

# Scheduling of Specific Commitments: the GATS Approach

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# Issues to be addressed:

- What is a schedule?
- What is in a schedule?
- How should a schedule be formulated?
  - List approach
  - Format
  - Terminology
- What are the common scheduling mistakes?
  - Unclear sectoral description
  - Schedule or not schedule: MA/NT limitations vs. domestic regulation
  - Ambiguous language and general references
  - Inconsistent entries
  - MFN exemptions

# What is a services schedule?

## Facts

- There are no tariffs in services trade.
- Regulations in services sectors are indispensable for the pursuit of policy goals.
- However, certain regulatory measures are deemed economically unnecessary and should be removed for trade.
- A huge disparity exists among countries in terms of the level of overall service industry. The case is even stronger in individual service sectors.

## Solution

- A mechanism is needed equivalent to tariff schedules, allowing for progressive liberalization and distinguishing trade barriers from necessary regulations.
- Schedules of specific commitments are also the embodiment of the principle of progressive liberalization as they serve as the starting point for future negotiations.



# Scheduling: distinction between trade Barriers and domestic regulation

- Market Access (Article XVI)

mostly quantitative restrictions

- National Treatment (Article XVII)

discriminatory measures

- Domestic Regulation (Article VI:4)

- qualitative (minimum) and procedural requirements - regulatory autonomy of Members subject to rules aimed at minimising trade restrictive effects (Article VI:4)

# What's in a Schedule?

- Market access (Art. XVI)
  - Mostly quantitative restrictions
- National treatment (Art. XVII)
  - Discriminatory restrictions
- Additional commitments (Art. XVIII)
  - Measures that do not fall under Art. XVI & XVII, usually undertakings.

# Limitations on market access

Measures that may be maintained or adopted:

- (a) Number of service suppliers\*
- (b) Value of transactions or assets\*
- (c) Number of operations or quantity of output\*
- (d) Total number of natural persons\*
- (e) Type of legal entity or joint venture
- (f) Foreign capital participation

\* (a) to (e) apply to non-discriminatory restrictions as well. The limitations concerned may be imposed in the form of quotas or via an economic needs test.



# Examples of Art. XVI limitations

- Number of suppliers (a)
  - The total number of taxi licenses is limited to 50
- Value of transactions or assets (b)
  - Foreign banks must not hold more than 30 % of total domestic assets of all banks
- Number of operations or quantity of output (c)
  - Restrictions on broadcasting time for foreign films
- Number of persons employed (d)
  - At least 75 % of the employees in a joint venture must be nationals
- Specific types of legal entity (e)
  - Foreign companies are required to establish subsidiaries
- Participation of foreign capital (f)
  - Foreign investors can hold up to 51 % of the capital.

# Limitations on national treatment

- (1) Each Member shall extend “treatment no less favourable than that it accords to its own like services and service suppliers”.
- (2) ... “either formally identical treatment or formally different treatment” ...
- (3) relevant benchmark: no modification of “the conditions of competition” in favour of own like services or service suppliers.

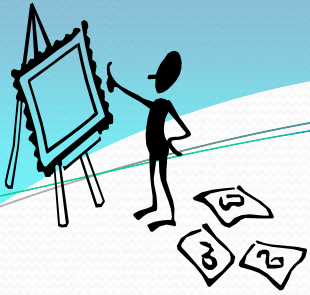


# Typical National Treatment Limitations\*

- Discriminatory *subsidies* and other fiscal measures
- Nationality and residency requirements (→ mode 3)\*\*
- Discriminatory licensing/registration/qualification/training requirements
- Technology transfer requirements
- Prohibitions on foreign land/property ownership
- Local content requirements

\* See also S/L/92, Attachment 1.

\*\* The scheduling of residency requirements should be decided on a case-by-case basis and in relation to the activity concerned (S/L/92, para 14).



## Additional commitments

- Commitments with regard to **measures not falling under Articles XVI or XVII**, including on qualification, standards or licensing matters.
- They can be unique to a particular Member or Members can agree to a common set of additional commitments.
- The Telecom Reference Paper is the first example of a negotiated set of such undertakings among interested Members.



# Format of Schedules under GATS

Modes of supply: (1) Cross-border supply (2) Consumption abroad (3) Commercial presence (4) Pres. of natural persons

Sector or sub-sector	Limitations on market access	Limitations on national treatment	Additional commitments
<b>I. HORIZONTAL COMMITMENTS</b>			
	(...)	(...)	
<b>II. SECTOR-SPECIFIC COMMITMENTS</b>			
	(1)	(1)	
	(2)	(2)	
	(3)	(3)	
	(4)	(4)	



# Structure and terminology

- Each schedule has 4 columns:
  - Column 1: Description of committed sector or sub-sector
  - Column 2: Market Access (MA) Limitations
  - Column 3: National Treatment (NT) Limitations
  - Column 4: Additional Commitments
- For each inscribed sector, undertake MA and NT commitments per mode of supply
  - **Levels of commitments:**
    - “**none**”: no limitations → full commitment
    - “**unbound**”: no commitment, reserves right to employ any measures inconsistent with MA or NT
    - **Limitation**: specifies measure(s) departing from full MA or NT that may be maintained or adopted

# GATS: Scheduling approach

## SCHEDULE OF SPECIFIC COMMITMENTS

Sector or Sub-Sector	Limitations on Market Access	Limitations on National Treatment	Additional Commitments
<b>Positive Element: selection of sectors in which Market Access and National Treatment is granted</b>	(1)	(1)	<b>Negotiated commitments not subject to scheduling under MA or NT</b>
	(2) <b>Negative Element:</b>	(2)	
	(3) <b>inscription</b>	(3)	
	(4) <b>of any</b>	(4)	
	(1) <b>limitations on</b>	(1)	<b>scheduling under MA or NT</b>
	(2) <b>Market Access</b>	(2)	
	(3) <b>and</b>	(3)	
	(4) <b>National Treatment</b>	(4)	



# Horizontal commitments

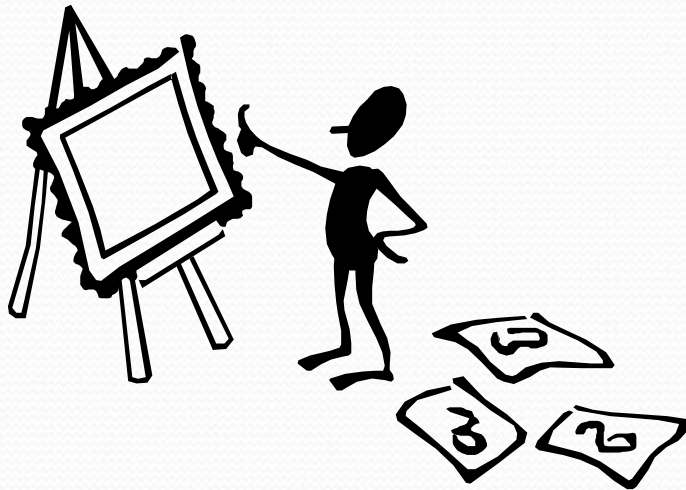
- A scheduling technique aimed to avoid repetition;
- Apply to trade in services in all scheduled sectors unless otherwise specified;
- Take the form of a limitation (on market access or national treatment) or positive undertaking (as additional commitment)



# Scheduling principles:

- Clearly define the scope of commitments as schedules require the greatest possible degree of clarity;
- Entry should specify the relevant **measure** concisely, indicating the elements inconsistent with Articles XVI or XVII (S/L/92, para 39);
- Ensure the consistency of all entries in the schedule;
- Bear in mind specific commitments reflect policy considerations. (e.g. If the intention is to bind the regulatory status quo, specific commitments should correspond with relevant regulations.

# Pitfalls in scheduling:



- Unclear and ambiguous entries may entail unintended commitments



# Sectoral descriptions in schedules

- In the majority of cases, schedules combine:
  - W/120
  - Five digits CPC Items
  - *Sui generis* national definitions
- Some schedules do not refer at all to CPC (e.g. United States)
- CPC/W120 remains the reference guide for 80-90 per cent of WTO Members in 80 per cent of the sectors.

NB: Be aware of the inadequacy of W/120 and CPC provisional.



# W/120: 12 categories, 160 sectors or subsectors

## Sectors

***Precise definition is critical as it defines the scope of a commitment***

- Business and professional
- Communications, all types
- Construction
- Distribution
- Education
- Environment
- Financial
- Health and social
- Tourism
- Recreation & cultural
- Transport, all types
- Other

# CPC (UN Central Product Classification)

- CPC focuses on products, which distinguishes nearly 600 service products in contrast to 300 services activities under (International Standard Industrial Classification – ISIC).
- The explanatory notes of the CPC contain a description of the broad spectrum of outputs or "service products" of heterogeneous service industries, and give sufficiently detailed descriptions of services for the purpose of delineating with some precision the scope of a specific commitment.



# Development of CPC

- Since the publication of its provisional version, the CPC has been under regular revision. Its latest version, i.e. CPC ver. 2, was completed on 31 December 2009 with rewritten explanatory notes. It may serve as a complementary tool for scheduling, in particular for those services that are not specifically reflected in W/120



# *ad hoc* Classifications in the framework of the GATS

- *Ad hoc* Classifications competes with W/120
  - Telecom Model Schedule/Chairman's Note
  - Annex on Financial Services
  - Maritime Model Schedule
  - Annex on Air Transport

# Challenges in the application of the current GATS classification

- In undertaking specific commitments, how to map technological advances, “new” commercial terminology or business models into W/120 is challenging, for example, :
  - convergence between CRS, telecom and audiovisual
  - services related to clean energy
  - integrated logistics services
- How to deal with identified inadequacy of W/120, for example:
  - Environmental services
  - Postal and courier services



# Trends in negotiations

- Cluster approach
- Checklist approach
- Model schedules
- Adapting definitions
- Understandings or explanatory notes
- Adapting subsector listings
- In negotiating proposals...In FTAs...

# Unclear sectoral description:

## US - Gambling

### Facts:

- United States refused to allow Antigua-based online gambling firms to supply their services cross-border into the United States.
- Key issue: whether US commitments on “other recreational services (except sporting)” cover gambling and betting services?



# US Schedule (GATS/SC/90)

Sector or subsector	Limitations on market access	Limitations on national treatment	Add. comm.
10. RECREATIONAL, CULTURAL & SPORTING SERVICES	1) None	1) None	
D. Other recreational services (except sporting)	2) None	2) None	
	3) The number of concessions available for commercial operations in federal, state and local facilities is limited.	3) None	
	4) Unbound, except as ...	4) None	

# Gambling services in W/120 and the CPC

- W/120, Section 10, Recreational services
  - D. Sporting and other recreational services  
CPC 964
- CPC 964 - “Sporting and other recreational service”
  - CPC 9641 – Sporting services
  - CPC 9649 – Other recreational services
    - 96491 – Recreation park and beach services
    - **96492 – Gambling and betting services**
    - 96499 – Other recreational services n.e.c.



# Unclear sectoral description:

## China - Audiovisual

### Facts:

- China prohibits foreign invested enterprises from engaging in “network music services”.
- Key issue: Whether China's commitments on "sound recording distribution services" under the Audiovisual Services section of its schedule cover the distribution of sound recordings in electronic form, through technologies such as the Internet?

# China Schedule (GATS/SC/135)

Sector or subsector	Limitations on market access	Limitations on national treatment	Additional commitments
<p>D. Audiovisual services</p> <p>- Sound recording distribution services</p>	<p>1)None</p> <p>2)None</p> <p>3)Upon accession, foreign services suppliers will be permitted to establish contractual joint ventures with Chinese partners to engage in the distribution of audiovisual products, excluding motion pictures, without prejudice to China's right to examine the content of audio and video products</p>	<p>...</p>	<p>...</p>



# Audiovisual Services in W/120

D.	<u>Audiovisual services</u>	
a.	Motion picture and video tape production and distribution services	9611
b.	Motion picture projection service	9612
c.	Radio and television services	9613
d.	Radio and television transmission services	7524
e.	Sound recording	n.a.
f.	Other	

# To be scheduled vs. not to be scheduled:

## case 1

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
<p>1. BUSINESS SERVICES</p> <p><u>A. Professional Services</u></p> <p>b) Accounting, auditing and bookkeeping services (CPC 862)</p>	<p>1), 2) None, except the following:</p> <ul style="list-style-type: none"> <li>- the auditing reports must be signed by an auditor certified under the national law</li> </ul> <p>3) None, except the following:</p> <ul style="list-style-type: none"> <li>- commercial presence is allowed only in the form of a juridical person constituted under the national law;</li> <li>- at least five auditors possessing a qualification certificate must be on the staff of an auditing organization;</li> <li>- persons engaged in auditing activities are not allowed to perform any other business activity not associated with auditing.</li> </ul> <p>4) Unbound except as indicated in the horizontal section</p>	<p>1), 2) None except as indicated in the column "Limitations on market access"</p> <p>3) None, except as indicated in the column "Limitations on market access".</p> <p>4) Unbound except as indicated in the horizontal section</p>	



# To be scheduled vs. not to be scheduled: case 2

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
A. <u>Professional Services</u>  h. Medical and dental services (CPC 9312)	1) None 2) None 3) None, except the following: <ul style="list-style-type: none"> <li>- commercial presence is allowed only in the form of a juridical person under the national law.</li> <li>- to provide medical and dental services it is necessary to obtain an authorisation for the supply of specified services in a specified territory. The authorization is issued on non-discriminatory basis.</li> </ul> 4) Unbound, except as indicated in Horizontal Commitments.	1) None 2) None 3) Unbound 4) Unbound, except as indicated in Horizontal Commitments	

# To be scheduled vs. not to be scheduled: case 3

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
<b>9. TOURISM AND TRAVEL RELATED SERVICES</b>  <b><u>C. Tourist guide services</u></b> <b>(CPC 7472)</b>	1) None  2) None  3) <b>Foreign service providers are required to incorporate or establish business locally</b>  4) Unbound except as indicated in the horizontal section	1) None  2) None  3) None  4) Unbound except as indicated in the horizontal section	



# To be scheduled vs. not to be scheduled: case 4

Sector or subsector	Limitations on market access	Limitations on national treatment	Add. comm.
10. RECREATIONAL, CULTURAL & SPORTING SERVICES	1) None	1) None	
D. Sporting and other recreational services (CPC 964)	2) None	2) None	
	3) Companies must register in the Register of Commerce in the Commercial Court.	3) None	
	4) Unbound, except as ...	4) None	

# Should the following measures be scheduled?

- Credit institutions must be established as a legal person. Subject to specific legal provisions, they must take the form of a private limited company.
- The activity of operators of storage and warehousing services must be licensed by the Customs and relevant Authorities.
- Leasing of land to foreign enterprises and any extensions thereof require government approval
- Cross-border accounting services need to be provided by a member of any internationally recognized institute of accountants.
- Official audit reports must be confirmed by an auditor or auditing firm in the country.



# Ambiguous language: case 1

Sector or subsector	Limitations on market access	Limitations on national treatment	Add. comm.
2. COMMUNICATION SERVICES  B. Courier services (CPC 7512)	1) None  2) None  3) None, except for mail items weighing less than 350 grams  4) Unbound, except as indicated in the horizontal section	1) None  2) None  3) None, except for mail items weighing less than 350 grams  4) Unbound, except as indicated in the horizontal section	

# Ambiguous language: case 2

Sector or subsector	Limitations on market access	Limitations on national treatment	Add. comm.
2. COMMUNICATION SERVICES			
C. Telecommunications services	1) None	1) None	
Packet and circuit switched data transmission services	2) None	2) None	
	3) None, except for mobile satellite based services which has a licensing requirement	3) None	
	4) Unbound, except as indicated in the horizontal section	4) Unbound, except as indicated in the horizontal section	



# Ambiguous language: case 3

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
<b>9. TOURISM AND TRAVEL RELATED SERVICES</b>  <b><u>A. Hotel and Restaurant services</u></b> <b>(CPC 641-643)</b>	1) None, <b>for reservation services only</b>  2) None  3) <b>Priority will be given to innovative projects and new cuisines</b>  4) Unbound except as indicated in the horizontal section	1) None  2) None  3) None  4) Unbound except as indicated in the horizontal section	

# Ambiguous language: case 4

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
<b>7. FINANCIAL SERVICES</b>  <b>All Banking and Other Financial Services excluding Insurance (A-L) with their relevant CPCs</b>	1) None  2) None, <b>except the person managing the bank should be a resident</b>  3) <b>Unbound</b>  4) Unbound except as indicated in the horizontal section	1) None  2) None  3) <b>None</b>  4) Unbound except as indicated in the horizontal section	



# Ambiguous language: case 5

Sector or subsector	Limitations on market access	Limitations on national treatment	Additional commitments
<b>7. FINANCIAL SERVICES</b>  A. All Insurance and Insurance-Related Services  (a) Life, health and pension/annuities insurance (b) Non-life insurance (c) Reinsurance (d) Services auxiliary to insurance	<b>1) Unbound except for</b> a) reinsurance b) international marine, aviation, and transport insurance <b>2) None</b>  <b>3) Joint ventures will be established, with foreign majority ownership permitted</b>  <b>4) Unbound except as indicated in the horizontal section</b>	<b>1) None</b>  <b>2) None</b>  <b>3) None</b>	

# Ambiguous language: case 6

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
<b>11. TRANSPORT SERVICES</b>  <b><u>H. Services auxiliary to all modes of transport</u></b> <b>b. Storage and warehousing services (CPC742)</b>	1) Unbound  2) None  3) <b>None, except for maritime transport where a foreign legal person is required to establish a company which should be granted a concession by the port authority following a public tendering procedure.</b>  4) Unbound except as indicated in the horizontal section	1) Unbound  2) None  3) None  4) Unbound except as indicated in the horizontal section	



# General reference to legislation: case 1

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
<b>I. Horizontal Commitments</b>			
<b>ALL SECTORS INCLUDED IN THIS SCHEDULE</b>	<p>3) a) Commercial presence requires that foreign service providers incorporate or establish the business locally.</p> <p>b) <b>All are subject to national laws, regulations and legislation requirements.</b></p>	3) <b>Respective national taxation laws/legislations apply.</b>	

# General reference to legislation:

## case 2

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
<b>4. DISTRIBUTION SERVICES</b>  <b>A. <u>Wholesale services</u></b> <b>CPC 622</b>	1), 2), 3), 4) Unbound, <b>except those services that are authorized under laws and regulations.</b>	1), 2), 3), 4) Unbound, <b>except those services that are authorized under laws and regulations.</b>	



# Inconsistency: case 1

Sector or subsector	Limitations on market access	Limitations on national treatment	Add. comm.
9. TOURISM AND RELATED SERVICES  A. Hotel and catering services (CPC641 & 643)	1) None  2) None  3) Unbound for hotels of less than thirty rooms.  4) Unbound, except as indicated in the horizontal commitments	1) None  2) None  3) None  4) None	

# Inconsistency: case 2

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
<b>9. TOURISM AND TRAVEL RELATED SERVICES</b>  <b>B. <u>Travel agency and tour operator</u></b> <b>(CPC 7471)</b>	1) None  2) None  3) The business scope of the travel agency/ tour operator is as follows: a) travel and hotel accommodation services; b) conducting of tours within the country c) travellers check cashing services within the country  4) Unbound except as indicated in the horizontal section	1) None  2) None  3) None  4) Unbound except as indicated in the horizontal section	



# Inconsistency: case 3

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
<b>I. Horizontal Commitments</b>			
<b>All sectors included in this schedule</b>	<p><b>3) Investors shall have the obligation to provide adequate and consistent training to local staff, including for promotion to senior positions</b></p> <p><b>4) Unbound except for temporary entry and stay of the natural persons in the following categories:</b> ...</p>	<p><b>1), (2), (3) None with respect to taxes</b></p> <p><b>(3), (4) Unbound for subsidies, including for research and development</b></p> <p><b>4) Unbound except for temporary entry and stay of the natural persons in the following categories:</b> ...</p>	

# Inconsistency: case 4

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
<b>9. TRANSPORT SERVICES</b>			
<b>A. Maritime Transport Services</b>			
International transport (freight and passengers) (CPC 7211 and 7212 less cabotage transport services)	<p>1) None</p> <p>2) None</p> <p>3) <b>Foreign service suppliers are permitted to establish joint venture shipping companies.</b></p> <p><b>Foreign investment shall not exceed 49 per cent of the total registered capital of the joint venture.</b></p> <p><b>The chairman of board of directors and the general manager of the joint venture shall be appointed by the host side.</b></p> <p>4) Unbound except as indicated in the horizontal section</p>	<p>1) None</p> <p>2) None</p> <p>3) None</p> <p>4) Unbound except as indicated in the horizontal section</p>	



# Inconsistency: case 5

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
<b>10. RECREATIONAL, CULTURAL AND SPORTING SERVICES</b>  <b>A. <u>Entertainment services</u></b> <b>- Cinema theatre operation services (part of CPC 96199)</b>	1) Unbound 2) <b>None</b> 3) <b>None, except for access to subsidies</b> 4) Unbound except as indicated in the horizontal section	1) Unbound 2) <b>Unbound</b> 3) <b>None</b> 4) Unbound except as indicated in the horizontal section	

# Relationship between specific commitments and MFN exemptions

- Specific commitments guarantee the minimum conditions for market access and national treatment and shall be applied on an MFN basis to all other Members. Therefore,
  - Where a commitment has been undertaken, an MFN exemption would be inadmissible if it may undermine the commitment (e.g. reciprocity conditions and other discriminatory provisions)
  - An MFN exemption is permissible when it provides more favourable treatment to specified trading partners than relevant commitments or when there is no commitment on relevant services



# How an MFN exemption works

Type of Exemption	Scheduled Commitment	Result
Preferences on foreign equity participation in retail distribution services	<i>Foreign equity limited to 49%</i>	<i>All suppliers are entitled to 49%. The exemption only permits granting some countries a higher level</i>
Bilateral agreements covering road transport	<i>No commitments scheduled on road transport</i>	<i>Any preferences or discrimination are permissible</i>
Commercial presence of foreign accounting firms is based on reciprocity	<i>Accountancy commitments show no limitations on commercial presence</i>	<i>The exemption is inoperable since all Members must be granted scheduled access</i>

# Question:

- If a bilateral agreement on road transport or a reciprocity requirement for licensing accountants is inscribed in the schedule as a limitation on market access, what would be the implications of the entry?