

**MULTILATERAL TRADE  
NEGOTIATIONS  
THE URUGUAY ROUND**

RESTRICTED  
MTN.GNS/W/164  
3 September 1993  
Special Distribution

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Group of Negotiations on Services

SCHEDULING OF INITIAL COMMITMENTS IN TRADE IN SERVICES:

EXPLANATORY NOTE<sup>1</sup>

Introduction

1. This note is intended to assist in the preparation of offers, requests and national schedules of initial commitments. Its objective is to explain, in a concise manner, how commitments should be set out in schedules in order to achieve precision and clarity. It is based on the view that a common format for schedules as well as standardization of the terms used in schedules are necessary to ensure comparable and unambiguous commitments. The note cannot answer every question that might occur to persons responsible for scheduling commitments; it does attempt to answer those questions which are most likely to arise. The answers should not be considered as an authoritative legal interpretation of the GATS.

2. The GATS contains two sorts of provisions. The first are general obligations, some of which apply to all service sectors (e.g. m.f.n., transparency) and some only to scheduled commitments (e.g. Article XI: Payments and Transfers). The second are specific commitments which are negotiated undertakings particular to each GATS signatory. Specific commitments, upon the conclusion of negotiations, are to be recorded in national schedules which will be attached to, and form an integral part of, the GATS. By virtue of Article XXVIII:1, every signatory must attach to the GATS its national schedule. This note addresses two main questions: what items should be entered on a schedule, and how should they be entered.

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<sup>1</sup>This note is circulated by the Secretariat in response to requests by participants. It is a revised version of a draft entitled Scheduling of Commitments in Trade in Services: Explanatory Note, 22 December 1992. References to the General Agreement on Trade in Services (GATS) are based on the text contained in MTN.TNC/W/FA of 20 December 1991, as adjusted by the Legal Drafting Group and distributed as an Informal Note by the Secretariat (Review of Individual Texts in the Draft Final Act, No. 1161, 25 June 1992).

**PART I**

**WHAT ITEMS SHOULD BE SCHEDULED?**

3. A schedule contains the following main types of information: a clear description of the sector or sub-sector committed, limitations<sup>2</sup> to market access, limitations to national treatment, and additional commitments other than market access and national treatment. If a Member undertakes a commitment in a sector then it must indicate for each mode of supply that it binds in that sector:

- what limitations, if any, it maintains on market access;
- what limitations, if any, it maintains on national treatment; and
- what additional commitments, relating to measures affecting trade in services not subject to scheduling under Articles XVI and XVII, it may decide to undertake under Article XVIII.

**A. Limitations on Market Access (Article XVI)**

4. A Member grants full market access in a given sector and mode of supply when it does not maintain in that sector and mode any of the types of measures listed in Article XVI. The measures listed comprise four types of quantitative restrictions (sub-paragraphs a-d), as well as limitations on forms of legal entity (sub-paragraph e) and on foreign equity participation (sub-paragraph f). The list is exhaustive and includes measures which may also be discriminatory according to the national treatment standard (Article XVII). The quantitative restrictions can be expressed numerically, or through the criteria specified in sub-paragraphs (a) to (d); these criteria do not relate to the quality of the service supplied, or to the ability of the supplier to supply the service (i.e. technical standards or qualification of the supplier).

5. It should be noted that the quantitative restrictions specified in sub-paragraphs (a) to (d) refer to maximum limitations. Minimum requirements such as those common to licensing criteria (e.g. minimum capital requirements for the establishment of a corporate entity) do not fall within the scope of Article XVI. If such a measure is discriminatory within the meaning of Article XVII and, if it cannot be justified as an exception, it should be scheduled as a limitation on national treatment. If such a measure is non-discriminatory, it is subject to the disciplines of Article VI:5. Where such a measure does not conform to these disciplines, and if it cannot be justified as an exception, it must be brought into conformity with Article VI:5 and cannot be scheduled.

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<sup>2</sup>The term "limitations" will be used throughout this note to refer to the "terms", "conditions", "limitations", and "qualifications" used in Articles XVI and XVII of the GATS.

6. The following are examples of limitations on market access drawn from the conditional offers. In this regard, paragraph 21 on the scheduling of limitations is also relevant.

(a) Limitations on the number of service suppliers:

- License for a new restaurant based on an economic needs test.
- Annually established quotas for foreign medical practitioners.
- Government or privately owned monopoly for labour exchange agency services.
- Nationality requirements for suppliers of services (equivalent to zero quota).

(b) Limitations on the total value of transactions or assets:

- Foreign bank subsidiaries limited to x percent of total domestic assets of all banks.

(c) Limitations on the total number of service operations or quantity of service output:

- Restrictions on broadcasting time available for foreign films.

(d) Limitations on the total number of natural persons:

- Foreign labour should not exceed x percent and/or wages xy percent of total.

(e) Restrictions or requirements regarding type of legal entity or joint venture:

- Commercial presence excludes representative offices.
- Foreign companies required to establish subsidiaries.
- In sector x, commercial presence must take the form of a partnership.

(f) Limitations on the participation of foreign capital:

- Foreign equity ceiling of x percent for a particular form of commercial presence.

**B. Limitations on National Treatment (Article XVII)**

7. A Member grants full national treatment in a given sector and mode of supply when it accords in that sector and mode conditions of competition no less favourable to services or service suppliers of other Members than

those accorded to its own like services and service suppliers. 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). Thus, it should be borne in mind that limitations on national treatment cover cases of both de facto and de jure discrimination as shown in the following examples.

Examples of limitations on national treatment

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

It is useful to keep in mind that, unlike Article XVI, Article XVII does not contain an exhaustive listing of the types of measure which would constitute limitations on national treatment.

8. Regarding the need to schedule residency requirements, it should be decided on a case-by-case basis, and in relation to the activity concerned, which requirements (e.g. the need to live in the country as opposed to having a mailing address in the country) constitute a de facto national treatment restriction and therefore must be scheduled under Article XVII unless justifiable as an exception. If the residency requirement is not discriminatory, it would be subject to the disciplines of Article VI:5. If it is not consistent with these disciplines and if it cannot be justified as an exception, it must be brought into conformity with Article VI:5.

9. Article XVII applies to subsidy-type measures in the same way that it applies to all other measures. Article XV (Subsidies) merely obliges Members to "enter into negotiations with a view to developing the necessary multilateral disciplines" to counter the distortive effects caused by subsidies. Therefore, any subsidy which is a discriminatory measure within the meaning of Article XVII would have to be either scheduled as a limitation on national treatment or brought into conformity with that Article. Subsidy-type measures are also not excluded from the scope of Article II (M.f.n.). An exclusion of such measures would require a legal definition of subsidies which is currently not provided for under the GATS.

10. There is no obligation in the GATS which requires a Member to take measures outside its territorial jurisdiction. It therefore follows that the national treatment obligation in Article XVII does not require a Member to extend such treatment to a service supplier located in the territory of another Member.

11. A Member may wish to maintain measures which are inconsistent with both Articles XVI and XVII. Article XX:2 stipulates that such measures shall be inscribed in the column relating to Article XVI on market access. Thus, while there may be no limitation entered in the national treatment column, there may exist a discriminatory measure inconsistent with national treatment inscribed in the market access column. However, in accordance with the footnotes to Article XVI:2 and Article XX:2, any discriminatory measure scheduled in the market access column is also to be regarded as scheduled under Article XVII and subject to the provisions of that Article.

#### **C. Additional Commitments (Article XVIII)**

12. A Member may, in a given sector, make commitments with respect to measures affecting trade in services not subject to scheduling under Articles XVI and XVII. Such commitments can include, but are not limited to, undertakings with respect to qualifications, technical standards, licensing requirements or procedures, and other domestic regulations that are consistent with Article VI. Additional commitments are expressed in the form of undertakings, not limitations. In the schedule, the Additional Commitments column would only include entries where specific commitments are being undertaken, and need not include those modes of supply where there are no commitments undertaken or any entries at all where no Article XVIII undertakings are made.

#### **D. Exceptions**

13. All measures falling under Article XIV (General Exceptions) are excepted from all obligations and commitments under the Agreement, and therefore need not be scheduled. Clearly, such exceptions cannot be negotiated under Part III of the Agreement. Likewise, any prudential measure justifiable under paragraph 2:1 of the Annex on Financial Services constitutes an exception to the Agreement and should not be scheduled. The prudential measure exception applies only to financial services as listed in the Annex, and not to other service sectors. Measures falling under Article XII (Restrictions to Safeguard the Balance of Payments) are also exceptions and should not be scheduled. Article XII provides for separate disciplines for such measures, including notification and consultation.

#### **E. Specific Commitments and M.F.N. Exemptions**

14. 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. The m.f.n. 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. Where an m.f.n. 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. Therefore, 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. In such cases, it is not possible for a Member to accord less favourable treatment to certain Members than that specified in its schedule (for example, on grounds of reciprocity or the lack of it).

## PART II

### HOW SHOULD ITEMS BE SCHEDULED?

15. Schedules record, for each sector, the legally enforceable commitments of each Member. It is therefore vital that schedules be clear, precise and based on a common format and terminology. This section describes how commitments should be entered in schedules. The main steps involved are:

- A. How to describe committed sectors and sub-sectors;
- B. How to treat the modes of supply;
- C. How to record commitments:
  - (i) Horizontal commitments;
  - (ii) Sector-specific commitments;
  - (iii) Levels of commitment.

#### A. How to describe committed sectors and sub-sectors

16. The legal nature of a schedule as well as the need to evaluate commitments, require the greatest possible degree of clarity in the description of each sector or sub-sector scheduled. In general the classification of sectors and sub-sectors should be based on<sup>3</sup> the Secretariat's revised Services Sectoral Classification List. Each sector contained in the Secretariat list is 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 CPC or other internationally recognised classification (e.g. Financial Services Annex). The most recent breakdown of the CPC, including explanatory notes for each sub-sector, is contained in the UN Provisional Central Product Classification.<sup>4</sup>

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<sup>3</sup> Document MTN.GNS/W/120, dated 10 July 1991.

<sup>4</sup> Statistical Papers Series M No. 77, Provisional Central Product Classification, Department of International Economic and Social Affairs, Statistical Office of the United Nations, New York, 1991.

Example: A Member wishes to indicate an offer or commitment in the sub-sector of map-making services. In the Secretariat list, this service would fall under the general heading "Other Business Services" under "Related scientific and technical consulting services" (see item 1.F.m). By consulting the CPC, map-making can be found under the corresponding CPC classification number 86754. In its offer/schedule, the Member would then enter the sub-sector under the "Other Business Services" section of its schedule as follows:

Map-making services (86754)

If a Member wishes to use its own sub-sectoral classification or definitions it should provide concordance with the CPC in the manner indicated in the above example. If this is not possible, it should give a sufficiently detailed definition to avoid any ambiguity as to the scope of the commitment.

17. It is understood that market access and national treatment commitments apply only to the sectors or sub-sectors inscribed in the schedule. They do not imply a right for the supplier of a committed service to supply uncommitted services which are inputs to the committed service.

**B. How to treat the modes of supply**

18. The four modes of supply listed in the schedules correspond to the scope of the GATS as set out in Article I:2. The modes are essentially defined on the basis of the origin of the service supplier and consumer, and the degree and type of territorial presence which they have at the moment the service is delivered.

MODES OF SUPPLY

<u>Supplier Presence</u>	<u>Other Criteria</u>	<u>Mode</u>
Service supplier <u>not present</u> within the territory of the Member	Service delivered <u>within</u> the territory of the Member, from the territory of another Member	CROSS-BORDER SUPPLY
	Service delivered <u>outside</u> the territory of the Member, in the territory of another Member, to a service consumer of the Member	CONSUMPTION ABROAD
Service supplier <u>present</u> within the territory of the Member	Service delivered within the territory of the Member, through the commercial presence of the supplier	COMMERCIAL PRESENCE
	Service delivered within the territory of the Member, with supplier present as a <u>natural</u> person	PRESENCE OF NATURAL PERSON

19. It is important to have a common understanding of what each mode covers. To this end, further examples and explanations are given below.

**(a) Cross-border supply**

International transport, the supply of a service through telecommunications or mail, and services embodied in exported goods (e.g. a computer diskette, or drawings) are all examples of cross-border supply, since the service supplier is not present within the territory of the Member where the service is delivered.

**(b) Consumption abroad**

- This mode of supply is often referred to as "movement of the consumer". The essential feature of this mode is that the service is delivered outside the territory of the Member making the commitment. Often the actual movement of the consumer is necessary as in tourism services. However, activities such as ship repair abroad, where only the property of the consumer "moves", or is situated abroad, are also covered.



- 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.

**(c) Commercial Presence**

This mode covers not only the presence of juridical persons in the strict legal sense, but also that of legal entities which share some of the same characteristics. It thus includes, inter alia, corporations, joint ventures, partnerships, representative offices and branches (see Definitions: Article XXXIV).

**(d) Presence of natural persons**

This mode covers natural persons who are themselves service suppliers, as well as natural persons who are employees of service suppliers.

**(e) Relationship between modes of supply**

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.

Example: A Member has made a commitment in the cross-border supply of architectural services (e.g. by telecommunications or by mail). This commitment alone does not extend to the presence of natural persons (e.g. visits by architects). A separate commitment would have to be taken under "Presence of natural persons" to cover this case.

**C. How to record commitments**

**(i) Horizontal commitments**

20. A horizontal commitment applies to trade in services in a number of service sectors. It is in effect a binding, either of a measure which constitutes a limitation on market access or national treatment or of a situation in which there are no such limitations. Where measures constituting limitations are referred to, the commitment should describe the measure concisely, indicating the elements which make it inconsistent with Articles XVI or XVII. In order to avoid repetition, it is desirable to enter these 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". Some horizontal measures may be specific to only one mode of supply:

Example: Legislation may refer to foreign investment, formation of corporate structures or land acquisition regulations. Such measures affect above all commercial presence.

Example: Legislation may stipulate requirements regarding entry, temporary stay and right to work of natural persons; the categories of natural persons covered by a particular offer may also be specified. Such measures affect above all the presence of natural persons.

Other horizontal measures may affect more than one mode of supply:

Example: Legislation may provide for tax measures which are contrary to national treatment and not covered by Article XIV(d). Such measures would normally affect the supply of services in several modes.

(ii) Sector-specific commitments

21. A sector-specific commitment applies to trade in services in a particular sector. If in the context of such a commitment, a measure is maintained which is contrary to Articles XVI or XVII, it 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 Articles XVI or XVII.

22. 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. In any event, such information will be subject to the obligations of Article III.

(iii) Levels of commitment

23. Since the terms used in a Member's schedule create legally binding commitments, it is important that those expressing presence or absence of limitations to market access and national treatment be uniform and precise. Depending on the extent to which a Member has limited market access and national treatment, for each commitment with respect to each mode of supply, four cases can be foreseen:

(a) Full commitment

24. In this case the Member does not seek in any way to limit market access or national treatment in a given sector and mode of supply through measures inconsistent with Articles XVI and XVII. The Member in this situation should mark in the appropriate column: NONE. However, any relevant limitations listed in the horizontal section of the schedule will still apply.

**(b) Commitment with limitations**

25. Where market access or national treatment limitations are inscribed, two main possibilities can be envisaged in this case. The first is the binding of an existing regulatory situation ("standstill"). The second is the binding of a more liberal situation where some, but not all, of the measures inconsistent with Articles XVI or XVII will be removed ("rollback"). In either case the Member must describe in the appropriate column the measures maintained which are inconsistent with Articles XVI or XVII. The entry should describe each measure concisely, indicating the elements which make it inconsistent with Articles XVI or XVII. It would not be correct merely to enter in a column words such as "bound", "freeze" or "standstill".

26. In some cases a Member may choose to partially bind measures affecting a given category of suppliers. For example, a Member may bind measures affecting the entry and temporary stay only of some categories of natural persons while leaving all other categories unbound. This may be achieved through an indication in the horizontal section of a schedule such as "Unbound except for measures affecting the entry and temporary stay of natural persons in the following categories ...". In such cases, the corresponding sectoral entry under the fourth mode of supply should be "Unbound except as indicated in the horizontal section".

**(c) No commitment**

27. In this case, the Member remains free in a given sector and mode of supply to introduce or maintain measures inconsistent with market access or national treatment. In this situation, the Member must record in the appropriate column the word: 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.

**(d) No commitment technically feasible**

28. In some situations, a particular mode of supply may not be technically feasible. An example might be the 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". Where the mode of supply thought to be inapplicable is in fact applicable, or becomes so in the future, the entry means "unbound".

SCHEDULE OF SPECIFIC COMMITMENTS OF COUNTRY X

Sector or Sub-Sector	Limitations on Market Access	Limitations on National Treatment	Additional Commitments
	(1)	(1)	
	(2)	(2)	
	(3)	(3)	
	(4)	(4)	
	(1)	(1)	
	(2)	(2)	
	(3)	(3)	
	(4)	(4)	

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

NOTE: The schedule shall also indicate the date of entry into force of the commitments and where appropriate the time-frame for their implementation. The date of entry into force of the commitments undertaken in the Uruguay Round would normally be the date of entry into force of the Agreement establishing the Multilateral Trade Organization. For all future commitments the relevant date of entry into force should be inscribed.