



**Asia-Pacific  
Economic Cooperation**

---

**2016/SOM3/GOS/WKSP/008**

Session V

## **Negotiating Service Chapters: A Negative List Approach: Temporary Entry Chapters**

Submitted by: Australia



**Capacity Building Workshop on Negotiations of  
Services Chapters Under Free Trade Agreements  
with a Negative List Approach**

**Lima, Peru  
19-21 August 2016**



## FREE TRADE AGREEMENTS

### Coverage of trade in services in negative list FTAs

*Approach in the TPP and Australia's FTAs with Chile, ROK and the US*

Mode of supply	Financial services	All other services
1	FS chapter	CBTS chapter
2	FS chapter	CBTS chapter
3	FS chapter*	Inv. chapter**
4 'at border'	<b>MNP/TE chapter</b>	<b>MNP/TE chapter</b>
4 'behind border'	FS chapter	CBTS chapter

\* Mostly: for financial institutions (FIs) and investors/investments in FIs.  
 \*\* This chapter also disciplines mode 3 supply by non-FIs. The MA, Dom Reg & Transparency Articles in the CBTS chapter apply to mode 3 supply, incl. in non-FIs.

## FREE TRADE AGREEMENTS

### Recap: Mode 4 in GATS, CBTS & TE/MNP chapters

- Think of mode 4 as being comprised of two parts, which tend to be regulated differently in APEC Economies.
  1. 'Entry' or 'at the border' measures:
    - Immigration authorities tend to regulate the entry and temporary stay
  2. 'Presence' or 'behind the border' measures:
    - Regulation of these measures is the responsibility of a range of authorities (but often not immigration authorities!)

## FREE TRADE AGREEMENTS

### Recap: Mode 4 in GATS, CBTS & TE/MNP chapters

- The CBTS chapter disciplines 'presence' or 'behind the border' measures.
  - WTO members generally did not make commitments on these measures in the GATS
- 'Entry' or 'at the border' measures are disciplined by TE/MNP chapters
  - WTO members tended to schedule TE/MNP commitments in the Market Access column of GATS schedules.

FREE TRADE AGREEMENTS			
Example of Mode 4 GATS Commitments			
Colombia's GATS Commitments - Horizontal			
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
<b>I. HORIZONTAL COMMITMENTS</b>			
ALL SECTORS INCLUDED IN THIS SCHEDULE	4) Unbound, except for measures affecting the entry and temporary stay of natural persons in the following categories  Managers, legal representatives and technical specialists, with the exception of the professional services sub-sectors.	4) Unbound, except for the categories of persons indicated in the market access column	

FREE TRADE AGREEMENTS			
Example of Mode 4 GATS Commitments			
Colombia's GATS Commitments - Sectoral			
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
<b>II. SECTOR-SPECIFIC COMMITMENTS</b>			
Fishing services	1) None 2) None 3) None 4) Unbound, except as indicated in the horizontal section	1) None 2) None 3) None 4) Unbound, except as indicated in the horizontal section	

## FREE TRADE AGREEMENTS

### Scope of TE/MNP Chapters

- Temporary Entry (TE) or Movement of Natural Persons (MNP) chapters in FTAs address the 'entry' or 'at the border' aspects of Mode 4 supply.
  - as well as these aspects in other sectors of the economy.
- These chapters address which business persons can obtain a visa, permit or other immigration formality to temporarily enter an economy to supply a service, invest or undertake other business activities
  - and what the conditions and limitations are on their entry and temporary stay.
  - the scope is not limited to service supply in comprehensive FTAs
    - e.g. intra-corporate transferees of mining companies.
- One can think of TE/MNP chapters as dealing with the Mode 4 commitments scheduled in Market Access column of GATS schedules.

## FREE TRADE AGREEMENTS

### Scope: TE/MNP chapters and the GATS Annex on MNP

#### Annex on Movement of Natural Persons Supplying Services under the Agreement

2. The Agreement shall not apply to measures affecting natural persons seeking access to the employment market of a Member, nor shall it apply to measures regarding citizenship, residence or employment on a permanent basis.
3. In accordance with Parts III and IV of the Agreement, Members may negotiate specific commitments applying to the movement of all categories of natural persons supplying services under the Agreement. Natural persons covered by a specific commitment shall be allowed to supply the service in accordance with the terms of that commitment.
4. The Agreement shall not prevent a Member from applying measures to regulate the entry of natural persons into, or their temporary stay in, its territory, including those measures necessary to protect the integrity of, and to ensure the orderly movement of natural persons across, its borders, provided that such measures are not applied in such a manner as to nullify or impair the benefits accruing to any Member under the terms of a specific commitment.

## FREE TRADE AGREEMENTS

### Scope: TE/MNP chapters and the GATS Annex on MNP

- The GATS establishes some of the core principles that are replicated in most MNP/TE chapters of FTAs.
- Paragraphs 2 and 4 carve out immigration, residence, citizenship and permanent employment.
  - forms of these paragraphs are replicated in many Australian FTAs.
- Paragraph 3 notes that while all immigration measures are carved out, commitments on specific categories of natural persons can be included in the GATS.

## FREE TRADE AGREEMENTS

### More than Mode 4 under the GATS

- Beyond the GATS Annex on MNP, the MNP/TE chapters of FTAs contain specific disciplines on economies' temporary entry regimes. These can include:
  - transparency requirements
  - provisions on fees
  - provisions on application procedures
  - committees to review implementation of these chapters.

## FREE TRADE AGREEMENTS

### Transparency provisions

- Transparency provisions ensure temporary entrants have access to information about temporary entry procedures.
- These can include making readily available information on:
  - the conditions and requirements attached to each category
  - relevant forms and documents needed to apply
  - how and where to submit an application
  - typical timeframes for processing
  - rules regarding accompanying spouses and dependents
  - any available review and/or appeal procedures.

## FREE TRADE AGREEMENTS

### Transparency provisions

- Other transparency provisions in TE/MNP chapters can include setting up a mechanism (i.e. phone line, online portal, etc.) to respond to public enquiries.
- Some FTAs, such as the ASEAN-Australia-New Zealand FTA (AANZFTA), also include a requirement to ensure that any modifications or amendments to immigration measures that affect temporary entry are made available shortly after the new measures enter into force.

## FREE TRADE AGREEMENTS

### Provisions on fees

- FTAs do not set the exact fees charged for processing a visa or other type of immigration formality.
- However, most FTAs contain an article which states that fees for temporary entry should be “reasonable.”
- The fees associated with temporary entry should not be so high that they impair or delay trade in goods or services or the conduct of investment activities under the FTA.

## FREE TRADE AGREEMENTS

### Other Disciplines on Application Procedures

- TE/MNP chapters can include disciplines obliging/encouraging authorities:
  - to process applications as expeditiously as possible
  - if any additional information is needed, to inform the applicant as soon as possible
  - to inform applicants of the outcome, including any conditions (e.g. period of stay), promptly
  - if an application is denied, to provide information on review or appeal procedures.



## FREE TRADE AGREEMENTS

### Dispute Settlement

- Most FTAs have a formal dispute settlement chapter which outlines the formal dispute settlement mechanisms and procedures parties agree to.
- The scope for formal dispute settlement under the temporary entry chapter is limited to
  - situations that involve a pattern of practice, and
  - provided the business persons affected have exhausted all available administrative remedies regarding the matter.

## FREE TRADE AGREEMENTS

### Grant of temporary entry

- In either Temporary Entry chapters or Annexes to Temporary Entry chapters, parties set out:
  - commitments in relation to categories of business persons eligible for temporary entry
  - conditions and limitations on entry, including
    - length of stay
    - whether entry is subject to quotas or economic needs tests.
  - whether spouses or families can accompany a business person and whether they can work.

## FREE TRADE AGREEMENTS

### Grant of temporary entry

*ASEAN-Australia-New Zealand FTA (AANZFTA) – Chapter Text*

#### **Article 4: Grant of Temporary Entry**

1. Each Party shall, in accordance with that Party's schedule of specific commitments in Annex 4 (Schedules of Movement of Natural Persons Commitments), grant temporary entry or extension of temporary stay in accordance with this Chapter to natural persons of another Party provided those natural persons:
  - a) Follow prescribed application procedures for the immigration formality sought; and
  - b) Meet all relevant eligibility requirements for entry to the granting Party.

## FREE TRADE AGREEMENTS

### Grant of temporary entry

*Trans-Pacific Partnership Agreement (TPP) - Chapter Text*

#### **Article 12.4: Grant of Temporary Entry**

1. Each Party shall set out in Annex 12-A the commitments it makes with regard to temporary entry of business persons, which shall specify the conditions and limitations for entry and temporary stay, including length of stay, for each category of business persons specified by that Party.

## FREE TRADE AGREEMENTS

### Grant of temporary entry

- In temporary entry negotiations, Parties may seek a commitment from trading partners not to apply quotas and economic needs tests to the temporary entry of their business persons.
- The form this commitment takes differs across different types of FTAs.

## FREE TRADE AGREEMENTS

### Numerical quotas and economic needs tests

- Parties may negotiate this into the text of FTAs. For example:

*The Singapore-Australia FTA (SAFTA)*

#### ARTICLE 12

##### *Labour Market Testing*

Neither Party shall require labour market testing, labour certification tests or other procedures of similar effect as a condition for temporary entry in respect of natural persons on whom the benefits of this Chapter are conferred.

## FREE TRADE AGREEMENTS

### Numerical quotas and economic needs tests

*Japan-Australia Economic Partnership Agreement (JAEPA)*

#### Article 12.3 Specific Commitments

2. Neither Party shall impose or maintain any limitations on the total number of visas to be granted to natural persons of the other Party falling under one of the categories referred to in Annex 10 (Specific Commitments on the Movement of Natural Persons), unless otherwise specified in that Annex.

## FREE TRADE AGREEMENTS

### Approaches for scheduling TE/MNP commitments

- TE/MNP chapters commonly:
  - incorporate Parties commitments on categories of temporary entrants (e.g. business visitors, ICTs) in the text itself, or
  - refer to an Annex where Parties can make these commitments, or
  - combine the text and annex approaches.
- The Annex approach is common in plurilateral FTAs
  - it allows Parties to tailor commitments around their immigration systems.

## FREE TRADE AGREEMENTS

### Approaches for scheduling TE/MNP commitments

- In an Annex structure, any conditions and limitations on entry on temporary entrants in these categories (e.g. numerical quotas) need to be explicitly carved out (similar to NCMs)
  - if a Party does not explicitly reserve the right to apply a quota or labour market test, they are committing not to apply a quota or labour market test.
- One can think of this as carving out conditions and limitations (on a negative list basis) for each category listed.

## FREE TRADE AGREEMENTS

### Extract of a plurilateral TE schedule

Description of Category	Conditions and Limitations (including length of stay)
<p><b>B. Intra-Corporate Transferees</b>  <u>Definition:</u>  <b>Intra-Corporate Transferees</b> comprise business persons employed by an enterprise in the territory of a Party who seek to render services to that enterprise's parent entity, subsidiary or affiliate, in its territory as an executive or manager, a specialist, or a management trainee on professional development.</p>	<p>Length of stay is up to three years. Extensions are possible.</p> <p>The length of stay for spouses, including extensions, shall be the same as that of the business person they are accompanying who has obtained temporary entry under this Section B.</p>

# FREE TRADE AGREEMENTS

**Questions?**