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DRAFT

REVISION OF THE GUIDELINES FOR THE SCHEDULING OF SPECIFIC COMMITMENTS

Note by the Secretariat

This document is a revision of the guidelines for the scheduling of specific commitments contained in document MTN.GNS/W/164, entitled Scheduling of Initial Commitments in Trade in Services: Explanatory Note of 3 September 1993, and document MTN.GNS/W/164/Add.1, entitled Scheduling of Initial Commitments in Trade in Services: Explanatory Note, Addendum of 30 November 1993. This revision is the result of discussions at formal and informal meetings of the Committee.

TABLE OF CONTENTS

INTRODUCTION.....	3
PART I : WHAT ITEMS SHOULD BE SCHEDULED?	3
A. LIMITATIONS ON MARKET ACCESS (ARTICLE XVI).....	4
B. LIMITATIONS ON NATIONAL TREATMENT (ARTICLE XVII)	5
C. ADDITIONAL COMMITMENTS (ARTICLE XVIII)	7
D. EXCEPTIONS	7
E. SPECIFIC COMMITMENTS AND MFN EXEMPTIONS.....	7
PART II: HOW SHOULD ITEMS BE SCHEDULED?	7
A. HOW TO DESCRIBE COMMITTED SECTORS AND SUB-SECTORS	8
B. HOW TO TREAT THE MODES OF SUPPLY	8
1. Cross-border supply	9
2. Consumption abroad	9
3. Commercial Presence	9
4. Presence of natural persons	10
5. Relationship between modes of supply.....	10
C. HOW TO RECORD COMMITMENTS.....	10
1. Horizontal commitments	10
2. Sector-specific commitments.....	11
3. Levels of commitment.....	11
(a) Full commitment	12
(b) Commitment with limitations.....	12
(c) No commitment	12
(d) No commitment technically feasible	12
(e) Special cases.....	13
ANNEX 1 - SCHEDULE OF SPECIFIC COMMITMENTS OF COUNTRY X	14
ANNEX 2 - LIST OF ATTACHED DOCUMENTS RELEVANT FOR	
 SCHEDULING PURPOSES.....	15

GUIDELINES FOR THE SCHEDULING OF SPECIFIC COMMITMENTS UNDER THE GENERAL AGREEMENT ON TRADE IN SERVICES (GATS)

Explanatory note¹

INTRODUCTION

1. This note is intended to assist in the preparation of offers, requests and national schedules of specific commitments. Its objective is to explain, in a concise manner, how specific 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 specific commitments; it does attempt to answer those questions which are most likely to arise. The answers should not be considered as a 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. MFN, transparency) and some only to scheduled specific 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 XX, 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.

PART I : WHAT ITEMS SHOULD BE SCHEDULED?

3. Since schedules, including footnotes, headnotes and attachments, are a record of legal commitments, nothing should appear in them which a Member does not intend to be legally binding. A schedule contains the following main types of information: a clear description of the sector or sub-sector committed, limitations² 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.

¹ This document is the result of a revision exercise carried out in the Committee on Specific Commitments. The exercise was based on the two documents which were produced and circulated during the Uruguay Round negotiations: MTN.GNS/W/164, entitled Scheduling of Initial Commitments in Trade in Services: Explanatory Note of 3 September 1993, and document MTN.GNS/W/164/Add.1, entitled Scheduling of Initial Commitments in Trade in Services: Explanatory Note, Addendum of 30 November 1993. These guidelines shall be applicable as of the date of their adoption. It should be understood that schedules in force prior to the date of this document have been drafted according to MTN.GNS/W/164 and MTN.GNS/W/164/Add.1.

² 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.

4. Where commitments do not cover the entire national territory, the entry should describe the geographical scope of measures taken according to Article I:3(a)(i).

5. If attachments are used, clear reference should be made to the part of the schedules they refer to (i.e. definitions in the first column, market access commitments in the second column, national treatment commitments in the third column and additional commitments in the fourth column).

6. Exchange control restrictions are subject to the general disciplines of Articles XI (Payments and Transfers) and XII (Restrictions to Safeguard the Balance of Payments) of the GATS.

7. There is no requirement in the GATS to schedule a limitation to the effect that the cross-border movement of goods associated with the provision of a service may be subject to customs duties or other administrative charges. Such measures are subject to the disciplines of the GATT.

A. LIMITATIONS ON MARKET ACCESS (ARTICLE XVI)

8. 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). In other words, all measures falling under any of the categories listed in Article XVI:2 must be scheduled, whether or not such measures are discriminatory according to the national treatment standard of 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).

9. With regard to market access limitations, such as numerical ceilings or economic needs tests, the entry should describe each measure concisely indicating the elements which make it inconsistent with Article XVI. Numerical ceilings should be expressed in defined quantities in either absolute numbers or percentages; regarding economic needs tests the entry should indicate the main criteria on which the test is based, e.g. if the authority to establish a facility is based on a population criterion, the criterion should be described concisely.

10. Approval procedures or licensing and qualification requirements, such as financial soundness or membership in a professional organization, are frequently stipulated as conditions to obtain a licence. If they are of a non-discriminatory nature, and therefore to be applied equally to nationals and foreigners, they should not be scheduled under Article XVII. Nor should they be scheduled under Article XVI as long as they do not contain any of the limitations specified in Article XVI. However, if such approval procedures or licensing and qualification requirements are discriminatory, they should be scheduled as national treatment limitations. If approval procedures or licensing and qualification requirements contain any of the limitations specified in Article XVI, they should be scheduled as market access limitations. It has been pointed out that in some schedules the granting of licences has been subject to review, possibly meaning they are granted on a discretionary basis. In such a case the right to supply the service is uncertain. Therefore such entries should be avoided unless the objective criteria on which such a review is based are precisely described.

11. 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.

12. The following are examples of limitations on market access drawn from the schedules of specific commitments. In this regard, paragraph 39 on the scheduling of limitations is also relevant.

- (a) Limitations on the number of service suppliers:
 - Licence 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 transaction 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)

13. 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 treatment³

- (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.

14. 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.

15. 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.

16. Article XVII applies to subsidies 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 and does not contain a definition of subsidy. 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. Subsidies are also not excluded from the scope of Article II (MFN). In line with the paragraph above, a binding under Article XVII with respect to the granting of a subsidy does not require a Member to offer such a subsidy to a services supplier located in the territory of another Member.

17. Restrictions on the purchase, lease or use of real estate, connected with the supply of a service inscribed in a schedule, are national treatment limitations to the extent that different conditions apply to foreign services suppliers which alter the conditions of competition in favour of service suppliers of the Member compared to like service suppliers of any other Member.

18. 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 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. When measures inconsistent with both Articles XVI and XVII are inscribed in the column relating to Article XVI (as provided for in

³ More examples of frequently occurring national treatment restrictions are listed in Attachment 1.

Article XX:2), Members could indicate that this is the case (e.g. by stating "also limits national treatment" in the market access column).

C. ADDITIONAL COMMITMENTS (ARTICLE XVIII)

19. 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

20. All measures falling under Article XIV (General Exceptions) are excepted from all obligations and commitments under the Agreement, and therefore should not be scheduled. Clearly, such exceptions cannot be negotiated under Part III of the Agreement. Likewise, any prudential measure taken in accordance with paragraph 2(a) of the Annex on Financial Services constitutes an exception to the Agreement and should not be scheduled. Notwithstanding any other provisions of the Agreement, a Member shall not be prevented from taking measures for prudential reasons in accordance with paragraph 2(a) of the Annex on Financial Services. 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 MFN EXEMPTIONS

21. 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 MFN 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 MFN 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?

22. 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:
 1. Horizontal commitments;
 2. Sector-specific commitments;
 3. Levels of commitment.

A. HOW TO DESCRIBE COMMITTED SECTORS AND SUB-SECTORS

23. 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 the Secretariat's Services Sectoral Classification List.⁴ 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). A breakdown of the CPC, including explanatory notes for each sub-sector, is contained in the UN Provisional Central Product Classification.⁵

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 I.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)

24. 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.

25. 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

26. 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.

⁴Document MTN.GNS/W/120, dated 10 July 1991.

⁵Statistical 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.

MODES OF SUPPLY

Supplier Presence	Other Criteria	Mode
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

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

1. Cross-border supply

28. International transport, the supply of a service through telecommunications or mail, and services embodied in exported goods (i.e. services supplied in or by a physical medium, such as a computer diskettes 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.

2. Consumption abroad

29. 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.

30. 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.

31. Limitations in the schedule of a Member - if any - with respect to mode 2 on market access and/or on national treatment should only relate to measures affecting the consumers of that Member, and not to measures affecting consumers of another Member, in the territory of that Member.

3. Commercial Presence

32. 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 XXVIII).

4. Presence of natural persons

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

34. With respect to the fourth mode of supply, many participants have chosen to inscribe their bound commitments in the form of undertakings rather than in the form of market access limitations. In such cases the bound measures affecting the entry and temporary stay of natural persons are explicitly stated. Thus, in the absence of a reference to a specific duration for the temporary stay of a foreign service supplier, it could be understood that no binding is being undertaken in respect of the duration of that stay. It is noted in this regard that, according to Article XX:1(a) of the Agreement, with respect to sectors where commitments are undertaken, each schedule shall specify the terms, limitations and conditions on market access. Commitments should include the duration of temporary stay of natural persons for the purpose of supplying a service. In any event a Member's regulatory measures would still be subject to the general requirement, in paragraph 4 of the Annex on the Movement of Natural Persons, that they do not nullify or impair the benefits accruing to any other Member under the terms of a specific commitment.

5. Relationship between modes of supply

35. 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

1. Horizontal commitments

36. A horizontal commitment applies to trade in services in all scheduled services sectors unless otherwise specified. 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.

37. Horizontal commitments condition all other entries in the schedule unless otherwise specified. Hence:

- A "none" in the sectoral section must be read as meaning "none except the conditions set out in the horizontal section".⁶
- To indicate in a given sector that no restrictions whatever are imposed, a Member must make clear in the horizontal section or in the relevant sectoral section that the horizontal restrictions do not apply in the sector in question.
- In the case of a sector-specific restriction the entry must be read as the combination of the horizontal restrictions and of the sector-specific restriction unless explicitly provided otherwise in the entry.

38. To the extent that domestic laws of general application contain measures which constitute limitations, and if the Member wishes to maintain them, the commitment should describe the measures concisely. According to the agreed scheduling procedures, schedules should not contain general references to laws and regulations as it is understood that such references would not have legal implications under the GATS.

2. Sector-specific commitments

39. 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.

40. 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.

3. Levels of commitment

41. 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:

⁶ Due account must be taken, if need be, of the provision of Article XX:2 of the GATS relating to the scheduling of measures inconsistent with both market access and national treatment in the market access column.

(a) Full commitment

42. 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.

43. Regardless of what is inscribed in the market access column, a "no limitations" entry in the National Treatment column (expressed as "None") would mean that national treatment is bound for the entire mode; it is not limited to what may be bound in a market access commitment with limitations. Thus, if a Member makes a commitment under Article XVI in a sector, where commercial presence is limited to partnerships, an entry "None" or any other entry in the national treatment column would refer to the whole mode of supply and not only to partnerships. (See also paragraphs 3 and 13)

(b) Commitment with limitations

44. 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 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".

45. 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

46. 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

47. 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". The term may not be used as an entry in the national treatment column for modes 1 and 2 when, for the same service, there is a market access commitment. Where the mode of supply thought to be inapplicable is in fact applicable, or becomes so in the future, the entry means "unbound".

(e) Special cases

48. It could be argued that a reservation for a residence requirement, a nationality condition or a commercial presence requirement under cross border trade amounts to an "unbound". However in some cases there is clearly an advantage in inscribing those requirements instead of the term "unbound" in that trading partners have the certainty that there are no other limitations with respect to the cross border mode (see also paragraph 14 on residency requirements and paragraph 12 on nationality requirements).

49. Where a national schedule refers to foreign companies and national companies, it is necessary to offer a definition for those cases where a Member uses terms which are not covered by the common definitions contained in Article XXVIII of the GATS.

ANNEX 1

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. For all future commitments the relevant date of entry into force should be inscribed.

ANNEX 2

LIST OF ATTACHED DOCUMENTS RELEVANT FOR SCHEDULING PURPOSES¹

- 1) Examples of frequently occurring national treatment restrictions, which appear in schedules of specific commitments.
- 2) Informal Note by the Secretariat for the Committee on Trade in Financial Services, dated 24 June 1997, "The Distinction between Modes 1 and 2", (Also included in document S/FIN/W/14).
- 3) Job No. 3706, dated 3 July 1997, Informal Note by the Secretariat for the Committee on Trade in Financial Services, Report of Informal Consultations held on 27 June 1997 on the Distinction between Modes 1 and 2 in Financial Services (Also included in document S/FIN/W/14).
- 4) Job No. 6496, dated 25 November 1998 (also included in document S/WPPS/4, dated 10 December 1998), Informal Note by the Chairman of the Working Party on Professional Services "Discussion of matters relating to Articles XVI and XVII of the GATS in connection with the disciplines on domestic regulation in the accountancy sector".
- 5) S/GBT/W/2/Rev.1, dated 16 January 1997, Note by the Chairman of the Negotiating Group on Basic Telecommunications on Scheduling Basic Telecom Services Commitments.
- 6) S/GBT/W/3, dated 3 February 1997, Note by the Chairman of the Negotiating Group on Basic Telecommunications on Market Access Limitations on Spectrum Availability.
- 7) Annex to Job No. 1311, dated 12 April 1995, Informal Note by the Secretariat "Model Schedule of Commitments on Basic Telecommunications".
- 8) MTN.GNS/W/120, dated 10 July 1991, Note by the Secretariat "Services Sectoral Classification List".

¹ It is understood that the status of each of the documents listed is unique and that therefore each document should be looked at based on its specific background and nature. The fact that such documents are annexed to these guidelines should not be interpreted as changing their status. In the same manner, it is understood that some of the documents listed in this annex deal with scheduling questions only for the sector they refer to.

Attachment 1

EXAMPLES OF FREQUENTLY OCCURRING NATIONAL TREATMENT RESTRICTIONS WHICH APPEAR IN SCHEDULES OF SPECIFIC COMMITMENTS

1. These examples are based on existing entries in the schedules and represent frequently occurring types of limitations on national treatment. It should be noted that the list is of an illustrative nature and therefore it is by no means exhaustive. Moreover, since the listed examples come from individual existing schedules and are based on their own interpretation of Article XVII of the GATS, the list does not represent the common view of WTO Members on this subject and therefore it does not prejudge Members' positions on the interpretation of Article XVII of the GATS. In other words, the list does not imply that all measures presenting similarities with one of the measures below would need to be listed as national treatment restrictions. Only discriminatory measures (i.e. measures which modify conditions of competition in favour of services suppliers of national origin) would need to be scheduled.

2. For instance, licensing and qualification requirements, registration requirements and authorization requirements will constitute national treatment limitations subject to scheduling only where they discriminate in favour of services and service suppliers of national origin. In the absence of discrimination, these same type of requirements will not constitute measures subject to scheduling under Article XVII and would possibly fall under Article VI of the GATS.¹ Similarly, whether residency requirements constitute national treatment limitations has to be determined on a case-by-case basis.

3. Finally, although there is no definition of what constitutes a subsidy under the GATS and disciplines under Article XV are still subject to negotiations, paragraph 16 in the revised guidelines recalls that a discriminatory subsidy constitutes a national treatment limitation. For this reason, an example of a discriminatory subsidy has been included in this list. The same goes *mutatis mutandis* for tax measures and other financial measures such as fees.

I. Subsidy measures

- Eligibility for subsidies reserved to nationals

II. Tax measures

- A 4 per cent federal excise tax is imposed on all non-life insurance premiums that are paid to companies that are not nationally incorporated
- An excise tax of 10 per cent is applicable on net premiums paid to non-resident insurers

III. Other financial measures (fees, charges, etc.)

- Charges taken for port services from foreign and national ships may differ in favour of national flag vessels

¹ On the determination of whether a measure is subject to scheduling under Articles XVI or XVII or whether it falls under Article VI of the GATS, see also the attached Informal Note by the Chairman of the Working Party on Professional Services "Discussion of matters relating to Articles XVI and XVII of the GATS in connection with the disciplines on domestic regulation in the accountancy sector", 25 November 1998, document Job No. 6496.

- Higher licence fees are charged for non-residents

IV. Nationality requirements

- Provision of yacht chartering and cruising services reserved to nationals
- Agents or managers must be citizens
- Sale or purchase of travellers cheques by individuals requires citizenship status

V. Residency requirements

- Permanent residency requirement for chiropodists
- Residency requirement for managers and the members of the board of directors of a company
- Residence requirement for actuarial profession
- Advisory and auxiliary financial services and asset management: The establishment must be managed by a resident of the province
- For foreign bank employees residence is required

VI. Licencing and qualification requirements

- In order to work as a mountain guide or ski instructor, passing of an examination is required; access to such exams for foreigners may be restricted
- Barristers and commercial lawyers in national law are required to be graduates of national universities
- Condition of licences is one year previous residency
- Three years of prior professional practice in the country required
- Non-residents must be registered and licenced in order to purchase unprocessed fish from primary producers and/or process fish

VII. Registration requirements

- Marketing of legal advice activities by foreign companies is restricted to registered law firms
- It is necessary to be registered as an accountant, for which it is necessary to be a national or an alien domiciled in the country for at least three years prior to the application
- Foreign companies are required to have a registered office in the country
- Certification of certain works involving health and safety is limited to registered engineers, who to become registered, must be ordinarily resident in the country

VIII. Authorisation requirements

- Loans to non-residents need to be approved by the Central Bank
- Banks: until 30 June 1999, ministerial approval is required for foreign bank subsidiaries to open more than one bank
- A non-national needs permission to become a director of a financial institution

IX. Technology transfer/training requirements

- The foreign service supplier shall use appropriate and advanced technology and managerial experience, and shall have the obligation to transfer its technology and pass on its experience to national personnel
- The foreign service supplier must prove commitment to recruit and develop more local human resources
- Foreign service suppliers, in the context of JV are required to offer on-the-job training for national employees
- Skilled foreign employees required to provide training to locals

X. Local content requirements

- Preferential use of local services to the extent they are available under conditions of quality, price and delivery equivalent to those of like services of foreign origin
- With regard to personnel, materials, equipment, facilities and services required in the petroleum operations, priority shall be given to the employment of national subcontractors, provided that they are competitive in delivery, time, price and quality

XI. Ownership of property/land

- Foreigners may not acquire direct ownership of land in a 100 km strip along the frontiers
 - The acquisition, purchase as well as rent or lease of real estate by foreign natural persons and juridical persons requires an authorization by the competent regional authorities which will consider whether important economic, social or cultural interests are affected or not
 - Foreign entities may only acquire real property through participation in joint ventures
 - Non-residents are excluded from the acquisition of real estate
-

Attachment 2

Committee on Trade in Financial Services

24.6.97

The Distinction between Modes 1 and 2

Informal Note by the Secretariat

At the meeting of the Committee on Trade in Financial Services on 5 June, the Secretariat was asked to organise informal consultations on the issue of the distinction between modes 1 and 2 which would be open to all delegations. The Secretariat was requested to report on the results of such consultations to the next meeting of the Committee on 17 July. The purpose of this note is to assist delegations in those informal consultations by identifying the nature of the issue and laying down some possible options for a solution.

* * *

1. The mode 1 – mode 2 issue arises because of a perceived ambiguity in the distinction between the two modes for scheduling purposes. The question becomes particularly relevant when one of the two modes is unbound in a Member's schedule, while the other mode is either fully bound or bound with few limitations.¹

2. As indicated in the agreed scheduling guidelines (MTN.GNS/W/164 of 3 September 1993), the modes of supply 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. In both modes 1 and 2, the supplier is not present within the territory of the Member. The distinction between mode 1 and mode 2, therefore, hinges upon whether the service is delivered within the territory of the Member from the territory of another Member or whether the service is delivered outside the territory of the Member.²

3. The ambiguity is due to the fact that the delivery of a financial service very often does not require the physical presence of the consumer. Electronic means associated with the globalization of financial markets has made it possible to "deliver" a financial service almost anywhere in the world. Once the physical presence of the consumer ceases to be a benchmark for determining the place of delivery of a service, it becomes extremely difficult to determine in an unambiguous manner where a service is delivered.

¹ If both modes were unbound, a Member would be entitled to introduce any measures inconsistent with Article XVI or XVII with respect to both modes, and drawing a line between them would not serve any practical purpose. If both modes were bound, a Member would be entitled to apply only the measures inscribed in its schedule. In this latter case, any ambiguity in the distinction between modes 1 and 2 could result in a misplacement of scheduled measures, but the consequences of this might not be as far-reaching as the non-scheduling of a measure. If the measures applicable to services supplied under the modes are prudential, there is no need to schedule them.

² In making this distinction between modes 1 and 2, one should focus on the delivery of the service itself, and not confuse this with the underlying flows of capital or the act of ordering or requesting the supply of a service.

4. Some examples may illustrate this point:

Deposits: A bank account is opened abroad by a consumer of a Member. If the consumer travelled abroad to open the account, this may be mode 2 supply, while the absence of travel (opening of the account through mail order and bank transfer, or through electronic means) may imply mode 1. However, the services directly associated with this account (payment of interest, debiting and crediting of payments and transfers, offsetting of balances, etc.) can be delivered either abroad or in the consumer's home country at the request of the consumer.

Loan: A loan is made from a foreign bank established abroad to a consumer of a Member. The loan can be delivered either within or outside the territory of the consumer's home country.

Insurance: The consumer of a Member concludes a property insurance contract with an insurer established abroad. It can be argued that if the insured property is abroad, the service is also delivered abroad, since the protection provided by the insurance contract is "delivered" with respect to the property; therefore this belongs to mode 2. However, it can equally be argued that the insurance provides protection to the consumer in his or her home country, as the premiums are paid by the consumer, and in the event of an accident, the indemnity will be paid to the consumer in the home country; therefore this would come under mode 1.

5. Given the diversity and complexity of financial services, there may be an infinite number of such examples. It would seem very difficult, if not impossible to reach agreement on each of those cases. On the other hand, some general substantive solutions have been proposed such as the following:

- (a) all financial transactions (between non-resident suppliers and resident consumers) that take place inside a Member's territory could be classified as mode 1;
- (b) mode 1 transactions could be defined as those that take place under the laws of the Member, while mode 2 transactions could be defined as those that take place under the laws of the foreign country from which the service is supplied;
- (c) the supply of services accompanied by solicitation could be defined as mode 1, if not, mode 2;
- (d) any measure applicable to the supplier of the service could be classified under mode 1, any measure applicable to the consumer under mode 2;
- (e) modes 1 and 2 could be merged.

6. In (a) above, the question of determining where the delivery of the service took place would be substituted by the question of where a financial transaction took place. If the answer to the latter question is based on where the payment of fees, commissions or charges took place, it would seem to require a departure from the general principle of determining the place of supply of a service according to where the service was delivered. However, this may have the merit of being consistent with balance-of-payment statistics.

7. In (b), one would need to recognize the fact that the territorial application of laws differ between countries, and between civil and administrative laws within a country. A Member may also encounter a situation in which its mode 2 commitments would become unenforceable, since it may not be possible to implement any commitments concerning transactions which took place entirely outside the Member's legal jurisdiction. The fact that the parties to a financial transaction could choose the laws applicable to them might also complicate the issue.

8. The solution in (c) above would also seem to require a departure from the principle of determining the mode of supply by the place of delivery of a service. The exact meaning of solicitation (or active marketing) would also need to be clarified and agreed.

9. In (d), there could be cases in which the regulatory measures are applicable to both suppliers and consumers.

10. Finally, (e) would not seem to be feasible without modifying the basic principle of scheduling and possibly Article I of the GATS.

11. If Members find it difficult to agree on any substantive solutions such as those above within the time-frame of the current financial services negotiations, i.e. before 12 December 1997, some practical solution may need to be found.³ Such a practical solution could involve clarifying in the headnote of each schedule the distinction employed by the Member.

³ Another point worth noting is that any substantive solution would have immediate implications for a broad range of other services which are commonly traded cross-border, such as telecommunication services. Since any attempt to draw the line between the modes of supply for a financial service would have direct relevance to other service sectors, this issue might ideally be dealt with in parallel by the Committee on Specific Commitments. Such a major exercise would not be completed in the time-frame of the financial services negotiations.

Attachment 3

Job 3706

3.7.97

Committee on Trade in Financial Services

Report of Informal Consultations held on 27 June 1997
on the Distinction between Modes 1 and 2 in Financial Services

Informal Note by the Secretariat

At the meeting of the Committee on Trade in Financial Services held on 5 June, the Secretariat was asked to organize informal consultations open to all delegations on the question of the distinction between modes 1 and 2 in financial services schedules. The Secretariat was also requested to report on the results of such consultations to the next meeting of the Committee on 17 July. The purpose of this note is to summarize the results of an informal meeting held in accordance with this request which took place on 27 June 1997.

* * *

1. Discussions in the informal meeting took place on the basis of an informal note by the Secretariat dated 24 June 1997. The Secretariat also made an oral presentation at the beginning of the meeting, explaining the technical nature of the issue and some options for removing the ambiguities or uncertainties in the schedules. Ideally, a definitive and watertight solution for clarification of the distinction between modes 1 and 2 should be found, which would be accepted by all Members and would be valid not just for financial services but for all sectors. It was recalled, however, that at the formal meeting of the Committee on 5 June, there seemed to be a general view that it would be impossible to find the necessary time before the end of the current negotiations to look for such a definitive solution. A new definition of the coverage of modes 1 and 2, or the merging of the two modes, would entail re-negotiation either of the scheduling guidelines or of articles of the GATS itself, and would be very time-consuming. To develop an agreed list of financial transactions falling under mode 1 and those falling under mode 2 would also require substantial time and effort. There had been general agreement at the 5 June meeting of the Committee that it would not be possible or desirable to devote a great deal of time to this question in the final months of the negotiation.

2. It was therefore necessary to try to find a pragmatic solution which would suffice for the purposes of the current negotiations. Such a solution must provide as much clarity as possible, must be neutral with regard to existing commitments while facilitating the negotiation of new ones under the two modes, should if possible be accepted at the 17 July meeting of the Committee, and should close the discussions on this issue until the conclusion of the financial services negotiations in December this year.

3. A large number of delegations stated that they had not encountered any major problems or difficulties regarding the distinction between modes 1 and 2 in financial services schedules. They were, however, willing to discuss this issue in order to achieve as much clarity as possible. Several delegations also added that while they themselves had not encountered difficulties with regard to this issue, they were willing to discuss bilaterally with any delegation which had found difficulties in scheduling commitments under these modes.

4. Delegations generally thought that the issue was a horizontal one, which meant that any definitive agreement or understanding on the distinction between the two modes would necessarily apply to other services as well as financial services. Given the difficulties involved in finding a definitive solution, there was general support for a pragmatic solution to the issue, which could be put together in

the limited time frame of the current financial services negotiations. It was made clear that no solution to this issue could affect the rights of Members to modify or withdraw commitments during the negotiations; the solution should be "neutral" in the sense that it would not affect the substance of existing commitments. It was also confirmed that the rights of Members to take necessary prudential measures could not be affected by any discussion or "solution" of the modes issue.

5. There was a broad willingness to consider the use of headnotes as a means of clarifying the distinction between modes 1 and 2. Several delegations cautioned, however, that it would be extremely difficult to negotiate a common headnote for use by all Members. It was also pointed out that if all countries needed to adopt a common headnote, all existing schedules in financial services would need to be reconsidered, regardless of whether there were changes in the substance of the commitments. Based on these discussions, there was general support for a suggestion to consider developing a non-binding model headnote or a menu of possible headnotes which could be used by delegations on a voluntary basis.

6. The Secretariat distributed an example of such a headnote (see attached) which focused on the object of the measure to be listed in the schedule. The example was based on the question on whom a mode 1 or mode 2 binding conferred rights of action and on whom limitations would consequently bite; if it was the foreign service supplier who was restricted from supplying the service, the limitation would be scheduled under mode 1, while if it was the consumer who was restricted from consuming the service abroad, then the limitation would be scheduled under mode 2. It was pointed out that such a headnote would not address the issue of location - where the supply of the service took place - but it would make clear the limits of the obligations, in terms of rights conferred, assumed by governments in making commitments under these two modes. Delegations generally thought that such an example would be helpful in considering options.

7. Another possible headnote listed in the example was a reference to solicitation. The example stated that there was no commitment to allow solicitation of business or active marketing under mode 2. It was accepted that headnotes clarifying other issues might be required, and that the Secretariat should be ready to assist in drafting them on request. It was made clear that any delegation which thought that the examples were insufficient could ignore or modify them at will. Discussion of these models implied no commitment to use them.

8. The main conclusions of the informal consultations were therefore as follows. It was agreed that the responsibility for clarifying the content of commitments under modes 1 and 2 must lie with those individual Members feeling the need to do so; to develop a common multilateral solution for the purposes of the financial services negotiations would be infeasible in the time available and was in any case unnecessary. The simplest means of providing such clarification appeared to be the use of a headnote. Again, it was not thought necessary or feasible to develop a common headnote, but delegations undertook to give thought to the possible value of the two examples circulated by the Secretariat, and to any other examples which may come forward. There was also wide support for the view that in the longer term - after the conclusion of the financial services negotiations - consideration should be given, perhaps in the Committee on Specific Commitments since this was a horizontal issue, to definitive clarification of the distinction between modes 1 and 2. However, some delegations had reservations on this point, being unconvinced of the need for further consideration of the matter in the near future.

27.6.97

Example of a headnote explaining the distinction between Modes 1 and 2 in financial services schedules

- Market access and national treatment limitations with respect to the mode (1) (cross-border supply) and mode (2) (consumption abroad) supply of financial services are inscribed in this section of the Schedule in accordance with the following distinction between the measures affecting these two modes of supply:
 1. Measures affecting mode (1)

Any limitation on the ability of a non-resident supplier of financial services to supply the service in the territory of the Member.
 2. Measures affecting mode (2)

Any limitation on the ability of a resident consumer to purchase the service in the territory of another Member.

Optional texts

If applicable, the following can be added as optional texts.

"The absence of any limitation on the ability of a resident consumer to purchase the service in the territory of another Member does not signify a commitment to allow a non-resident service supplier to solicit business or to conduct active marketing in the territory of the Member."

Attachment 4

Job No. 6496

Working Party on Professional Services

25 November 1998

**DISCUSSION OF MATTERS RELATING TO ARTICLES XVI AND XVII OF THE GATS IN
CONNECTION WITH THE DISCIPLINES ON DOMESTIC REGULATION IN THE
ACCOUNTANCY SECTOR**

Informal Note by the Chairman

1. For the purpose of transparency, this Note explains the method by which the Working Party on Professional Services (WPPS) pursued its work with respect to the question of the types of measures it would address in creating the disciplines in the accountancy sector. For the avoidance of any doubt, it is emphasised that this Note has no legal status.

2. In the course of work to develop multilateral disciplines on domestic regulation in the accountancy sector, pursuant to paragraph 4 of Article VI of the GATS, the WPPS addressed a wide range of regulatory measures which have an impact on trade in accountancy services. In discussing the structure and content of the new disciplines, it became clear that some of these measures were subject to other legal provisions in the GATS, most notably Articles XVI and XVII. It was observed that the new disciplines developed under Article VI:4 must not overlap with other provisions already existing in the GATS, including Articles XVI and XVII, as this would create legal uncertainty. For this reason, a number of the suggestions for disciplines were excluded from the text.

3. Although it was not in the mandate of the WPPS to provide an interpretation of GATS provisions, the important relationship between the new disciplines and Articles XVI and XVII was noted. While these two Articles relate to the scheduling of specific commitments on measures falling within their scope, the disciplines developed under Article VI:4 aim at ensuring that other types of regulatory measures do not create unnecessary barriers to trade. It has been noted that Article XVI (Market Access) covers the categories of measures referred to in paragraph 2 (a) to (f), whether or not any discrimination is made in their application between domestic and foreign suppliers. Article XVII (National Treatment) captures within its scope any measure that discriminates - whether *de jure* or *de facto* - against foreign services or service suppliers in favour of like services or service suppliers of national origin. A Member scheduling commitments under Articles XVI and XVII has the right to maintain limitations on market access and national treatment and inscribe them in its schedule. On the other hand, the disciplines to be developed under Article VI:4 cover domestic regulatory measures which are not regarded as market access limitations as such, and which do not in principle discriminate against foreign suppliers. They are therefore not subject to scheduling under Articles XVI and XVII. However, it is also recognized that for some categories of measures the determination as to whether an individual measure falls under Article VI:4 disciplines or is subject to scheduling under Article XVII will require careful consideration.

4. The following types of measures affecting trade in accountancy services were raised by some Members as examples of those which may be subject to negotiation and scheduling under Articles XVI and XVII:

- * Restrictions relating to the number of foreign accountants that can be employed, the number of new licences to be issued, the legal form of establishment and the ownership of firms.

- * Discriminatory requirements and procedures relating to the licensing of foreign individuals and the establishment of natural persons and legal persons in the accountancy sector, including the use of foreign and international firm names. Discriminatory elements which set prior conditions unrelated to the ability of the supplier to provide the service when preparing, adopting or applying licensing requirements.
 - * Discriminatory residency requirements or requirements for citizenship, including those required for sitting examinations related to obtaining a licence to practice. Discriminatory requirements for membership of a particular professional body as a prior condition for application.
 - * Discriminatory treatment of applications from foreign service suppliers vis-à-vis domestic applications including: criteria relating to education, experience, examinations and ethics; the overall degree of difficulty when testing competence of applicants; the need for in-country experience before sitting examinations.
5. The above mentioning of these types of measures does not prejudge future negotiations, which are mandated under Article XIX of the GATS.
-

Attachment 5

WORLD TRADE ORGANIZATION

RESTRICTED
S/GBT/W/2/Rev.1
16 January 1997

(97-0173)

Group on Basic Telecommunications

Note by the Chairman

Revision

It has been suggested by a number of delegations that it might be helpful to produce a brief and simple note on assumptions applicable to the scheduling of commitments in basic telecoms. The purpose of the attached note is to assist delegations in ensuring the transparency of their commitments and to promote a better understanding of the meaning of commitments. This note is not intended to have or acquire any binding legal status.

NOTES FOR SCHEDULING BASIC TELECOM SERVICES COMMITMENTS

1. Unless otherwise noted in the sector column, any basic telecom service listed in the sector column:

- (a) encompasses local, long distance and international services for public and non-public use;
- (b) may be provided on a facilities-basis or by resale; and
- (c) may be provided through any means of technology (e.g., cable¹, wireless, satellites).

2. Subsector (g) --private leased circuit services -- involves the ability of service suppliers to sell or lease any type of network capacity for the supply of services listed in any other basic telecom service subsector unless otherwise noted in the sector column. This would include capacity via cable, satellite and wireless network.

3. In view of points 1 and 2 above, it should not be necessary to list cellular or mobile services as a separate subsector. However, a number of Members have done so, and a number of offers have commitments only in these subsectors. Therefore, in order to avoid extensive changes in schedules, it would seem appropriate for Members to maintain separate entries for these subsectors.

¹ Including all types of cable.

Attachment 6

WORLD TRADE ORGANIZATION

RESTRICTED

S/GBT/W/3

3 February 1997

(97-0415)

Group on Basic Telecommunications

Original: English

CHAIRMAN'S NOTE

Market Access Limitations on Spectrum Availability

Many Members have entries in the market access column of their schedules indicating that commitments are "subject to availability of spectrum/frequency" or similar wording. In light of the physical nature of spectrum and the constraints inherent in its use, it is understandable that Members may have sought to rely on these words to adequately protect legitimate spectrum management policies. There is, however, doubt that words such as "subject to availability of spectrum/frequency" as listed in the market access column of many Members' schedules achieve that objective.

Spectrum/frequency management is not, *per se*, a measure which needs to be listed under Article XVI. Furthermore under the GATS each Member has the right to exercise spectrum/frequency management, which may affect the number of service suppliers, provided that this is done in accordance with Article VI and other relevant provisions of the GATS. This includes the ability to allocate frequency bands taking into account existing and future needs. Also, Members which have made additional commitment in line with the Reference Paper on regulatory principles are bound by its paragraph 6.

Therefore, words such as "subject to availability of spectrum/frequency" are unnecessary and should be deleted from Members' schedules.

Attachment 7

1311

12 April 1995

Negotiating Group on Basic Telecommunications

Informal Note by the Secretariat

DRAFT MODEL SCHEDULE OF COMMITMENTS ON
BASIC TELECOMMUNICATIONS

1. As requested by the Chairman at the meeting of 27-28 February 1995, the Secretariat has prepared a revision of the draft model schedule for further discussion and elaboration at subsequent meetings of the Negotiating Group on Basic Telecommunications. As further agreement is obtained among participants on any outstanding elements of the draft model schedule, the Secretariat can continue to provide updated versions of the model to assist participants in the drafting of their offers and final schedules.

2. Only four minor and non-substantive adjustments have been made to the draft model schedule as it appeared in *Negotiations on Basic Telecommunications* (TS/NGBT/W/1/Rev.1, 10 June 1994). These are as follows:

- (i) the paragraph preceding the table format, concerning the provision of information regarding the regulatory environment for reasons of transparency has been deleted. Most such information has been or is being provided in the context of participants' responses to the *Questionnaire on Basic Telecommunications* (S/NGBT/W/3, 15 July 1994);
- (ii) for clarity, a complete list of the telecommunications services subsectors from the *Services Sectoral Classification List* (MTN.GNS/W/120, 10 July 1991), previously referred to in the model as (a)-(g) and (o), has been listed in the sector or subsector column;
- (iii) the reference to "modes of delivery" has been changed to "modes of supply" and has been moved to the top of the table so as to be consistent with the terminology and format used in the final schedules of commitments resulting from the Uruguay Round; and
- (iv) the footnote referring to an emerging consensus on the use of the positive list approach in scheduling the commitments has been deleted as there has been no apparent outstanding disagreement on this point.

3. Regarding elements of this draft model schedule which have been left unchanged, it may be useful to recall the possible implication of certain issues for the continued drafting process. These include, but are not limited to, the following:

- (i) many of the remaining footnotes refer to outstanding issues now under discussion, as further described in the *Review of Outstanding Issues* (TS/NGBT/W/2, 8 July 1994) and the Reports of previous meetings of the Group. The footnotes have been retained since the issues to which they refer are not yet resolved. As resolution of the issues is achieved, it would be

possible to delete such footnotes and, in some cases, make relevant changes to the model;

- (ii) the model's reference to 2.C(o) Other services is, and should probably remain, open ended. However, it may be useful to draw from "other" basic services cited in participants' responses to the *Questionnaire on Basic Telecommunications*¹, in order to furnish the model with some examples of "other" basic telecommunications on which commitment might be undertaken;
- (iii) the examples of measures listed in the model under the columns on limitations on market access and on national treatment may not be complete and may be further elaborated as a result of discussions on limitations relevant to the modes of supply for basic telecommunications (see also the informal note by the Secretariat on *Modes of Supply and Market access Limitations* (14 February 1995). For example, mode 2 in both columns and mode 4 under national treatment in the model currently list no examples;
- (iv) as currently drafted, the additional commitments column of the draft model schedule contains entries referring to areas of regulation in which some participants believe that additional commitments may be sought. Most of these entries do not yet specify any actual examples of how additional commitments might be drafted in the regulatory areas noted.

4. With regard to techniques to be used in the drafting of offers and schedules of commitments on basic telecommunications, the draft model schedule entails few, if any, departures from the techniques recommended in *Scheduling of Initial Commitments in Trade in Services: Explanatory Note* (MTN.GNS/W/164, 3 September 1993 and Add.1, 30 November 1993). However, for additional clarity of commitments in the telecommunications sector, the model provides some additional scheduling tools not addressed in the *Explanatory Note*. These include the list of "categories" that may be used in conjunction with entries in the sector or subsectors column and the list of possible areas of additional commitments. How these tools could be used to clarify the drafting and hence the understanding of offers/schedules may be viewed as follows:

- (i) the "categories" are intended to supplement, where relevant to a participant's telecommunications regime, the listing of subsectors 2.C(a)-(g)&(o). Using a "positive list" approach to scheduling, the combined use of subsectors and categories would mean, for example, that a participant could list "a. Voice telephone services: on a resale basis", along with any applicable limitations, as a commitment and might not list "Voice telephone services: facilities based", thus offering no commitment on the latter. Also, "a. Voice telephone services: wire based" and "a. Voice telephone services: radio based" might be listed separately in a schedule where different sets of limitations apply to each;
- (ii) whether a participant undertakes particular additional commitments and how such a commitment would be formulated will be likely to depend on the regime concerned and the agreed results of bilateral negotiations and/or

¹ Some such examples might include: paging services, satellite transmission services, intra-corporate communications, video dialtone, wireless access, fixed line access, analogue/digital cellular mobile networks and services, PCS networks and services, mobile data services, international switching and other international gateway facilities such as satellite earth stations, domestic/international satellite services and satellite links/capacity.

multilateral discussions. For example, participants that agree to undertake additional commitments on establishing or maintaining the separation of regulatory and operational functions might adopt a common formulation for such commitments. Alternatively, a regime that has posed a particular problem for its trading partners with respect to, for example, assignment or allotment of radio frequencies might inscribe a unique and appropriately drafted additional commitment as a result of bilateral negotiations.

DRAFT

MODEL SCHEDULE OF COMMITMENTS ON BASIC TELECOMMUNICATIONS

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

Sector or Sub-Sector	Limitations on Market Access	Limitations on National Treatment	Additional Commitments
2.C.TELECOMMUNICATION SERVICES (UNCPC) a. Voice telephone services 7521 b. Packet-switched data transmission services 7523** c. Circuit-switched data transmission services 7523** d. Telex services 7523** e. Telegraph services 7522 f. Facsimile services 7521**+7529** g. Private leased circuit services 7522**+7523** and o. Other ^b Relevant categories: ^d Local/long distance/international service - wire-based - radio-based - on a resale basis - facilities-based - for public use - for non-public use	<i>Types of measures to be listed:^c</i> 1) e.g., Quantitative limitations/needs tests applied to the number of service suppliers (incl. monopolies, duopolies, etc.) total value of transactions, total number of operations or quantity of output. 2)	<i>Types of measures to be listed:</i> 1) e.g., Preferences given to domestic suppliers or restrictions imposed on foreign suppliers in the allotment of frequencies. 2)	<i>Types of measures relevant to possible undertakings:</i> (Commitments on measures not subject to scheduling under Articles XVI and XVII, including but not limited to those regarding qualifications, standards, or licensing requirements or licensing procedures and other domestic regulations that are otherwise consistent with Article VI and the Annex on Telecommunications.) e.g., Separation of regulatory and operational functions; Safeguards against anti-competitive practices (i.e., of monopolies and dominant providers);

¹There may be a need to determine whether any telecom-specific clarifications regarding modes of supply are required.

^bRefers to services mentioned in the *Services Sectoral Classification List* (MTN.GNS/W/120, 10 July 1991) which is considered as an illustrative list.

^cIt has been noted that there is a need for further discussion of measures related to international agreements between operators and the applicability of the Agreement to such measures.

^dDepending on the services being offered or on the limitations existing in the regulatory regime concerned, the specific commitments on these services may be subdivided in to the categories as noted.

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

Sector or Sub-Sector	Limitations on Market Access	Limitations on National Treatment	Additional Commitments
2.C.(a) through (g), and (o) (continued)	<p>3) e.g., Quantitative limitations/needs tests applied to the number of service suppliers (incl. monopolies, etc.), total value of transactions or assets, total number of operations or quantity of output;</p> <p>Quantitative limitation on the number of available frequencies to be allotted to foreign service suppliers;^f</p> <p>Restrictions or requirements regarding the type of legal entity permitted to supply the services (also, a requirement of certain forms of commercial presence could rule out cross-border supply);</p> <p>Limits on foreign equity participation.</p> <p>4) e.g., Limitations/needs test applied to the total number of natural persons that may be employed.</p>	<p>3) e.g., Preferences given to domestic suppliers or restrictions imposed on foreign suppliers in the allotment of frequencies;</p> <p>Limitations on the nationality or residency of directors or board members;</p> <p>Restrictions on foreign ownership of land, or foreign ownership of facilities.</p> <p>4)</p>	<p>Procedures or requirements related to^g:</p> <ul style="list-style-type: none"> - licensing - allotment of radio frequencies - numbering and identification codes - type approval - interconnection; <p>Pricing related measures, e.g. cost-oriented pricing^g;</p> <p>Participation in the standards-setting process, including review and comment prior to adoption of new standards;</p> <p>Rights of way for the construction of infrastructure.^g</p>

^e. There may be a need to determine whether any telecom-specific clarifications regarding modes of delivery are required.

^f. This example is a discriminatory limitation. Some participants consider non-discriminatory limitations on the number of service suppliers that are established strictly for technical reasons (e.g. availability of frequency bands for radio-based services) to be covered by the disciplines of Article VI, rather than by Article XVI. This is not the view of all participants.

^g Further discussion is required to determine whether these measures would need to be addressed in the context of the negotiations; if so, whether they are adequately covered by other provisions of the Agreement or whether they need to be addressed as additional commitments.

Attachment 8

WORLD TRADE ORGANIZATION

RESTRICTED

MTN.GNS/W/120
10 July 1991

(98-0000)

Special Distribution

SERVICES SECTORAL CLASSIFICATION LIST

Note by the Secretariat

The secretariat indicated in its informal note containing the draft classification list (24 May 1991) that it would prepare a revised version based on comments from participants. The attached list incorporates, to the extent possible, such comments. It could, of course, be subject to further modification in the light of developments in the services negotiations and ongoing work elsewhere.

SERVICES SECTORAL CLASSIFICATION LIST

<u>SECTORS AND SUB-SECTORS</u>		<u>CORRESPONDING CPC</u>
1.	<u>BUSINESS SERVICES</u>	<u>Section B</u>
A.	<u>Professional Services</u>	
a.	Legal Services	861
b.	Accounting, auditing and bookkeeping services	862
c.	Taxation Services	863
d.	Architectural services	8671
e.	Engineering services	8672
f.	Integrated engineering services	8673
g.	Urban planning and landscape architectural services	8674
h.	Medical and dental services	9312
i.	Veterinary services	932
j.	Services provided by midwives, nurses, physiotherapists and para-medical personnel	93191
k.	Other	
B.	<u>Computer and Related Services</u>	
a.	Consultancy services related to the installation of computer hardware	841
b.	Software implementation services	842
c.	Data processing services	843
d.	Data base services	844
e.	Other	845+849
C.	<u>Research and Development Services</u>	
a.	R&D services on natural sciences	851
b.	R&D services on social sciences and humanities	852
c.	Interdisciplinary R&D services	853
D.	<u>Real Estate Services</u>	
a.	Involving own or leased property	821
b.	On a fee or contract basis	822
E.	<u>Rental/Leasing Services without Operators</u>	
a.	Relating to ships	83103
b.	Relating to aircraft	83104
c.	Relating to other transport equipment	83101+83102+83105
d.	Relating to other machinery and equipment	83106-83109
e.	Other	832
F.	<u>Other Business Services</u>	
a.	Advertising services	871
b.	Market research and public opinion polling services	864
c.	Management consulting service	865
d.	Services related to man. consulting	866
e.	Technical testing and analysis serv.	8676

f.	Services incidental to agriculture, hunting and forestry	881
g.	Services incidental to fishing	882
h.	Services incidental to mining	883+5115
i.	Services incidental to manufacturing	884+885 (except for 88442)
j.	Services incidental to energy distribution	887
k.	Placement and supply services of Personnel	872
l.	Investigation and security	873
m.	Related scientific and technical consulting services	8675
n.	Maintenance and repair of equipment (not including maritime vessels, aircraft or other transport equipment)	633+ 8861-8866
o.	Building-cleaning services	874
p.	Photographic services	875
q.	Packaging services	876
r.	Printing, publishing	88442
s.	Convention services	87909*
t.	Other	8790
2.	<u>COMMUNICATION SERVICES</u>	
A.	<u>Postal services</u>	7511
B.	<u>Courier services</u>	7512
C.	<u>Telecommunication services</u>	
a.	Voice telephone services	7521
b.	Packet-switched data transmission services	7523**
c.	Circuit-switched data transmission services	7523**
d.	Telex services	7523**
e.	Telegraph services	7522
f.	Facsimile services	7521**+7529**
g.	Private leased circuit services	7522**+7523**
h.	Electronic mail	7523**
i.	Voice mail	7523**
j.	On-line information and data base retrieval	7523**
k.	electronic data interchange (EDI)	7523**
l.	enhanced/value-added facsimile services, incl. store and forward, store and retrieve	7523**
m.	code and protocol conversion	n.a.
n.	on-line information and/or data processing (incl.transaction processing)	843**
o.	other	

The () indicates that the service specified is a component of a more aggregated CPC item specified elsewhere in this classification list.

** The (**) indicates that the service specified constitutes only a part of the total range of activities covered by the CPC concordance (e.g. voice mail is only a component of CPC item 7523).

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	
E.	<u>Other</u>	
3.	<u>CONSTRUCTION AND RELATED ENGINEERING SERVICES</u>	
A.	<u>General construction work for buildings</u>	512
B.	<u>General construction work for civil engineering</u>	513
C.	<u>Installation and assembly work</u>	514+516
D.	<u>Building completion and finishing work</u>	517
E.	<u>Other</u>	511+515+518
4.	<u>DISTRIBUTION SERVICES</u>	
A.	<u>Commission agents' services</u>	621
B.	<u>Wholesale trade services</u>	622
C.	<u>Retailing services</u>	631+632 6111+6113+6121
D.	<u>Franchising</u>	8929
E.	<u>Other</u>	
5.	<u>EDUCATIONAL SERVICES</u>	
A.	<u>Primary education services</u>	921
B.	<u>Secondary education services</u>	922
C.	<u>Higher education services</u>	923
D.	<u>Adult education</u>	924
E.	<u>Other education services</u>	929
6.	<u>ENVIRONMENTAL SERVICES</u>	
A.	<u>Sewage services</u>	9401
B.	<u>Refuse disposal services</u>	9402

C.	<u>Sanitation and similar services</u>	9403
D.	<u>Other</u>	
7.	<u>FINANCIAL SERVICES</u>	
A.	<u>All insurance and insurance-related services</u>	812**
a.	Life, accident and health insurance services	8121
b.	Non-life insurance services	8129
c.	Reinsurance and retrocession	81299*
d.	Services auxiliary to insurance (including broking and agency services)	8140
B.	<u>Banking and other financial services</u> (excl. insurance)	
a.	Acceptance of deposits and other repayable funds from the public	81115-81119
b.	Lending of all types, incl., inter alia, consumer credit, mortgage credit, factoring and financing of commercial transaction	8113
c.	Financial leasing	8112
d.	All payment and money transmission services	81339**
e.	Guarantees and commitments	81199**
f.	Trading for own account or for account of customers, whether on an exchange, in an over-the-counter market or otherwise, the following:	
	- money market instruments (cheques, bills, certificate of deposits, etc.)	81339**
	- foreign exchange	81333
	- derivative products incl., but not limited to, futures and options	81339**
	- exchange rate and interest rate instruments, inclu. products such as swaps, forward rate agreements, etc.	81339**
	- transferable securities	81321*
	- other negotiable instruments and financial assets, incl. bullion	81339**
g.	Participation in issues of all kinds of securities, incl. under-writing and placement as agent (whether publicly or privately) and provision of service related to such issues	8132
h.	Money broking management, all forms of collective investment management, pension fund management, custodial depository and trust services	81339** i. 81323*
j.	Settlement and clearing services for financial assets, incl. securities, derivative products, and other negotiable instruments	81339** or 81319**
k.	Advisory and other auxiliary financial services on all the activities listed in Article 1B of MTN.TNC/W/50, incl. credit reference and analysis, investment and	8131 or 8133

	portfolio research and advice, advice on acquisitions and on corporate restructuring and strategy	
1.	Provision and transfer of financial information, and financial data processing and related software by providers of other financial services	8131
C.	<u>Other</u>	
8.	<u>HEALTH RELATED AND SOCIAL SERVICES</u> (other than those listed under 1.A.h-j.)	
A.	<u>Hospital services</u>	9311
B.	<u>Other Human Health Services</u>	9319 (other than 93191)
C.	<u>Social Services</u>	933
D.	<u>Other</u>	
9.	<u>TOURISM AND TRAVEL RELATED SERVICES</u>	
A.	<u>Hotels and restaurants (incl. catering)</u>	641-643
B.	<u>Travel agencies and tour operators services</u>	7471
C.	<u>Tourist guides services</u>	7472
D.	<u>Other</u>	
10.	<u>RECREATIONAL, CULTURAL AND SPORTING SERVICES</u> (other than audiovisual services)	
A.	<u>Entertainment services</u> (including theatre, live bands and circus services)	9619
B.	<u>News agency services</u>	962
C.	<u>Libraries, archives, museums and other cultural services</u>	963
D.	<u>Sporting and other recreational services</u>	964
E.	<u>Other</u>	
11.	<u>TRANSPORT SERVICES</u>	
A.	<u>Maritime Transport Services</u>	
a.	Passenger transportation	7211
b.	Freight transportation	7212
c.	Rental of vessels with crew	7213
d.	Maintenance and repair of vessels	8868**
e.	Pushing and towing services	7214

f.	Supporting services for maritime transport	745**
B.	<u>Internal Waterways Transport</u>	
a.	Passenger transportation	7221
b.	Freight transportation	7222
c.	Rental of vessels with crew	7223
d.	Maintenance and repair of vessels	8868**
e.	Pushing and towing services	7224
f.	Supporting services for internal waterway transport	745**
C.	<u>Air Transport Services</u>	
a.	Passenger transportation	731
b.	Freight transportation	732
c.	Rental of aircraft with crew	734
d.	Maintenance and repair of aircraft	8868**
e.	Supporting services for air transport	746
D.	<u>Space Transport</u>	733
E.	<u>Rail Transport Services</u>	
a.	Passenger transportation	7111
b.	Freight transportation	7112
c.	Pushing and towing services	7113
d.	Maintenance and repair of rail transport equipment	8868**
e.	Supporting services for rail transport services	743
F.	<u>Road Transport Services</u>	
a.	Passenger transportation	7121+7122
b.	Freight transportation	7123
c.	Rental of commercial vehicles with operator	7124
d.	Maintenance and repair of road transport equipment	6112+8867
e.	Supporting services for road transport services	744
G.	<u>Pipeline Transport</u>	
a.	Transportation of fuels	7131
b.	Transportation of other goods	7139
H.	<u>Services auxiliary to all modes of transport</u>	
a.	Cargo-handling services	741
b.	Storage and warehouse services	742
c.	Freight transport agency services	748
d.	Other	749
I.	<u>Other Transport Services</u>	
12.	<u>OTHER SERVICES NOT INCLUDED ELSEWHERE</u>	95+97+98+99