

CHAPTER I

PREPARING FOR NEGOTIATIONS

Preparing for negotiations on services is largely about doing one's homework and preparing, to the greatest extent possible, for the challenges that negotiators can be expected to face, both in the negotiating room and outside. This chapter deals with the various aspects of this preparatory phase, focusing first on establishing the right working structures and relationships within government, before discussing the need to consult broadly outside government circles, i.e., with the private sector and any civil society stakeholders that are likely to take in interest in one or more aspects of the negotiations. The findings and recommendations from this chapter are derived largely, albeit not exclusively, from recent reference works by Marconini and Sauvé (2010) and Feketekuty (2008). Box I.1 gives a brief outline the terminology used in this publication.

Box I.1. Note on terminology

At this point, a brief note is probably required on terminology. The authors use the abbreviations FTA, PTA and EPA largely interchangeably, despite the substantive differences that may, in reality, exist between the terms that they stand for in any given instance (free trade agreement, preferential trade agreement and economic partnership agreement, respectively). The term “free trade agreement” is normally used in the context of an international trade agreement to liberalize trade among two economies (although the Free Trade Agreement of the Americas [FTAA] was intended to encompass many nations from North, South and Central America). A “preferential trade agreement” can be an FTA, but it might also be an “arrangement” under which two or more countries agree to accord preferential market access, with or without this being done on a reciprocal basis. The term Economic Partnership Agreement is a more recent addition to the trade policy lexicon, and is typically used when an international treaty is concluded between a developed and developing country on economic cooperation and trade. Unless otherwise indicated, when the term PTA or FTA is used in this publication, it means an international trade agreement that has been concluded between two or more economies and which entails some degree of reciprocal exchange of trade liberalization commitments on substantially all trade (i.e., with no sector excluded).

Source: Authors' notes.

A. Establishing the mandate – political endorsement from the highest levels

Marconini and Sauvé (2010) pointed out that trade negotiations on services inevitably focused on behind-the-border measures that fall within the ambit of regulatory agencies who may have little understanding of, or even much interest in international trade policy. Officials in such agencies generally tend to be concerned with a different set of regulatory objectives, such as monetary

stability or managing inflation (in the case of financial regulators), or overseeing the viability and integrity of communications networks (in the case of the telecoms regulator) than about ensuring non-discriminatory market access or national treatment that are the essential tenants of a trade official's policy portfolio. For this reason, and because of the inherently complex and sometimes conflicting policy nexus that negotiating on behind-the-border regulatory frameworks touches upon (its cross-cutting nature), it is important that the negotiating mandate be rooted in some degree of inter-agency consensus. Even more importantly, it must have the backing, support and endorsement of the highest level of political leadership.

It is thus recommended locating overall responsibility for negotiations on trade and services “at the highest levels of government”³ and this advice is certainly very sound. The decision to embark on negotiations towards an FTA or PTA should ideally come from the president or prime minister and should be the result of an understanding to do so between the Heads of State of the countries concerned.⁴

B. Identifying and mobilizing actors within government

Once the decision to launch PTA negotiations has been taken and announced, the agency that will take the lead in services negotiations must begin a wide-ranging process of consultations with the many sectoral ministries and regulatory agencies likely to be affected by the type of commitments the country is sure to be asked to make. This consultation process should also include those lawmakers who are likely to play an instrumental role in getting the results of the negotiations ratified so they can become law. The consultation process serves to inform all stakeholders and helps to achieve “buy-in” from them for when their help is needed at a later stage (Feketekuty, 2008). Many domestic political and commercial stakeholders need to be included in the consultation phase in order to determine what the country's national economic interests are in upcoming negotiations on services liberalization. The discussion here focuses first on those agencies within the executive branch of government before discussing the (often overlooked) legislative branch.

1. Executive agencies

Many governments have, in recent years, become cognizant of the cross-cutting and inter-departmental nature of trade in services, and have taken commensurate organizational steps to establish working groups and consultative mechanisms within existing institutional structures.⁵ Similarly, most countries that have recently acceded to the World Trade Organization (WTO) (including many transition economies), have gained valuable experience in establishing an inter-agency or inter-ministerial committee to coordinate the acceding country's decision-making processes and policy commitments during the accession process.⁶

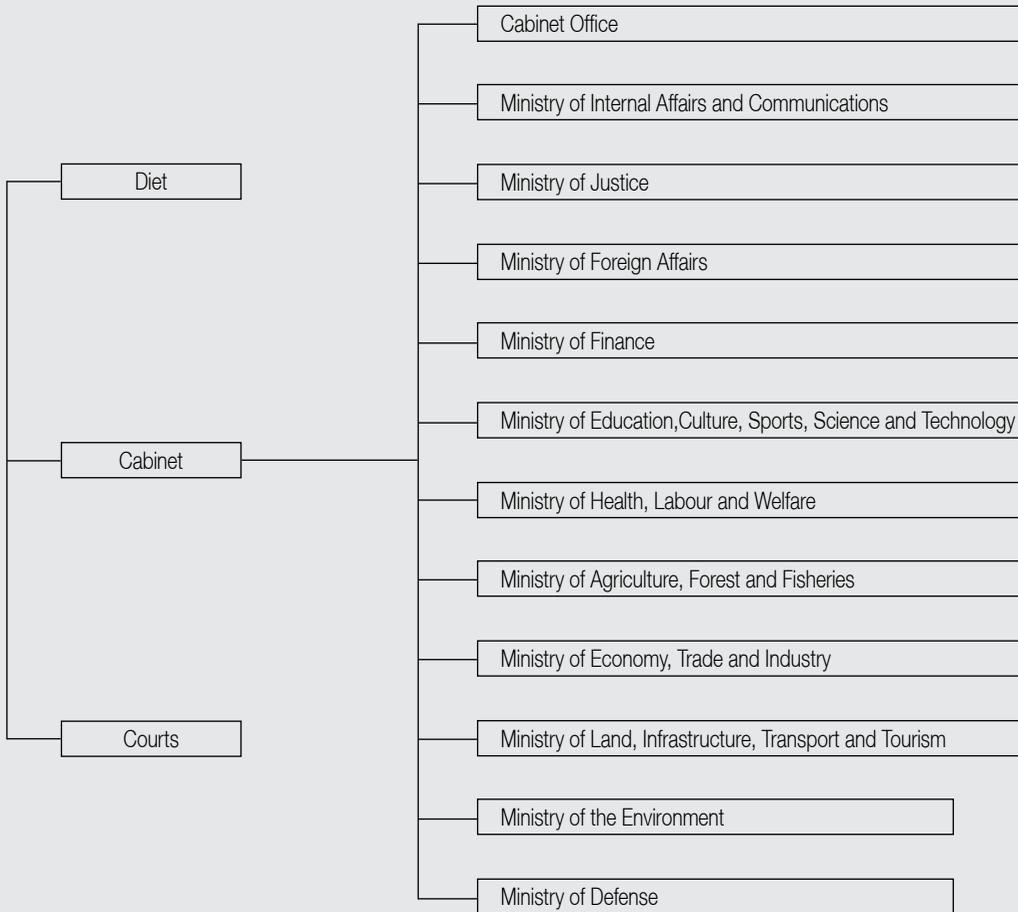
³ Namely, in the office of the presidency or the prime minister. See Marconini and Sauvé (2010) for additional explanations.

⁴ In this context, reference is made to the now famous anecdote that the decision to launch an FTA between Singapore and the United States was taken during a midnight round of golf between then United States President Bill Clinton and then Singapore Prime Minister Goh Chok Tong (see Koh and Lin, 2004, pp. 6-7).

⁵ Both authors were involved with the Indonesian Trade Assistance Project in 2007, one element of which was the establishment in 2007 of a team within the Ministry of Trade to deal specifically with services negotiations, at WTO, within the Association of Southeast Asian Nations (ASEAN) and in PTAs (United States Agency for International Development, 2009).

⁶ See, for example, the case study by Pan (2011) of Cambodia's accession to WTO.

Box I.2. Organizational structure of the Government of Japan



Source: Authors' adaptation from www.kantei.go.jp/foreign/constitution_and_government_of_japan/charts_e.html (accessed 20 May 2012).

Box I.2 shows a simplified organizational chart of the Government of Japan, with the 12 main ministries across which the executive's numerous policy portfolios are spread. Of the 12 listed, arguably only the Ministry of Agriculture, Forestry and Fisheries would not have to be part of government-wide consultations to determine the various agencies' specific interests in upcoming negotiations on services.⁷ Each and every one of the other ministries will have various interests requiring consultation, and which should be incorporated as appropriate into the country's negotiating strategy.

As mentioned above, with the exception of the Ministry of Agriculture, Forestry and Fisheries, each ministry is likely to have responsibilities and regulatory objectives that could be affected by, or even conflict with the concessions to be made in negotiations on services liberalization. It bears recalling here that the scope of services agreements, whether the General Agreement on Trade

⁷ Even this statement must be qualified by the fact that many PTAs with developing countries specifically exclude or restrict from services or investment liberalization any market access or national treatment concessions for commercial farming, forestry or fishing activities.

Box 1.3. Services negotiations and executive branch stakeholders in Japan

- The Cabinet Office will need to be informed at regular intervals on the progress of both consensus building and the actual negotiations, once they start, since it is the Cabinet that sets the Government's policy objectives at the highest level.
- The Ministry of Internal Affairs and Communications has a number of powerful bureaucratic fiefdoms that will want to weigh in heavily before and during negotiations, including the Global ICT Strategy Bureau, the Information and Communications Bureau, and the Telecommunications Bureau.
- The Ministry of Justice will need to be informed during both the consensus-building stage prior to the start of negotiations as well as regularly once negotiations have begun. Its interests in services negotiations stem from the fact that it represents the Government of Japan in international dispute settlement as well as from the fact that it is ultimately responsible for administering the nation's immigration policies (which could be affected by commitments on the movement of natural persons). Finally, it is most likely to be lawyers from the Ministry of Justice who will inevitably have to be involved in the process of legal verification or "scrubbing" of any treaty texts once negotiations have been concluded.
- Although the Ministry of Foreign Affairs in Japan does not take the lead on trade negotiations, it will nevertheless want its views on the potential impact of services liberalization in the context of a PTA with another country on Japan's broader foreign policy interests to be taken into consideration, for obvious reasons. It might also be a useful source of information for trade negotiators trying to gain a more detailed understanding of their PTA negotiating partners.
- The Ministry of Finance will play a key role at all stages of services negotiations, but especially in regard to any concessions that may have a bearing on the country's banking system or the markets for other financial products, such as insurance, securities and consumer credit among others. Finance officials can be expected to exercise a somewhat cautious, conservative and restraining influence on negotiations, and will be much more concerned with the overall stability of the country's monetary and financial system than any need to extend concessions to trading partners. However, the Minister of Finance is a powerful voice in Cabinet and securing his or her buy-in with regard to the ultimate negotiated outcome will be essential. This is even more so the case given the heightened importance placed on the prudential integrity of countries' financial systems, following a spate of financial crises that have rocked the global financial system during the past decade and a half, starting with the Asian financial crisis in 1998.
- The Ministry of Education, Culture, Sports, Science and Technology will also need to be consulted and kept informed during negotiations, since it has interests in such issues as education services and audio-visual services (e.g. under its cultural mandate).
- The Ministry of Health, Labour and Welfare will have sectoral interests that are relatively narrowly defined and will shape its views on upcoming negotiations, but which should equally ensure that it will demand to have these views heard. Health services are increasingly traded internationally through all modes of supply, and commitments on the natural movement of persons will have implications for both the health sector specifically as well as for the national labour market more generally.
- As the lead agency primarily responsible for the negotiations, the interests of the Ministry of Economy, Trade and Industry are obvious.
- The Ministry of Land, Infrastructure, Transport and Tourism will also largely have narrowly defined sectoral interests in any upcoming services negotiations, particularly those on transport services, but also with regard to any concessions that may affect market access or national treatment commitments in the hotel industry or other tourism-related sectors.

Box I.3. Services negotiations and executive branch stakeholders in Japan *(continued)*

- The Ministry of the Environment is likely to have somewhat narrowly defined sectoral interests focused primarily, albeit not exclusively, on environmental services, and will need to be part of the broader consultation process before negotiations start.
- Finally the Ministry of Defence will inevitably take a broadly formulated interest in how concessions made in services negotiations may open strategically import sectors in terms of national defence, such as telecommunications, aviation and shipping to name just a few.

Source: Authors' notes.

in Services (GATS) or PTAs, is typically very broad, extending to all measures affecting services. As WTO case law has shown on numerous occasions, such scope is often broader than policymakers have typically assumed, such that trade law in services and goods may often be closely linked and provide context for purposes of dispute mediation. Box I.3 contains a more detailed discussion, based on the example of the Japanese executive structures indicated above, of the type of interests each of the ministries shown is likely to have with regard to services negotiations.

Of course, each country is different and each government parcels out and allocates responsibilities for different regulatory sectors in the manner that most befits its own internal political and policy realities and needs. Nevertheless, the description of the various ministries provided in the Japanese examples in boxes I.2 and II.2 should be sufficient to inform readers as to what type of inter-agency structures and mechanisms are likely to be necessary in their own domestic institutional context.

An equally important but often overlooked stakeholder within government, the legislative branch or Parliament is considered in the section below.

2. Parliament

Some constitutional systems have a particularly well-established and robust separation of powers, in which the legislative branch is given considerable influence in both the formulation of trade policy – and thus the framing of a given negotiating mandate – as well as the more traditional power to give trade agreements the binding force of law by means of ratification. The United States is perhaps the best known example, where Congress to a very large extent sets the limits on what concessions the United States Trade Representative (USTR) and, by extension, the President may offer. In other constitutional systems, the Parliament plays a very important role in being the ultimate arbitrator of whether or not a given trade agreement will be allowed to enter into force, with lawmakers (particularly opposition Parties) playing the role of “the Sword of Damocles”, threatening to make a negotiated trade agreement mute by refusing to ratify it. Republic of Korea is perhaps the best known and most recent example of this, where opposition politicians repeatedly threatened to block any hope of ratifying the United States-Republic of Korea FTA over various concerns, none of which were specifically related to trade in services. In yet other systems, the Parliament appears to play little more than a “rubber stamp role”, either because its powers have largely been curtailed in favour of the executive, or because it is firmly in the hands of the ruling Party. However, other countries also have such processes in place, such as Thailand, where policymakers and negotiators in the executive branch may not proceed with FTA talks before being given a specific mandate to do so by Parliament (see Marconini and Sauvé, 2010).

Either way, there are many reasons why it is good practice to actively consult with, and inform the legislative branch in the context of future or ongoing trade negotiations on services, the main reason being that doing so increases the legitimacy of the negotiated outcome once it has been achieved. This is all the more so in the case of services, given the regulatory (and hence legislative) intensity of the subject matter. Moreover, there have been numerous instances of the lack of parliamentary support derailing or delaying the ratification of a trade agreement. One prominent recent example was the refusal of Vanuatu's Parliament to ratify its WTO accession package due, among other things, to the detrimental effect that the envisaged tariff liberalization was foreseen as having on the country's public finances.⁸ Box I.4 summarizes the parliamentary scuffles that accompanied the ratification of the United States-Canada FTA in 1988. It also refers to a number of other constituents outside the central Government; these are mentioned following box I.4.

The United States-Republic of Korea FTA also saw its fair share of high political drama before it was finally ratified by both the United States Congress and the Korean National Assembly. Box I.5 contains an excerpt from a newspaper article published on 18 September 2011, which documented some of the difficulties that the ruling Party in the Republic of Korea had in obtaining passage of the bill to ratify the FTA.

In summary, although in many countries consultations with Parliament may not always generate a full consensus between negotiators and policymakers over the Government's negotiating mandate (this may be because parliamentarians lack sufficient technical knowledge of the issues to enable them to provide much actionable guidance), it is equally true that failing to consult with, and inform Parliament can result in unpleasant surprises for the executive branch and trade negotiators who wish to see the results of their hard-fought efforts ratified swiftly.

Box I.4. Canadian parliamentary scuffles and ratification of the United States-Canada FTA in 1988

After a prolonged absence, the Conservative Party returned to power by winning the 1984 federal elections. A senate committee had already recommended in 1982 that Canada should sign a free trade agreement (FTA) with the United States. After much negotiation, a treaty was signed in 1987 between the American and Canadian Governments. Before it could take effect, the treaty had to be approved by a law passed in the United States Congress and the Canadian Parliament. This resulted in vigorous debate; the Liberal Party and the New Democratic Party accused the Conservative Party of basically selling Canada to the United States and reducing its sovereignty. There was also a debate between the provinces and Ottawa. While some provinces supported the treaty, such as Quebec, others such as Ontario, were adamantly opposed to it. Lobby groups also became involved in the debate.

While some business sectors were in favour of the agreement, union groups were not. The FTA was also scrutinized from the point of view of women who were fighting for better jobs and working conditions. Although the House of Commons, which was controlled by the Conservative Party, adopted a law on the FTA, the Senate, controlled by the Liberal Party, decided to block it. As a result, a federal election was called and the FTA became a key election issue. The Conservative Party was re-elected and again brought the Canada-United States Free Trade Agreement to Parliament. It was again presented in the House of Commons, and this time, the Senate had to oblige and approved the treaty. The treaty was ratified in 1988 and entered into effect on 1 January 1989.

Source: Historica Foundation of Canada (www.historica.ca/peace/page.do?pageID=346 (accessed 31 May 2012)).

⁸ There was also an issue involving liberalization of telecoms services (Grynberg and Joy, 2000).

Box 1.5. Parliamentary opposition to ratifying international trade agreements: The case of the Republic of Korea-United States FTA

Opposition parties hang onto hard line position on ratification bill

Ruling and opposition parties are preparing to lock horns once again over the free trade agreement between Republic of Korea and the United States (KORUS).

Main opposition Democratic Party lawmakers on the Parliamentary Committee on Foreign Affairs and Trade left the meeting room as the Grand National Party submitted the FTA ratification bill to the panel Friday.

The Democratic Party vowed to expose shortcomings in the revisions made to the KORUS FTA and block its ratification, while the ruling Grand National Party promised to seek approval from opposition parties in passing the bill at the parliamentary session.

Democratic Party lawmakers said that they would confirm a Wikileaks revelation of further FTA concession. Last week, the website released a United States diplomatic cable that Kim Jong-hoon, Minister for Trade, on 29 August 2007, told then United States Ambassador to Republic of Korea, Alexander Vershbow, and then-congressman Earl Pomeroy, that after the FTA signing the Government of [the Republic of] Korea would renegotiate tariff rates for rice imports with the United States after 2014.

This date is when the suspension of the application of tariffs to rice by the World Trade Organization is to expire. The allegation contradicts the Government's stance that rice tariffs and FTA would be dealt with separately.

Rep. Kim Dong-cheol of the Democratic Party said the information showed the Republic of Korea's submissive attitude toward the United States. "Yes, we do respect [the] Korea-US alliance but this is too much," he said. He suspected that there were more things behind the FTA deals.

Kim and other opposition lawmakers were also expected to pitch their voices against the Grand National Party's unilateral reference of the FTA bill.The opposition walked out of the room when Foreign Affairs Minister Kim Sung-hwan explained future procedure of the FTA bill passage and its effect after the reference.

Source: Excerpt from an article in the Korea Herald, dated 18 September 2011, titled "Parties to clash over US FTA again", available at <http://view.koreaherald.com/kh/view.php?ud=20110918000239&cpv=0> (accessed 31 May 2012).

The following section discusses the case of other stakeholders whom policymakers should ideally consult when preparing for negotiations on trade in services if they wish to have the best possible handle on their negotiating objectives. The private sector is considered first, followed by civil society.

C. Consulting with stakeholders outside of government

Apart from the various stakeholders within the executive and legislative branches of government that are discussed above, some of the most crucial inputs towards formulating negotiating objectives and determining the likely limits of domestic support for future commitments in services trade negotiations can, and do, come from the private sector. Another important set of stakeholders can be found within civil society; this is particularly the case with organized labour and environmental groups, many of which tend to view trade liberalization with a certain degree of scepticism. Each of these two broad stakeholder communities is discussed separately below.

1. *Private sector*

The depth and sophistication of the private sector's engagement in consultations prior to trade in services negotiations varies immensely from one economy to another; even in some advanced developed countries, policymakers may be at a loss on how to obtain sufficient input from private sector stakeholders. This was notably the case in Singapore when its negotiators were preparing to begin trade talks with the United States. Despite its best efforts, the Government of Singapore was unable to garner much active participation from the private sector in formulating an inventory of negotiating requests to present to the United States.

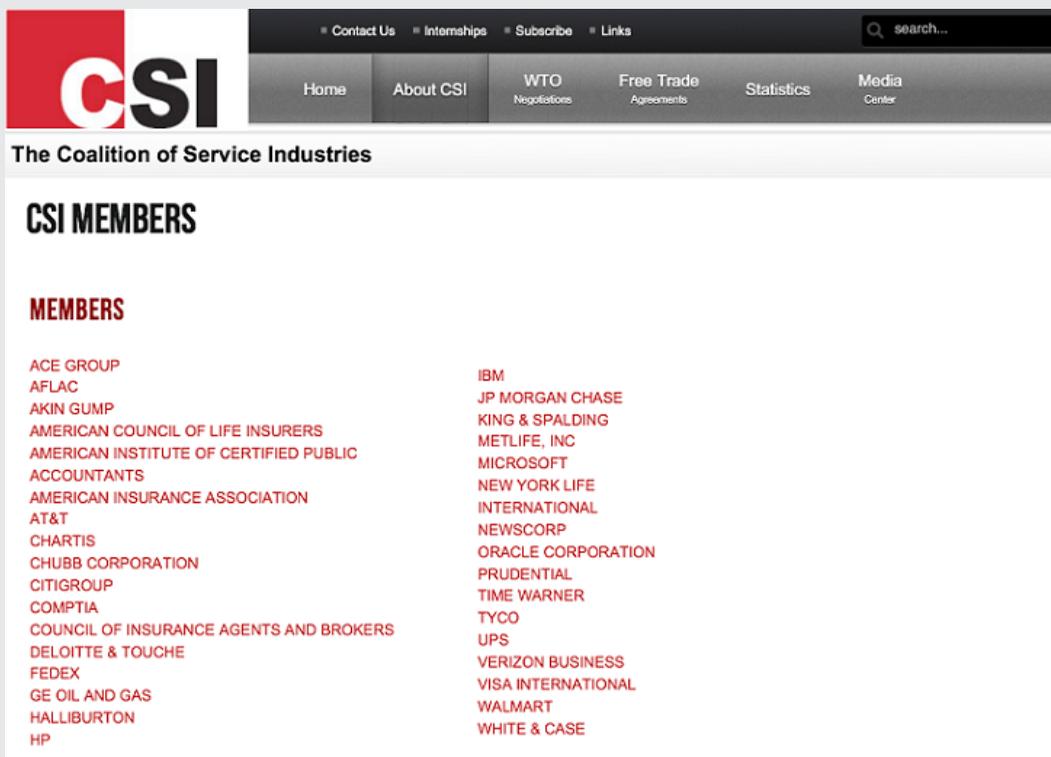
Some countries, such as the United States and Canada, have long had formal and effective mechanisms for garnering and harnessing the support of the private sector in the lead-up to services trade negotiations. In the United States, one of the most important bodies in this process is the Coalition of Services Industries (CSI),⁹ which regularly lobbies both the legislative (Congress) and executive (USTR and other agencies) branches of government in order to achieve the desired outcomes of its members, who include some of United States (and the world's) largest and most influential service sector multinationals. Box I.6 contains a website screenshot of the CSI "Members" section. Readers will notice that some of these companies have a global footprint in industries as diverse as financial services, logistics and distribution, telecommunications or IT services. Other countries such as Australia, Hong Kong, China, and Malaysia also have trade associations which unite their leading service exporting companies and aim to influence trade policy (and other regulatory developments) in favor of their members. Other such industry bodies that regularly engage with policymakers in the United States with a view to shaping the substance and outcome of services trade negotiations include:

- American Insurance Association;
- National Retail Federation;
- National Foreign Trade Council;
- Securities Industry and Financial Markets Association;
- Telecommunications Industry Association;
- United States Chamber of Commerce;
- United States Council for International Business.

In the United States, these industry bodies are afforded various means by policymakers to have their views heard, such as submitting written comments to the USTR directly, providing testimony at Congressional hearings on upcoming negotiations, or (more significantly) participating in the so-called Trade Advisory Committee process. Established in 1974, and modified several times since then, such committees are formally constituted bodies comprising representatives from a broad swath of industries and economic sectors, and are convened by the USTR. Box I.7 contains a diagram of the Trade Advisory Committee structure as it was in 2009 (it has since been slightly modified).

⁹ See <http://uscisi.org/> (accessed 31 May 2012).

Box I.6. Website screenshot of CSI “Members” section



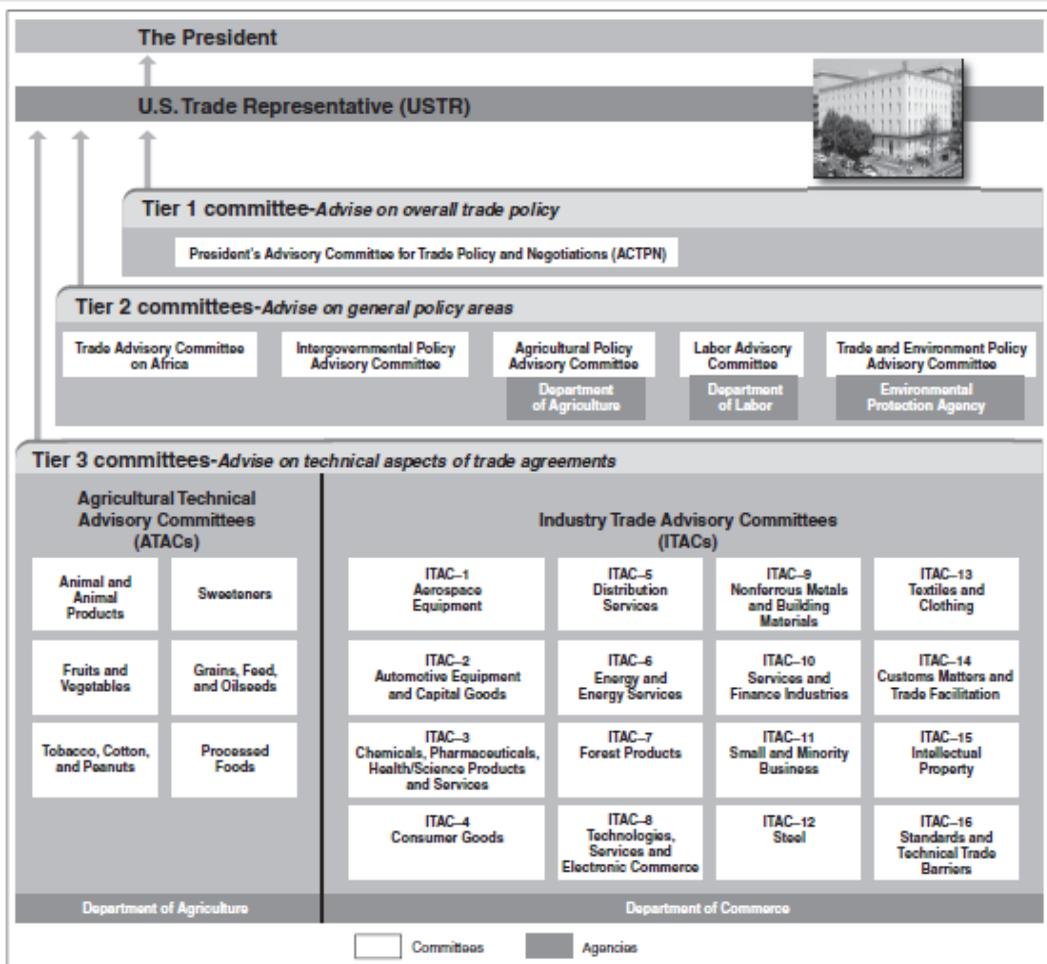
Source: <http://uscsi.org/about-csi/csi-members> (accessed 31 May 2012).

In Europe, the equivalent body is the European Services Forum (ESF), which has a membership of more than 30 major European companies, more than 30 European and National Business Federations, spanning 20-plus different sectors and represented in all 27 European Union member States.¹⁰ In the context of WTO and preferential trade negotiations, ESF takes positions and tries to influence decision makers in Europe (particularly the European Commission and the Council of Ministers and, increasingly, the European Parliament). The CSI and ESF websites both serve as uniquely informative sources of information for market access and other issues of the greatest concern to services exporters in these two large trading partners.

For many countries, the establishment of a formal and permanent structure such as the policy advisory committees discussed above would not be practical, not least due to cost reasons. Nevertheless, there are other ways for governments to solicit input from the private sector with a view to upcoming negotiations on trade in services. Several countries publish their intentions to enter into trade negotiations in the near future and solicit input from any stakeholder with an interest. Examples of this include Australia and New Zealand, which regularly invite citizens, corporations, or any other bodies to share their concerns regarding future FTA negotiations. Box I.8 contains an excerpt from the Australian Department of Foreign Affairs and Trade (DFAT) website

¹⁰ See www.esf.be/ (accessed 17 July 2012).

Box I.7. United States Trade Advisor Committee structure



Source: www.gao.gov/assets/130/123085.pdf (accessed 20 May 2012).

summarizing the results of such public consultations in the context of a planned trade agreement with Pacific Island nations (PACER Plus).

Because it is not governments that engage in trade but rather businesses, it is crucial for governments to seek and obtain inputs from the private sector as policymakers start to formulate negotiating objectives in anticipation of launching negotiations on trade in services. This is equally true in terms of offensive as well as defensive interests, with exporting service providers able to provide input on the first set of interests, and import-competing service providers able to do so for the second. Consulting with and actively affording the private sector a chance to participate in this process can do more than merely provide key insights to policymakers. Doing so can also help strengthen the business case for – and resulting democratic legitimacy of – any ultimate negotiated outcomes.

Box 1.8. Public consultations in the context of planned Pacific Agreement on Closer Economic Relations (PACER) Plus negotiations

Summary of views expressed in consultations on PACER Plus

On 6 August 2009, Pacific Islands Forum leaders agreed at their meeting in Cairns to commence negotiations on a new regional trade and economic integration agreement, which is referred to as PACER Plus.

The first round of negotiations, which will discuss the scope and timetable for negotiations, is expected to be held no later than November 2009.

In line with the Government's commitment to ensuring Australia's trade objectives are pursued on the basis of community consultation, public consultations on Australia's participation in PACER Plus negotiations commenced on 1 July 2009.

The Department of Foreign Affairs and Trade, via newspaper advertisements, e-mails to stakeholders and its website, called for public submissions providing views on PACER Plus negotiations and specifically invited comment on the economic, regional, social, cultural, regulatory and environmental impacts expected to arise from Australia's participation. Reflecting the development aims of the negotiations, views were also sought on capacity-building issues. The Department received more than 30 written submissions from a variety of stakeholders.

Consultations were held with representatives from companies, industry bodies, academics, non-governmental organizations, unions and individuals, as well as State and Territory Government officials. All non-confidential submissions received will shortly be available on the Department's website.

The Australian Government welcomes all the submissions received and the views expressed during the initial consultations. These submissions and views will be considered in the formulation of our future approach to PACER Plus negotiations. The Australian Government will continue to provide an opportunity for domestic stakeholders to express their views throughout the course of the PACER Plus negotiations.

Priorities and objectives

A proportion of stakeholder views expressed indicate that there is clear support for the Australian Government's overall priorities and objectives for negotiation of a new Pacific trade and economic integration agreement with trade capacity-building and development assistance elements.

The Australia and New Zealand Banking Group's submission also indicated it was "strongly supportive of Australian Government efforts to work with Forum Island Countries to build the capacity and infrastructure they require to take greater advantage of trade across the region, including through more liberal trade in goods, services and investment. A comprehensive trade pact in the Pacific will assist countries in the region to share in the benefits of increased trade and economic growth. Notwithstanding, for any trade pact to deliver meaningful outcomes for Forum Island Countries, both Australia and New Zealand will need to ensure [that] the Forum Island Countries are provided with assistance to address supply-side constraints in key trade-supporting disciplines such as education and technical assistance."

The National Institute of Accountants written submission was another instance of support for the negotiation of a "new trade and economic agreement between Australia, New Zealand and Forum Island Countries, known as PACER Plus, and believes it will provide further assistance to the region to promote sustainable economic development."

Box I.8. Public consultations in the context of planned Pacific Agreement on Closer Economic Relations (PACER) Plus negotiations *(continued)*

The Australian Industry Group supported the “Government’s proposal to commence negotiations on PACER Plus, and its objective to include in the Agreement’s framework trade capacity-building and trade development assistance to strengthen Pacific island countries’ ability to trade.”

Source: Excerpt from the DFAT website at www.dfat.gov.au/fta/pacer/pacer-views.html (accessed 31 May 2012).

2. Civil society

Like the private sector, civil society also contains various other stakeholders who hold strong views on the perceived impact of future negotiations on trade in services. As stated above, this is particularly true for organized labour and environmental groups. It can also be the case with organizations that pursue social, developmental or sector-specific objectives in the home country or the country with which negotiations are being contemplated. The latter groups often tend to approach trade and investment negotiations with a greater degree of scepticism than many private sector actors. They also often tend to be concerned with broader economic and social policy objectives than just improving market access to, or the conditions of competition, in foreign services markets. Despite any opposition such groups may have, and regardless of how well-founded such opposition may or may not be, it is important from the perspective of the legitimacy of negotiated outcomes to include these groups in the consultation process early on. A failure to do so could prove costly at the ratification stage.

Box I.9. Civil society concerns regarding PTA negotiations

6. Uniting Church position on (PACER) Plus

6.1. The Uniting Church’s position is set out in the appended paper as follows:

“Many Pacific Island countries face particular challenges to development associated with small size and isolation, natural resource constraints, frequent natural disasters and vulnerability to climate change induced sea-level rise. The agreements under negotiation will have significant implications for development in the Pacific. Pacific churches and civil society organisations are concerned that these agreements will curtail their governments’ ability to develop policies which are tailored to their particular development needs. In particular, they are concerned that the agreements will:

- Erode government revenue, resulting in cuts to services such as health and education;
- Prevent governments from taking measures to support the development of local industries and service sectors;
- Restrict the ability of governments to ensure essential services are provided to all citizens.

Pacific Island churches are concerned that the European Union, Australia and New Zealand are bullying Pacific Island governments in trade negotiations and attempting to push them into trade liberalization on unacceptable terms.”

Source: Excerpt from a submission made by the Uniting Church of Australia in the context of the PACER Plus negotiations <http://www.dfat.gov.au/fta/pacer/pacer-views.html> (accessed 31 May 2012).

As explained by the excerpt shown in box I.9, a submission by the Uniting Church of Australia appears to be advocating an approach that is wider than just merely promoting a narrowly-defined set of export-orientated economic interests in favour of one that takes the economic and social development needs of Australia's trading partners into consideration. Whereas it is probably fair to say that the Uniting Church does not represent a large or influential constituency in Australia, similar groups may wield much greater influence in many other countries, making it imperative that policymakers consult them throughout the preparatory and negotiating process.

Organized labour is often one of the most vocal voices among civil society stakeholders, and often comes down on the defensive side of the various economic interests in contention. Whereas organized labour is typically more focused on shaping negotiating outcomes in negotiations involving the liberalization of goods trade, it is not uncommon that various potentially adversely affected

Box I.10. American Nurses Association efforts to influence the focus and outcome of trade negotiations on nursing services in the late 1990s

Impact of global trade on nursing

US nurses face increased competition

ANA has been working on many fronts to ensure fair play for US nurses; they successfully advocated for a delay of Congressional "fast-track" trade legislation, in part because the legislation's extension proposals focused on trade in goods, not services. As a result, nursing's concerns were not addressed. ANA is "committed to international trade agreements that protect and enhance all participating countries' public health systems and promote rising wage standards and working conditions for nurses," says Peterson [Cheryl A. Peterson, MSN, RN, senior policy fellow, international affairs, ANA's Department of Health and Economic Policy].

ANA also worked closely with Representative Bobby Rush (D-IL) and Senator Richard J. Durbin (D-IL), who introduced legislation (H R2 759) designed to allow for limited, temporary immigration of foreign nurses to work at hospitals that are having difficulty recruiting domestic RNs. The Bill was spurred by nurse staffing needs at two hospitals – one in Chicago and one in Laredo, Texas – and would establish the H1-C visa to allow foreign nurses in to a small number of US hospitals that meet carefully defined shortage criteria.

[...]

Barriers to working abroad

According to Peterson [...] US nurses wishing to work abroad [...] face hurdles. Among them is an inequity under current NAFTA treaty provisions toward US nurses who seek to work in Ontario or Quebec. Currently, US nurses wanting a licence to practice in these two provinces must [either] be permanent residents or obtain Canadian citizenship. This is a direct contradiction to the basic principles upon which NAFTA was negotiated. No similar barrier faces Canadian nurses wishing to work in the US.

[...]

[A]though it's difficult for American nurses to work in England, Australia and Canada, it is relatively easy for nurses from those countries to work in the US [...] "The playing field is far from level for US nurses," [says Peterson]. As the US readies to enter into trade agreements with other nations – Chile being the next likely candidate – ANA is acting now, before current and future in equities are cast in stone and before entering into a free-trade relationship ..."

Source: Stewart, 1998.

groups will also weigh in with regard to upcoming services negotiations. Box I.10 sets out efforts by the American Nursing Association (ANA) to influence the focus and outcome of these negotiations, both during and after the North American Free Trade Agreement (NAFTA).

The scope of such concerns has heightened in recent years with the IT-induced possibility of offshoring many services transactions. Labour concerns over services negotiations also typically extend to the treatment of labour mobility in services agreements. This is a consequence of the labour market effects arising from the benefits of temporary entry commitments agreed in trade agreements.

As box I.9 indicates, ANA argued its case on the basis of various considerations, including the integrity of public health systems as well as the objectives of improving wage standards and working conditions for their members. However, ANA also couched its arguments in terms that were more easily incorporated into the existing cultural and intellectual dynamics of trade negotiations, i.e., non-discriminatory and reciprocal market access.

Because services negotiations inevitably have an impact on regulatory frameworks that operate far behind a country's borders, and because so many different services are traded internationally through the various modes of supply, policymakers can and should expect the commitments they seek and grant in the context of services negotiations to have an impact on a wide range of stakeholders, both market participants and other constituencies. They must therefore ensure that they consult as widely and as comprehensively as resources and time allow. Failing to do so may have two main implications: (a) negotiators will be less well-informed than they should be about their immediate offensive and defensive interests going into negotiations; and (b) the eventual negotiated outcome could run seriously afoul of potentially powerful and well-organized opposition, either making ratification uncertain or subjecting such ratification to unwanted delays.

3. Some process-related comments on stakeholder consultations

Consultations need to be designed to satisfy multiple objectives as sectoral consultations tend to involve vertical discussions with industry and the relevant regulatory agencies. The latter are often hostile to externally-induced change and resistant to liberalization. Horizontal consultations aim to compare issues that arise across several sectors and involve both users and providers, domestic and foreign economic actors, so that in these consultations the views expressed may differ considerably. By way of an example, telecommunications suppliers operating in oligopolistic markets may wish to slow down the pace of liberalization, whereas banks and IT companies may push for more rapid market opening with a view to reducing their input costs and improving their bottom lines

The key is to design the consultation process in such a way that it can provide government with a clear sense of the pros and cons of market opening as well as a sense of how the costs and benefits of liberalization are likely to be distributed spatially within a country, between small and larger firms and across various worker categories. This sort of analysis will allow a government to compare and contrast the views of users and providers, as well as those of domestic versus foreign actors, and those of established firms relative to those of potential market entrants.

It will ultimately be up to the coordinating ministry, i.e., the ministry that sets the domestic agenda for the negotiations (trade, foreign affairs, and the office of the prime minister or the president) that must arbitrate between the differences that inevitably arise when competing and conflicting interests vie with one another to influence the decision-making process in the context of a policy dynamic as inherently distributional as trade negotiations. It will fall on the coordinating ministry to arbitrate on distributional

matters in clashes between government ministries and agencies over regulatory turf (and thus potential sources of licensing revenue and regulatory power) as well as clashes between import-competing and exporting interests, and between oligopolistic rent seekers and those seeking to benefit from greater competition.

D. Conducting research on the trade policy regime of future PTA partners

At the start of this chapter it is noted that preparing for services negotiations is largely about doing one's homework. This section focuses on a very important part of that homework, i.e., research on the trade policy regime of negotiating partners. Thanks to the Internet, this task is now vastly simpler than it was just a few years ago. The discussion here is limited to two sets of publications, i.e., those that address market access barriers specifically from the perspective of a given country's exporters, and those prepared by international organizations.

1. Market access reports

Several countries now produce and regularly update inventories of the market access barriers faced by their exporters, including the United States, the European Union and Japan. By far the most comprehensive of these inventories is produced by the United States. The United States inventory of trade and investment barriers is called the "National Trade Estimate Report on Foreign Trade Barriers (NTE)" and is updated on an annual basis, usually appearing in April of any given year.

Box I.11. Barriers to trade in services confronting United States exporters in the Japanese market

Distribution services

The United States Government continues to urge Japan to take a variety of steps to improve customs processing and to facilitate other faster and lower-cost solutions in the distribution sector. In this regard, the United States Government welcomes Japan's work to formulate an Authorized Economic Operator (AEO) system, which allows exporters with good compliance records to process goods more expeditiously through Customs. Exempting AEO exporters from paying the 5 per cent consumption tax for cleared cargo would help facilitate more efficient cargo flows. Currently, Japan customs refunds this tax, but an exemption would reduce the administrative burden of filing for a refund. Japan was also encouraged to raise the Customs Law *de minimis* ceiling from 10,000 yen to a higher level. The customs clearance process and clearance times could also be further facilitated by, for example, allowing all users of Nippon Automated Cargo and Port Consolidated System to select the Customs Office for declaration, and by allowing customs officials to be co-located at the bonded premises of private companies handling shipments. Strengthening Japan's system for advanced rulings would also improve transparency and predictability for United States exporters.

Legal services

Japan imposes restrictions on the ability of foreign lawyers to provide international legal services in Japan in an efficient manner. The United States Government continues to urge Japan to liberalize the legal services market further. Legislation was submitted to the Diet in March 2012 that would allow foreign lawyers to form Japanese professional corporations that are permitted to establish branch offices within Japan. Another important step would be to allow foreign lawyers to establish multiple branch offices in Japan, whether or not they have established a professional corporation. Japan is invited to take other important measures, including ensuring that no legal or Bar Association impediments exist to Japanese lawyers becoming members of international legal partnerships, and accelerating the registration process for new foreign legal consultants.

Source: 2012 National Trade Estimate Report on Foreign Trade Barriers (NTE) pp. 214 and 216, available at www.ustr.gov/sites/default/files/Japan_0.pdf (last accessed on 11 June 2012).

Box I.11 contains an excerpt from the 2012 NTE concerning barriers to trade in services being experienced by United States exporters in the Japanese market. If United States service suppliers are experiencing certain difficulties in a given market, the chances are relatively good that this involves a practice or measure that affects most or all foreign services suppliers in the market in question. Thus, the NTE can be a valuable source of business intelligence for negotiators seeking to identify what possible offensive interests they may wish to assert in upcoming services negotiations.

Any of the concerns expressed by the United States in box I.11 could form the basis for a request by another country in the context of its services negotiations. Reports such as the one cited here are thus a potentially very useful source of freely available intelligence on the regulatory regimes and policies affecting market access and conditions of competition in foreign services markets.

2. Reports prepared by international organizations

(a) WTO trade policy review process

Another informative source of intelligence on the trade policy regime of a future PTA negotiating partner is the WTO website, provided that said partner is a WTO member. The WTO Trade Policy Review (TPR) is one of several monitoring instruments that WTO operates, whereby each WTO member is, in principle, subject to a regular and relatively comprehensive review of its trade policy regime at intervals of differing frequency, depending upon the respective member's importance to world trade and level of development. The reports prepared by the WTO Secretariat itself and the minutes of the meetings during which a given TPR is adopted are likely to be the most informative sources of any policies or measures affecting trade in services in the member under review.¹¹

Box I.12 Regulatory requirements in Chinese banking services

(5) Services

Foreign banks

118. Only foreign commercial banks that have maintained a representative office in China for at least two years prior to application, and which have total assets of not less than US\$ 10 billion at the end of the year preceding the application, may apply to establishment a wholly foreign-funded bank (subsidiary). The same asset requirement applies for the establishment of a Chinese-foreign joint venture bank. A foreign bank wishing to establish a branch must have total assets of not less than US\$ 20 billion at the end of the year preceding the application, and must have maintained a representative office in China for at least two years in the area in which it applies to establish its first branch. The minimum asset requirements are higher for the establishment of branches than for locally incorporated entities. In addition, foreign financial institutions wishing to establish any type of operational foreign-funded bank must have persistent profit-earning capacity and a good reputation; have experience in international financial activities; have in place an effective anti money-laundering system; and be subject to supervision, and have its application approved, by its home country regulator.

Source: Trade Policy Review 2012 of China Report by the Secretariat, p. 127 (WT/TPR/S/264, 8 May 2012) available at www.wto.org/english/tratop_e/tp_r_e/tp_r_e.htm (last accessed 11 June 2012).

¹¹ More information on the WTO Trade Policy Review Mechanism, and the various reports and documents that have been produced by it, can be viewed at https://www.wto.org/english/tratop_e/tp_r_e/tp_r_e.htm.

Box I.12, for example, demonstrates the existence of specific conditions applied to foreign banks in China, which were identified and described in the TPR of China (2012). Any of the restrictions mentioned in this box might be the subject of a request in the context of services negotiations.

The issues raised by Japan in the context of adopting the TPR Report of China (box I.13) might also prove insightful for other negotiators preparing for or engaged in negotiations with China on the liberalization of trade in services. Thus any official charged with helping to prepare for negotiations on trade in services with a WTO Member is well advised to familiarize him or herself with the respective country's most recent TPR report.

Box I.13. Trade Policy Review 2010 of China: Excerpt from the statement by the representative of Japan

Japan is particularly interested in the improvement of commitments, in the financial services, telecommunications services and construction services in particular. In services in general, Japan would like to see more transparency in domestic regulations, smoother administrative procedures and the steady implementation of commitments already made. In particular, Japan is interested in seeing relevant legislations being operated consistent with the WTO rules.

Source: Trade Policy Review 2010 of China. Record of the Meeting of Trade Policy Review Body of 31 May and 2 June 2010, p. 32 (WT/TPR/M/230, 29 June 2010), available at www.wto.org/english/tratop_e/tp_r_e/tp_r_e.htm (last visited on 11 June 2012).

(b) WTO-OECD-UNCTAD report for the G-20 on trade and investment restrictions

Another, more recent, tool that seeks to monitor any changes to the openness of selected country's trade policy regime is the bi-annual WTO-OECD-UNCTAD report for the G-20 on trade and investment restrictions. Initially adopted as a mechanism to report on an incremental increase in protectionist measures in the wake of the 2008 financial crisis, this instrument continues to be a valuable resource, despite the limited number of countries it covers.

Box I.14. Trade and investment restrictions: October 2011 WTO-OECD-UNCTAD G-20 report

The Indonesian authorities introduced implementing regulations to the Law on Shipping (17/2008, 8 April 2009) that limit the right to cabotage to Indonesian vessels only. As of May 2011, only Indonesian vessels have the right to transport passengers and cargo within the country. However, a recently enacted regulation (Government Regulation 22 of 2011) postponed the entry into force of the restrictions on foreign-flagged shipping in the area of oil and gas.

The new regulation provides that foreign-flagged ships may be used in offshore drilling until end-December 2015, in oil and gas surveys until end-December 2014, and in dredging, salvage and offshore construction until end-December 2012. The new regulation also stipulates that a permit allowing a particular foreign vessel to operate will be issued only where there has first been an (unsuccessful) attempt to charter an Indonesian vessel.

Source: WTO Report on G-20 Trade Measures, 25 October 2011, pp. 13-14, available at www.wto.org/english/news_e/news11_e/igo_26oct11_e.htm (accessed 11 June 2012).

The measure listed in box I.14 and the trend that it appears to indicate, could form the basis of a request to be formulated and made in upcoming services negotiations. The WTO Report on G-20 Trade Measures has many such examples, from many countries, and is thus well worth consulting in the preparatory phase.

(c) World Bank and OECD Services Trade Restrictions Indices

These relatively new sources are still very much in their early stages of development but will almost certainly become two of the best sources of intelligence on barriers to trade in services in developed and developing countries. Work on Services Trade Restrictions Indices (STRI) indices essentially comprises two different but complementary tools: (a) a database of regulatory measures affecting trade in services on a country-by-country, sector-by-sector basis and mode of supply basis; and (b) an index that provides a quantitative measure of services trade restrictiveness. The World Bank dataset has just been released for public use. The data cover five key sectors: (a) finance (banking and insurance); (b) telecommunications (both fixed and mobile); (c) retail distribution; (d) transportation (air and maritime (both domestic and international), road and rail); and (e) professional services (accountancy, auditing and legal services). The data set, which covers 114 developed and developing countries, can be accessed at <http://iresearch.worldbank.org/servicestrade>.

The OECD dataset is still under development and has yet to be made public (box I.15). From limited information publicly available, it can be stated that the OECD STRI aims to cover a number of significant sectors, including computer services, telecommunications, construction, professional services (engineering, architecture, legal and accounting), transport (air, maritime, rail, road, courier), distribution and audio-visuals in some 34 member countries. As work on the Index continues, the ultimate goal is to have all commercially significant services sectors covered.

Meanwhile, work recently commenced at WTO on mapping existing sectoral and modal restrictions to market access and national treatment in member countries, thus complementing the efforts of the World Bank and OECD. The WTO work aims to pursue an already completed analysis in the field of air transport services through its Quantitative Air Service Agreement Reviews dataset, which can be accessed at www.wto.org/english/news_e/news10_e/serv_14jun10_e.htm.

Box I.15. OECD Services Trade Restrictiveness Index (STRI) in telecommunications services

Examples of measures included in the regulatory database: Telecommunications

Policy Area	Measure*	Result	Source	Country
Foreign ownership & market entry restrictions	Joint ventures are required	Qualitative information	Link to regulation (law, administrative decision), etc.	Country confirms entry or provides correction
	Screening of investment			
Restrictions on temporary movement of people	Quotas			
	Labour market tests			
Other discriminatory measures	Foreign participation in government procurement			
Barriers to competition	Whether access to networks and interconnection is regulated			
Regulatory transparency	Information on spectrum regulations publically available			

*Measures shown are examples for illustrative purposes only

Source: www.oecd.org/trade/stri (accessed 11 June 2012).

3. *Other sources*

For the sake of brevity, only two of the most informative sources, i.e., the Global Trade Alert (GTA), a private initiative of the Centre for Economic Policy Research, and the media (newspapers in particular) are discussed here.

(a) Global Trade Alert

Set up shortly after the onset of global financial crisis of 2008, GTA is a predominantly private effort that brings together donors from the public sector and civil society. It seeks to offer real-time intelligence on any measures enacted by governments that impose additional restrictions on trade in goods or services. Although not limited to trade in services, GTA is nevertheless a unique and timely tool for policymakers preparing for services negotiations, and provides a significantly more up-to-date resource than the USTR's NTE report or the WTO's TPR reports.

Arguably the most informative GTA outputs are its reports on protectionism published by the Centre for Economic Policy Research and freely downloadable from www.globaltradealert.org/. The eleventh GTA report, which was published on 14 June 2012, documents in great detail how many governments have imposed protectionist measures that either contravene the spirit or letter of their stated commitments to keeping global trade open as many countries struggle to recover completely from the 2008 crisis.

A part of any diligent policymaker's preparation for trade negotiations will inevitably involve consulting the GTA website and reports for updated information on any harmful trade measures in place between his or her home country and the country with which negotiations are intended to be launched. Such measures will invariably have to be part of the negotiating objectives to be formulated, particularly if the economic and political economy impact of the measures in question are significant.

(b) Media

Finding newspaper reports on matters that relate to international trade in services these days is as easy as typing a few key terms into the search box at Google News or a similar search engine. Some subscriber-only access news organizations, such as World Trade Online and the Washington Trade Daily offer updated coverage of the most important current developments affecting trade policy and trade negotiations in general, but might not always be the best source of information on the enactment of a specific measure affecting trade in services in any country. Other media groups, such as the *Financial Times*, the *Wall Street Journal* and Bloomberg represent global news organizations that can and do follow regulatory and business developments governing various areas of economic activity, including important services sectors.

The measure complained about in box I.16 by Tesco could easily form the basis for a request by any Party negotiating or planning to negotiate services negotiations with the Republic of Korea.

Box I.16. Dismantling retail distribution restrictions in the Republic of Korea

Tesco attacks Seoul's 'red' retail policy

By Christian Oliver in Seoul

"Tesco's chairman in South Korea – its biggest market outside the United Kingdom – has launched an unusually caustic attack on Seoul's policymakers, accusing them of being "red" for attempting to protect small family-run shops from the expansion of supermarkets".

[...]

"Seoul has introduced a law that smaller urban supermarkets cannot open within 1km of small stores without first gaining the local communities' consent. It is also blocking large retailers from running certain kinds of store between midnight and 8a.m., when small stores generally cannot compete".

Source: Financial Times, 29 February 2012 online edition, available at www.ft.com (accessed 11 June 2012.)

4. Requests made by PTA partners and stakeholder consultations

The old adage that there is nothing new under the Sun applies to trade negotiations generally and to services trade negotiations specifically. The type of market access commitments previously requested and/or obtained by the PTA partner in earlier negotiations with other countries and economies need to be reviewed, as doing so will easily be the best indication of the PTA partner's offensive interests, in terms of service sectors and modes of supply. These commitments can also provide context and insights into the political economy and trade policy formulation dynamics at play in the PTA partner, which shrewd negotiators will be able to utilize to their own advantage when preparing their countries' own offers and requests.

Similarly, consulting domestic stakeholders is important in terms of both determining defensive lines in the sand (for offers) as well as for developing an offensive strategy (for requests) that is truly in line with an economy's existing or potential export interests. Although this process is discussed in some detail in section C above, it needs to be reiterated here since this step should also be contemplated once negotiators have a tentative but clearly emerging idea of what requests can typically be expected from the PTA partner. Again, the rationale behind this type of process should be clear – inter-agency and external stakeholder consultations serve the purpose of assessing trading partner requests. In fact, in many developing countries, where offensive interests are weak or weakly articulated, the main task of consultations will be to consider whether, and at what pace, to heed the market opening requests formulated by offensive-minded partners in the domestic market. For developing countries, where Mode 1 and Mode 4 interests tend to predominate in the offensive side of the equation, consultations carried across a broad range of domestic stakeholders will ensure that negotiators are ready to assert their own national economic interests.

E. Determining desired development outcomes

Advanced economies arguably engage in trade liberalization in order to maintain and increase competitiveness and national welfare. While such aims also motivate developing country efforts, trade liberalization in such countries often also aims to serve a broader set of economic development objectives. Thus, when preparing for services negotiations, policymakers must understand what these economic development objectives are as well as how trade liberalization in general (and liberalization

of trade and investment in services in particular) may be harnessed to further these objectives. Subsection 1 below discusses national development plans and how to formulate negotiating objectives that align with the over-arching goals contained in such plans.

1. National development plans

Most developing countries have prepared individual national development strategies in cooperation with either the World Bank and/or one of the regional development banks, such as the Asian Development Bank, or with one of the various United Nations agencies that work on development issues, such as the United Nations Development Programme. Most national development plans tend to group their various objectives under the familiar headings of economic growth, social equality (or harmony), improved governance and environmental protection. Trade liberalization in general and liberalization of trade in services in particular can be made to serve a number of these outcomes.

Most development plans share a number of common objectives, such as alleviating poverty for those still living in its grip as well as achieving economic growth that benefits both rural and urban areas, and generates better employment opportunities for both men and women. Improving transparency, accountability and governance standards more generally in the public sector are also often reiterated objectives of national development plans, as is realizing the benefits of economic progress with minimal impact

Box I.17. Afghanistan National Development Strategy, 2008-2013

By the solar year 1400 (2020), Afghanistan will be:

- A stable Islamic constitutional democracy at peace with itself and its neighbours, standing with full dignity in the international family;
- A tolerant, united and pluralistic nation that honours its Islamic heritage and the deep-seated aspirations toward participation, justice and equal rights for all;
- A society of hope and prosperity based on a strong, private-sector led market economy, social equity and environmental sustainability.

Our goals

The Afghanistan National Development Strategy serves as Afghanistan's Poverty Reduction Strategy Paper and uses the pillars, principles and benchmarks of the Afghanistan Compact as a foundation. The pillars and goals of the strategy are:

1. Security: Achieve nationwide stabilization, strengthen law enforcement and improve personal security for every Afghan;
2. Governance, rule of law and human rights: Strengthen democratic processes and institutions, human rights, the rule of law, delivery of public services and government accountability;
3. Economic and social development: Reduce poverty, ensure sustainable development through a private sector-led market economy, improve human development indicators and make significant progress towards the Millennium Development Goals.

A further vital and cross-cutting area of work is eliminating the narcotics industry, which remains a formidable threat to the people and State of Afghanistan, the region and beyond.

Source: www.undp.org.af/publications/KeyDocuments/ANDS_Full_Eng.pdf (accessed 15 June 2012).

on the environment, or in a manner that is environmentally sustainable. Most national development plans also set out the general objective of improving the investment climate and the business environment more broadly.

Of the development goals listed in box I.17, many of those under goals (2) and (3) could be directly or indirectly affected by the outcome of trade negotiations. Before formulating negotiating objectives in anticipation of services negotiations, it is important that policymakers familiarize themselves with their respective national development plans, so that they do not find themselves ultimately working at cross-purposes with these plans. Moreover, a well-written national development plan will also discuss some of the constraints or bottlenecks (physical, infrastructural, human-resource related or policy-related) that have hitherto held back economic growth; policymakers preparing for services negotiations must also have an understanding of these constraints, both when formulating offensive objectives as well as defensive needs.

Even in the absence of a national development plan, the Millennium Development Goals (referred to in the Afghanistan National Development Strategy cited above) adopted by the United Nations in 2000, or the Poverty Reduction Strategy Papers many countries have developed with World Bank and other sources of donor assistance, can provide policymakers with useful overall guidance on the type of development objectives their trade policy in general and their strategy in services negotiations in particular should ultimately be serving. Box I.18 sets out the Millennium Development Goals.¹²

Box I.18. Millennium Development Goals

The Millennium Development Goals are eight international development goals that all 193 United Nations member States and international development organizations have set themselves to achieve by 2015. The individual goals are:

1. Eradicating extreme poverty and hunger;
2. Achieving universal primary education;
3. Promoting gender equality and empowering women;
4. Reducing child mortality rates;
5. Improving maternal health;
6. Combating HIV/AIDS, malaria, and other diseases;
7. Ensuring environmental sustainability; and
8. Developing a global partnership for development.

Source: www.un.org/millenniumgoals/bkgd.shtml (accessed 15 June 2012).

Although these goals do not in and of themselves contain much specific guidance to policymakers trying to determine a given set of objectives in anticipation of trade in services negotiations, they should provide help in contextualizing where a country's development efforts should be focused. Eradicating poverty through private sector growth, increasing education levels across the board and promoting the participation of women in economic life are all goals that trade policy tools such as services liberalization can be harnessed to help achieve.

¹² In 2015, the Millennium Development Goals are to be replaced by the Sustainable Development Goals.

2. Formulating negotiating outcomes for development

In addition to national development plans, many countries have also formulated a national trade policy as part of a broad range of policy instruments aimed at furthering the objectives set forth in the national development plan. Known as “mainstreaming trade”, this has been part of the so-called Enhanced Integrated Framework approach, whereby trade policy is to be treated as one of the central tools for achieving economic development goals. Policymakers preparing for upcoming services trade negotiations should take the time to determine whether such a national trade policy was ever drafted and, if so, to what extent it remains relevant.

Box I.19 refers to the National Trade Policy (NTP) of the Federated States of Micronesia, as formulated in January 2011. Although still pending adoption by the nation’s Parliament, the NTP contains a set of relatively clearly defined objectives, although it admittedly falls short of defining detailed strategies for using services trade liberalization to achieve these objectives. Nevertheless, it should be relatively easy for policymakers from Micronesia to formulate negotiating objectives and strategies for achieving the objectives, based on the guidance contained in the NTP.

Box I.19. Mainstreaming trade into development strategies – National Trade Policy of the Federated States of Micronesia

The ultimate objective of the National Trade Policy is to promote export-led sustainable economic growth and self-reliance, with the ultimate objective of creating employment, alleviating hardship and raising the living standards of citizens of the Federated States of Micronesia. The Trade Policy provides clear recommendations on what needs to be done in order to promote private sector development and export-led economic growth.

Services contribute about 77 per cent to GDP but exports of services are very low. The main services export is tourism, but it is still underdeveloped. Another potential source of “exports” is the temporary movement of natural persons abroad. Technical and financial assistance is needed to upgrade the training institutions to develop skills that are needed to turn around the economy and export the surplus skills.

The Federated States of Micronesia will liberalize and upgrade the key service sectors such as telecommunications, financial and transport services among other sectors, to promote efficiency and reduce the cost of doing business. However, diagnostic studies need to be undertaken prior to liberalization and some regulations need to be put in place to protect public interests.

The key policies outlined in the table below will be pursued in order to promote trade and investment in the identified priority sectors.

Sectors	Trade policy
<i>Services</i>	
Transport	Liberalization of the transport sector (air and maritime) to improve efficiency, reliability and quality of service.
Tourism	Liberalization of the tourism sector to allow foreign investment and improve the quality of services offered to tourists.
Financial services	Liberalization of the financial sector to improve the quality of services to the private sector including the small and medium-sized enterprises.

Box I.19. Mainstreaming trade into development strategies – National Trade Policy of the Federated States of Micronesia *(continued)*

Sectors	Trade policy
Education and human resources development	Strengthening and upgrading the education system/programmes to improve the quality of education and produce work-ready graduates for the local market, and export the surplus skills to the international labour market.
Telecommunications	Liberalization of the telecommunications sector to improve the quality of services and reduce the costs of business.
Energy	Liberalization of the petroleum sector and promotion of investment in renewable energy.

Source: Federated States of Micronesia Trade Policy, January 2011, available at www.fsmrd.fm (accessed 15 June 2012).

With or without a national trade policy, the strategic negotiating implications of many of the specific objectives set out in a given country's national development plan will be relatively obvious to most policymakers as they start to prepare for services negotiations. Thus, the objective of encouraging foreign direct investment (FDI) in a number of strategic sectors (such as tourism) can be achieved by making relatively liberal market access and national treatment offers in the sectors concerned, and by removing any regulatory constraints that might currently be preventing potential FDI in this sector.

This last point leads to the discussion, in the next section of this chapter, of the need by policymakers preparing for services negotiations to: (a) obtain a detailed understanding of their own regulatory regime as it governs different service sectors; and (b) learn to appreciate how existing regulations may be having an impact on foreign service supplier, for better or worse.

F. Performing a trade-related regulatory audit

The benefits of conducting a trade-related regulatory audit are broadly recognized.¹³ Suffice to say here that, for most transition economies, performing a comprehensive trade-related regulatory audit is something that is likely to have been done to a relatively far-reaching extent during the WTO accession process. Such an audit may furthermore have been updated during any subsequent WTO Trade Policy Review. Nevertheless, such an audit can still be performed with a view to helping to prepare for upcoming negotiations and enhancing the quality of needed dialogue between trade negotiators, sectoral regulators and private sector stakeholders.

Furthermore, an audit may prove particularly helpful when PTA negotiations in services (and investment) proceed on the basis of a negative list approach typical to the majority of PTAs in existence today. In this context, drawing up a list of non-conforming measures might be particularly useful for:

- (a) Promoting understanding among trade negotiators and regulators of the implications of making commitments in upcoming services negotiations;
- (b) Benchmarking the national regulatory regime in terms of its effectiveness and compliance with international best practices;

¹³ See, for example, Marconini and Sauvé, 2010.

(c) Anticipating and preparing for requests that are likely to ensue from negotiating partners once services trade negotiations have begun.

1. *Promoting understanding between trade negotiators and regulators*

As discussed at the beginning of this chapter, regulators will generally have a solid handle on the sectors over which they have been given regulatory oversight. Such regulators are most likely to view these powers through the lens of domestic policy considerations. Trade negotiators on the other hand, may have less of a solid handle on the legal intricacies and regulatory rationales and minutiae governing these various economic sectors and the policy measures governing them; however, they must gain an understanding of them that is sufficient to allow them to sensibly conduct negotiations with trading partners on their eventual liberalization. Enter the trade-related regulatory audit. As some commentators have noted: “[This] internal exercise strengthens interagency coordination and promotes a healthy dialogue among the officials involved in domestic and external policy matters, while also favouring a culture of regulatory reform and regulatory impact assessment.”¹⁴

2. *Benchmarking the domestic regulatory regime*

The trade-related regulatory audit also allows policymakers to perform a limited cost-benefit analysis of existing regulations in the light of their stated regulatory objectives, and may also allow for a comparison to be made with similar regulations in a country's main trading partners. It should also allow policymakers to address the series of important questions that are summarized in box I.20.

Box I.20. Trade-related regulatory audit: Key questions

- What is the policy objective pursued by the relevant regulatory measure?
- Is the policy objective pursued by the specific measure consistent with overall government policy?
- How transparent is the regulatory measure and the process to adopt it?
- Are private sector stakeholders, domestic and foreign, consulted prior to the enactment of new policy measures?
- When was the policy measure, law, or regulation enacted?
- When was the measure last invoked?
- Is the measure periodically reviewed?
- Is the Government satisfied that the policy objective is being achieved, and has it developed a framework to assess the effectiveness of the regulatory regime?
- Can the policy measure be achieved through other means or in a manner that might lessen the restrictive impact on trade or investment?

Source: Marconini and Sauvé, 2010.

¹⁴ *Ibid*, p. 36.

3. *Anticipating and preparing for requests*

There are obvious benefits that a trade-related regulatory audit can have in terms of preparing negotiators directly to anticipate likely requests for regulatory change and liberalization of the regime governing the supply of services under existing laws, regulations and administrative practices. This is particularly the case where the audit involves drawing up a negative list of non-conforming measures, or measures that would have to be specifically tabled in order to be exempt from market access and national treatment commitments in a PTA that took a negative list approach towards services trade liberalization (which, as noted above, is increasingly likely to be the case). Box I.21 describes the mechanics of how the trade-related regulatory audit was conducted by Canadian policymakers in the lead-up to the NAFTA negotiations, and the interaction that this inevitably entailed between trade negotiators on the one hand, and regulators on the other hand.

Box I.21. Conducting a trade-related regulatory audit: Canadian approach in NAFTA

In the Canadian context, the compilation of the list of non-conforming measures maintained at the federal level was carried out over four months by a small group of young officials chosen for their expertise in law. The group was under the supervision of a member of the service negotiating team. The supervisor provided the group with a methodology to produce comparable reservations across all service sectors. Once the inventory was completed in draft form, the trade negotiating team met with ministries and sectoral regulatory agencies. The team asked them to verify the accuracy of the information that had been collated.

Then, during a second phase, it engaged in a policy dialogue on the rationale behind the restrictive measures identified, the possibility (or not) of achieving these objectives through other means (including through non-discriminatory measures), and the scope for removing (or not) the non-conforming measures or progressively reducing the level of non-conformity within the context of the negotiations on the North American Free Trade Agreement. A similar dialogue was held with private sector representatives, who were asked about the scope for modifying or eliminating the restrictive measures maintained at the domestic level.

Source: Marconini and Sauvé, 2010.

To be sure, the approach followed by Canada (box I.20) may not be perfectly suited to all countries. However, it does show the kind of inter-agency and cross-cutting cooperation that policymakers in a country preparing to embark on services trade negotiations must be prepared to engage in if they wish to maximize the opportunity with regard to the forward looking and pro-competitive regulatory reform that such negotiations represent.

G. Some final considerations in preparing for service negotiations

Policymakers in developing countries should be aware of the fact that when negotiating with developed countries, the latter will typically have an existing template, on the basis of which it will expect to negotiate. In addition, their willingness or ability to deviate from this template may be limited by domestic political imperatives and the inherent path dependency of the trade negotiating process itself. Policymakers in developing countries who are preparing for services negotiations must therefore carefully study any previous PTAs that their future developed-country negotiating partners have already entered into, and consider the degree to which specific trade disciplines and commitments entered under these agreements are compatible with the development objectives of the negotiating developing country.

As mentioned at the outset of this chapter, preparing for services negotiations is essentially about doing one's homework on a broad range of domestic and foreign economic/trade policy issues. As explained in section C of this chapter, it is also a matter of consulting widely both within and outside of government to better understand the prevailing domestic regulatory frameworks and politico-economic realities. We turn now to some important considerations that should ideally govern policymakers conduct during the course of services negotiations once these have started.