



PUBLIC SERVICES AND THE GATS




Rudolf Adlung
Trade in Services Division, WTO



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Three possible
scenarios for
any particular
service ...



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- **Not covered by the GATS**
 - ▶ **Governmental services (police, military, ...)**
- **Covered / no commitments**
- **Covered & commitments**

Examples
 higher education, hospital services, sewage services:
 Albania, Cambodia, most EU Members, Japan, Jordan,
 United States, Vietnam, Nepal

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Application of GATS disciplines

		I. Governmental Services & Air Traffic Rights	All Other Services	
			II. Covered – No commitment	III. Covered – Commitment
Unconditional obligations (MFN!) ^a		no	yes	yes
Conditional obligations		no	no	yes
Specific Commitments ^b	MA	no	no	As scheduled
	NT	no	no	
	AC	no	no	

^a Possibility of departures and exemptions, e.g., for preferential trade agreements.

^b MA = Market Access (Art. XVI); NT = National Treatment (XVII); AC = Additional Commitments (XVIII)

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Definition of
'Governmental
Services'?

(Art. I:3(c))



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Any service which is supplied

- **'neither on a commercial basis'**

...

- **'nor in competition with one or more service suppliers'**

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Need for clarification (?)

- **Not yet raised in WTO fora**
 - ▣ Too sensitive?
 - ▣ Not relevant?
 - > *politically?* > *economically?* > *legally?*
- **Used in other contexts as well (PTAs)**
- **'Immunization strategies'(?)**

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I. No commitments – implications:

- (a) **Most-favoured-nation (MFN) treatment**
(Possibility of departures and exemptions)
- (b) **Other ('unconditional') obligations**

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II. Specific commitments – possible scenarios:

Public service-related objectives are pursued via

- entries in schedules
 - sector column
 - limitations on market access (Art. XVI)
 - limitations on national treatment (Art. XVII)
- measures NOT subject to scheduling

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Starting point: Which definition?

- **Problems with Classification List generally used for GATS Commitments (MTN.GNS/W/120): Focus on 'end-of-pipe' cleanup services**
- **OECD/Eurostat definition includes services provided to:**
"measure, prevent, limit, minimize or correct environmental damage to water, air, soil, as well as problems related to waste, noise and ecosystems ..."

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Towards a new Classification system?

MTN.GNS/W/120

Sewage services
(CPC 9401)
Refuse disposal services
(CPC 9402)
Sanitation and similar services
(CPC 9403)
Other

EC Proposal (S/CSS/W/38)

6A. Water for human use & wastewater management
6B. Solid/hazardous waste management
6C. Protection of ambient air and climate
6D. Remediation and cleanup of soil & water
6E. Noise & vibration abatement
6F. Protection of biodiversity and landscape
6G. Other environmental & ancillary services

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Commitments on Environmental Services, based on W/120 – unchanged in offer (Canada)

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

Sector or subsector	Limitations on market access	Limitations on national treatment	Additional commitments
6. ENVIRONMENTAL SERVICES	1) Unbound*	1) Unbound*	
A. <u>Sewage services</u> (CPC 9401)	2) None	2) None	
B. <u>Refuse disposal services</u> (CPC 9402)	3) None	3) None	
C. <u>Sanitation and similar services</u> (CPC 9403)	4) Unbound, except as indicated in the horizontal section	4) Unbound, except as indicated in the horizontal section.	
D. <u>Other</u> Cleaning services of exhaust gases (CPC 9404) Noise abatement services (CPC 9405) Nature and landscape protection services (CPC 9406) Other environmental services n.e.c. (CPC 9409)			

Possible modification of commitments (Australia, revised offer)

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

Sector or subsector	Limitations on market access	Limitations on national treatment	Additional commitments
6. ENVIRONMENTAL SERVICES ^{3,4}	1) Unbound*	1) Unbound*	
A. Sewage services <u>Wastewater management</u> (CPC 9401)	2) None	2) None	
<i>This covers removal, treatment, and disposal of household, commercial and industrial sewage and other waste waters including tank emptying and cleaning, monitoring, removal and treatment of solid wastes.</i>	3) None	3) None	
	4) Unbound, except as indicated in the horizontal section	4) Unbound, except as indicated in the horizontal section.	

³ The Australian offer excludes the provision of water for human use, including water collection, purification and distribution through mains.

⁴ [...]

What type of measures might be subject to scheduling?



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Horizontal entry covering all scheduled services (EC)

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

Sector or subsector	Limitations on market access	Limitations on national treatment	Additional commitments
ALL SECTORS INCLUDED IN THIS SCHEDULE	3) Services considered as public utilities at national or local level may be subject to public monopolies or to exclusive rights granted to private operators ¹		

¹ Explanatory Note: Public utilities exist in sectors such as related scientific and technical consulting services, R&D services on social sciences and humanities, technical testing and analysis services, environmental services, health services, transport services and services auxiliary to all modes of transport. Exclusive rights on such services are often granted to private operators, for instance operators with concessions from public authorities, subject to specific service obligations. ...

Possible modifications of commitments: Hospital Services (USA)

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

Sector or subsector	Limitations on market access	Limitations on national treatment	Additional commitments
HOSPITAL AND OTHER HEALTH CARE FACILITIES - Direct ownership and management and operation by contract of such facilities on a "for fee" basis	1) Unbound* 2) None 3) Establishment of hospitals or other health care facilities ... may be subject to needs-based quantitative limits. 4) Unbound, except as indicated in the horizontal section	1) Unbound 2) Federal or state government reimbursement of medical expenses is limited to licensed, certified facilities in ... 3) None 4) None	

Structure of specific commitments under Mode 3 in selected service sectors, April 2005, Number of Members*

	Health		Education		Telco (voice)	Sewage services	Road pass'ger transport
	Medical services	Hospital services	Primary	Higher			
WTO Members with specific commitments	52 (46)	43 (39)	32 (25)	37 (30)	85 (73)	44 (33)	37 (26)
Limitations in sector coverage	13 (12)	4 (3)	5 (4)	10 (9)	42 (41)	8 (7)	20 (10)
No bindings of MA Quantitative limitations (Art. XVI:2(a)-(d))	7 (5) 9 (7)	3 (3) 10 (5)	2 (2) -	2 (2) 2 (1)	2 (2) 51 (51)	- 1 (1)	2 (1) 4 (1)
<i>Of these: ENTs</i>	8 (6)	7 (4)	-	1 (-)	8 (8)	-	4 (1)
Discriminatory regulation (Art. XVII)	15 (13)	5 (5)	3 (3)	4 (4)	8 (4)	-	6 (2)
Discriminatory taxes/subsidies (Art. XVII)	-	3 (3)	1 (1)	1 (1)	1 (1)	-	-

*Developing economies in parenthesis

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What 'non-schedulable'
measures are
conceivable?



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Types of government intervention

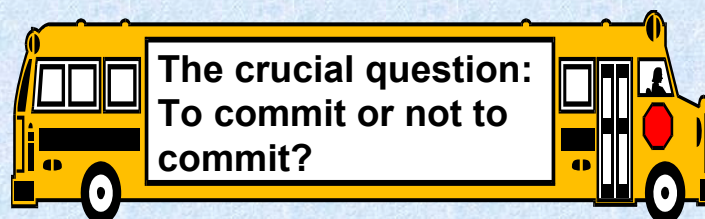
- **Regulation (non-discriminatory)**
 - Example: Universal service requirements (> Art. VI)
- **Taxes and subsidies (non-discriminatory)**
 - Examples:
 - Tax deductibility of health insurance premiums
 - Subsidies for a theatre company
- **Direct supplies of 'governmental services' (plus government procurement)**

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Current situation under the GATS

- **Regulation**
 - ▶ Procedural obligations under Art. VI:1
 - ▶ 'Standstill' pursuant to Art. VI:5
 - ▶ Negotiating mandate in Art. VI:4
- **Subsidies**
 - ▶ Art. II (MFN) & XVII (NT)
 - ▶ Negotiating mandate in Art. XV
- **Government procurement**
 - ▶ Non-application of Art. II (MFN), XVI (MA) & XVII (NT)
 - ▶ Negotiating mandate in Art. XIII

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Pros & cons of undertaking specific commitments in “public services”

- Pros:
 - To send signals to private investor
 - To facilitate technology transfer and improve know-how
 - To promote reform and contain vested interests
 - To gain commitments in areas of export interest
- Cons:
 - Unclear or incomplete regulatory framework
 - Concerns about capacity to regulate (profit-seeking) private providers
 - Desire to experiment with policy reforms
 - Political sensitivity: Public services are not negotiable

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... to be kept in mind: BITs have (more) bite

Typical treaty obligations

- National treatment (pre-/post-establishment)
- Fair and equitable treatment
- Guarantees against expropriation, including ‘regulatory’ expropriation
- Dispute Settlement (incl. Investor-to-State)
- Retroactive monetary compensation for damages
- Others (Transfers of funds, etc.)

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THE END

rudolf.adlung@wto.org

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Reading Material

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