

**MULTILATERAL TRADE
NEGOTIATIONS
THE URUGUAY ROUND**

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General Agreement on Trade in Services - A Draft Blueprint

A. Introduction

The following paper provides an outline of essential elements considered necessary to be contained in a future General Agreement on Trade in Services (GATS). It should be understood as a contribution to the negotiating process (cf. paragraph 11 of Part II of MTN.TNC/7(MIN)) and not as a submission of merely national positions. Taking into account the Ministerial Decision of Montreal (TNC/7(MIN) Part II), and former submissions by the Swiss delegation (MTN.GNS/W/30 and W/45), the present blueprint seeks to provide an appropriate set-up of the agreement, and to identify areas of problems still unsettled.

With a view to improving market access and increasing participation of developing countries, the Uruguay Round Agreement would contain short-and long-term elements. It could contain immediately applicable achievements (freeze, requirement for the accession to the agreement), as well as a system for the progressive liberalization of commercial services to be undertaken after the end of the Round. This means that at the end of the Round contracting parties would accept to submit the universe of commercial services to the general rules and procedures of the GATS Agreement. The progressive liberalization of trade in services would be undertaken sectorially by means of a process of progressive inclusion of service sectors under a set of specific rules and disciplines (inter alia non-discrimination/m.f.n., national treatment). Such inclusion would correspond to the concept of binding in GATT. Sectorial negotiations - multilateral, plurilateral or bilateral - would furthermore pursue the compatibility of pertinent service regulations and the elimination of specific barriers to market access.

The proposed framework, therefore, could contain three major baskets which, of course, would remain closely interrelated:

1. General provisions applicable to the universe of commercial services, including obligations to negotiate and institutional aspects of GATS;
2. An agreement on immediately applicable achievements;
3. Provisions on the long-term process of progressive liberalization including bindings of services:
 - (i) Substantive rules and principles applicable to areas of services where market access is bound, including exceptions thereof;
 - (ii) modalities of bindings, including deconsolidation and safeguards.

B. The Essential Elements of the Agreement

1. General provisions applicable to the universe of commercial services

(a) The purpose and goal of GATS

The main purpose of this agreement is to provide a long-term framework for the progressive liberalization of commercial services as a means of promoting economic growth of all trading partners and the development of developing countries. Liberalization would be defined as a substantial reduction of trade barriers in commercial services, aiming at effective market access.

(b) General obligations under GATS

(i) Commitment to progressive liberalization and effective market access

The agreement would state in terms of a contractual obligation, and not merely in terms of a recommendation, a commitment to engage in an ongoing process of liberalization of trade in commercial services and to bring about effective market access for foreign competition.

(ii) Obligation to enter into negotiations in good faith

The central element to generate a long-term and dynamic process is an explicitly stated right to negotiations and, as a corollary, an obligation to enter into service negotiations in good faith. All commercial services are open to requests for negotiations. None would be a priori excluded under GATS.

In this context, negotiating rights and obligations would need to be defined carefully. A contracting party having an important interest in a sector should be entitled, irrespective of its trade volume and rank among suppliers, to request negotiations with another contracting party.

(iii) Different modes of negotiation

Negotiations may take place in different forms and fora.

Negotiations should primarily be undertaken under the aegis of the GATT system, either within multilateral trade rounds or on a bilateral, plurilateral or a multilateral basis. Furthermore such negotiations may take place outside the GATT system, on a bilateral, plurilateral or multilateral basis within or without other international fora and organizations.

Either under the aegis of the GATT system or outside of it, negotiations may be undertaken on the basis of specific requests and offers or with a view to achieving sector related standard-setting agreements which bring about a higher degree of compatibility of national regulations. Negotiations in international fora other than the GATT system are necessarily dedicated to such standard-setting operations.

In all modes, agreements shall be subject to rules and disciplines of GATS.

(iv) Autonomous liberalizations

GATS does not need to regulate unilateral, autonomous liberalizations, erga omnes. They can be bound under the rules and disciplines of this agreement.

(v) Notification and transparency

Transparency in respect to all laws, regulations and administrative practices on commercial services, including important administrative and judicial rulings and international agreements, are an essential requirement to define interests and to identify potential and actual problems with a view to seeking negotiations. The agreement would define the basic principles regulating the process and scope of notification, taking into account that it is practically impossible to notify all regulations on commercial services. It is conceivable that information should be generally accessible and provided on the basis of specific requests. Further obligations on transparency regarding bound services are considered below (dispute prevention, paragraph 3.1.j).

Any party to the agreement may bring to the attention of the appropriate surveillance mechanism any actions or omissions it believes to be relevant to the fulfilment of these commitments. Notifications should be addressed to the GATT secretariat which may also provide further relevant information.

(vi) Special circumstances

The agreement may contain provisions allowing a phasing-in of obligations under this heading, taking into account existing levels of market access granted, as well as circumstances and resources available to contracting parties, in particular to developing countries.

(c) General provisions of the agreement

(i) Scope of agreement

Two aspects should be considered:

- GATS should apply to the universe of commercial services. None of existing and future commercial services are

excluded. As GATT, which contains no definition of a traded good, GATS should not attempt to define the notion of commercial services at this stage, but leave the matter open to future developments.

- Each contracting party shall take such reasonable measures as may be available to it to ensure observance of the provisions of this agreement by the regional and local governments and authorities within its territory. Inclusion of services regulated by such authorities should be taken into account in the context of defining requirements for the Accession to the Agreement (see 2.a.i and 2.b) and modalities (see 3.2.a).

(ii) Institutional aspects drawn from GATT

In order to achieve greatest possible compatibility with GATT, institutional questions should be resolved on the basis of GATT experience. The following GATT features could, inter alia, be taken, into account:

- The process of consultation, mediation, and dispute settlement, including arbitration.
- The establishment of a Standing Body for the purpose of monitoring the functioning of the agreement, the elaboration of further rules (recommendations), the conciliation of disputes by the Chairman and, possibly, the adoption of panel reports.
- The system of monitoring, implementation and sanctions.

(iii) Relationship GATT - GATS

GATT and GATS should be part of the same multilateral system. Since an increasing number of economic activities combine elements both of goods and of services, rules may need to be established in order to determine which of the agreements applies in a particular case.

(iv) The Relationship of GATS to sectorial standard-setting agreements

Since GATS is a framework agreement, it has a constitutional function. It would be important that GATS should legally prevail over subsequent sectorial agreements with respect to market access.¹

¹Without such provision, subsequent, sectorial and more specific agreements could replace the rules and disciplines of GATS in accordance with the general principles codified in Article 30 of the Vienna Convention on the Law of Treaties.

2. Agreement on immediately applicable achievements

Even though GATS is a framework for long-term liberalization of commercial services, it might be desirable to include provisions on specific achievements by the end of the Round. These results could provide the starting point for further negotiations.

An agreement could include the following elements:

(a) Initial level of commitment

Initial commitments in particular sectors or sub-sectors of individual service activities/transactions could be envisaged. They would oblige contracting parties to refrain from steps reducing the present level of market access for foreign competitors in the sense that they would be pre-empted from rendering market access more difficult (freeze). Violations of such commitments would be subject to countermeasures within the GATS system.

Modalities of the initial level of commitments could be negotiated with a view to taking up negotiations on liberalization and bindings. It might be conceivable to develop some sort of a safeguard clause with respect to market access in order to facilitate commitments by contracting parties under this heading.

There are two principal ways to define the initial level of commitment:

(i) Requirement for the Accession to the Agreement (RAA)

The initial level of commitment could be the entry-ticket to the agreement. Each contracting party would have to freeze a certain number of commercial services of economic importance, taking into account the degree of protection and of present market access. Each country could submit a list (schedule) of services falling under the initial level of commitments. Conditions to secure an overall balance would have to be developed.

A less ambitious model of RAA, described in MTN.GNS/W/45, would merely require parties to notify a minimal number of service sectors, sub-sectors or service activities/transactions open for negotiations within the next [x] years.

(ii) Package deal

Another approach would consist of defining an initial level of commitments in terms of a negotiated number of selected services (package deal). It may be combined with individual schedules. A similar approach is conceivable for the model which merely lists services open for subsequent negotiations.

(b) Special circumstances

It should be noted that the initial contribution required to adhere to the agreement takes into account existing levels of protection and levels of market access, including those enacted by regional or local governments and authorities. The agreement may also take into account other circumstances. This would allow for a successive phasing-in of obligations also under this section of the GATS, in particular on the part of developing countries.

(c) Subsequent accessions

Subsequent accessions to the GATS would be negotiated on the basis of similar requirements. The global degree of liberalization of the sector should be taken into account.

3. Provisions on the long-term process of progressive liberalization and bindings

Progressive liberalization of service sectors, sub-sectors or service activities/transactions could be achieved under the general commitment defined above by the successive inclusion of different sectors under substantive rules and disciplines of this agreement. This inclusion is called binding. It may be achieved either by autonomous measures or by bilateral, plurilateral or multilateral negotiations.

3.1 Substantive rules and principles

This basket would contain the legal obligations and effects attached to bindings. Unlike the General Agreement on Tariffs and Trade, services would be subject to the following rules and principles only to the extent that they are bound. This reflects the complexity of the matter and the need for a step-by-step approach. Such rules are as follows:

(a) Scope of binding

Binding relates to three elements of regulations on trade in services:

- Accession to the market and activities on the market (i.e. modalities to enter a service market, regulation of operations in a service market);
- preferred mode of delivery (i.e. cross-border trade, establishment of a commercial presence and transborder movements of factors of production);
- relevant factors of production (labour, capital, information, e.g. real estate, labour and capital market regulations, privacy laws).

(b) The principle of non-discrimination/m.f.n.

GATS would contain this fundamental principle of GATT multilateralism. Legal effects of non-discrimination are at the heart of the agreement. Given the great variety of different structures in service industries and complexity of regulation, the principle could be developed in two different modalities:

(i) M.f.n.

M.f.n., corresponding to the principle contained in Article I GATT, brings about an immediate extension of autonomous and negotiated liberalizations of commercial services to all contracting parties. It could apply to autonomous liberalizations and to those achieved in bilateral negotiations.

(ii) Qualified m.f.n.

The model would certainly apply in all cases where standard-setting agreements are concluded. It is natural that benefits of such agreements only accrue to parties of such treaties. What the GATS could provide for is a right to access or to negotiations leading to such agreements.

(c) National treatment (equality of opportunity)

The concept of national treatment, i.e. treatment no less favourable than accorded to domestic service-providers, could be expressed in terms of a principle of equal opportunity. This would help to recall that regulations need not be absolutely identical for domestic and foreign supplied services. What matters is that the effect of both regulations must provide equality of opportunities on the market. The concept was used by the Panel in United States - Section 337 of the Tariff Act of 1930, L/6439, page 51/2 paragraph 5.11 and could be taken up in GATS:

"The words treatment no less favourable in paragraph 4 [of Article III GATT] call for effective equality of opportunities for imported products in respect of the application of laws, regulations and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution or use of products. This clearly sets a minimum permissible standard as a basis. On the one hand, contracting parties may apply to imported products different formal legal requirements if doing so would accord imported products more favourable treatment. On the other hand, it also has to be recognized that there may be cases where application of formally identical legal provisions would in practice accord less favourable treatment to imported products and a contracting party might thus have to apply different legal provisions to imported products to ensure that the treatment accorded to them is in fact no less favourable."

Equality of opportunity therefore makes it clear that it is not formal treatment before the law but equality of access to and conditions for the operation on the market which matters. Accordingly, equality of opportunity shall be granted notwithstanding the legal form of the foreign enterprise operating on a domestic market.

(d) Further undertakings

GATS may include further undertakings in order to progressively overcome systemic differences in view of achieving mutually compatible competition conditions.

(e) Disciplines on service subsidies and TRIMS

GATS may have to address the problem of subsidies which may cause trade distortions. The question should be examined whether special provision on subsidies can draw from Article XVI and the present reforms on subsidies in GATT.

Equally, it has to be examined to what extent results of negotiations on TRIMS should be included in GATS.

(f) Cartels and State monopolies

GATS may include a provision obliging signatories to establish minimal rules on fair competition, and to provide for judicial protection and review.

Equally, rules might be designed to set-off similar trade-distorting effects caused by state monopolies.

(g) Legitimate Public Policy Objectives

Exceptions to national treatment or equality of opportunity could be provided for legitimate public policy objectives in line with Articles XX and XXI GATT which the GATS should enumerate explicitly (ordre public as defined by the agreement).

(h) Regional economic integration and free trade areas

Lawful derogation from both modalities of the m.f.n. principle of GATS should be envisaged for agreements concluded in the context of regional integration falling under Article XXIV GATT and provided that the exclusion of the m.f.n. principle does not constitute a disguised restriction on international trade in services.

(i) Special circumstances

Special provisions on transitional periods of phasing-in of obligations linked to bindings could be made available, taking into account special circumstances of contracting parties to the agreement, in particular of developing countries.

(j) Dispute prevention

All changes to significant laws and regulations in a bound area of services would be subject to prior notification. Contracting parties therefore should allow for advance commentary by interested parties, to be taken into account on the basis of reciprocity. The problem of major policy changes imposed by court rulings should be examined in this context. Dispute prevention should also include the possibility of cross-notification.

3.2 Modalities for progressive liberalization (bindings)

(a) Degrees of bindings available

In order to facilitate commitments and to take into account special circumstances, different degrees of bindings could be provided for:

- (i) Full binding: A sector is bound with respect to all its aspects and all legal obligations and effects attached to bindings.
- (ii) Segmental binding: The sector is bound with respect to some of its service activities.
- (iii) Partial binding: A sector is bound with respect to some, but not all substantive rules and principles (in particular non-discrimination/m.f.n. and national treatment) and for not all aspects of service regulations (market access, preferred mode of delivery, relevant factors).
- (iv) Sub-ceiling binding: Bindings can be undertaken at a level below the present state of market access. This takes into account high levels of existing market access and would allow to keep some leeway for future restrictive legislation, if need be.
- (v) Combinations of modalities under (ii)-(iv) may be envisaged.

(b) Notification of bound services and monitoring

GATS should regulate the procedures how to notify bindings to the contracting parties of the agreement.

Areas not fully subject to bindings could be subject to a strict system of reporting on the state of affairs and developments.

(c) Deconsolidation

The agreement could provide for appropriate processes of deconsolidation. Signatories, as in GATT, may introduce market restrictions only if they provide for appropriate compensation to those mainly affected. The problem of calculation of compensation and the allocation of Initial Negotiating Rights (INRs) needs careful examination.

(d) Safeguards

Besides modalities of deconsolidation, a safeguard clause type Article XIX GATT is conceivable and to be distinguished from constellations under paragraphs 2.a in fine and 3.1.g-j above. Under strictly defined criteria, access restrictions applied to new applicants may be imposed in case of actual or immediate threat of injury to a particular domestic service industry. Measures should only be justified within a period of five years after the liberalization took effect. Also, safeguard measures in order to facilitate structural adjustment should be provided for.

Finally, the need and scope of balance-of-payment safeguards for appropriate situations could be examined by the GNS. Due to close links between balance of payments, capital movement and liberalization of services, appropriate and strict criteria and procedures have to be devised in order to avoid excessive recourse to restrictions on service transactions under that safeguard clause.