

## Certification of GATS schedules and the plurilateral reference paper on services domestic regulation

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The reference paper resulting from the plurilateral joint-statement initiative (JSI) on services domestic regulation provides that “Members shall inscribe the disciplines in Section II in their Schedules as additional commitments under Article XVIII of the Agreement” (para. 7 of INF/SDR/1). This brief note reviews how the certification process of General Agreement on Trade in Services (GATS) schedules is undertaken and why using GATS schedules of sectoral commitments to unilaterally adopt the reference paper on services domestic regulation amounts to abuse of GATS schedules and bypasses the consensus process for amending GATS rules. More analysis on this issue can be found in Jane Kelsey, “Briefing note on Services Domestic Regulation JSI text of 27 September 2021 (INF/SDR/1)” (October 2021).<sup>1</sup>

### Process for amending schedules

- Each Member has a GATS schedule of sectoral commitments that record the bargains reached through bilateral requests and offers between one Member and another in the Uruguay Round or their accession, which were then multilateralised.
- Changes to a Member’s GATS schedule are covered by GATS Article XXI. That process is fleshed out in WTO document S/L/80 that covers withdrawals or amendments of sectoral commitments, which alter the original bargain, and S/L/84 that covers new liberalisation and technical changes that supposedly do not.
- These “modification” processes are designed to ensure that the original balance of sectoral concessions between Members is not disturbed and, where necessary, to require compensatory liberalisation to restore that balance.
- The revised schedule cannot be implemented until it has been certified.
- There are two processes for examining and certifying changes.
- The faster-track process is for additional sectoral liberalisation or technical changes that are not expected to affect Members’ entitlements (S/L/84).
- A Member who believes that its benefits would be negatively affected can still object and try to secure agreement on compensatory adjustments.

<sup>1</sup> Available at: [https://www.twn.my/title2/briefing\\_papers/twn/Domestic%20regulation%20TWNBP%20Oct%202021%20Kelsey.pdf](https://www.twn.my/title2/briefing_papers/twn/Domestic%20regulation%20TWNBP%20Oct%202021%20Kelsey.pdf)

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- The possible grounds for an objection are not specified but the objector should set out the issues as far as possible.
- If that objection cannot get resolved, or the proposal withdraws or amends a scheduled commitment, the objection moves to the second process (S/L/80).
- Again, another Member can object that this proposed change negatively affects its entitlements.
- That objection leads to consultation and, if unresolved, the objector can go to arbitration.
- The terms of reference for arbitration are limited to maintaining the balance of rights and interests under the original schedule.
- Although the objection process is bilateral, various Members can propose the same modifications, and a number of Members can make the same objections.
- All objections have to be consulted on and resolved before certification.
- The proponent cannot implement the changes until it complies with the arbitration outcome.
- If the proponent proceeds without compliance, the objector can withdraw equivalent concessions in its schedule.

### **Why JSIs want to adopt texts using schedules**

- The proposed reference paper on services domestic regulation sets out new rules for domestic regulation of services.
- General rules, rather than sectoral commitments and related rules, belong to GATS Part II, and changes to them require amendment through the consensus decision-making process under Article X of the Marrakesh Agreement.
- Schedules come under GATS Parts III and IV that relate to specific commitments, including sector-specific rules as Article XVIII additional commitments.
- The use of schedules to adopt the reference paper is designed to bypass the consensus process for amending GATS rules, which has broader adverse effects on Members' rights under the GATS and WTO.
- Going down the road of adopting the reference paper through schedules of commitments therefore amounts to abuse of schedules and would have systemic impacts on Members' rights under the GATS and WTO.
- Allowing this strategy to proceed would mean that current and future JSIs could change the general GATS rules without having to amend them under the consensus requirements of the Marrakesh Agreement.
- That sets an incredibly dangerous precedent for the future.

### **Grounds for objections**

- The JSI proponents say there is no negative effect of their proposed changes because they are liberalising further and on a most favoured nation (MFN) basis.
- So they plan to use the faster-track certification process for modifying schedules (S/L/84) and say there are no grounds for objections.
- Because the changes are mainly to rules, it is hard to show disruption to the bargain of sectoral commitments that was made in the original schedules.
- That should not stop Members from raising objections to the proposals on the grounds that adopting the reference paper through schedules of commitments amounts to an abuse of schedules.
- It would be good for a number of Members to make similar objections.
- Pursuing these objections will be difficult, however, because of how the process is framed.
- If JSI proponents refuse to address objectors' concerns and the matter goes to arbitration, the outcome is limited to restoring the balance of sectoral commitments (again, that does not mean it should not be done).
- Of course, the limits on the remedy that could result from objections to the certification process confirm that this process is not intended to deal with changes to rules and those changes should not be made in this manner.

### **GATS Article XXI: Modification of Schedules**

- Member must notify WTO Council for Trade in Services at least 3 months before intended implementation of the modification
- An affected Member may object
- Proponent must enter consultations with objectors
- Aim is to agree on compensatory adjustment of scheduled commitments to reflect the original balance between the Members
- Any adjustment is on an MFN basis
- If no agreement, affected Member(s) can refer the matter to arbitration
- A Member wanting to enforce a right to compensation must take part in the arbitration
- If no arbitration is requested, the proponent can implement the changes
- Proponent cannot implement changes until it complies with the arbitration outcome
- If the proponent implements the changes without complying with the arbitration outcome, the affected Member can withdraw equivalent benefits to the proponent



### **S/L/84 (18 April 2000)**

applies to “new commitments, improvements to existing ones, or rectifications or changes of a purely technical character that do not alter the scope or the substance of existing commitments”

- Member notifies WTO Secretariat of proposed change to its schedule
- If no objection within 45 days, Secretariat certifies that procedures have been completed
- A Member can object to the proposed modification within 45 days of its notification
- The possible grounds for objection are not specified
- A Member should identify “to the extent possible” the specific elements behind its objection
- The proponent and objector enter consultations and endeavour to seek a resolution
- If consultations result in further changes to the schedule, the notification process is repeated
- If no agreement is reached in 45 days, and the proponent and objector both want to continue, the S/L/80 process starts



### **S/L/80 (29 October 1999)**

covers withdrawals of or amendments to sectoral commitments

- Member notifies WTO Secretariat of proposed alteration to its schedule at least 3 months before planned implementation of changes
- Notification includes list of changes to commitments, proposed implementation times, and exact nature of proposed modification
- Proposal is included on next Council for Trade in Services agenda
- If no objection is made within 45 days, the changes can proceed after formal certification
- A Member can object that the proposed modification affects its interests within 45 days of notification
- A Member should identify “to the extent possible” specific elements behind its objection
- The proponent and objector enter consultations and endeavour to seek a resolution
- Consultation period is 3 months but can be extended by agreement
- After negotiation is completed for each objector, a joint letter is sent to Secretariat for circulation to all Members
- Within 15 days of resolving all objections, proponent sends a final report to Secretariat
- Changes are certified 45 days after circulation by Secretariat unless a Member objects that the schedule does not reflect agreed outcomes or exceeds initial proposed changes
- After certification, Member can implement changes that are no greater than originally notified plus any agreed compensatory adjustments
- If agreement cannot be reached, the matter can be referred to arbitration



### Arbitration under S/L/80

- If no agreement is reached in consultations, objector can request arbitration
- Request must be within 45 days of the end of the consultation period
- If no arbitration is sought, proponent can implement changes once certified
- If agreement has been reached with some objectors, and others do not request arbitration, the agreed changes can be implemented once certified
- If arbitration is requested, no changes can be made until findings are received and complied with
- Three arbitrators are mutually appointed by Parties, or by the WTO Director-General if no agreement
- Arbitrators are not from either Party, unless agreed otherwise
- Arbitrators must have relevant legal, economic, financial or technical expertise
- A developing-country Party can request at least 1 developing-country arbitrator
- All objectors must participate if they want to enforce a right, but one that has already reached an agreement is deemed to have participated
- Terms of reference are to examine the compensatory adjustments offered or requested and “find a resulting balance of rights and obligations which maintains a general level of mutually advantageous commitments”
- Parties must be told of the arbitration findings within 3 months
- Proponent can implement changes compliant with the findings once certified
- If proponent fails to comply, the objector can give 1-month notice that it will withdraw substantially equivalent benefits from the proponent until it complies
- Proponent can withdraw proposed changes at any time and process ends

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