



**Asia-Pacific  
Economic Cooperation**

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Session I

## **Negotiating Service Chapters: A Negative List Approach: Cross-Border Trade in Services**

Submitted by: Australia



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

**Lima, Peru**

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## 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	<b>CBTS chapter</b>
2	FS chapter	<b>CBTS chapter</b>
3	FS chapter*	Inv. chapter**
4 'at border'	MNP/TE chapter	MNP/TE chapter
<b>4 'behind border'</b>	FS chapter	<b>CBTS chapter</b>

\* 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.

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### Modes of Supply and the scope of CBTS Chapters

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

- Which modes are covered by the CBTS chapters of the TPP and other FTAs?
  - Mode 1 (Cross-Border Supply)
  - Mode 2 (Consumption Abroad)
  - Mode 4 (Supply by Natural Persons) – only the 'behind the border' element. The 'at the border' element will be covered later on.
- A little bit on Mode 3 ...

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### Scope of CBTS Chapters and Mode 3 supply

- In many negative list FTAs, Mode 3 (Commercial presence) is primarily covered by a separate investment chapter.
  - this means that the same investment disciplines apply to investments in all sectors of the economy.
- There are some important exceptions to the Mode 3 carve-out from CBTS, which relate to disciplines that are specific to the services sector.
  - the Market Access, Domestic Regulation and Transparency obligations in the CBTS chapter do apply to Mode 3 supply.

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### Subsidies out of scope

- Under the GATS, members typically reserved the right to provide trade-distorting subsidies in some committed sectors.
- By contrast, subsidies are carved out of the scope of CBTS chapters
  - Therefore, they do not need to be reserved for cross-border service supply

**3. This Chapter shall not apply to:**

**(d) subsidies or grants provided by a Party, including government-supported loans, guarantees and insurance.**

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### Subsidies out of scope

- Some CBTS chapters nonetheless
  - include consultation mechanisms on trade-distorting subsidies
  - provide for further work on subsidies, in line with GATS Article XV.

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### Services Supplied in the Exercise of Government Authority (SSEGA) out of scope

*"Any service which is supplied neither on a commercial basis, nor in competition with one or more service suppliers."* -- GATS Art. I(3)(c)

- The same definition is used in CBTS chapters of negative list FTAs.

## FREE TRADE AGREEMENTS

### Services Supplied in the Exercise of Government Authority (SSEGA) out of scope

- As in the GATS, SSEGA are carved out of the scope of CBTS chapters. The following text is taken from the Korea-Australia FTA (KAFTA):

5. This Chapter shall not apply to services supplied in the exercise of government authority in a Party's territory. A service supplied in the exercise of governmental authority means any service which is supplied neither on a commercial basis, nor in competition with one or more service suppliers.

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### Examples of SSEGA that do not need to be reserved

- Basic Postal Services:

Australia Post, a wholly-owned government entity, has the exclusive right to issue postage stamps and carry letters within Australia, whether the letters originated within or outside Australia. This includes:

- the collection within Australia of letters for delivery within Australia; and
- the delivery of letters within Australia.

## FREE TRADE AGREEMENTS

### Examples of SSEGA that do not need to be reserved

- Monopolies that meet the definition of SSEGA

Airservices Australia, a government owned commercial enterprise, is the monopoly provider of the following services:

- airspace management, air traffic flow information, air traffic control, traffic and flight information, navigation services, aeronautical information, and aerodrome rescue and fire fighting services.

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### Government Procurement (GP) out of scope

- GATS Art. XIII(1) exempts GP from the GATS Most-Favoured-Nation Treatment, National Treatment and Market Access obligations.
  - Art. III(2) provides for future multilateral negotiations on GP.
- Similarly when GP is included in FTAs, it is not disciplined under CBTS chapters, but in a separate chapter
  - these separate GP disciplines are nonetheless important for service suppliers!

## FREE TRADE AGREEMENTS

### Financial Services out of scope of many CBTS chapters

- Under the GATS, financial services are disciplined in the same way as in other sectors.
- Many negative list FTAs address financial services in a separate chapter, not in the CBTS chapter
  - this allows more tailored disciplines to be developed for this important sector.
- Australia followed this approach in most, but not all, negative list FTAs.
  - in FTAs in which financial services are in the scope of the CBTS chapter, additional disciplines specific to financial services are sometimes included in an Annex.

## FREE TRADE AGREEMENTS

### Mode 4: What is in the scope of CBTS chapters?

- Under the GATS, members limited their Mode 4 commitments to the temporary entry / movement of categories of natural persons
  - “(4) Unbound, except for the entry of the following categories of natural persons...”
  - such as business visitors and intra-corporate transferees
  - these tend to have been scheduled in the Market Access column of GATS schedules.
- Negative-list FTAs recognise that Mode 4 is about more than MNP and TE!

“...the supply of a service... **through presence of** natural persons...”

## FREE TRADE AGREEMENTS

### Mode 4: What is in the scope of CBTS 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!)



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### Mode 4: What is in the scope of CBTS chapters?

- The CBTS chapter disciplines ‘presence’ or ‘behind the border’ measures’
- Restrictions in APEC Economies may include:
  - Numerical limitations on the number of natural persons (e.g. doctors) able to obtain a licence to supply a service
  - Bans on foreign natural persons able to supply a service (e.g. on foreign lawyers practicing domestic law)

## FREE TRADE AGREEMENTS

### Mode 4: What is in the scope of CBTS chapters?

- ‘Entry’ or ‘at the border’ measures are disciplined by TE/MNP chapters:

*Extract from the TPP Temporary Entry chapter*

3. Nothing in this Agreement shall prevent a Party from applying measures to regulate the entry of natural persons of another Party 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 those measures are not applied in a manner as to nullify or impair the benefits accruing to any Party under this Chapter.

## FREE TRADE AGREEMENTS

### Air Transport Services

- The GATS Annex on Air Transport Services explicitly excludes traffic rights and services directly related to the exercise of traffic rights (except...).
- The Annex explicitly stipulates GATS applies to:
  - Aircraft repair and maintenance service
  - Selling and marketing air transport services
  - Computer reservation services.
- In negative list FTAs, the list of sectors explicitly covered for cross-border trade has been expanded to include:
  - Airport operations services (on a fee or contract basis)
  - Ground handling services
  - Specialty air services.

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### Air Transport Services in select Australian FTAs

Sector	USA	Chile	ASEAN	China	ROK	Japan	TPP
Aircraft repair and maintenance	✓	✓	✓	✓	✓	✓	✓
Selling and marketing	✓	✓	✓	✓	✓	✓	✓
Computer reservation systems	✓	✓	✓	✓	✓	✓	✓
Airport operations	x	✓	x	✓	x	x	✓
Ground handling	x	✓	x	✓	x	x	✓
Specialty air	✓	✓	x	✓	✓	x	✓

## FREE TRADE AGREEMENTS

### Air transport services

- Unlike all other services, services related to air transport services are often positively listed in the scope article of CBTS chapters:
  - commitments are still scheduled on a negative basis (...Session II)
- From Australia's perspective, the optimal approach is for all services related to air transport to be included in the scope in the same way as all other services
  - as is the case in Australia's Services Protocol with New Zealand.

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### Reminder: Air transport services and Mode 3

- In many negative list FTAs, Mode 3 measures affecting:
  - Air transport sectors, including traffic rights
  - All related servicesare primarily disciplined by separate Investment chapter.
- Don't forget slide 4!

## FREE TRADE AGREEMENTS

### National Treatment

- National treatment commits a party to accord services and service suppliers of another party the same treatment it grants its own service suppliers.
- GATS Article XVII states:
 

1. In the sectors inscribed in its Schedule, and subject to any condition and qualifications set out therein, each Member shall accord to services and service suppliers of any other Member, in respect of all measures affecting the supply of services, treatment no less favourable than that it accords to its own like services and service suppliers.
- As commitments are scheduled on a positive list basis under the GATS, the paragraph requires parties to make commitments (subject to any conditions or qualifications).

## FREE TRADE AGREEMENTS

### National Treatment

- National Treatment obligations in FTAs frequently state that national treatment must be accorded “in like circumstances”.

1. Each Party shall accord to services and service suppliers of another Party treatment no less favourable than that it accords, in like circumstances, to its own services and service suppliers.

- In a negative list framework, services and service suppliers of another party are accorded national treatment, unless a party schedules exceptions in its ‘NCMs’.

## FREE TRADE AGREEMENTS

### Most-Favoured-Nation (MFN) Treatment

- Article II of the GATS states that:

- With respect to any measure covered by this Agreement, each Member shall accord immediately and unconditionally to services and service suppliers of any other Member treatment no less favourable than that it accords to like services and service suppliers of any other country.
- A Member may maintain a measure inconsistent with paragraph 1 provided that such a measure is listed in, and meets the conditions of, the Annex on Article II Exemptions.

- WTO Members have scheduled exceptions for existing or future measures inconsistent with MFN in a separate Annex
  - conceptually this is like the negative list approach
  - MFN applies to all measures covered by the GATS except where Members have listed exceptions.

## FREE TRADE AGREEMENTS

### Most-Favoured-Nation (MFN) Treatment

- MFN obligations in FTAs frequently state that MFN treatment must be accorded to services and service suppliers "in like circumstances".

***Each Party shall accord to services and service suppliers of another Party treatment no less favourable than that it accords, in like circumstances, to services and service suppliers of any other Party or a non-Party.***

- Services and service suppliers of another party are accorded MFN treatment, unless a party schedules exceptions in its 'NCMs'.
- Parties commit to automatically extend any better/preferential treatment they commit to in future FTAs to existing trading partners by virtue of the MFN obligation.

## FREE TRADE AGREEMENTS

### Market Access (MA)

- MA articles under the GATS and in CBTS chapters of negative-list FTAs prohibit, in committed sectors, Members/Parties imposing:

- (a) Limitations on the number of service suppliers whether in the form of numerical quotas, monopolies, exclusive service suppliers or the requirements of an economic needs test;
- (b) Limitations on the total value of service transactions or assets in the form of numerical quotas or the requirement of an economic needs test;
- (c) Limitations on the total number of service operations or on the total quantity of service output expressed in terms of designated numerical units in the form of quotas or the requirement of an economic needs test;
- (d) Limitations on the total number of natural persons that may be employed in a particular service sector or that a service supplier may employ and who are necessary for, and directly related to, the supply of a specific service in the form of numerical quotas or the requirement of an economic needs test;
- (e) Measures which restrict or require specific types of legal entity or joint venture through which a service supplier may supply a service.

## FREE TRADE AGREEMENTS

### Market Access

- The MA obligation in the GATS, positive list and some negative list FTAs also prohibits, in committed sectors, Members/Parties imposing:

(f) Limitations on the participation of foreign capital in terms of maximum percentage limit on foreign shareholding or the total value of individual or aggregate foreign investment.

- This additional limb is not included in many negative list FTAs, such as the TPP and Australia's FTAs with Chile, ROK and the US
  - foreign equity caps do not need to be scheduled as breaches of MA in these FTAs.

Article 9.3  
Market Access

1. With respect to market access through the modes of supply defined in subparagraph (n) of Article 9.2, a Party shall not adopt or maintain, either on the basis of a regional subdivision or on the basis of its entire Area, measures that are defined as:

- (a) limitations on the number of service suppliers whether in the form of numerical quotas, monopolies, exclusive service suppliers or the requirements of an economic needs test;
  - (b) limitations on the total value of service transactions or assets in the form of numerical quotas or the requirements of an economic needs test;
  - (c) limitations on the total number of service operations or on the total quantity of service output expressed in terms of designated numerical units in the form of quotas or the requirements of an economic needs test;
- Note: This subparagraph shall not apply to measures of a Party which limit inputs for the supply of services.
- (d) limitations on the total number of natural persons that may be employed in a particular service sector or that a service supplier may employ and who are necessary for, and directly related to, the supply of a specific service in the form of numerical quotas or the requirements of an economic needs test;
  - (e) measures which restrict or require specific types of legal entity or joint venture through which a service supplier may supply a service; and
  - (f) limitations on the participation of foreign capital in terms of maximum percentage limit on foreign shareholding or the total value of individual or aggregate foreign investment.

## FREE TRADE AGREEMENTS

### Market Access

- In FTAs in which the MA obligation excludes the equity caps limb (f), the MA obligation targets measures that are 'non-discriminatory'
  - i.e. measures (e.g. numerical quotas on licences) that apply equally to both Australian and foreign service suppliers
  - if a numerical quota applies only to foreign suppliers, it needs to be scheduled against NT.

## FREE TRADE AGREEMENTS

### Market Access

- CBTS chapters allow for MA breaches to be scheduled on a negative list basis, in the same way exceptions to NT and MFN are scheduled
  - however some Economies prefer to make some or all of their MA commitments in a positive list fashion
  - this will be discussed in greater depth in the next session.

## FREE TRADE AGREEMENTS

### Local Presence (LP)

- A prohibition on requiring a local presence is a standard feature of the CBTS chapters of negative-list FTAs.
- Unless exceptions are scheduled, Parties are prohibited from requiring, as a condition of providing services on a cross-border basis, service suppliers to:
  - establish a representative office or any form or enterprise; or
  - to be a resident, in the territory of the Economy they wish to provide services to.



## FREE TRADE AGREEMENTS

### Local Presence

- As the local presence obligation is not included in the GATS, most Members tended to schedule these measures as limitations on National Treatment
  - the same applies in FTAs that do not include an LP obligation
- If a measure is only a breach of the LP obligation, it should only be scheduled against the LP obligation
  - it does not need to be, and should not be, scheduled against NT as well.

## FREE TRADE AGREEMENTS

### Local Presence

- To qualify as a breach of the LP obligation, a service supplier must be prevented from supplying the service cross-border unless they are resident or establish an office/enterprise
  - a registration requirement to have an address (e.g. a post office box) is not considered a breach of local presence.
  - a requirement to incorporate a business is not considered an LP breach if the service can then be supplied cross-border.

## FREE TRADE AGREEMENTS

### Scheduling exceptions to NT, MFN, MA and LP: 'NCMs'

- The NCMs or 'Non-Conforming Measures' article in CBTS provides the framework for Parties to schedule both:
  1. Exceptions for **existing measures** at the central and regional levels of government that violate one or more of: NT, MFN, MA and LP
    - these are included in "Annex I" of Party-specific schedules.
  2. Policy space to violate one or more of these obligations at any level of government for particular sectors, sub-sectors or activities
    - these are listed in "Annex II of Party-specific schedules"
    - this policy space is often for both existing and future measures.

## FREE TRADE AGREEMENTS

### Scheduling exceptions in 'NCMs'

- Exceptions for existing measures at the **local level of government** do not need to be included in Annex I
  - the exception for these is written into the NCMs article.
- The Investment and Financial Services chapters also have an NCMs article which is structured in the same way.
- In Session II, we will explore the NCMs article further.

## FREE TRADE AGREEMENTS

**Questions?**

## FREE TRADE AGREEMENTS

### ***Further reading: Other disciplines in CBTS chapters***

- CBTS chapters also contain other articles that conceptually will be familiar from the GATS (there are some differences in the disciplines)
  - Domestic regulation
  - Transparency
  - Recognition
  - Denial of benefits
  - Payments and transfers.

## FREE TRADE AGREEMENTS

### *Further reading: Annexes to CBTS chapters*

- Annexes to CBTS chapters often include annexes that contain additional disciplines for specific sectors
- An example is **professional services annexes**
  - encourage best practice regulation of transnational legal services
  - promote recognition of qualifications, including the possibility of implementing a licensing or registration regime on a temporary basis or for a specific for engineering and architectural services projects
  - establish **professional services working groups** to facilitate discussion between TPP Parties and relevant professional bodies.