

**MULTILATERAL TRADE
NEGOTIATIONS
THE URUGUAY ROUND**

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SCHEDULING OF COMMITMENTS

Points Raised in Informal Discussions

Note by the Secretariat

1. In the consultations held by the Director-General on 10 and 11 April 1991, a number of issues relating to the scheduling of commitments were discussed. This note presents these issues under the headings identified in the Secretariat note prepared for the meeting on 10-11 April 1991 (see attached). The note also discusses a number of questions which participants may wish to address in future meetings.

2. The intention of the secretariat in preparing this note has not been to be exhaustive with respect to all the points or questions raised in the discussion, and the note can be modified as considered appropriate by participants.

Issues relating to the scheduling of commitments

3. What types of measures are considered to be restrictions on trade in services (i.e. limitations and conditions on market access and conditions and qualifications on national treatment) and therefore should be specified in the Parties' schedule?

Points raised by delegations:

- (i) A country's offer should make clear the actual market access conditions. Thus, all measures which affect market access and national treatment for inscribed services could be scheduled.
- (ii) Regarding which measures should be scheduled, two broad categories are relevant:
 - all measures which discriminate between nationals and foreigners;
 - all measures which impose quantitative restrictions, (number of licences etc.), irrespective of whether there is discrimination between foreign and domestic suppliers.

- (iii) A uniform approach is needed with respect to non-discriminatory measures: for example, to make them all subject to negotiation and inscribe them into schedules. To consider only certain types of non-discriminatory measures, such as quantitative restrictions, as suggested under (ii) above, would create problems.
- (iv) If a regulation treats foreign and domestic suppliers alike, is it necessary to inscribe anything in the schedule as long as the objective criteria in Article VI are fulfilled?
- (v) It is important to agree on what should be covered by Article VI:
 - there has to be an appropriate test or criteria in Article VI to identify measures that do not restrict trade (e.g. a regulation that is not serving as a means to apply an additional restriction on trade);
 - measures falling under Article VI should be categorised into different types so that the question of their scheduling could be considered.
- (vi) If regulations falling under Article VI are not scheduled, how would information relating to these regulations which is required and exchanged during the process of negotiations be treated?
 - This issue is partially addressed under transparency; a transitional period for notification of such measures might be considered, or there may be an annex or footnote to the schedules; but it would be of a different character from measures that can be scheduled and do not fall under Article VI.

4. Is it necessary to make a clear distinction between the types of measures to be bound under market access and those which should be bound under national treatment? If so, what are the criteria on which such a distinction should be based?

Points raised by delegations:

- (i) Except in those cases where a regulation is clearly covered by Article VI and thus is not required to be scheduled, it is necessary to have columns dealing with both national treatment and market access.
- (ii) In most cases it is not difficult to make a distinction between entry and operation conditions. Examples of measures that deny market access to foreigners include restrictions of a numerical nature where the law explicitly states that there will be limitations on the number of operators.

- (iii) Market access needs to be more clearly defined as the distinction between market access and national treatment is not clear. For example, is a limitation on access by foreigners to a specific portion of a national banking market, a market access or a national treatment restriction? It would be possible for the country maintaining this restriction to put a commitment in either column.
- (iv) In the market access column, should only quantitative restrictions be listed and all other conditions and limitations listed under national treatment?
- (v) Where "additional commitments" are being sought, they would have to be dealt with on an ad hoc basis.

5. What types of measures are covered under each of the four modes of supply, and what is the distinction between each of the four modes of supply?

Points raised by delegations:

- (i) The distinction between modes of supply is crucial and fundamental to the agreement because:
 - it is essential to maintain the distinction between trade in services and investment;
 - there are many service sectors where more than one mode of supply is necessary in order to provide a meaningful market access concession;
 - all services cannot be delivered through all modes of supply;
 - the movement of personnel needs to be specified separately; it may be linked to establishment, but it is also an independent mode of supply which needs to be reflected in the schedules.
- (ii) While a standard format with standard expressions indicates whether a particular mode is relevant for the supply of a particular service, all columns may not be relevant for all parties or for all services.
- (iii) Even if Article I provides for four modes of supply, it may not be necessary to list all the modes in the schedule. In this respect:
 - there seems to be no need to specify all modes where there are only some mode specific regulations;

- it may not be necessary to list all the modes in the schedule i.e. a sector or sub-sector would be bound according to the available modes of supply even if the schedule does not indicate a particular mode.
- (iv) In practice, negotiating partners need to know which modes of supply are not allowed. If there are restrictions, they should be mentioned in national schedules without a separate listing of available modes of supply.
- (v) How is cross-border trade to be defined?
- no movement of personnel is involved.
 - movement of personnel in order to supply a service must be included.
 - if the movement of personnel is involved, the duration of stay should determine if the trade is cross-border trade or not.
- (vi) Regulations prescribing particular modes of supply may apply on a horizontal or sector-specific basis:
- where they apply on a horizontal basis, they should be specified in a generic way in the schedule;
 - in general, measures concerning personnel movement are totally different from those governing establishment.

6. Would there be a need for an explanatory note that contains an agreed interpretation of the technical terms used in drawing up schedules?

Point raised by delegations:

- It is necessary to draw up a common terminology to ensure that when comparing entries in schedules, the same term means the same thing. This also applies to the description of restrictions inscribed in the schedules.

Questions and comments

7. In order to deal with the points raised in the preceding paragraphs, the following issues need to be addressed:

- (i) In sectors where specific commitments are assumed, what are the types of regulatory measures which are considered to fall under Articles XVI (limitations and conditions on market access) and XVII (conditions and qualifications on national treatment), and therefore should be scheduled. What is the precise border line between such measures and other regulatory measures that conform

with Article VI and therefore need not be scheduled? To resolve this question, it is necessary to have a clear understanding as to what the present Article VI is intended to cover.

- (ii) Article VI indicates that requirements to be met by foreign service suppliers should not discriminate between parties or constitute a means to restrict international trade in services. Does this mean that only those measures that discriminate between domestic and foreign services or service suppliers constitute a limitation on market access for the purposes of Article XVI? Or, could a restriction on international trade in services also exist when there is a limitation or qualification which applies to both domestic and foreign services or service suppliers? Correspondingly, are the only regulations that need to be identified under these articles those that constitute a limitation or qualification on the foreign service or service supplier, or should regulations that constitute a limitation or qualification on both domestic and foreign services or service suppliers also be identified?
- (iii) Article XVII is clear insofar as it sets out a "no less favourable" standard for the treatment of foreign services and service suppliers. In the case of Article XVI, however, there is a problem in the light of the issues set out in paragraph 7(ii) above as to what measures would be covered under this article as against those that would be covered by Article VI. The basic point here is to determine the treatment of measures for the purposes of Article XVI which do not discriminate, but none the less restrict access for foreign suppliers (e.g. non-discriminatory numerical limitations).
- (iv) As to the need for a distinction between market access and national treatment, if the qualifications or limitations to be dealt with under Articles XVI and XVII are only those that apply to the foreign service supplier, a distinction between measures falling under Article XVI and those falling under Article XVII could be based on limitations that apply at the point of entry to the market, and those that apply at the stage of operation after entry. Alternatively, the distinction between national treatment and market access could be eliminated, and all limitations or qualifications with respect to the foreign supplier identified in one column.
- (v) If, however, Article XVI also refers to measures which relate to both domestic and foreign services or service suppliers, then a distinction between the scheduling of commitments under Articles XVI and XVII would be necessary. An alternative basis for making such a distinction would be to list under Article XVI all measures which apply both to domestic and foreign services or service suppliers and under Article XVII only those which apply to foreign services and service suppliers.

- (vi) It must be recognized that if Article VI is interpreted to mean that a restriction on international trade in services does not exist where a limitation or qualification applies to both the domestic and foreign service and service supplier, the regulations permitted under that article could bear on the possibility of market access even in the absence of discrimination between domestic and foreign services or service suppliers. It may, therefore, in any event, be necessary to make such regulations subject to additional transparency requirements in those cases where commitments are being undertaken. There may also be a need to consider introducing a provision into the agreement to deal with situations where due to subsequent changes in regulations (which apply to both domestic and foreign suppliers) there is a change in benefits which a foreign supplier would expect, or in the concession being offered.
- (vii) If it is decided to maintain two separate columns for market access and national treatment, it may also be desirable, in view of the difficulties in distinguishing in every case between what needs to be scheduled under each column, to provide for an understanding that the mere listing of a measure under one column or the other will not have implications for any dispute settlement cases involving breach of commitments.
- (viii) Insofar as the specification of modes of supply is concerned, is a useful purpose served by the current schedule format which requires the identification of the four modes of supply in every instance?
- (ix) If the schedule format is to be maintained, there would appear to be need for a clearer common understanding of what is covered by each particular mode of supply, including the extent to which movement of personnel is covered.
- (x) A question also arises as to how the binding of a horizontal measure, which may be mode specific, should be entered in the schedule. Should it be entered in the introductory part of the schedule?
- (xi) The need to draw up a common terminology in order to have the required degree of precision has been emphasized. A number of participants in making their offers have indicated the use made by them of certain terms, notably, "bound", "not bound", "no limitations or conditions", "not applicable" and "standstill". Complete agreement on what the terminology covers may be possible only in the light of the understanding reached regarding the scheduling of commitments, etc.

ATTACHMENT

3.4.91

CHECKLIST OF ISSUES RELATING TO A SERVICES CLASSIFICATION LIST
AND THE SCHEDULING OF COMMITMENTS

The following checklist of issues and accompanying notes have been drawn up with a view to facilitating discussion at the meeting on 10-11 April. The list of issues is not intended to be exhaustive. Some delegations may wish to formulate some of these issues differently or to bring up other questions. For some other delegations, not all the issues listed below may need consideration. The list is not intended to limit the discussions in any way.

A. Services Classification List

In the services discussions so far there has been no agreed basis for a classification or nomenclature of services. This was possible because the discussions up to now were very much related to general principles and problems in connection with a framework agreement on trade in services.

A comparison of initial offers so far tabled by countries, however, has in the view of many demonstrated the necessity for a detailed common sector classification system which would enable countries to make, compare and record commitments in a consistent manner. Some participants advocate a common numerical classification system which would be based on the secretariat reference list contained in MTN.GNS/W/50 whereas others consider it more feasible, at least regarding the negotiation of initial commitments, to be able to use their own national classifications which would then be brought into concordance on a sector-by-sector basis.

Nature of Classification List

1. Should the services classification be based on the CPC classification?

Note:

- (a) The reference list of the secretariat in MTN.GNS/W/50 was based on the CPC classification.
 - (b) Most participating countries are moving to the CPC classification. Therefore consistency in national services classification is most likely through the adoption of the CPC classification.
2. If the CPC classification system is adopted as a basis for a refined classification list to be developed by the secretariat, how should the problem that in certain sectors the classification adopted for earlier sectoral discussions and for the making of offers differs from the CPC system be dealt with? Should such cases be addressed through

adjustment or elaboration of the CPC classification, or should these cases be addressed through adjustment and elaboration of classifications adopted in individual offers by participants?

Note:

The CPC has a subcategory "other" for most of its categories. To the extent that it is felt that the CPC is not detailed enough or incomplete, additional services could be placed under the "other" subcategory for the purposes of the reference list. A first step could be to examine the offer lists that have already been submitted, as well as the reactions to the CPC based secretariat classification list made by certain countries in 1989, and determine to what extent the CPC may need to be augmented.

Use of Classification List

- (a) In making their offers/requests, should participants be required to follow the classification list established by the secretariat, or should they cross-refer the items of the list which correspond to what is contained in their offers/requests?
- (b) Should the final schedules of commitments be drawn up according to the classification list to be established by the secretariat, or would it be sufficient to have a concordance of the entries in schedules with their correspondents in the indicative list?

B. Other Issues Relating to the Scheduling of Commitments

A number of participants in the negotiations have submitted their initial offers on specific commitments. The process of consultations which has started among different delegations on the basis of such offers has revealed a number of technical issues that need to be resolved. Most of these issues concern the precise content of these offers and how they relate to the provisions in the draft framework on the negotiation of commitments and the consolidation of schedules.

1. Is it clear in every instance: what types of measures are covered under each of the four modes of supply, and what is the distinction between each of the four modes of supply?
2. What types of measures are considered to be restrictions on trade in services (i.e. limitations and conditions on market access and conditions and qualifications on national treatment) and therefore should be specified in the Parties schedule? What other measures do not constitute restrictions and fall under the provisions of Article VI (Domestic Regulation)?
3. How should information on regulations falling under Article VI which is exchanged during the process of negotiations be treated? Should it only be subject to transparency obligations of Article III, or should there be any additional requirements on the Parties to the Agreement

with respect to its compilation? [Could this have any implications for the balance of rights and obligations under the Agreement?]

4. Is it necessary to make a clear distinction between the types of measures to be bound under market access and those which should be bound under national treatment? If so, what are the criteria on which such a distinction should be based?
5. Should measures which limit the activities of both domestic and foreign suppliers equally be listed under market access?
6. How should horizontal restrictions such as restrictions on investment, real estate ownership or movement of persons which affect a certain mode of supply across all sectors be inscribed in schedules? Should they be tabled in the introductory part of each schedule and how would sector-specific entries in the schedule relating to such restrictions be treated? For example, would the currently used term "no limitations or conditions" be understood to mean "no sector-specific limitations or conditions"?
7. Would there be a need for an explanatory note that contains an agreed interpretation of the technical terms used in drawing up schedules (e.g. "not applicable", "standstill", "no limitations", etc.) in order to avoid any confusion or incompatibility between different schedules?

3.4.91

HORIZONTAL AGREEMENTS THAT ADDRESS MATTERS PERTAINING TO SERVICES

1. As agreed in the March 8th consultations on services, the secretariat has prepared a background note on horizontal arrangements relevant to the negotiations. This note examines the main principles, obligations and commitments contained in bilateral horizontal arrangements such as treaties of friendship, commerce and navigation (FCNs), and bilateral investment treaties (BITs).¹

2. This note does not deal with OECD instruments which are also horizontal in character, consisting of the Code of Liberalisation of Current Invisible Operations, the Code of Liberalisation of Capital Movements, and the National Treatment Instrument contained in the 1976 Declaration on International Investment and Multinational Enterprise. The principal features of these OECD instruments are described in MTN.GNS/W/16 of 6 August 1987. Some recent developments regarding the OECD codes of liberalisation are summarized in a separate note. The observations relating to the checklist of issues concerning the services classification list and the scheduling of commitments also apply to the list of questions relating to bilateral agreements and arrangements. Some of the questions raised with respect to the bilateral agreements and arrangements may also be relevant to the OECD instruments.

Background

3. Although FCNs have been used to facilitate bilateral commercial relations since the late 1700s, the investment-related provisions relevant to this discussion became common only after World War Two. Three factors may have contributed to a diminishing resort to FCNs and the increased use of BITs from the 1960s onwards: (1) the availability of the GATT system to address, among a growing body of signatories, many central elements of FCNs; (2) the rising importance of overseas investment in international commerce; and (3) the need foreseen by industrialized countries for a legal framework to protect their investments in newly independent countries.

4. From the mid-1940s to the mid-1960s the United States concluded 22 FCN treaties that, in addition to other more traditional matters, sought to facilitate and protect investment. At the beginning of the 1960s, European countries began negotiating investment treaties, mostly with developing countries but also with some Eastern bloc countries. Germany, the United Kingdom, Netherlands, and Switzerland account for the majority of over 150

¹FCN and BIT are used here to refer generically to these types of agreements, whatever the formal title may be.

BITs concluded by European countries. The U.S. first began negotiating BITs with developing countries in the early 1980s. It reportedly sought stronger commitments to guard against foreign exchange restrictions, performance requirements, and expropriation than did the Europeans. A few BITs were also concluded among developing countries or between them and Eastern bloc countries. At the end of 1989, over 300 BITs had been negotiated worldwide. BITs may not have been equally critical for the regulation of investment among industrialized countries because of the establishment of the OECD instruments that deal with such matters among members.²

5. The bilateral agreements have developed standards for host-country treatment of foreign enterprises or investors, including those which provide services, at a time when multilateral disciplines in this area are limited. The contents of such bilateral agreements vary depending on the year they were concluded or the parties involved. However, the kinds of provisions that form the principal elements are briefly described below.

General description

6. FCNs, in particular, but also BITs, address a broad spectrum of bilateral commercial concerns. Thus, both cover issues and commerce significantly beyond the scope envisioned for the GATS. FCNs address, for example, basic rights of natural and juridical persons, acquisition and disposal of property, taxation, trade in goods, transfer of payments, business activities of persons or companies, shipping and customs formalities. BITs address investment and activities of investors generally and also include specific provisions dealing with conditions of entry, monetary transfers, protections against and compensation for nationalisation, expropriation or loss and dispute settlement procedures.

7. The bilateral agreements raise certain issues in the areas of coverage and principles which are relevant to the discussions on the framework on trade in services. First, the bilateral agreements cover certain kinds of services, in particular, those delivered via commercial presence. Second, they apply the concepts of national treatment and m.f.n.. However, the bilateral agreements frequently contain exceptions to the application of these concepts to certain services.

8. With respect to principles applied, in most BITs and in most post-war FCNs, the parties agree to extend national treatment and m.f.n. treatment with respect to entry and with respect to business operations in the domestic market for one another's firms or investors. The treaties fall short, however, of granting a "right of establishment", although the language of provisions on conditions of entry offers stronger guarantees in

²In particular, the Code of Liberalization of Capital Movements and the "National Treatment Instrument" of the 1976 Declaration on International Investment and Multinational Enterprises.

some accords than in others. There is an implication, however, that the parties should treat applications from foreign investors no less favourably than those from its nationals unless related to a sector or activity exempted under the terms of the agreement.

9. As regards coverage, the relevant provisions of post-WWII FCN treaties address the conduct of business by each party's persons or companies in the territory of the other party. Although not often explicitly mentioned, services are usually considered to be included within the scope of such provisions of the FCNs. In BITs, investors who provide services are also implicitly, and in some cases explicitly,³ covered by the agreement in the same way as other kinds of investment activities.

10. In most cases, the bilateral agreements contain exceptions to the application of national treatment and/or m.f.n.. For example, in BITs negotiated by the U.S. the application of national treatment is frequently limited for the following sectors or activities: air transportation, ocean and coastal shipping, maritime services and maritime-related services, banking and insurance, primary dealership in U.S. government securities, ownership and operation of broadcast or common carrier radio and television stations, provision of common carrier telephone and telegraph services, provision of submarine cable services, energy and power production, custom house brokers, ownership of real property, government grants, government insurance and loan programs, mining on the public domain, and use of land and natural resources. FCNs negotiated by the U.S. often employ more generic language making similar exceptions for: air transport, water transport, banking involving depository or fiduciary functions, communications, and land or other natural resources.

³E.g., one U.S. BIT states that investment means "every kind of investment, in the territory of one Party owned or controlled directly or indirectly by nationals or companies of the other Party, such as equity, debt, and service and investment contracts ...".

Checklist of questions relating to horizontal arrangements

- Are the main concepts and principles that form the basis of these arrangements compatible with those of the draft framework?
- Are the obligations contained in these arrangements more or less stringent than those in the draft framework?
- What role has the principle of reciprocity played in these arrangements?
- How do the commitments undertaken in these arrangements compare with market access and national treatment commitments envisioned under the GATS?
- How do the approaches taken with respect to coverage, limitations on, or exemption of particular services transactions or sectors differ with the approach used in the GATS?

Recent Developments in the OECD Code of Liberalization
of Current Invisible Operations and the
Code of Liberalisation of Capital Movements: Supplementary Information

1. Recent changes to the OECD Codes have resulted from an ongoing review that is being carried out by the OECD Committee on Capital Movements and Invisible Transactions (CMIT). As a result of this review, new liberalisation obligations have been adopted. Major changes since MTN.GNS/W/16 was drafted relate to banking and financial services and to audio-visual works. Work is also underway in a number of other sectors.

2. The review of the Current Invisibles Code was mainly to take account of technological changes that had contributed to the development of new service industries or to the growth of those only marginally important when the Code was first drafted. Updating of the Capital Movements Code was partly to extend coverage to new financial instruments and partly to cover other operations not previously subject to liberalization obligations.

3. Under Decisions adopted in May 1989, the liberalization mechanisms of the Codes apply to a full range of banking and financial services:

(a) Changes to the Current Invisibles Code include:

- a new section on banking and financial services covering cross-border services including payment services (e.g. the issuance and use of cheques, travellers' cheques and credit cards), banking and investment services (e.g. underwriting and broker/dealer services), asset management (e.g. portfolio management and pension fund management) and advisory and agency services (e.g. investment research and advice);
- new provision calling on members to ensure "equivalent treatment" under which requirements for establishment for branches and agencies of non-resident financial institutions shall be no more burdensome than those applying to domestic institutions;
- additional specific provisions regarding authorization, representation, representative offices, self-employed intermediaries, membership of associations or regulatory bodies, prudential considerations, and financial requirements for establishment.

(b) Changes to the Capital Movements Code include:

- The extension of its coverage to virtually all capital movements including, money-market operations, forward operations, swaps and other activities not previously covered.

4. The Current Invisibles Code also adopted a much broader concept of audio-visual works in July 1988. It brought under coverage modern audio-visual products and activities, such as video-cassettes and television broadcasting by cable and satellite, as well as activities associated with audio-visual works involving the temporary presence of non-residents.