted the “LDC collective request regarding the services waiver” to the Council for Trade in Services in July 2014, and a high-level Meeting on the

Operationalization of the LCD services waiver was held as a formal Council meeting in February 2015. As a result of the discussion at the meeting, it was decided that Members would notify the WTO Secretariat of the preferential treatment they provide to LDCs. Japan made its notification at the end of July 2015.At the 10th WTO Ministerial Conference in 2015, as a result of the discussion aiming at any outcome concerning services, it was decided to: (1) extend the LDC services waiver until 2030, (2) encourage Members to undertake specific technical assistance and capacity building measures to ensure that LDC service suppliers can utilize the preferences regarding which notification has been provided, (3) encourage Members that have not provided notification of preferences to promptly do so, and (4) initiate a process to review the operation of notification of preferences). It also was decided to extend the taxation moratorium in relation to electronic commerce (see Addendum 2 "ELECTRONIC COMMERCE").

2. CURRENT OVERVIEW

At the 11th WTO Ministerial Conference in 2017, Australia, the EU, Canada, Japan, and other countries jointly proposed text concerning domestic regulation (WT/MIN(17)/7/Rev.2). However, Members did not reach an agreement due to opposition from African and other developing countries. Those that made the joint proposal issued a joint ministerial statement (WT/MIN(17)/61), calling upon all Members to intensify work toward the conclusion of negotiations before the next Ministerial Conference (WT/MIN(17)/61).

An overview of recent discussion held at meetings of the Council for trade in services and its subordinate bodies is as follows.

(a) At the Council for Trade in Services, discussions are being held on issues including the above-mentioned LDC services waiver, the WORK PROGRAMME ON ELECTRONIC COMMERCE, which was agreed upon at a series of Ministerial Conferences, and cybersecurity laws in China and Viet Nam (see Part I, Chapter I Trade in Services, (5) Chinese Cybersecurity Law, and Chapter 2, 4. Viet Nam, Trade in Services, Cybersecurity Law (Draft)).

(b) At the Working Party on Domestic Regulations, following the Hong Kong Ministerial Declaration, in which Members agreed to develop discipline of Domestic Regulation (international regulations on the license/standard of qualifications/procedures regarding supply of services) before the conclusion of current Round; discussions have been undertaken in parallel with market access negotiations. As a result of intensive discussions, the chairman’s text with annotations of probable points of conflict and controversy was made publicly available on March 14, 2010. During 2011, despite intensive work on preparing draft text, substantial convergence was not achieved among Members regarding substantive matters of regulation. Currently, discussions continue to mainly focus on formulation of rules on domestic regulation under Article VI: 4 of the GATS.

(c) The Committee on Specific Commitments discusses services classification issues that may arise from possible changes in the development of business and technology. At present, discussions on the classification of “new services” that are not yet classified are taking place.

(d) At the Working Party on GATS Rules, discussions on emergency safeguard measures, government procurement and subsidies were held as explained below. The Working Party did not meet in 2017. Discussions on emergency safeguard provisions in regional trade agreements initiated in 2014 were ongoing. The final version of the Staff Working Paper concerning government procurement was completed in November 2014. As regards subsidies, the Secretariat issued the revised version of its Background Note in January 2015, to which several Members made comments.

(e) The committee on Trade in Financial services is holding discussions on trade in financial services and development, and regulatory issues in financial services, etc. Regarding trade in financial services and development, discussions on “financial inclusion” are ongoing, and the Secretariat had compiled the overview.

(f) In relation to discussions on electronic commerce under the WORK PROGRAMME ON ELECTRONIC COMMERCE, in November 2014 the EU submitted a proposal on electronic authentication and made a presentation concerning the new EU rules for electronic signature, while the United States submitted a proposal on cross-border circulation of information, demand for data localization, and cloud computing. In June 2015, Chinese Taipei submitted a proposal on the protection of personal information and development of electronic commerce, and also proposed holding a workshop on this issue, while China submitted a proposal to the Council for Trade in Services for promoting the exchange of information concerning electronic commerce among Members and adopting this issue as a permanent sub-agenda item. In June 2016, developed countries expressed their opinion that additional disciplines should be considered, but there was a contrary opinion that a debate based on the WORK PROGRAMME ON ELECTRONIC COMMERCE should not aim to formulate any regulations. In October 2016 there was a debate in relation to a seminar proposed by Taiwan on trade in services for electronic commerce. Although a general agreement was reached that a debate should be held under the Work Program, no negotiation authority was granted under the Work Program, and some argued that attention should be paid to development issues. As such, it was decided that efforts to coordinate the views should made under the supervision of the Chair. There was also an ongoing discord among Members in 2017: while some argued that some sort of outcomes should be aimed to be achieved in the 11th Ministerial Conference, others argued that information and opinion exchanges and sharing of insights would be enough as the WORK PROGRAMME did not include any negotiation mandate. As for the seminar on e-commerce, India claimed that it would not support the holding of the seminar unless a Mode 4 seminar is to be held. It was decided that this issue would be discussed in the following year.

3. A NEGOTIATION ON NEW AGREEMENT ON TRADE IN SERVICES

A long time has passed since GATS came into force in 1995. During this period several countries have requested the WTO to revise commitments and develop new rules corresponding to changing circumstances due to the technology revolution including expansion of internet, and changes in the reality of supply/consumption of services. However, the Doha Round remained in deadlock with little hope for rapid progress, and Members had driven forward the liberalization of trade in services through conclusion of EPAs/FTAs.

At the 8th WTO Ministerial Conference held in December 2011, agreements were made on: (1) non-suspension of the Doha Development Agenda which developing countries strongly support; and (2) working on “new approaches” which build upon possible outcomes, including partial agreements and prior agreements, while admitting that a single-undertaking would be impossible to fulfill at the moment.

Accordingly, in the beginning of 2012 some Members volunteered to start holding discussions on development of a new negotiation for liberalization of trade in services as one of the “new approaches”. With the purpose of upholding and expanding momentum in negotiation, securing transparency toward developing countries and encouraging them to join the discussions, the media release “Advancing Negotiations on Trade in Services“, a summary of the unanimous opinions in 6 months of discussions, was made publicly available on July 5, 2012 (see page 497 in the 2016 Report on Compliance by Major Trading Partners with Trade Agreements -WTO, FTA/EPA and

IIA-). The voluntary Members continued holding discussions, and proceeded to the full-scale negotiation phase by June 2013. Although the Members agreed at the unofficial Ministerial Conference held in January 2016 to accelerate negotiations with an eye to their completion by the end of 2016, the negotiations did not see completion in the same year and reached a deadlock. Members from 23 nations/regions participated (Japan, United States of America, European Union, Australia, Canada, Republic of Korea, Hong Kong China, Chinese Taipei, Pakistan, Israel, Turkey, Mexico, Chile, Colombia, Peru, Costa Rica, Panama, New Zealand, Norway, Switzerland, Iceland, Liechtenstein and Mauritius (as of February 2018)).

This new negotiation aims at developing new advanced rules suitable for the 21st Century, adopting more liberalized rules in trade in services than the current GATS rules and outcomes of the current EPAs. Japan will actively address consensus-building in these important fields of trade in services working together with concerned Members.

MAJOR CASES

(1) Canada – Measures Regarding Automobiles (DS139, 142)

Canada's preferential measures for wholesale automobile services under the "Auto Pact" violate the most-favoured-nation (Article II) and national treatment (Article XVII) obligations of the GATS. Japan, together with the EC, contested Canada's auto program before the WTO; the Panel upheld virtually all of Japan's arguments. However, in May 2000, the Appellate Body overturned the Panel ruling, finding insufficient evidence that Canada's program impacted services. Canada, after completing its public comment procedures, issued an administrative order eliminating the preferential measures effective 18 February 2001. (For details, *see* the section on Canadian automobile measures in Part II, Chapter 1, Most-Favoured-Nation Principle.)

(2) Mexico – Telecommunication Services (DS204)

Mexico permits several carriers to offer international telephone services, but the international long-distance telephone service regulations mandate "negotiations on interconnection rates with telecommunication businesses from certain countries by the long-distance service licensee that has achieved the largest share in the long-distance telephone market over the 6 months preceding the negotiations." In practice, accounting rate systems for settling interconnection rates with carriers from certain countries are conducted solely by TELMEX (Mexico's telecommunications company), which controls 60 percent of the market; other Mexican carriers merely apply the rates to which it agrees (the so-called uniform accounting rate system). The United States claimed that: (i) this accounting rate system is not based on actual costs; (ii) the system allows exclusive negotiation rights and the uniform accounting rate is unreasonable because it permits the major service provider to engage in anti-competitive activities; and (iii) the practice is contrary to the "Reference Paper on the Regulatory Framework for Basic Telecommunications Services"("Prevention of Anti-Competitive Practices" and "Interconnection to be Ensured") included by Mexico in its specific commitments. The United States also claimed that Mexico's measures prohibiting foreign companies from supplying services by using public telecommunications transport networks and services violates the duty set forth in the GATS "Annex on Telecommunications," which obligates Members to ensure access to and use of public telecommunications transport networks and services on reasonable terms and conditions. In August 2000, the United States requested WTO consultations with Mexico. In November of that year, the United States requested that a panel be established and again sought consultations with Mexico. A WTO panel was established on

April 17, 2002. Japan participated as a third-party. The panel issued its report in April 2004. The panel found against Mexico with respect to the GATS "Annex on Telecommunications". (Concerning measures prohibiting the provision of services by foreign companies using public telecommunication transport networks and services, although Mexico has committed to the liberalization of Mode 3 (commercial presence), it has not committed to Mode 1 (cross-border supply of services). Therefore, prohibiting the provision of services in Mode 1 did not constitute a breach of the Agreement, and only the section that prohibited the provision of services in Mode 3 was considered a breach of the Agreement.)

In accordance with the findings of the panel, Mexico and the United States reached an agreement in June 2004. Mexico issued revised international long-distance telephone service regulations in August of the same year to implement the agreement.

(3) United States – Online Gambling Services (DS285)

The United States regulates internet gambling services. In March 2003, Antigua and Barbuda requested WTO consultations with the United States claiming that the US regulations violated US commitments to liberalize entertainment services (no restrictions to be imposed on Mode 1: cross-border supply of services), as well as GATS Articles XVI (Market Access), VI (Domestic Regulation), XI (Payments and Transfers) and XVII (National Treatment). Antigua and Barbuda requested the establishment of a WTO panel in June 2003. The panel issued its report on April 30, 2004, and circulated copies to Members in November 2004. The panel found that US federal regulations and state laws violated US market access commitments under GATS Article XVI. However, the panel did not make any judgment on the consistency/inconsistency with other articles of GATS. Both parties appealed the ruling of the panel in January 2005, and the Appellate Body found violation of GATS Article XVI on the part of the United States.

After that, an implementation panel pursuant to Article 21.5 of the DSU was established due to the divergent opinion among the parties regarding the existence and/or consistency of measures implemented by the United States to comply with GATS. A panel report saying that the US had not implemented the DSB's recommendations was issued on March 30, 2007 and adopted by the DSB on May 22, 2007. Thereafter, on June 21, 2007, Antigua and Barbuda requested approval of countermeasures (suspension of concessions and other duties under the GATS and TRIPS agreements) pursuant to Article 22.2 of the DSU. Upon the request of the US on July 23, 2007, the case was submitted to arbitration regarding the amount of the countermeasure. On December 21, 2007, the arbitrator's report approving the countermeasure on the TRIPS Agreement was issued, although its amount was drastically reduced (from the 3443 million US dollars per year that Antigua demanded to 21 million US dollars per year).

Meanwhile, on May 8, 2007, the US informed the Member countries that it would renegotiate its Schedule of Specific Commitments to exclude gambling and betting services. Concerned countries have the right to negotiate for compensation if this action by the US has any negative effect on their interests. Negotiations were not successful, so Antigua and Barbuda and Costa Rica requested arbitration to determine the level of compensatory adjustment as provided by GATS Article XXI: 3(a). (Later, Costa Rica came to an agreement on the US proposal for compensation, and reported the completion of negotiation and suspension of arbitration to the Dispute Settlement Body. The arbitration between Antigua and Barbuda and the US has been suspended upon mutual agreement).

Antigua and Barbuda had been requesting mediation by the Director-General to resolve the problem since the issuance of the above arbitrator's report. However, it requested that the DSB approve the suspension of concessions and other duties under the TRIPS Agreements pursuant to

Article 22.7 of the DSU on December 13, 2012.

(4) China - Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products (DS363)

On acceding to the WTO, China agreed that, within three years of accession, it would bring its measures regarding the import and distribution of publications (books, newspapers, etc.) and audiovisual products (CDs and DVD, etc.) by foreign companies into compliance with WTO requirements. However, the Chinese government still restricts operating in such industries to either national Chinese companies or companies in which the majority investment is Chinese capital. In April 2007, at the same time as the U.S. raised the problem of intellectual property rights systems regarding import and distribution restrictions relating to Chinese copyright (DS362), it also requested a consultation with China based on the WTO Agreement. The subsequent bilateral consultation failed to reach an agreement, and in October of the same year the U.S. requested the formation of a Panel. The Panel was established at the November meeting of the WTO Dispute Settlement Body.

In August 2009, the Panel found that there had been a violation of Article XVII (national treatment) of the GATS, mainly because of the following four points:

(1) While China had agreed to unlimited national treatment under the terms of the GATS for third mode distribution (wholesale) service, foreign-owned companies within China were effectively prevented from participation in the distribution of imported publications.

(2) While China had agreed to unlimited national treatment for distribution (wholesale and retail) services, it in fact prohibited foreign-owned companies from engaging in master distribution (one form of distribution for which the permission of a master distributor is required for the sale of publications).

(3) Discriminatory minimum capitalization requirements and operating period restrictions placed only on foreign-owned companies when engaging in the wholesale of publications. (In regard to the prohibition on foreign-owned companies distributing publications in electronic form, the Panel found that this may also constitute a violation of GATS Article XVII, but the Panel denied the claim by the U.S. on this point since the proof that foreign-owned companies were unable to engage in the distribution of publications in electronic formats was not sufficiently made).

(4) China had included within its commitment the category of “Sound Recording Distribution Services” under the heading “Audio Visual Services”, and this could be interpreted to include distribution of audiovisual recordings in non-tangible forms, for example in electronic formats using technology such as the internet. In effect, however, foreign-owned companies were prevented from engaging in the distribution of audiovisual products, particularly in electronic formats using technology such as the internet.

Furthermore, the Panel found that there had been a violation of Articles XVI and XVII of GATS in the measure that disqualified companies with more than 50% foreign capital from engaging the distribution of videos, DVDs or other audiovisual home entertainment products despite the fact that China had agreed not to restrict investment ratios by foreign-owned companies engaging in mergers with companies involved in video distribution services. (China appealed the Panel decisions in regard to sound recording distribution services to the Appellate Body, but it upheld the Panel’s decisions). Ultimately, the breach of the treaty obligation by China was confirmed in

December 2009, with the DSB setting the period to comply with the measures as ending on March 19, 2011.

Afterward, at the meeting of the WTO Dispute Settlement Body held on February 22, 2012, China announced that it had fulfilled the majority of the DSB's recommendations, and that both China and the US reached a memorandum of agreement to settle the dispute on February 18, 2012. According to the US-China joint communication addressed to the chairman of the Dispute Settlement Body as of May 9 of the same year, the memorandum includes requiring: (1) the importation of at least 14 titles of high-definition films such as IMAX and 3D, in addition to the 20 titles that the Chinese Government set for itself within the framework of the annual distribution restrictions for foreign films (import approval calculated according to the profit sharing formula); (2) raising profit distribution for film producers to 25%; (3) to allow Chinese enterprises including private enterprises to enter the market of foreign film distribution; and (4) the United States and China to hold consultations on the main factors of the memorandum five years later and discuss the issues of the DSB's recommendations. China announced that it had fulfilled all of the DSB's recommendations at the WTO DSB meeting held on May 24, 2012. Meanwhile, the United States stated that the agreed memorandum represents major progress but is not the final solution.

Japan continues to follow the development of this situation between the US and China, and also the development of the reform and implementation of relevant Chinese judicial systems as well as seeking further deregulation regarding foreign capital in bilateral policy dialogues and the WTO service negotiations.

(5) China - Regulations Related to Electronic Payment Services (DS413)

The Chinese government is currently implementing various measures in order for China Union Pay ("CUP") to monopolize electronic payment service ("EPS") for payment in China's domestic currency, Renminbi ("RMB") in China. The United States requested consultations with China on September 15, 2010, alleging that China appears to be acting inconsistently with its obligations under Article XVI (market access) and Article XVII (national treatment) of GATS. A panel was established on March 25, 2011. Japan participated as a third-party (as did Australia, Ecuador, the EU, Guatemala, India and Republic of Korea).

The United States alleged that China refuses to allow foreign suppliers of EPS to establish the processing infrastructure and network in China or to process payment transactions in China denominated in local currency (RMB). Therefore, foreign suppliers of EPS need to make payments through China's monopolized payment network (China Union Pay) by entering into a joint venture with Chinese operators. The United States believes that these regulations are not consistent with China's commitment when it acceded to the WTO to provide by December 11, 2006, both market access and national treatment for "all payment and money transmission services, including credit, charge and debit cards" to foreign financial organizations in foreign and local currency.

The Chinese measures that the United States claims to be inconsistent with obligations under the GATS are the following:

(1) Requirements that mandate the use of CUP and/or establish CUP as the sole supplier of EPS for all domestic transactions denominated and paid in RMB.

(2) Requirements for institutions that issue payment cards to bear the CUP logo on RMB-denominated payment cards (including bank, credit, charge and debit cards) issued in China. The institutions that issue payment cards to consumers must also have access to the CUP system.

(3) Requirements that all automated teller machines ("ATMs"), merchant card processing

equipment, and POS terminals in China put CUP logo and accept CUP cards.

(4) Requirements that mandate all acquirers (contracting merchants) to post CUP logos and accept all payment cards with CUP logo.

(5) Broad prohibitions on the use of non-CUP cards for domestic and inter-bank transactions.

(6) China requires that CUP be used to handle all RMB transactions in Macao or Hong Kong using bank cards issued in China, and all RMB transactions in China using bank cards issued in Macao and Hong Kong.

Whether the measures described above breach the commitments China made when acceding to the WTO are dependent on the WTO service category in which electronic payment services and RMB transactions are classified.

The United States claimed that the services in question constituted “all payments and money transmission services (including credit, charge and debit cards), and stated that China committed to providing market access and national treatment of these services in the Specific Commitments in its GATS Schedule when it acceded to the WTO.

China claimed that it had not made commitments to open RMB bank cards and the clearing and settlement market to foreign-funded institutions, and that these services were categorized as “settlement and clearing services for financial assets (which relate to issues such as securities settlement)” in the Annex on Financial Services.

The panel report was distributed to the Members on July 16, 2012. Neither the United States nor China brought an appeal to the Appellate Body, and was adopted at the DSB meeting on August 31, 2012.

The panel first construed China’s commitment taking into account the regular meaning of its words in their context and in light of object and purpose of the agreement. EPS was found to fit in the category of “all of the payment and transfer services (including credit, charge and debit card)”.

Second, the panel reviewed whether or not the above measures of 1 to 6 existed as the US claimed, and recognized existence of measures 2, 3, 4, and 6. As regards to existence of the measures 1 and 5, after conducting reviews on each legal document indicated by the US, the panel did not recognize that such measures would establish CUP as the sole supplier or prohibit the use of other service supplier upon EPS paid in RMB .

Third, the panel found that measure 6 violated Article XVI, Paragraph 2 (a), which prohibits restricting the number of service suppliers. The panel found that China made CUP the exclusive service supplier on certain transactions.

Fourth, the panel considered that measures 2, 3, and 4 violated Article XVII, Paragraph 1 because it treated EPS suppliers from other member countries less favourably than CUP.

As reported above, the US and China reached an agreement to set the implementation period as 11 months from the adoption of the panel report (August 31, 2012), ending on July 31, 2013. China announced that it had fulfilled all of the DSB’s recommendations at the WTO DSB meeting held on July 23, 2013. However, the U.S. disagreed and announced that it would monitor and review the Chinese measures. On August 19 of the same year, the U.S. and China notified the Dispute Settlement Body that the two countries had agreed to solve the issue through bilateral consultations.

(6) Argentina - Measures Relating to Trade in Goods and Services (DS453)

Panama alleged that Argentina applies various measures under the Income/Profits Tax Law only

to trade with specific countries and that these measures are inconsistent with the rules under the GATS, including MFN treatment (Article II), payments and transfers (Article XI), market access (Article XVI), and national treatment (Article XVII), as well as some provisions of the GATT 1994. Accordingly, Panama requested consultations with Argentina on December 12, 2012, and a panel was established on June 25, 2013. This dispute concerns the following financial, taxation, foreign exchange and registration measures imposed by Argentina, mostly on services and service suppliers from countries which do not exchange information with Argentina for tax transparency purposes ("non-cooperative countries"):

1. Withholding tax on payments of interest or remuneration;

2. Presumption of unjustified increase in wealth;

3. Transaction valuation based on transfer prices;

4. Payment received rule for the allocation of expenditure;

5. Requirements relating to reinsurance services;

6. Requirements for access to the Argentine capital market;

7. Requirements for the registration of branches; and

8. Foreign exchange authorization requirement.

The panel circulated its report on September 30, 2015. It found that measures 1 to 8 in dispute all are inconsistent with Article II: 1 of the GATS because by taking these measures Argentina accords to services and service suppliers of non-cooperative countries treatment less favourable than it accords to like services and service suppliers of cooperative countries.

The panel found that measures 2, 3, and 4 are not inconsistent with Article XVII of the GATS because by taking these measures Argentina accords to services and service suppliers of non-cooperative countries treatment no less favourable than it accords to like Argentine services and service suppliers in the relevant services and modes in which Argentina has undertaken specific commitments.

The Panel dismissed Panama's claim with respect to measure 5 (requirements relating to reinsurance services) because (1) measure 5 is not covered by Article XVI: 2(a) of the GATS (limitations on the number of service suppliers) and (2) Panama had failed to establish a *prima facie* case of inconsistency under Article XVI: 1 of the GATS.

In response to Argentina's arguments, the panel found that measures 1, 2, 3, 4, 7, and 8 are not justified under Article XIV of the GATS because the distortion arising from Argentina designating cooperative countries and non-cooperative countries is inconsistent with the chapeau of Article XIV(c) of the GATS, which prohibits arbitrary and unjustifiable discrimination.

In response to Argentina's argument that measures 5 and 6 are taken for prudential reasons, the panel found that these measures could not be deemed to have been taken for prudential reasons because there is no rational relationship between these measures and the prudential objective, and it concluded that they are not justified under paragraph 2(a) of the Annex on Financial Services.

Meanwhile, the panel refrained from ruling regarding Argentina's defense under Article XIV(d) of the GATS, exercising judicial economy because it found that measures 2, 3, and 4 are not inconsistent with Article XVII of the GATS (national treatment).

Panama filed an appeal with the DSB on October 27, 2015, and Argentina also filed an appeal on November 2, 2015. The Appellate Body report was issued on April 14, 2016.

The Appellate Body determined that if measures are classified only based on the country of

origin of services or service suppliers, their likeness will be inferred. However, it found that in its analysis under Article II:1 of the GATS, the Panel did not make a finding that the distinction between cooperative and non-cooperative countries in the measures at issue was based *exclusively* on origin, and that the Panel erred in finding likeness “by reason of origin” in the absence of such a finding. Accordingly, the Appellate Body reversed the panel’s findings that had found that the measures 1 to 8 were in violation of GATS Article II, Paragraph 1. The Appellate Body also reversed the panel’s findings on the violation of GATS Article XVII because its findings on likeness under GATS Article XVII were based on its findings relating to GATS Article II, Paragraph 1.

(7) EU - Measures Regarding Energy Industry (DS476)

In April 2014, Russia requested consultations with regard to the consistency of the EU's gas industry regulations with the WTO Agreement (mainly GATS). The measures in dispute can be broadly classified into the following three types:

* Various measures based on EU Directive No. 73, 2009 concerning common rules for the internal market in natural gas which was established in July 2009 (Hereafter, Gas Directive) which is included in the series of EU directives and regulations related to gas and electricity called "Third Energy Package".
* Domestic measures of certain EU members (three countries Croatia, Hungary and Lithuania) to implement the Gas Directive,
* Measures based on the Trans-European Networks for Energy Regulation related to the designation of priority energy infrastructure projects (TEN-E measures).

The panel circulated its report on August 2018, and the outline is described below.

The unbundling measure

(a) The unbundling measure under the Gas Directive

The Gas Directive introduced regulations (the unbundling measure) separating the gas production or supply business from the transmission system operator (TSO) or the transmission system with respect to vertically integrated undertakings (VIUs) that produce and supply of natural gas. The specific forms of separation are, in principal: (i) producer or supplier shall not have ownership of the transmission system (the same operator shall not control/hold the right of both of transmission and production/supply) (ownership unbundling (OU) model), except that transmission systems belonging to VIU as of September 3, 2009 may take either or both of (ii) a method in which (VIU delegates system operation to an independent operator while maintaining ownership of the transmission system (independent system operator (ISO) model), or (iii) a method in which an affiliated company of VIU owns and operates the transmission system (in other words, VIU can maintain control over the owner and operator of the transmission system, however, the transmission system operator's decision regarding the transport business needs to be independent from the VIU to some extent.) (independent transmission operator (ITO) model).

Russia claimed that the unbundling measure under the Gas Directive discriminate Russian pipeline transmission service suppliers that provided relevant service in EU members which introduced only OU model against pipeline transmission service suppliers of other non-EU members that provided relevant services in other EU members which introduced other two models as well, by enabling the choice whether to introduce only OU model or introduce other two models as well to the EU members (GATS Article II: 1). In addition, Russia argued that Russian natural gas

was discriminate against natural gas of other non-EU members or of EU members (GATT Articles III: 4 and I:1).

<Premise: Regional level to assess WTO consistency>

First, the EU argued that, since EU directives have the effect of determining the conditions for natural gas sales and pipeline transmission services only after they are enforced by the national laws of each EU member state, it should be judged only on the territory basis of each member state rather than on an EU-wide basis (and there can be no discrimination based on nationality of service/service suppliers in each of such territory unit). However, the panel determined that the consistency of the unbundling measure under the Gas Directive should be assessed in relation to the entire EU because the unbundling measure under the Gas Directive applies to the entire EU, and have effect of imposing legal obligations on EU member states to enforce the unbundling measure,.

< GATS Article II: 1>

Russia claimed the violation of MFN treatment obligation under GATS for mode 3 of pipeline transport service. For service provision of mode 3, two types of entities are related; (i) commercial presence in the service importing country (for example, TSO) (GATS Articles I: 2 (c) and XXVIII (d)); and (ii) natural or juridical persons in the service exporting countries that provide services through the commercial presence (for example, VIU). Accordingly, it was argued that the treatment of which entity should be examined.

The panel found that entities that should be assessed for the treatment of services and service suppliers under GATS depend on the details of the claim and measures in individual cases. The panel further found that, regarding VIU under the unbundling measure at issue, while the treatment for VIU cannot be completely ignored, only VIU that “owns” (owns a majority stake) or “controls” (directorship majority, etc.) (GATS Article XXVIII (n) (i) (ii)) TSO shall be taken into account.

Next, regarding the difference between the OU model and the other models in terms of the pipeline transport service and treatment for the service supplier (impact on the competitive conditions), in the OU model, VIU faces the legal need to choose whether to continue the production and supply functions, or to continue pipeline transport services through a commercial presence (TSO) (pipeline transport services cannot be provided through the commercial presence in the EU market while continuing production and supply operations), while there is no such need in ITO model. Thus, the panel found that the latter model gives less favourable treatment to the service supplier as compared to the former model.[1]

Next, the issue was whether the less favourable treatment is given to the Russia's service/service supplier by giving choice of ITO model to the EU members under the unbundling measure. Russia claimed that, while the unbundling measure does not provide discrimination on its text, it actually (de facto) discriminates Russian pipeline transport services and suppliers. Regarding the approach of finding the de facto discrimination under GATS, the EU argued that, like the one under GATT, it needs to conduct a group-to-group comparison for the subjects to be compared and the predominant effect test (an approach that finds a less favourable treatment of a group only when a predominant

[1] With regard to the ISO model, because an entity who provides a pipeline transport service is an independent ISO, and VIUs cannot be deemed that they can continue the service (through ISO), the panel found that there was no difference in treatment of VIUs between the OU model and the ISO model and did not advance to examine the existence or nonexistence of the de facto discrimination of the Russian service and service providers.

part of that group receives the less favouralble treatment) should be taken. In this regard, the panel found that it is required to compare the entire group in the current case as well, stating that it is concerned with the approach of comparing only a part of related groups (e.g. to ignore Russian service/service suppliers who are subject to the ITO model and service/service suppliers of other non-EU member countries who are subject to the OU model). However, the panel also found that the predominant effect test is not the sole means to show the design, structure, and expected operation of the measure. In particular, when the number of service suppliers in a specific industry is limited, it cannot be denied that limited number of application cases can also be relevant evidence.

Then the panel further found that the individual cases of less favourable treatment that Russia has raised are not related to the relevant VIUs "own" or "control" the TSO, and thus not the ones of Russian service and service suppliers. Moreover, the panel found that there are more cases in which the Russian VIUs were affected not only under the OU model but also under the ITO model than cases in which VIUs of other countries – This reflects the situation in the EU market at the time the Gas Directive came into effect that Russian service suppliers had a superior commercial position over service suppliers of other countries, rather than the design etc. of the measure. Based on those findings, the panel did not find that there is a less favourable treatment for the Russian pipeline transport service/service supplier based on the design and structure of the measures and expected operation. In conclusion, the panel did not find that the unbundling measure under the Gas Directive is inconsistent with GATS Article II: 1.

<GATT Article I:1 and Article III: 4>

Russia argues that, since VIUs cannot own or control TSO under the OU model, while VIUs can promote transportation and supply of its own natural gas by controlling TSOs under the other two models, the former model will give less favourable treatment to the VIU's natural gas than the later model. However, the panel did not find that the unbundling measure is inconsistent with GATT Article I: 1 and Article III: 4 as there is no difference regarding the treatment of VIUs' natural gas between models, and VIUs under the other two models do not gain a competitive advantage in its natural gas transmission and supply, considering that TSO is obliged to allow third-party access to the pipeline under the other two models etc. The panel also found that there is no need to further examine about the de facto discrimination.

(b) The Unbundling Measure by Three Countries

Russia claimed that the unbundling measures implemented by each of the three countries (or parts of them) – Croatia, Lithuania and Hungary –[2] are inconsistent with WTO Agreement by restricting (1) number of pipeline transport service suppliers (GATS Article XVI:2 (a)), (2) forms of legal entity supplying the service (same article (e)), and (3) foreign capital participation (same clause (f)) are restricted and inconsistent. However, the panel rejected all of these claims for the following reasons:

Article XVI: 2 (a) (limitation on the number of suppliers): The fact that there is currently only one state-owned monopoly company in each of Croatia and Lithuania, does not demonstrate that the unbundling measures limit the number of suppliers by nature.

[2] These three countries promise liberalization of all or a part of market access and national treatment obligation regarding the third mode of pipeline transport service in a GATS commitment list.

Article XVI: 2 (e) (forms of legal entity): The clause covers measures that clearly define the types of legal entity (legal form) for the service supplier to supply the service, rather than all measures that affects the legal entity (e.g. by requesting certain conduct, or restricting certain conducet). For the unbundling measures, it is stipulated whether VIUs can own or control TSO, however, ownership or control itself does not imply the legal form of the entity. The unbundling measures do not determine the legal form of the entity and do not fall under the scope of the provision (e).

Article XVI: 2 (f) (foreign capital participation): Considering the ordinary meaning of the term "foreign capital", and the context that each item (a)-(e) is a country-neutral provision, item (f) applies only to restrictions on capital participation because it is foreign capital. The domestic laws of the three countries are all regulated in a country-neutral form and therefore are not subject to the provision of the same clause (f).

(2) The Public Body Measure by Three Countries

Under the Gas Directive, VIUs can own and control both TSO and production and supply business only if the government or public body has control of VIUs and through different public bodies (exception from the unbundling measure) (The public body measures). Russia argues that the public body measures apply only to the public bodies of the EU member states and that the public body measures by the three countries is inconsistent with the national treatment of the pipeline transport service supplier (GATS Article XVII).

With regard to the less favourable treatment requirement, the panel found that Russia needs to demonstrate that: (i) the public body measures are an "exception" of unbundling measure and that (ii) the public body measures only apply to domestic service suppliers and that the competition conditions have been changed against other countries' service suppliers. In this regard, the public body measures require a complete separation of the public body that controls the TSO or transport system and the public body involved in the production and supply business. Because it is functionally equivalent to unbundling measure, in terms of requirement of separation between transport and production supply functions, the public body measures is not an "exception" of the unbundling measure, and it has not been demonstrated that the scope of application of the public body measures is limited to public institutions in EU member states under the Gas Directive and domestic law. Panel has not approved the inconsistency with GATS Article XVII without approving the disadvantageous treatment.

(3) The Liquefied Natural Gas (LNG) Measure Under the Gas Directive

Under the Gas Directive, operators of LNG facilities and LNG systems are not included in TSO and transport systems that are subject to the unbundling measure by definition. For LNG, VIUs can own and control both production and supply businesses and transport systems. Russia argues that, as LNG exported to the EU by other non-EU member states has gained "benefits" that are not provided to Russian natural gas, the measure violates the MFN principle (GATT Article I: 1). However, the panel found that LNG and natural gas are not considered to be the like product due to differences in HS codes and transport modes, etc., and did not find that the determination on other requirements is required, and rejected the aforesaid claim by Russia.

(4) The Infrastructure Exemption Measure Under the Gas Directive

Under the Gas Directive, certain major natural gas facilities such as new inter-state pipelines are exempted from the unbundling measure etc. (the infrastructure exemption measure). Russia

claimed that the application of infrastructure exemptions by relevant national regulatory authorities (NRAs) and the European Commission in several specific individual cases are inconsistent with Article X: 3 (a) of GATT in that the Gas Directive is not implemented in a uniform, impartial and reasonable manner. Russia has also claimed that because it is disadvantageous to Russian pipeline transport service suppliers and Russian natural gas compared to the like services and goods of other non-EU countries, the Gas Directive is applied in a discriminatory manner and lacks consistency, it violates the MFN principles (GATS Article II: 1 and GATT Article I:1).

The Panel ruled that Russia's allegation is outside the scope of Article X: 3 (a) of GATT because it is not about "administration" of the infrastructure exemption measure but about the substantive aspects of the applicable standards. Furthermore, the panel examined each decision raised by Russia and found that it is not demonstrated that the Gas Directive is applied in a discriminatory and non-consistent manner, and thus did not find a violation of MFN treatment obligations.

In addition, in the determination of the infrastructure exemption measure for pipelines funded by a certain Russian operator (Gazprom), under the direction by the European Commission, the NRA of Germany (i) imposed an upper limit (50% or less) on the allocation of exit capacity to dominant operators including Gazprom and; (ii) imposed a condition in the event of allocation exceeding the limit, such dominant operator is obligated to sell a certain amount of gas to a competitor at a fixed price and release the equivalent capacity of the pipeline. Russia claimed that these imposed conditions are import restriction tor Russian natural gas and violated Article XI: 1 of GATT.

The panel found that these two conditions are considered as import restrictions on Russian natural gas and are inconsistent with GATT Article XI:1, taken into account the following facts, among others: that the allocated capacity will affect the amount of natural gas transported using the capacity, ;that, in particular, , due to the nature of natural gas and pipeline transportation, the access conditions for capacity have a restrictive effect on imports of products when associated with an entry point into the importing country market; that for the pipeline at issue, Gazprom is the exclusive user of capacity, and all transported natural gas of the operator is originated in Russia, and; that the upper limit of capacity is reinforced by the gas sales and capacity release obligations etc.

(5) The Upstream Pipeline Networks (UPN) Measure

Under the Gas Directive, UPN (pipelines and networks used for natural gas production and transportation to refineries) falls out of the definition of "transport" and unbundling measure are not applied. Thus, VIUs can own or control both the natural gas production and supply business and the UPN system (the UPN measures). Russia claimed the violation of MFN treatment obligations (GATT Article I: 1) and national treatment obligations (Article III: 4), because through the UPN measures, VIUs which control UPN operators can develop the export pipeline networks and manage the gas supply and sales in the EU market in a manner that it considers appropriate, and thus natural gas exported to the EU by other non-EU countries or EU members through UPN has a better competitive opportunity than Russian natural gas exported by pipeline transport. However, the panel rejected such claim, as the aforementioned claim by Russia failed to explain why it would create favourable conditions for natural gas transport through UPN.

(6) The Third-Country Certification Measure

(a) The Third-Country Certification Measure under the Gas Directive

Under the Gas Directive, when TSO or transport system owner controlled by a third country (non-EU countries) requests certification, the relevant NRA should reject such certification if there

is a risk to the security of energy supply in the relevant member state and the EU, and there is an obligation to seek the European Commission's opinion before making a decision on certification (the third country certification measure). Russia claimed that it is a de facto national treatment violation (Article II: 1 of GATS) as, when the European Commission reviewed the certification decision draft of NRAs and provided their opinions, they did not request an assessment of the security of energy supply in five instances of certifications for other third country service suppliers, while requesting for such assessment in one certification for pipeline transport service supplier.

The panel did not find the less favourable treatment to Russian transport services/service suppliers and rejected this claim, stating that: a mere indication of some application instances cannot demonstrate that the competitive conditions have been adversely changed for the Russian services and the service suppliers according to the design, structure, and expected operations of the measures; and that one certification decision raised by Russia as an example of a Russian operator was an instance where Russian operators invested in an operator that "own"s pipeline, rather than an instance of a Russian pipeline "transport" service supplier..

(b) The Third-Country Certification Measure by Three Countries

Regarding the domestic implementation measures of the third country certification measure by the three countries, Russia claimed a violation of national treatment obligation as the necessity of an examination for the security of energy supply would differ depending on whether it is foreign operators or domestic operators that control TSO (GATS Article XVII). EU argued in response that the measures would be justified as necessary measures for "maintaining public order" (GATS Article XIV (a)).

The Panel admitted that the third country certification measures fall under the violation of national treatment (GATS Article XVII) (EU did not substantially contend with this point). The panel further found that, because of the following reasons, while these measures fall under the measures necessary for "maintaining the public order" (GATS Article XIV (a)), it falls under the "arbitrary or unjustifiable discrimination" under the chapeau of the same provision, and thus the justification is not allowed.

GATS Article XIV (a): Among the issues provided in subparagraph (a), the exception for reasons of "public order" applies only where "a genuine and sufficiently serious threat" is posed to one of "the fundamental interests of society" (footnote 5 of the same article). The parties did not dispute that the disruption of energy supply may have a social, economic and political consequences. The security of energy supply is one of the "fundamental interests of society".

Moreover, it can be reasonably inferred that: (i) foreign governments, in certain circumstances, have important economic and/or political interests which conflict with the EU's own interest in ensuring energy supply within the EU, i.e., incentives to effectively undermine the EU's security of energy supply; (ii) TSOs controlled by foreign operators (foreign controlled TSOs) can effectively undermine the EU's security of energy supply either by failing to comply with legal obligations imposed under the EU law or by acting in a manner that is not in their own commercial interests: and (iii) foreign governments have the means to require or induce foreign controlled TSOs to undermine the EU's security of energy supply (such as imposing legal obligations in their own country that conflict with the EU's legal obligations or commercial interests). When these situations occur simultaneously, compounded by the limitations of the ability of the EU authorities to investigate and sanction foreign controlled TSOs, it can be said that there is a "genuine threat" as there is a genuine risk that the foreign governments will require or induce foreign-controlled TSOs to undermine the EU's security of energy supply. Furthermore, since it can reasonably be inferred

that the above situation will have a serious impact on energy supply, foreign control over TSOs constitutes a "genuine and sufficiently serious threat" to the EU's security of energy supply. Thus, the third country certification measures are the measures which are designed to "maintain public order". Furthermore, the third country certification measures of the three countries are necessary to "maintain public order" and thus satisfy the necessary requirement under the subparagraph (a) since: the policy objective of the security of energy supply is important; the measure can clearly respond to the aforementioned threats in advance (i.e., the measure can contribute the policy objective); the the degree of trade restrictions is limited as the third country certification measures reject the certification only when the above-mentioned threat is recognized; and an alternative measure proposed by Russia (which is to impose TSOs an obligation not to comply with extraterritorial laws by foreign governments affecting trade with the EU (the "blocking statute")) is not effective and cannot provide the same level of protection in situations where the above-mentioned threats are recognized and TSOs are requested and induced not to comply with the EU law). Thus, the third country certification measures are provisionally justified under the subparagraph (a).

Chapeau of GATS Article XIV: The EU should have adjusted third-country certification measures so that the measures can respond to the threat that foreign governments request or induce TSOs controlled by domestic operators (domestically controlled TSO) to undermine the EU's security of energy supply. However, the EU did not assess such threat. Although the threat through domestically controlled TSOs may be lesser than the threat through foreign controlled TSOs, the EU did not demonstrate that the threat does not exist or is a complete speculation or hypothesis. This point is not compatible with the cause or rationale of the third country certification measures. Thus, the third country certification measures constitute arbitrary and unjustifiable discrimination.

(7) The TEN-E Measure under the Gas Directive

Russia claimed that the Russian natural gas imports are disadvantaged as compared to the natural gas of the other non-EU countries or EU members (GATT Article III:4 and Article I:1) as the pipeline infrastructure projects that transport the non-Russian natural gas have been designated as priority projects under the TEN-E measure. On the other hand, the EU denied Russia's allegations, and argued that even if this measure falls under GATT Article III: 4 or Article I: 1, it would be justified as a measure that is "essential to the acquisition or distribution of products in… short supply" (GATT Article XX (j)).

The panel found that the TEN-E measure aims to diversify the natural gas supply ,and accordingly to overcome a situation where the EU depend on a single or dominant source, and that, as Russia is now the single or major source of natural gas in many EU members, the criteria for designation of priority projects in the TEN-E measure include, in practice, the condition that it is an infrastructure development project to link certain EU member states with sources other than Russia. The panel further found that, as a result, some projects are designated as priority projects and receive the preferential treatment to develop a pipeline infrastructure to transport the natural gas produced in other than Russia. The panel accordingly concluded that the TEN-E measure makes the conditions for the transport of Russian natural gas disadvantageous and is inconsistent with Articles III: 4 and Article I: 1 of GATT.

Furthermore, regarding the requirement of "shor supply" in Article XX (j) of GATT, the panel found that it is not enough to demonstrate the risk of falling short of supply but it is required to prove that the supply is short "currently, presently". In this regard, the panel concluded that the EU did not demonstrate it and rejected that the measure may be justified.

Russia has also claimed that the TEN-E measure discriminated the Russian pipeline transport services and service suppliers, compared with the like services and service suppliers of other non-EU countries, and thus the measure violates the MFN treatment obligations (GATS Article II: 1). The panel rejected this claim by finding that: Russia did not establish the link between infrastructure projects and pipeline transportation services and service suppliers (since pipelines are used to provide transportation services after the infrastructure starts functioning, the infrastructure projects for pipeline development are neither encompassing transportation services nor operated by transportation service suppliers); and that Russia did not explain that why the failure of Russian operators to promote the priority projects that contribute to the Russian natural gas may lead to the adversely effects on the competitive opportunity of such operator as a pipeline transport service supplier.

This case is currently pending with the Appellate Body, as EU appealed in September 2018 and then Russia counter-appealed after the release of the panel report.