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Overview of Services in RTAs : Positive or Negative List?

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Overview of services in RTAs: positive or negative list?

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Services chapter in FTAs – scope, coverage and general disciplines (I)

- Strong degree of convergence between FTAs and the GATS in terms of scope, coverage and general disciplines.
- Many FTAs tend to follow the GATS structure of a framework of rules and disciplines and individual schedules of commitments.



Services chapter in FTAs – scope, coverage and general disciplines (II)

- **But also some new features:**
 - **Negative-list** or hybrid approaches to scheduling commitments.
 - Separate chapters on **financial services, telecommunications and the temporary movement of natural persons**.
 - Services-related disciplines also to be found in separate chapters on **investment, competition policy and government procurement**.



Scheduling commitments

- A key element that distinguishes preferential trade in services is the approach to liberalization. Distinctions tend to be drawn depending on whether a **GATS-type (positive list) or NAFTA-type (negative list)** approach has been followed.

The GATS approach to scheduling...

SCHEDULE OF SPECIFIC COMMITMENTS OF MEMBER X

Sector or Sub-Sector	Limitations on Market Access	Limitations on National Treatment	Additional Commitments
Positive Element: selection of sectors in which Market Access and National Treatment is granted	(1)	(1)	Negotiated commitments not subject to scheduling under MA or NT
	(2)	(2)	
	(3)	Negative Element: inscription of any limitations on Market Access and National Treatment	
	(4)		
	(1)	(1)	
	(2)	(2)	
	(3)	(3)	
	(4)	(4)	

GATS “Positive-list” approach in RTAs: eg. from Singapore’s schedule of commitments with India

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
SECTOR SPECIFIC COMMITMENTS			
1. BUSINESS SERVICES			
A. Professional Services			
Legal consultancy services for Indian law (861**)	1) Unbound 2) None 3) Unbound 4) Unbound except as indicated in the horizontal section	1) Unbound 2) None 3) Unbound 4) Unbound	
Accounting, auditing and bookkeeping services, except for financial auditing services (862**)	1) None 2) None 3) None 4) Unbound except as indicated in the horizontal section	1) None 2) None 3) None 4) Unbound	

Variations on the GATS “Positive-list” approach: Thai-Australia

Sector or Sub-Sector	Limitations
II. SECTOR SPECIFIC COMMITMENTS	
Notes:	
<p>a. Commitments in this Schedule are subject to the general limitations contained in the “Horizontal Commitments” section of this Schedule.</p> <p>b. The (*) indicates that sector-specific commitment for cross-border supply is unbound due to the lack of technical feasibility.¹</p> <p>c. The (**) indicates that the service specified constitutes only a part of the total range of activities covered by the Provisional CPC concordance.</p>	
I. Business Services	
General management consulting services (CPC 86501) provided exclusively through regional operating headquarters (ROH), ROH’s associated company or foreign branch.	Equity participation of up to 100% by Australian investors/service suppliers is allowed.
Convention services (CPC 87909**) excluding catering and beverage services	Total area of not less than 4,000 square meters; and total area of the largest hall must not be less than 3,000 square meters.
International exhibition services (CPC87909**)	Total area of not less than 50 rai (80,000 square meters) with an indoor exhibition area of not less than 25,000 square meters is required.

Variations on the GATS “Positive-list” approach: Japan-Philippine Economic Partnership Agreement (JEPA)

Modes of supply: 1) Cross-border supply 2) Consumption abroad 3) Commercial presence 4) Presence of natural persons				
Sector or Subsector	SS	Limitations on Market Access	Limitations on National Treatment	Additional Commitments
C. Telecommunication Services				
Basic telecommunication services:	SS	1) None	1) None	Japan undertakes the additional commitments below.
a) Voice telephone services (7521);		2) None	2) None	
b) Packet-switched data transmission services (7523**);		3) None except that foreign capital participation, direct and/or indirect, in Nippon Telegraph and Telephone Corporation (NTT) ²³ must be less than one-third.	3) None except that board members and auditors in NTT and the Regional Companies are required to have Japanese nationality.	
c) Circuit-switched data transmission services (7523**);		4) None	4) None	
d)				



Variations on the GATS “Positive-list” approach: Japan-Philippine Economic Partnership Agreement (JEPA)

Main innovations:

- Additional column (SS) which allows parties to specify whether the limitation is an existing non-conforming measures.
- Gives greater clarity on current measures and also encourages the parties to bind the status quo.
- If bound at the status quo (SS) – a ratchet mechanism is triggered whereby any unilateral liberalisation is automatically bound.




NAFTA inspired “negative list” approach (I)

- NAFTA pioneered the use of a negative list where all services are considered liberalized unless otherwise indicated through lists of reservations.
- Reservations are typically for existing non-conforming measures (Annex 1) and for future measures (Annex 2).
- All measures and sectors are considered free of restrictions unless there is a reservation listed in the Annex on “non-conforming measures”.
- The absence of any reservations indicates that there is full liberalisation of the sector.



NAFTA inspired “negative list” approach (II)

- **A “top down” approach**
- PTAs using a negative list approach also typically include a ratchet mechanism whereby any future liberalisation of Annex 1 type reservations is automatically locked in.
- Whenever a PTA member unilaterally removes any restriction, it has to extend the benefit of that liberalisation to all PTA parties. The ratchet mechanism thus provides for the automatic binding of any liberalisation.
- Actual level of openness is spelled out, along with an indication of the legal/regulatory framework in place.



Negative list: Example of Annex 1 “non-conforming” measure (I)

- Annex 1 reservation is on an **existing “non-conforming” measure – it is binding the regulatory status quo**. Measure cannot be made more restrictive at a later date.
- **Ratchet mechanism – should measure be lifted or made less restrictive it will be automatically bound.**
- **Possible to pre-commit** in Annex 1 by setting a timetable by which the reservation will be lifted. Since reservations are taken on the basis of existing non-conforming measures, such pre-commitments to phase-out restrictions are a good indication of actual liberalization.

Negative list: Example of Annex 1 “non-conforming” measure (II)

Box 7: Example of an Annex 1 reservation list, Australia-United States FTA

Sector:	Telecommunications
Obligations Concerned:	National Treatment (Article 11.3) Senior Management and Boards of Directors (Article 11.10)
Level of Government:	Central
Source of Measure:	<i>Telstra Corporation Act 1991</i>
Description:	<u>Investment</u> The maximum aggregate foreign ownership allowed in Telstra is 35 per cent of the Telstra shares that are not Commonwealth held. The maximum individual foreign ownership allowed in Telstra is 5 per cent of the Telstra shares that are not Commonwealth held. The Chairperson and a majority of directors of Telstra must be Australian citizens, and Telstra is required to maintain its head office, main base of operations, and place of incorporation in Australia.

Negative list: Example of Annex 2 “future measures” (III)

- A second type of reservation are those on “future measures”.
- **This allows parties to reserve the right to adopt new or more restrictive measures.**
- Somewhat equivalent to the “unbound” situation in a GATS positive list.
- Annex 2 reservations on “future measures” provides an important exception to the sweeping coverage of a negative list.

Negative list: Example of Annex 2 “future measures” (IV)

Example of an Annex 2 reservation on “future measures” from the Chile-US FTA	
Sector:	Social Services
Obligations Concerned:	National Treatment (Articles 10.2, 11.2) Most-Favored-Nation Treatment (Articles 10.3, 11.3) Local Presence (Article 11.5) Performance Requirements (Article 10.5) Senior Management and Boards of Directors (Article 10.6)
Description:	<u>Investment and Cross-Border Services</u> The United States reserves the right to adopt or maintain any measure with respect to the provision of law enforcement and correctional services, and the following services to the extent they are social services established or maintained for a public purpose: income security or insurance, social security or insurance, social welfare, public education, public training, health, and child care.

Positive or Negative list ? (I)

Recent research shows that:

- PTAs using a negative list tend to show a significant degree of improvements over commitments taken in the GATS, as compared to those PTAs that have used a positive list. See Roy, Marchetti and Lim (2007).
- But in some negative-list approach PTAs, a high number of sectors are excluded from their specific commitments; Chile-Korea 46.4%, Japan-Mexico 53.3%, US-Singapore 59.4%, Korea-Singapore 59.8%. See Ochiai, Dee and Findlay (2007).
- Binding the regulatory status quo and a ratchet mechanism which harvests unilateral liberalization—are found in all negative list agreements. However, they have also been incorporated into two positive list agreements (Japan-Philippines and Japan-Malaysia). See Fink and Molinuevo (2007).



Positive or Negative list ? (II)

- In principle, it is **possible to arrive at the same level of liberalisation using either a negative or positive list.**
- Whether a negative list PTA liberalises more than a positive list PTA depends on what is reserved in Annex 1 and 2 and what limitations are scheduled.
- Qualitative differences between negative list and positive list approaches but ultimately need to establish what is contained in individual schedules of commitments and in Annexes.



Positive or Negative list ? (III)

- **Both approaches have strengths and weaknesses.**
- While “top-down” approach in a negative list may seem impressive – countries can still have Annex 1 and 2 reservations. A long list of reservations undermines the value of a negative list.
- Certain degree of self selection may have been involved in the results - could be that those countries that had the greatest motivation to liberalise had also chosen to use a negative list approach.
- Since a negative-list approach is favoured by large demandeurs, this may also influence the bargaining relationship.



Positive or Negative list ? (IV)

BUT...

- Form does not necessarily determine substance. Ultimately, it is not the scheduling approach which determines the transparency and depth of commitments but the willingness to commit.

Thank You