

GENERAL PRINCIPLES & GUIDELINES ON SCHEDULING SERVICES COMMITMENTS UNDER THE GATS

Dr. Pralok Gupta
Assistant Professor
Centre for WTO Studies
New Delhi

Overview

- Scheduling of Commitments
- What to Schedule in Commitments
- How to Schedule Commitments
- How to Record Commitments
- Key Pointers for Scheduling Commitments

Overview of GATS

- The General Agreement on Trade in Services (GATS), a treaty of the WTO, entered into force in January 1995 as a result of the Uruguay Round negotiations
 - The treaty extended the multilateral trading system to service sector, as the GATT provides such a system for merchandise trade
- The GATS contains two sorts of provisions
 - Part- I: General Obligations- MFN, Transparency, Domestic Regulations etc.
 - Part- II: Specific Commitments- negotiated undertakings particular to each GATS signatory, to be recorded in national schedules

SCHEDULING OF COMMITMENTS

What is a Schedule?

- A legal document containing commitments which are negotiated undertakings particular to each GATS signatory
- Article XX requires each Member to submit a schedule of specific commitments but it does not prescribe the sector scope or level of liberalization
- A schedule contains the following information:
 - a clear description of the sector or sub-sector committed
 - limitations to market access
 - limitations to national treatment
 - additional commitments other than market access and national treatment
- The scheduling method used by the GATS is often called a "bottom-up" or "positive-list" approach since market access and national treatment commitments are undertaken only for sectors that have been included

Modes of supply:

- 1) Cross-border supply 2) Consumption abroad 3) Commercial presence 4) Presence of natural persons

Sector or subsector	Limitations on market access	Limitations on national treatment	Additional commitments
I. HORIZONTAL COMMITMENTS			
SECTORS INCLUDED IN THIS SCHEDULE			
II. SECTOR-SPECIFIC COMMITMENTS <i>[Insert specific commitments in the relevant service sector(s)/sub-sector(s) as appropriate]</i>			
	1) 2) 3) 4)	1) 2) 3) 4)	
	1) 2) 3) 4)	1) 2) 3) 4)	
	1) 2) 3) 4)	1) 2) 3) 4)	

HOW TO DESCRIBE COMMITTED SECTORS AND SUB-SECTORS?

- The classification of sectors and sub-sectors should be based on the Secretariat's Services Sectoral Classification List (MTN.GNS/W/120)
 - Each sector contained in the Secretariat list identified by the corresponding Central Product Classification (CPC) number
- Where it is necessary to refine further a sectoral classification, this should be done on the basis of the UN Provisional CPC or other internationally recognised classification (e.g. Financial Services Annex)
- If a Member wishes to use its own sub-sectoral classification or definitions, it should provide concordance with the CPC
 - If this is not possible, it should give a sufficiently detailed definition to avoid any ambiguity as to the scope of the commitment

- **CLASSIFICATION OF SERVICE SECTORS (MTN.GNS/W/120)**

1. **Business Services** — Professional, computer and related, research and development, real estate, rental/leasing without operators and other business services;
2. **Communication Services** — Postal, courier, telecommunication, audiovisual and other communication services;
3. **Construction and related Engineering Services** — General construction for buildings and civil engineering, installation, assembly building completion and finishing work;
4. **Distribution Services** — Commission agents', wholesale trade and retailing services, franchising;
5. **Educational Services** — Primary, secondary, higher and adult education;
6. **Environmental Services** — Sewage, refuse disposal, sanitation and similar services;
7. **Financial Services** — Insurance, banking and other financial services;
8. **Health-related and Social Services**
— Hospital, other human health and social services;
9. **Tourism and Travel-related Services**
— Hotel and restaurants, travel agencies and tour operators, and tourist guides services;
10. **Recreational, Cultural, and Sporting Services** — Entertainment, news agency, libraries, archives, museums, sporting services;
11. **Transport Services** — Maritime, internal waterways, air, space, rail, road, pipeline and auxiliary transport services;
12. **Other Services.**

Case Study: US-Gambling Case (DS285)

- Antigua and Barbuda filed a complaint against US for violation of its commitments under GATS

Antigua's claim

- Certain US laws, namely 'Wire Act', 'Travel Act', 'Illegal Gambling Business Act' and certain State laws of Colorado, Louisiana etc. violated its GATS commitments
- Restrictions imposed by above laws resulted in "total prohibition" on cross border supply of gambling and betting services from Antigua
- This violated US specific commitments on betting and gambling services

- The relevant US Schedule read as follows

Sector or Sub sector	Limitations on Market Access
<p>10. Recreational, Cultural and Sporting Services</p> <p>A. Entertainment Services (Including live band, theatre, circuses)</p> <p>B. News Agency Services</p> <p>C. Libraries, Archives, Museums and other cultural services</p> <p>D. Other Recreational Services (Except sporting)</p>	<p>(1) None</p> <p>(2) None</p> <p>(3) None</p> <p>(4) Unbound, except as indicated in horizontal sector</p> <p>Same as above</p> <p>Same as above</p> <p>(1) None</p> <p>(2) None</p> <p>(3) The number of concessions available for commercial operations in federal, state and local facilities is limited</p> <p>(4) Unbound, except as indicated in horizontal sector</p>

- CPC Group 964 is broken down into following classes and sub-classes:

964 Sporting and other recreational services

9641 sporting services

96411 sports event promotion services

96412 sports event organization services

96413 sports facility operation services

96419 other sporting services

9649 other recreational services

96491 recreational park and beach services

96492 gambling and betting services

96499 other recreational services

- CPC class that corresponds to “sporting services” (sub-class 9641) does not include gambling and betting services which falls in another sub class 9649
- Taking into account all the above, AB concluded that entry in US schedule “Other recreational services (except sporting)” must be interpreted as excluding services corresponding to CPC class 9641 “sporting services” and including services corresponding to CPC 9649, “other recreational services” including sub-class 96492, “gambling and betting services”

Exercise 1:

A Member wishes to make a commitment in the sub-sector of "Accounting, auditing and bookkeeping services". How it should mention this sub-sector in its Schedule of Commitments?

- In the Classification List, this service falls within "Professional Services" which is a sub-sector under "Business Services". The Classification List also contains the relevant CPC number, 862.
- In its Schedule, the Member could make the following entry in the "Business Services"/"Professional Services" section: **Accounting, auditing and bookkeeping services (CPC 862)**

Modes of supply:

- 1) Cross-border supply 2) Consumption abroad 3) Commercial presence 4) Presence of natural persons

Sector or subsector	Limitations on market access	Limitations on national treatment	Additional commitments
I. HORIZONTAL COMMITMENTS			
SECTORS INCLUDED IN THIS SCHEDULE			
II. SECTOR-SPECIFIC COMMITMENTS <i>[Insert specific commitments in the relevant service sector(s)/sub-sector(s) as appropriate]</i>			
01. Business Services			
01.A. Professional Services b) Accounting, auditing and book-keeping services (862)	1) 2) 3) 4)	1) 2) 3) 4)	
	1) 2) 3) 4)	1) 2) 3) 4)	
	1) 2) 3) 4)	1) 2) 3) 4)	

Exercise 2:

A Member wishes to indicate an offer or commitment in the sub-sector of “Architectural Design Services”. How it should mention this sub-sector in its Schedule of Commitments?

- In the Secretariat list, this service would fall under the general heading “Business Services” under “Architectural Services” (see item I.A.d). By consulting the UN Provisional CPC, Architectural Design Services can be found under the corresponding CPC classification number 86712.
- In its offer/schedule, the Member should enter the sub-sector under the “Business Services/Professional Services” section of its schedule as: **Architectural Design Services (86712)**

Modes of supply:

- 1) Cross-border supply 2) Consumption abroad 3) Commercial presence 4) Presence of natural persons

Sector or subsector	Limitations on market access	Limitations on national treatment	Additional commitments
I. HORIZONTAL COMMITMENTS			
SECTORS INCLUDED IN THIS SCHEDULE			
II. SECTOR-SPECIFIC COMMITMENTS <i>[Insert specific commitments in the relevant service sector(s)/sub-sector(s) as appropriate]</i>			
01. Business Services			
01.A. Professional Services b) Accounting, auditing and book-keeping services (862)	1) 2) 3) 4)	1) 2) 3) 4)	
d) Architectural Services - Architectural Design Services (86712)	1) 2) 3) 4)	1) 2) 3) 4)	
	1) 2) 3) 4)	1) 2) 3) 4)	

LIMITATIONS ON MARKET ACCESS (MA): Article XVI

- Giving access to home market by a member country to services and service suppliers of other Member countries
- The provisions of GATS, laid down in Article XVI.2, cover six types of restrictions that must not be maintained in the absence of limitations
 1. Limitations on the number of service suppliers;
 2. On the total value of service transactions or assets;
 3. Number of operations or quantity of output;
 4. Number of natural persons supplying a service;
 5. Type of legal entity or joint venture through which a service is provided;
 6. Any foreign capital limitations relating to maximum levels of foreign participation

- The first four restrictions are quantitative as they deal with quota-type limits
 - May be expressed either as an absolute number or in the form of an Economic Needs Tests (ENTs)
 - For ENTs, members should specify the approval criteria that are being applied to such tests
- These measures, except for (5) and (6), are not necessarily discriminatory, i.e., they may affect national as well as foreign services or service suppliers

Article XVI.2 limitations	Examples
<p>a) Number of service suppliers (i.e. numerical quotas, monopolies, exclusive service suppliers or an economics needs test)</p>	<p>Annually established quotas for foreign medical practitioners.</p> <p>Licence for a new restaurant based on an economic needs test.</p> <p>Nationality requirements for suppliers of services (equivalent to zero quota for foreigners).</p>
<p>b) Value of service transactions or assets (i.e. numerical quotas or economics needs test)</p>	<p>Foreign bank subsidiaries limited to x percent of total domestic assets of all banks.</p>
<p>c) Number of service operations or quantity of service output (i.e. designated numerical units in the form of quotas or economics needs test)</p>	<p>Restrictions on broadcasting time available for foreign films.</p>
<p>d) Number of natural persons employed (i.e. numerical quotas or economic needs test)</p>	<p>Foreign labour should not exceed x per cent and/or wages y per cent of total.</p>
<p>e) Type of legal entity or joint venture</p>	<p>Commercial presence excludes representative offices.</p> <p>Foreign companies required to establish subsidiaries.</p> <p>In sector x, commercial presence must take the form of a partnership.</p>
<p>f) Participation of foreign capital (i.e. maximum percentage limit on foreign shareholding or the total value of individual or aggregate foreign investment)</p>	<p>Foreign equity ceiling of x per cent for a particular form of commercial presence.</p>

WHAT NEED NOT BE ENTERED INTO THE MARKET ACCESS COLUMN?

- Many factors can potentially affect “market access”, but only restrictions that fall under the six categories listed in Article XVI.2 are subject to scheduling
- Approval procedures or licensing and qualification requirements, such as financial soundness or membership in a professional organization, are frequently stipulated as conditions to obtain a licence, they do not need to be scheduled under market access
- Quantitative restrictions specified in first four conditions refer to maximum limitations
 - Minimum requirements, such as, minimum capital requirements for the establishment of a corporate entity do not fall within the scope of Article XVI

LIMITATIONS ON NATIONAL TREATMENT (NT): ARTICLE XVII

- The national treatment standard does not require formally identical treatment of domestic and foreign suppliers
 - Formally different measures can result in effective equality of treatment; conversely, formally identical measures can in some cases result in less favourable treatment of foreign suppliers (*de facto* discrimination)
- That limitations on national treatment cover cases of both *de facto* and *de jure* discrimination
- Unlike Article XVI, Article XVII does not contain an exhaustive listing of the types of measure which would constitute limitations on national treatment

- The NT obligation in Article XVII does not require a Member to extend such treatment to a service supplier located in the territory of another Member
- Any subsidy which is a discriminatory measure within the meaning of Article XVII would have to be either scheduled as a limitation on NT or brought into conformity with that Article
- Restrictions on the purchase, lease or use of real estate, connected with the supply of a service inscribed in a schedule, are NT limitations to the extent that different conditions apply to foreign services suppliers which alter the conditions of competition in favour of service suppliers of the Member compared to like service suppliers of any other Member

Exercise 3:

Domestic suppliers of audiovisual services should be given preference in the allocation of frequencies for transmission within the national territory. Should this be included as an NT Limitation? Why or why not?

- Yes. 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.

Exercise 4:

A measure stipulates that prior residency is required for the issuing of a licence to all service suppliers. Should this be included as an NT Limitation? Why or why not?

- Yes. 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.

ADDITIONAL COMMITMENTS

- Commitments with respect to measures affecting trade in services not subject to scheduling under Articles XVI and XVII
- Are expressed in the form of undertakings, not limitations
- Can include, but not limited to, undertakings with respect to qualifications, technical standards, licensing requirements or procedures, and other domestic regulations that are consistent with Article VI
- Are optional

EXCEPTIONS (ARTICLE XIV) AND SCHEDULING

- All measures falling under Article XIV (General Exceptions) excepted from all obligations and commitments, should not be scheduled
- Cannot be negotiated under Specific Commitments
- Any prudential measure taken in accordance with paragraph 2(a) of the Annex on Financial Services constitutes an exception to the Agreement, should not be scheduled
- Measures falling under Article XII (Restrictions to Safeguard the Balance of Payments) also exceptions, should not be scheduled

SPECIFIC COMMITMENTS AND MFN EXEMPTIONS

- The MFN obligation requires that the most favourable treatment actually accorded in all sectors, whether the subject of a commitment or not, must also be accorded to all other Members
- A Member taking a national treatment or a market access commitment in a sector must accord the stated minimum standard of treatment specified in its schedule to all other Members
- Where an MFN exemption has been granted for a measure, a Member is free to deviate from its Article II obligations, but not from its Article XVI and Article XVII commitments
- In such cases, a Member may accord treatment in that sector more favourable than the minimum standard to some Members, as long as all other Members receive at least that minimum standard of market access and national treatment appearing in its schedule

HOW TO TREAT THE MODES OF SUPPLY?

- Four modes of supplying services under the GATS
- Whatever the mode of supply, obligations and commitments under the Agreement relate directly to the treatment of services and service suppliers
- They only relate to service consumers insofar as services or service suppliers of other Members are affected
 - It should be noted that a Member may only be able to impose restrictive measures affecting its own consumers, not those of other Members, on activities taking place outside its jurisdiction
- Limitations in the schedule of a Member - if any - with respect to mode 2 on market access and/or on national treatment should only relate to measures affecting the consumers of that Member, and not to measures affecting consumers of another Member, in the territory of that Member

- In Mode 4, many participants have chosen to inscribe their commitments in the form of undertakings rather than in the form of market access limitations
 - In such cases the bound measures affecting the entry and temporary stay of natural persons should be explicitly stated
 - In the absence of a reference to a specific duration for the temporary stay of a foreign service supplier, it could be understood that no binding is being undertaken in respect of the duration of that stay
- Where a service transaction requires in practical terms the use of more than one mode of supply, coverage of the transaction is only ensured when there are commitments in each relevant mode of supply

Exercise 5:

A Member has made full commitment in the cross-border supply of architectural services (e.g. by telecommunications or by mail). Would this extend to presence of foreign architects to provide their services on a temporary basis?

- No. This commitment alone does not extend to the presence of foreign architects as it comes under Mode 4. A separate commitment would have to be taken under "Presence of natural persons (Mode 4)" to cover this case.

HOW TO RECORD COMMITMENTS?

- Three important things to consider while recording the commitments-
 1. Horizontal commitments
 2. Sector-specific commitments
 3. Levels of commitment
- Some commitments may apply to trade in services in all scheduled services sectors unless otherwise specified
- In order to avoid repetition, it is desirable to enter such commitments in a separate section at the beginning of the schedule according to the four modes of supply
 - Such a section could be entitled: "Horizontal commitments applicable to sectors listed in the sectoral part of the schedule"

- Horizontal commitments condition all other entries in the schedule unless otherwise specified
- For a sector-specific restriction, the entry must be read as the combination of the horizontal restrictions and of the sector-specific restriction unless explicitly provided otherwise in the entry
 - A "none" in the sectoral section must be read as meaning "none except the conditions set out in the horizontal section"
- To indicate in a given sector that no restrictions whatever are imposed, a Member must make clear in the horizontal section or in the relevant sectoral section that the horizontal restrictions do not apply in the sector in question

SECTOR SPECIFIC COMMITMENTS

- A sector-specific commitment applies to trade in services in a particular sector
- A measure, maintained as contrary to MA or NT, must be entered as a limitation in the appropriate column (either market access or national treatment) for the relevant sector and modes of supply
 - The entry should describe the measure concisely, indicating the elements which make it inconsistent with MA or NT
- Given the legal nature of a schedule, it should contain only descriptions of bound commitments
 - Any additional information for transparency purposes should not be entered in the schedule
 - A reference to the legal basis of a scheduled measure (i.e. the relevant law or regulation) may be entered if thought necessary

LEVELS OF COMMITMENT

- Depending on the extent to which a Member has limited market access and national treatment for each commitment, four cases can be foreseen:

1. Full Commitment

- No limitation on market access or national treatment in a given sector and mode of supply through measures inconsistent with MA or NT
 - The Member should mark in the appropriate column: NONE
 - Relevant limitations listed in the horizontal section of the schedule still applies
- Regardless of entry in the MA column, "None" entry in the NT column mean that NT is bound for entire mode and not limited to what bounded in MA commitment with limitations
 - If a Member makes an MA commitment, where commercial presence is limited to partnerships, an entry "None" or any other entry in the NT column would refer to the whole mode of supply and not only to partnerships

2. Commitment with Limitations

- Two possibilities
 - I. Binding of an existing situation ("standstill")
 - II. Binding of a more liberal situation where some, but not all, of the measures inconsistent with MA or NT will be removed ("rollback")
- In either case, the Member must describe in the appropriate column the measures maintained and inconsistent with MA or NT
- The entry should describe each measure concisely, indicating the elements which make it inconsistent with MA or NT
 - It would not be correct merely to enter in a column words such as "bound", "freeze" or "standstill"
- In some cases a Member may choose to partially bind measures affecting a given category of suppliers. "Unbound except for measures affecting....."

3. No Commitment

- Member remains free in a given sector and mode of supply to introduce or maintain measures inconsistent with MA or NT
 - Member must record in the appropriate column:
UNBOUND
- This case is only relevant where a commitment has been made in a sector with respect to at least one mode of supply
- Where all modes of supply are "unbound", and no additional commitments have been undertaken in the sector, the sector should not appear on the schedule

4. No Commitment Technically Feasible

- In some situations, a particular mode of supply may not be technically feasible, example, cross-border supply of hair-dressing services
- In these cases the term UNBOUND* should be used
 - The asterisk should refer to a footnote which states "Unbound due to lack of technical feasibility"
- The term may not be used as an entry in the NT column for modes 1 and 2 when, for the same service, there is an MA commitment
- Where the mode of supply thought to be inapplicable is in fact applicable, or becomes so in the future, the entry means "unbound"

KEY POINTERS FOR SCHEDULING COMMITMENTS

- By virtue of Article XX, every signatory must attach to the GATS its national schedule

 Submitting scheduling document is a *compulsion* and not a *choice*

- Schedules, including footnotes, headnotes and attachments, are a record of legal commitments

 *Nothing* should appear in them which a Member does *not intend to be legally binding*

- Market access and national treatment commitments apply only to the sectors or sub-sectors inscribed in the schedule

 *Not a right* for the supplier of a committed service *to supply uncommitted services* which are inputs to the committed service

- For MA scheduling purposes, the entries should be confined to measures that fall under one or more of the six categories of limitations listed in Article XVI.2
- For NT, the benchmark is not whether there has been formally identical or different treatment of domestic and foreign services and service suppliers, but if conditions of competition have been modified as a result of the measure
- Commitments guarantee minimum levels of treatment, but do not prevent Members from being more open (or less discriminatory) in practice



Thanks
pralok@iift.ac.in