GATS Schedules of Commitments – Focus on Telecoms

Submitted by: WTO
GATS Schedules of Commitments
Focus on Telecoms

Trade in Services Division
WTO, Geneva
http://www.wto.org

WTO Fundamentals

Non-discrimination

Transparency of laws and regulations

Progressive liberalization

Reasonable regulation
Schedules in GATS Structure
...a traffic light approach

**STOP:** Presumed trade barriers

**Prohibited**
- Lack of transparency
- Discrimination among countries (MFN)

**SLOW:** Potential trade barriers
- Technical standards
- Licensing criteria & procedures

**GO:** Measures for broader policy objectives
**Exceptions for, e.g.**
- Health, safety
- Privacy
- Preventing fraud
- Public morals, public order

**Progressively eliminate**
- Discrimination against foreigners (National treatment)
- Quantitative restrictions

Should be objective & not be more burdensome than necessary

No exceptions for many other policies, measures, but disciplines are minimal

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At Present:
Telecom commitments in WTO

**1997: The 4th Protocol**
- 69 governments
- 9 MFN exemptions
- In force: Feb ’98
- 2 still to ratify

**Today:**
- 99 governments with basic, 108 total
- More existing Members & acceding countries committed
- Protocol schedules improved
- 81 Members commit to the Reference Paper on regulatory principles
Additional Commitments
The Reference Paper

Telecom Regulatory Principles
adopted by 81 governments

- Competition - avoid abuse of dominance
- Interconnection - guarantee fairness
- Regulator - independent of operators
- Universal service - competition friendly
- Finite resources - administer fairly (e.g. spectrum, numbering, rights of way)
- Licensing - added transparency
Profile of Commitments by Emerging Economies

(As per cent of the emerging economies with commitments)

- Reg. Disciplines: 90%
- Data Transmission: 88%
- Cellular Telephone: 85%
- Fixed Telephone: 82%
- Leasing circuits: 79%
- Mobile Satellite: 72%
- Voice simple resale: 54%

Immediate implementation
Phased-in

Profile of Restrictions in Telecom Commitments

(In percent of country grouping)

- Limits on Number of Suppliers:
  - Emerging economies: 28%
  - Industrialized Economies: 42%

- Limits on Foreign Equity:
  - Emerging economies: 23%
  - Industrialized Economies: 4%

Legend:
- No limits
- Limits to be phased out
- Limits applied
What’s in a Schedule?

λ Market access (Art. XVI) *
λ National treatment (Art. XVII) *
λ Additional commitments (Art. XVIII)

* Listed by service and modes of supply

Schedules do not bind laws - they bind a level of access (MA) or standard of treatment (NT)

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Telecom scheduling
Some unique features

➢ Telecom scheduling “guidelines”
➢ Phase-in dates
➢ Routing restrictions
➢ Other “zero quota” entries
e.g. “only resale not permitted until x”
➢ Spectrum constraints (technical)
➢ The Reference Paper
**Commitments can be simple ...**

<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>2.C. Telecommunications Services</td>
<td>(a) Voice telephone services</td>
<td>(1) None</td>
<td>Regulatory Principles, as annexed.</td>
</tr>
<tr>
<td></td>
<td>(b) Packet switched data transmission</td>
<td>(2) None</td>
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<td></td>
<td>(c) Circuit-switched data transmission</td>
<td>(3) None</td>
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<td></td>
<td>(d) Telex services</td>
<td>(4) Unbound except as indicated in Part I</td>
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<td>(e) Telegraph services</td>
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<td>(f) Facsimile services</td>
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<td>(g) Private leased circuit services</td>
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<td>(h) Electronic mail</td>
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<td>(i) Voice mail</td>
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<td>(j) On-line information and data base retrieval</td>
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<td>(k) Electronic data interchange (EDI)</td>
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<td>(l) Enhanced/value-added facsimile service</td>
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<td>(m) Code and protocol conversion</td>
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<td>(n) On-line information and/or data processing</td>
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</table>

**Terminology**

<table>
<thead>
<tr>
<th>Term</th>
<th>Definition</th>
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<tbody>
<tr>
<td>“None”</td>
<td>Binding to apply no limitations (within the meaning of Articles XVI and XVII). Also means “none other than those listed in the horizontal section”, if any, so need to specify if horizontal limits not applicable</td>
</tr>
<tr>
<td>“Unbound”</td>
<td>No commitment, no binding (usually entered for a particular mode of supply wherein other modes DO contain commitments) <em>Not technically feasible</em></td>
</tr>
<tr>
<td>“Unbound**” Limitation(s) specified</td>
<td>Binding where the relevant limitation(s) is specified Is understood to mean “none, except” i.e. that ONLY said limitation(s) will be applied (in addition to relevant horizontal limits, if any)</td>
</tr>
<tr>
<td>“Unbound except ... “</td>
<td>Limits the scope of binding within a mode. Differs from limiting the type of services covered (which is noted in sector/sub-sector column) Limitations applied to the “bound” segment must also be listed</td>
</tr>
</tbody>
</table>
modes of supply & telecoms

<table>
<thead>
<tr>
<th>Modes</th>
<th>Definition</th>
<th>Examples</th>
</tr>
</thead>
<tbody>
<tr>
<td>1 Cross border</td>
<td>The suppliers are not present in the territory in which the service is supplied</td>
<td>International simple resale, call back services, incoming flows of telecom traffic, certain satellite services, location of payment?</td>
</tr>
<tr>
<td>2 Consumption abroad</td>
<td>The consumers obtain services outside their country of residence</td>
<td>Mobile roaming, Data or traffic sent out for on-line processing, Purchase abroad of transmission capacity, call back services</td>
</tr>
<tr>
<td>3 Commercial presence</td>
<td>The services entities are present in the territory where they supply the services</td>
<td>A rep office or subsidiary. Foreign equity in privatization of a PTO. Any direct or indirect investment by a foreign service supplier, outgoing traffic supplied by such entities</td>
</tr>
<tr>
<td>4 Presence of natural persons</td>
<td>The entry and temporary stay of individuals to supply services</td>
<td>Consultancy or professional services, e.g. contracting of foreign telecom engineers or experts. Also, employment of foreign personnel by telecom service providers</td>
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</tbody>
</table>

The listing of services is critical as it defines the scope of a commitment.

- 2. Communications services
  - C. Telecommunications
    - Voice telephone services
    - Packet switched data transmission
    - Circuit-switched data transmission
    - Telex services - Telegraph services
    - Facsimile services
    - Private leased circuit services
    - Electronic mail - Voice mail
    - On-line information and data base retrieval
    - Electronic data interchange (EDI)
    - Enhanced/value-added facsimile service
    - Code and protocol conversion
    - On-line information and/or data processing
The Telecom Approach

A listed service covers, unless otherwise stated:

- local, long distance & international service
- any wire-based or wireless technology
- facilities-based or resale-based supply
- public or non-public (CUG) services

The Chairman’s Note on Scheduling Basic Telecoms

- What is it?
- What are it’s origins?
- What functions does it serve?
- How can you use it?
- Why use it?
### Chairman's Note services/categories matrix

<table>
<thead>
<tr>
<th>CHAIR NOTE CATEGORIES</th>
<th>GEOGRAPHIC MARKET</th>
<th>MEANS OF SUPPLY</th>
<th>USER-BASE</th>
<th>TYPE OF TECHNOLOGY</th>
</tr>
</thead>
<tbody>
<tr>
<td>W/120 SERVICES</td>
<td>Local</td>
<td>Long distance</td>
<td>Intl.</td>
<td>Facilities-based</td>
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<td>Resale-based</td>
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<td>For public use</td>
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<td>For non public use</td>
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<td>Wire-based</td>
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<td>mobile terrestrial</td>
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<td>mobile satellite</td>
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<td>fixed satellite</td>
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<td>Voice telephone</td>
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<td>Packet-switched</td>
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<td>circuit services</td>
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<td>Enhanced value-added</td>
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<td>Other</td>
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### Market Access: Definition

**Measures not allowed unless specified:**

a. limits on number of suppliers
b. limits on value of transactions or assets
c. limits on number of operations or the quantity of output
d. limits on number of persons that may be employed in a sector or by a supplier

e. measures that restrict or require specific types of legal entity or joint venture
f. limits on the participation of foreign capital

*or an economic needs test having the same effect*

A complete or “closed ended” definition
Economic Needs Test

- The quantitative limit is not expressed as a specific number or amount. Instead, is determined by a market analysis (supply/demand)
- Can be performed by government authorities or it can be required of the license applicant
- Authorities may use it to apply a quota that is adjusted periodically or it can be determined on a case-by-case basis
- The main criteria help determine the level of binding, so should be indicated in the schedule

Market Access: “Routing restrictions”
Where do we stand?

Typically: listed in mode 1, market access column, where monopoly rights maintained on international services, infrastructure or transit

- “zero quota” on a form of service, e.g. resale?
- what about modes 2 & 3?
- “double safety”?
- most clear/accurate formulation?
- relation to sector/subsector column entry?
- relation to Reference Paper & Annex obligations?
National Treatment: Definition

Unless otherwise specified:

- Each Member shall accord to foreign services and services suppliers treatment no less favorable than that it accords to its own like services and service suppliers
- No discrimination in favour of national suppliers on a de jure or de facto basis
- Applies to all discriminatory measures

An “open ended” definition

Additional Commitments

What can be listed?

- Schedules can contain commitments on measures not covered by market access and national treatment, e.g. related to qualifications, technical standards or licensing (Art. XVIII)
- 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 plurilateral negotiation of a common set of such undertakings
Market Access & National Treatment

Listing discriminatory measures

National Treatment

All other discriminatory measures belong in this column

Market Access

Discriminatory & nondiscriminatory measures fitting the Art. XVI definition of market access must be listed in this column

Spectrum Management & Scheduling

Members have the right to exercise spectrum/frequency management, which may affect the number of service suppliers, in accordance with Article VI and other relevant GATS provisions and, if applicable, the Reference Paper.

As a result, limitations stating "subject to availability of spectrum/frequency" were deleted from most draft offers

(chairman’s note)
General Obligations vs. Schedules
Domestic regulation
& additional commitments

✓ The definition of possible commitments is open-ended, but they
  ➢ should not be used to list restrictions
  ➢ should go beyond what is already required by general obligations

✓ Example: the telecom Reference Paper - in many ways, supplements Art. VI (domestic regulation) & extends Art. VIII-like disciplines (on monopolies) to dominant suppliers

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General Obligations vs. Schedules
Domestic Regulation

Not listed
e.g. non-discriminatory regulatory measures, e.g. standards, licensing criteria and procedures

Listed in schedules
e.g.
- Restrictions on market access definition, e.g. limits on the number of licenses
- All Article VI-type measures that are discriminatory (inconsistent with national treatment)
Regulations not listed in schedules

Requirements for obtaining a license
The applicant must demonstrate an adequate financial base &
technical capability to supply the services...

Criteria relating to financial base
• minimum capital requirement of £50,000
• presentation of a business plan

Criteria relating to technical capacity
• at least 2 staff must be certified engineers
  with 5 or more years of experience

Implication: A license can be denied if the applicant does
not satisfy the criteria, even if commitments with no
limitations are scheduled on that service

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General Obligations vs. Schedules

**MFN Treatment**

- No discrimination among services or service suppliers of other Members. Applies to all services, **whether or not listed in schedules**
- Measures inconsistent with MFN cannot be listed as limitations in schedules*

**Implication:** If licenses are being issued to foreign firms
or FDI is being permitted, discrimination based on
national origin of the firms must be avoided, **even for services not in the schedule**

* (Derogations, if any, had to be listed as “MFN exemptions” in
1994 or at accession. If not, WTO waiver procedures apply)
**General Obligations vs. Schedules**

**Listing exceptions?**

**Listed:**
Art. XVI & XVII related measures

**Not listed:**
Any measures related to GATS exceptions, e.g., measures to protect national security, public morality or health covered by Arts. XIV & XIV bis, even if they fit Art. XVI & XVII definitions

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**General Obligations & Disciplines**

**Example: General Exceptions**

GATS permits measures necessary to

- achieve policy objectives such as protection of public morals and the maintenance of public order
- protect privacy of personal data, confidentiality of individual records, and to prevent fraud

Must not be more restrictive than necessary, applied in an arbitrary way, discriminate unjustifiably or be used as a disguised restriction

Why would you list and “negotiate” the “liberalization” of a measure covered by an exception? Exceptions have their own disciplines!
... Review

? Why doesn’t it make sense to inscribe laws, decrees or regulatory citations in a Schedule

? Why should many (or most) regulations not appear in a Schedule

? Why is the requirement to obtain a license not considered a limitation on market access

? Why not list limits on number of suppliers due to spectrum constraints? When should a limit be listed?