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Negative List Approach in Services Negotiations

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Negative List Approach in Services Negotiations

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Objective of Negative List

Provides a mechanism for negotiating and defining the "Party-specific" services commitments of an FTA:



Text Negotiation

- Establishes the rules (party-specific) exceptions to the rules

Negative List

- Defines (party-specific)

WHY?

1. Account for existing laws and regulations
2. Achieve liberalization
3. Allow policy space

Why Negative List Approach?

1. Achieve free(er) trade
2. More closely reflect "realities"
3. Secure future liberalization
4. Provide clearer guidance to traders

Objectives of Approach

Achieve free(er) trade

	<u>Positive List</u>	<u>Negative List</u>
Starting Point	Everything is closed	Everything is open
Process	Commitments built one-by-one	Reservations are <u>exceptions</u> to general rules
Negotiation	Asking Party justifies interest	Reserving Party justifies exception

Objectives of Approach

More closely reflect "realities"

<p><u>Negative List</u></p> <p>MEASURE IS THE EXCEPTION</p> <p>(Non-conforming measures correspond to actual laws and regulations)</p>
<p><u>Positive List</u></p> <p>WHERE DO I FIT?</p> <p>(Commitments defined by reference to external classifications schemes)</p>

BENEFIT FOR GOVERNMENTS

Exceptions can be scheduled for laws and regulations, without need to consider whether, where, and how a measure relates to a given classification scheme (SIC, CPC, etc.).

BENEFIT FOR TRADERS

More closely reflects how business is actually done. Companies do not think or operate in the real world in the silos of industrial classifications.

Objectives of Approach

Secure future liberalization

- **NO GAPS IN SECTOR COVERAGE**
 - Particularly important for ensuring FTA disciplines apply to activities not contemplated when agreement was concluded.
 - Makes FTA "future-proof"
- **NO NEED TO REVISIT FTA**
 - Ability to automatically capture future liberalization of existing non-conforming measures.
 - Contrast with "future liberalization" clauses in positive list agreements

Biggest problem with GATS – how to renegotiate?

Objectives of Approach

Clarity for traders

- Annexes of non-conforming measures (the *negative list*) can provide a consolidated, one-stop snapshot of restrictive measures affecting trade and investment in a given sector.
- Businesses have direct information about actual laws and regulations that affect trade and investment. The FTA itself creates a repository of information.

NCMs – Which Obligations?

Typical (Cross-Border) Services Chapter obligations

1. National Treatment
2. Most-favored Nation Treatment
3. Market Access
4. Local Presence

Typical Investment Chapter obligations

1. National Treatment
2. Most-favored Nation Treatment
3. Performance Requirements
4. Senior Management and Boards of Directors

Starting Point – NCM Article

Article 10.7: Non-Conforming Measures

(Cross-Border Trade in Services Chapter, TPP)

1. Article 10.3 (National Treatment), Article 10.4 (Most-Favoured-Nation Treatment), Article 10.5 (Market Access) and Article 10.6 (Local Presence) shall not apply to:

(a) any existing non-conforming measure that is maintained by a Party at:

(i) the central level of government, as set out by that Party in its Schedule to Annex I;

or
(ii) a regional level of government, as set out by that Party in its Schedule to Annex I;

(iii) a local level of government;

(b) the continuation or prompt renewal of any non-conforming measure referred to in subparagraph (a); or

(c) an amendment to any non-conforming measure referred to in subparagraph (a), to the extent that the amendment does not decrease the conformity of the measure, as it existed immediately before the amendment, with Article 10.3 (National Treatment), Article 10.4 (Most-Favoured-Nation Treatment), Article 10.5 (Market Access) or Article 10.6 (Local Presence).²

2. Article 10.3 (National Treatment), Article 10.4 (Most-Favoured-Nation Treatment), Article 10.5 (Market Access) and Article 10.6 (Local Presence) shall not apply to any measure that a Party adopts or maintains with respect to sectors, sub-sectors or activities, as set out by that Party in its Schedule to Annex II.

NCM Article (Investment)

Article 9.12: Non-Conforming Measures

(Investment Chapter, TPP)

1. Article 9.4 (National Treatment), Article 9.5 (Most-Favoured-Nation Treatment), Article 9.10 (Performance Requirements) and Article 9.11 (Senior Management and Boards of Directors) shall not apply to:

(a) any existing non-conforming measure that is maintained by a Party at:

(i) the central level of government, as set out by that Party in its Schedule to Annex I;

(ii) a regional level of government, as set out by that Party in its Schedule to Annex I; or

(iii) a local level of government;

(b) the continuation or prompt renewal of any non-conforming measure referred to in subparagraph (a); or

(c) an amendment to any non-conforming measure referred to in subparagraph (a), to the extent that the amendment does not decrease the conformity of the measure, as it existed immediately before the amendment, with Article 9.4 (National Treatment), Article 9.5 (Most-Favoured-Nation Treatment), Article 9.10 (Performance Requirements) or Article 9.11 (Senior Management and Boards of Directors).

2. Article 9.4 (National Treatment), Article 9.5 (Most-Favoured-Nation Treatment), Article 9.10 (Performance Requirements) and Article 9.11 (Senior Management and Boards of Directors) shall not apply to any measure that a Party adopts or maintains with respect to sectors, sub-sectors or activities, as set out by that Party in its Schedule to Annex II.

ANNEX I

How does Annex I operate?

Four identified articles (NT, MFN, Market Access, Local Presence) do not apply to:

EXISTING MEASURES

- (a) any **existing** non-conforming measure that is maintained by a Party at:
 - (i) the central level of government, as set out by that Party in its Schedule to Annex I,
 - (ii) a regional level of government, as set out by that Party in its
- (b) the continuation or prompt renewal of any non-conforming measure referred to in subparagraph (a); or

CHANGE IN MEASURE (BUT ONLY ONE WAY)

- (c) an amendment to any non-conforming measure referred to in subparagraph (a) to the extent that the amendment does not decrease the conformity of the measure, as it existed immediately before the amendment, with the four identified articles.

ANNEX I - Summary

"Annex I" NCMs – Existing Measures

• Main features:

Limited to existing measures

Central and regional level measures only excepted if they are explicitly scheduled

Local measures automatically excepted (no need to list them)

Exception continues to apply if measure "continues"

Exception applies to amendments to the measure, but subject to conditions (e.g., ratchet)

ANNEX II

How does Annex II operate?

Four identified articles (NT, MFN, Market Access, Local Presence) do not apply to:
ANY MEASURES A PARTY CHOOSES (EXISTING OR FUTURE)

2. Article 10.3 (National Treatment), Article 10.4 (Most-Favoured-Nation Treatment), Article 10.5 (Market Access) and Article 10.6 (Local Presence) shall not apply to any measure that a Party adopts or maintains with respect to sectors, sub-sectors or activities, as set out by that Party in its Schedule to Annex II.

"Annex II" NCMs – Policy Space

- Main features:

- Not limited to existing measures

- Usually applicable to all levels of government

- Generally no conditions on amendment to measures (e.g., ratchet)

Parts of the NCM Annexes

- Annex I
 - Explanatory / Formatting Note (common to all Parties)
 - Schedules of each Party
 - Introductory note (sometimes)
 - NCM entries
- Annex II
 - Explanatory / Formatting Note (common to all Parties)
 - Schedules of each Party
 - Introductory note (sometimes)
 - NCM entries

Common Scheduling Mistakes

Relationship to other exceptions

- Measures only need to be scheduled as “non-conforming” if they are not already covered by an exception already present in the text:

Horizontal exceptions – applicable to the entire FTA

Exceptions applicable in certain chapters

Chapter-specific exceptions

Common Scheduling Mistakes

Example of horizontal exception

Article 29.2: Security Exceptions

(Exceptions Chapter, TPP)

Nothing in this Agreement shall be construed:

(a) to require a Party to furnish or allow access to any information which it determines to be contrary to its essential security interests; or the disclosure of

(b) to preclude a Party from applying measures that it considers necessary for the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests.

Common Scheduling Mistakes

Example of exception applicable in certain chapters

Article 11.11: Exceptions

(Financial Services Chapter, TPP)

1. Notwithstanding any other provisions of this Chapter and Agreement except for Chapter ... , a Party shall not be prevented from adopting or maintaining measures for prudential reasons, including for the protection of investors, depositors, policy holders, or persons to whom a fiduciary duty is owed by a financial institution or cross-border financial service supplier, or to ensure the integrity and stability of the financial system.

Common Scheduling Mistakes

Example of chapter-specific exceptions

Article 10.2: Scope and Coverage

(Cross-Border Trade in Services Chapter, TPP)

3. This Chapter shall not apply to: ...
 - (b) government procurement;
 - (c) services supplied in the exercise of governmental authority; or
 - (d) subsidies or grants provided by a Party, including government-supported loans, guarantees and insurance.

5. This Chapter shall not apply to air services, including domestic and international air transportation services, whether scheduled or non-scheduled, or to related services in support of air services, other than the following:
 - (a) aircraft repair and maintenance services during which an aircraft is withdrawn from service, excluding so-called line maintenance;
 - (b) selling and marketing of air transport services;
 - (c) computer reservation system services;
 - (d) specialty air services;
 - (e) airport operation services; and
 - (f) ground handling services.

Common Scheduling Mistakes

WHAT ELSE?

Often, the biggest scheduling mistakes are things that do not need to be scheduled at all:

- Requirement to obtain a license, and/or comply with qualification requirements
- Requirement to register with a regulator
- Requirement to obey local laws and regulations, including with respect to labor
- Measures that are inconsistent with only one obligation, but not with others (over-scheduling)