Liberalization modalities in GATS and PTAs

Trade in Services Division
World Trade Organization
The GATS approach
Structure of the GATS

- Framework agreement
- Annexes for sectoral rules
- Schedules of specific commitments
GATS Annexes

- MFN Exemptions
- Movement of Natural Persons
- Financial Services
- Telecommunications
- Air Transport
- Maritime Transport
Schedules of specific commitments under the GATS

- A Member’s GATS schedule contains commitments on market access and national treatment.
- They are results of negotiations, representing the binding level of market conditions in services.
- They also serve as the starting point for future negotiations and thus embody the principle of progressive liberalization.
- It is to ensure transparency, certainty and predictability in international trade relations in services.
Reasons for a scheduling mechanism

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.
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 measures

• Additional commitments (Art. XVIII)
Format of Schedules under GATS

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

<table>
<thead>
<tr>
<th>Sector or sub-sector</th>
<th>Limitations on market access</th>
<th>Limitations on national treatment</th>
<th>Additional commitments</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>I. HORIZONTAL COMMITMENTS</strong></td>
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<tr>
<th><strong>II. SECTOR-SPECIFIC COMMITMENTS</strong></th>
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<td>(3)</td>
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<td>(4)</td>
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</tbody>
</table>
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
### SCHEDULE OF SPECIFIC COMMITMENTS

<table>
<thead>
<tr>
<th>Sector or Sub-Sector</th>
<th>Limitations on Market Access</th>
<th>Limitations on National Treatment</th>
<th>Additional Commitments</th>
</tr>
</thead>
<tbody>
<tr>
<td>Positive Element: selection of sectors in which Market Access and National Treatment is granted</td>
<td>(1) Negative Element: inscription of any limitations on</td>
<td>(1) (2) (3) (4)</td>
<td>Negotiated commitments not subject to scheduling under MA or NT</td>
</tr>
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<td></td>
<td>(2) limitations on Market Access and National Treatment</td>
<td>(1) (2) (3) (4)</td>
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<td></td>
<td>(3) National Treatment</td>
<td>(1) (2) (3) (4)</td>
<td></td>
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<tr>
<td></td>
<td>(4)</td>
<td>(1) (2) (3) (4)</td>
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</table>
There is no compulsory classification system

However, according to Scheduling Guidelines (S/L/92),
(a) schedules “require the greatest possible degree of clarity” and
(b) “in general, the classification ... should be based on the Secretariat’s Services Sectoral Classification List” (W/120)

Reference instruments:
- Services Sectoral Classification List (W/120)
- UN Provisional Central Product Classification (CPC)
Case (1):

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

<table>
<thead>
<tr>
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</tr>
</thead>
<tbody>
<tr>
<td>9. TOURISM AND TRAVEL RELATED SERVICES</td>
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</tr>
<tr>
<td>A. Hotels and restaurants (CPC 641- 643)</td>
<td>1) Unbound*</td>
<td>1) Unbound*</td>
<td></td>
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<tr>
<td></td>
<td>2) None</td>
<td>2) None</td>
<td></td>
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<tr>
<td></td>
<td>3) The admission of new hotels in individual provinces may be made contingent on past tourist arrivals over a representative period</td>
<td>3) Foreign-owned hotels and restaurants are subject to training requirements (one trainee per two regular staff)</td>
<td></td>
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<tr>
<td></td>
<td>4) Unbound except as indicated in the horizontal section</td>
<td>4) Unbound</td>
<td></td>
</tr>
</tbody>
</table>

*Unbound due to lack of technical feasibility
**Second Column: 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.
Case (2):

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

<table>
<thead>
<tr>
<th>Sector or subsector</th>
<th>Limitations on market access</th>
<th>Limitations on national treatment</th>
<th>Additional commitments</th>
</tr>
</thead>
<tbody>
<tr>
<td>5. EDUCATIONAL SERVICES</td>
<td>1) Unbound</td>
<td>1) Unbound</td>
<td></td>
</tr>
<tr>
<td>A. Primary Education Services (CPC 921, excluding national compulsory education in CPC 92190)</td>
<td>2) None</td>
<td>2) None</td>
<td></td>
</tr>
<tr>
<td></td>
<td>3) Joint schools will be established, with foreign majority ownership permitted</td>
<td>3) Unbound</td>
<td></td>
</tr>
<tr>
<td></td>
<td>4) Unbound, except as indicated in Horizontal Commitments ...</td>
<td>4) ....</td>
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</tbody>
</table>
Third Column: 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).
Fourth column: 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.
Case (3):
Modes of supply: 1) Cross-border supply 2) Consumption abroad 3) Commercial presence 4) Presence of natural persons

<table>
<thead>
<tr>
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</tr>
</thead>
<tbody>
<tr>
<td>2. COMMUNICATION SERVICES</td>
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<tr>
<td>C. Telecommunication services</td>
<td></td>
<td></td>
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<tr>
<td>Facilities-based services</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>(a) Voice telephone services (CPC 7521)</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1) None</td>
<td></td>
<td></td>
<td></td>
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<tr>
<td>2) None</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>3) None, except direct investment by non-[...] persons in a service supplier cannot exceed 70% …</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>4) Unbound except as indicated in the horizontal section</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1) None</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>2) None</td>
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<tr>
<td>3) The chairman and a majority of the board of directors shall be [...] nationals</td>
<td></td>
<td></td>
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<tr>
<td>4) Unbound except as indicated in the horizontal section</td>
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</table>

[...] undertakes the obligations contained in the attached reference paper.
Horizontal commitments

- Aim 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)
Example: horizontal commitments (I)

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

<table>
<thead>
<tr>
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<tbody>
<tr>
<td>All sectors included in this schedule</td>
<td>3) One year after accession, the 30% foreign equity limitation for acquisition of Vietnamese enterprises shall be eliminated, except for capital contribution in the form of buying shares of joint-stock commercial banks. […]</td>
<td>3) Eligibility for subsidies may be limited to Vietnamese service suppliers, i.e. to juridical persons established within the territory of Viet Nam, or a part thereof. […] Unbound for subsidies for Research and Development. […] Unbound for subsidies aimed at promoting the welfare and employment of ethnic minorities. […]</td>
<td></td>
</tr>
</tbody>
</table>
Example: horizontal commitments (II)

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

<table>
<thead>
<tr>
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<th>Limitations on national treatment</th>
<th>Additional commitments</th>
</tr>
</thead>
<tbody>
<tr>
<td>I. Horizontal Commitments</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>ALL SECTORS INCLUDED IN THIS SCHEDULE</td>
<td></td>
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<td></td>
</tr>
<tr>
<td>4) Unbound, except for the temporary presence for up to three years of the following categories of persons:</td>
<td>3) Unbound for subsidies. Acquisition of land subject to government approval.</td>
<td>4) Unbound, except for measures concerning the categories of natural persons referred to in the Market Access column.</td>
<td></td>
</tr>
<tr>
<td>A. Services Salespersons ...</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>B. Intra-corporate Transferees ... Executives ... Managers ... Specialists ... Professionals ...</td>
<td></td>
<td></td>
<td></td>
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<tr>
<td>C. Personnel Engaged in Establishment ...</td>
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</table>
Scheduling principles:

• Entry should specify the relevant measure concisely, indicating the elements inconsistent with Articles XVI or XVII (S/L/92, para 39).
• Limitations can apply to a Member's entire territory or to subdivisions only (Art. XVI:2).
• Measures inconsistent with both Articles XVI and XVII are to inscribed under Article XVI only (Art. XX:2).

Question: What is the relationship between Articles XVI and XVII, in particular when market access is scheduled “Unbound” and national treatment “None” or vice versa?
Case (4):

<table>
<thead>
<tr>
<th>Sector or subsector</th>
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<th>Limitations on national treatment</th>
</tr>
</thead>
<tbody>
<tr>
<td>7. FINANCIAL SERVICES</td>
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<tr>
<td>B. Banking and Other Financial Services (excluding insurance and securities)</td>
<td>1) Unbound except for the following: ...</td>
<td>1) None</td>
</tr>
<tr>
<td>Banking services as listed below:</td>
<td>2) ....</td>
<td>2) ...</td>
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<tr>
<td>...</td>
<td>3) ...</td>
<td>3) ...</td>
</tr>
<tr>
<td>(d) All payment and money transmission services, including credit, charge and debit cards, travellers cheques and bankers drafts (including import and export settlement);</td>
<td>4) ....</td>
<td>4) ...</td>
</tr>
</tbody>
</table>
Approaches used in PTAs
Designs of services PTAs

- Broad commonality among different PTAs, and vis-à-vis the GATS: scope, general provisions, exceptions... In particular, framework agreement combined with schedules of specific commitments.
- No substantive developments in ‘rules’, like the GATS
- Main difference relates to architecture and modalities:
  - Cross-border trade in services
  - Investment (covering both goods and services or only services)
  - Temporary movement of business people
  - Individual chapters/provisions on financial services, telecom, express delivery...
  - Schedules of specific commitments
Modalities of liberalization: negative list vs. positive list approaches

- Positive-list approach: bottom-up (typically a voluntary, positive choice of sectors in which governments are willing to make binding commitments, together with a negative list of nonconforming measures “limitations” to be retained in scheduled sectors and modes of supply)

- Negative-list approach: top-down/list it or lose it.

Consider: can the two approaches generate qualitative differences that are significant both domestically and internationally?
Negative-list approach

- Raised during the Uruguay Round, first used by Australia and New Zealand in ANZCERTA, then further developed in NAFTA.
- Replicated in PTAs involving US or Canada (with few exceptions)
- Replicated in PTAs signed between Mexico and countries in Central and South America, between Central and South American countries and advanced Asian-Pacific economies (Australia, Japan, Korea, NZ, Singapore, Chinese Taipei).
Negative-list approach: full liberalization is assumed

- Free trade and investment in services are assumed unless specific existing measures are inscribed in reservation lists indicating sector, subsector, industrial classification, nature of the treaty provision that is violated, description of the measure in question, and nature of the measure’s nonconformity with regard to specific treaty provision.
Negative-list approach: standstill

- List or lose: all nonconforming measures not notified at the moment of a PTA’s entry into force are automatically bound as “free” (parties lose the right to invoke nonconforming measures that are not inscribed in their lists of reservations on an agreement’s entry into force.

- Many negative-list PTAs require listing the existing nonconforming measures and thus lock in regulatory status quo.
Many negative-list PTAs feature a ratchet mechanism aimed at ensuring that any autonomous measure of a liberalizing nature enacted after a PTA’s entry into force or, where envisaged, between periodic negotiating rounds, becomes the liberalizing party’s commitment under the PTA, with market-opening benefits automatically extended to PTA partners on an MFN basis in the case of plurilateral PTAs.
Annex I non-conforming measures

- The Schedule of a Party to this Annex sets out, ... the Party’s existing measures that are not subject to some or all of the obligations imposed by the provision on market access, national treatment and MFN (cross-border trade in services and investment), etc.

- Example:  
  **Sector:** Retail Distribution of Pharmaceuticals  
  **Obligations Concerned:** Market Access (Article 12.4)  
  Local Presence (Article 12.5)  
  **Measures:** *Pharmaceutical Affairs Act* (Law No. 8035, October 4, 2006), Articles 16 and 19  
  **Description:** Cross-Border Trade in Services  
  A person that supplies pharmaceutical product retail distribution services (including distribution of *han-yak-jae* (Asian medicinal herbs)) must establish a pharmacy in Korea.  
  That person may not establish more than one pharmacy nor establish in the form of a corporation.
Annex II non-conforming measures

The Schedule of a Party to this Annex sets out, ... the specific sectors, subsectors, or activities for which that Party may maintain existing, or adopt new or more restrictive, measures that do not conform with obligations imposed by the provisions on market access, national treatment and MFN (services and investment), etc.

- Example: **Sector:** Transportation Services - Storage and Warehousing Services
  
  **Obligations Concerned:** National Treatment (Articles 11.3 and 12.2)
  
  **Description:** Cross-Border Trade in Services and Investment
  
  Korea reserves the right to adopt or maintain any measure with respect to storage and warehousing services related to rice.
Negative-list approach: more transparency?

- It appears that negative-list approach tends to provide greater transparency than the GATS approach given the list of existing non-conforming measures.
- However, some agreements allow parties to make sweeping reservation (e.g. all nonconforming measures that exist at the subnational level or excluding a whole sector).
- Cross-reference to the GATS commitments:
  - XX reserves the right to adopt or maintain any measure that is not inconsistent with XX’ obligations under Article XVI of the General Agreement on Trade in Services as set out in XX Schedule of Specific Commitments under the GATS.
Concerns about negative-list approach

- Administrative burdensome, esp. for developing countries as it requires countries to perform a comprehensive audit of existing trade and restrictive measures;
- Governments ultimately forgo the right to introduce discriminatory or access-impairing measures in the future—even in sectors that do not yet exist or are not regulated at the time of an agreement’s entry into force (This may explain some developed Members inscribe “new services” carve-out in their PTAs).
Recent variations

- Combination of the best properties of positive- and negative-list approaches, i.e. positive list of sectors + scheduling the regulatory status quo.
  - E.g. recent Japan PTAs
  - EU-CARICOM

- Mix the positive- and negative-list approaches within the same agreement (e.g. positive listing for cross-border trade and negative listing for commercial presence, or negative listing for banking services and positive listing for insurance services, or in the ongoing TISA, the approach on trial is positive listing for market access and negative listing for national treatment.)
EU-CARICOM EPA

- The EPA adopts a GATS-like hybrid approach to scheduling liberalisation commitments which significantly improve the two parties’ GATS commitments.

- The two parties take different schedule formats.
  - The EC’s schedule is split into four sections by modes of supply (commercial presence, cross-border supply and the temporary movement of natural persons). No distinction is made between national treatment and market access. This approach facilitates the identification of the types of restrictions maintained for specific modes, but complicates the assessment of the limitations scheduled for all modes in one particular sector.
  - The schedule of CARIFORUM is divided into two parts. Annex IV.E lists horizontal restrictions and specific commitments for non-services activities whereas Annex IV.F adopts the GATS format to scheduling and comprises horizontal commitments as well specific market access and national treatment commitments in relation to Modes I to IV.