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# **Overview of Various Approaches to Services Liberalization**

**Training Workshop on Trade in Services  
Negotiations for AU-CFTA Negotiators**

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## Outline

- Introduction: FORM vs. SUBSTANCE
- Scheduling Techniques: Positive List, Negative List and Hybrid Approach
- Structure of Negative List Agreements
- Additional and Emerging Disciplines often included or proposed for Negative List Services Agreements

Services Agreements  
demonstrate a wide variety  
and diversity: no two  
agreements are identical

- **IMPORTANT TO DISTINGUISH BETWEEN SCHEDULING  
TECHNIQUE and SUBSTANCE**



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## **Approaches to Services Agreements must distinguish between SCHEDULING TECHNIQUE and SUBSTANCE**

It is not the scheduling technique that necessarily determines the quality of the services agreement, but more importantly, the disciplines that are associated with it.

- 1. Technique:** modality used for scheduling liberalization or market access commitments
- 2. Substance:** disciplines associated with the scheduling technique



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## **QUALITY of a Services Agreement depends upon a number of things**

- Coverage (sectors; modes of supply)
- Transparency obligations
- National treatment obligation
- Scheduling at level of status quo
- Future liberalization commitments
- Breadth and depth of other included disciplines
- Rule of origin criteria / denial of benefits
- Regulatory annexes

**NONE OF THE ABOVE REFERS TO THE SCHEDULING TECHNIQUE (i.e. POSITIVE / NEGATIVE / HYBRID LIST), EACH OF WHICH CAN BE ASSOCIATED WITH WEAKER OR STRONGER DISCIPLINES**



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## **Besides the SCHEDULING TECHNIQUE, what differs between Services RTAs is the STRUCTURE of the Agreement**

- What is meant by “STRUCTURE”?
- The way that services are dealt with in various chapters in the RTA
- The relationship between services and investment and services and other areas
- The structure may influence the quality of the agreement as well, since it can either help or impede the use of the RTA by service suppliers.
- Ideally the structure should reflect the way in which services are produced and traded in real world.

# Approaches to Trade Liberalization in Services Agreements

## **REVIEW OF SCHEDULING TECHNIQUES:**

**Positive List – Negative List – Hybrid Approach**



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## Types of Scheduling Techniques

- **POSITIVE LIST:** Largely based on WTO GATS; has been the traditional approach for most (but not all) RTAs between developing countries.
- **NEGATIVE LIST:** Largely based on NAFTA; increasingly adopted since 2000 and becoming standard practice for the majority of RTAs.
- **HYBRID APPROACHES:** Variations on either approach; being followed in the TISA negotiations.



## 1. Positive List: GATS Approach

- Bottom up: Sectors are listed by choice/ or in a positive way → Commitments do not apply unless the sector and/or specific sub-sector is inscribed in the schedule.
- The way the commitment is expressed in both the MA and NT columns is generally **negative** → Setting out the limitation that is inconsistent with the agreement
- All limitations to MA & NT must be listed unless:
  - A full commitment to maintain no restrictions / limitations - 'NONE'
  - No commitment at all / complete regulatory freedom - 'UNBOUND'
- However, Mode 4 is by convention expressed in a positive way because of sensitivities. Thus, areas of liberalising commitments are identified in the schedule, in the horizontal section and sector-specific.

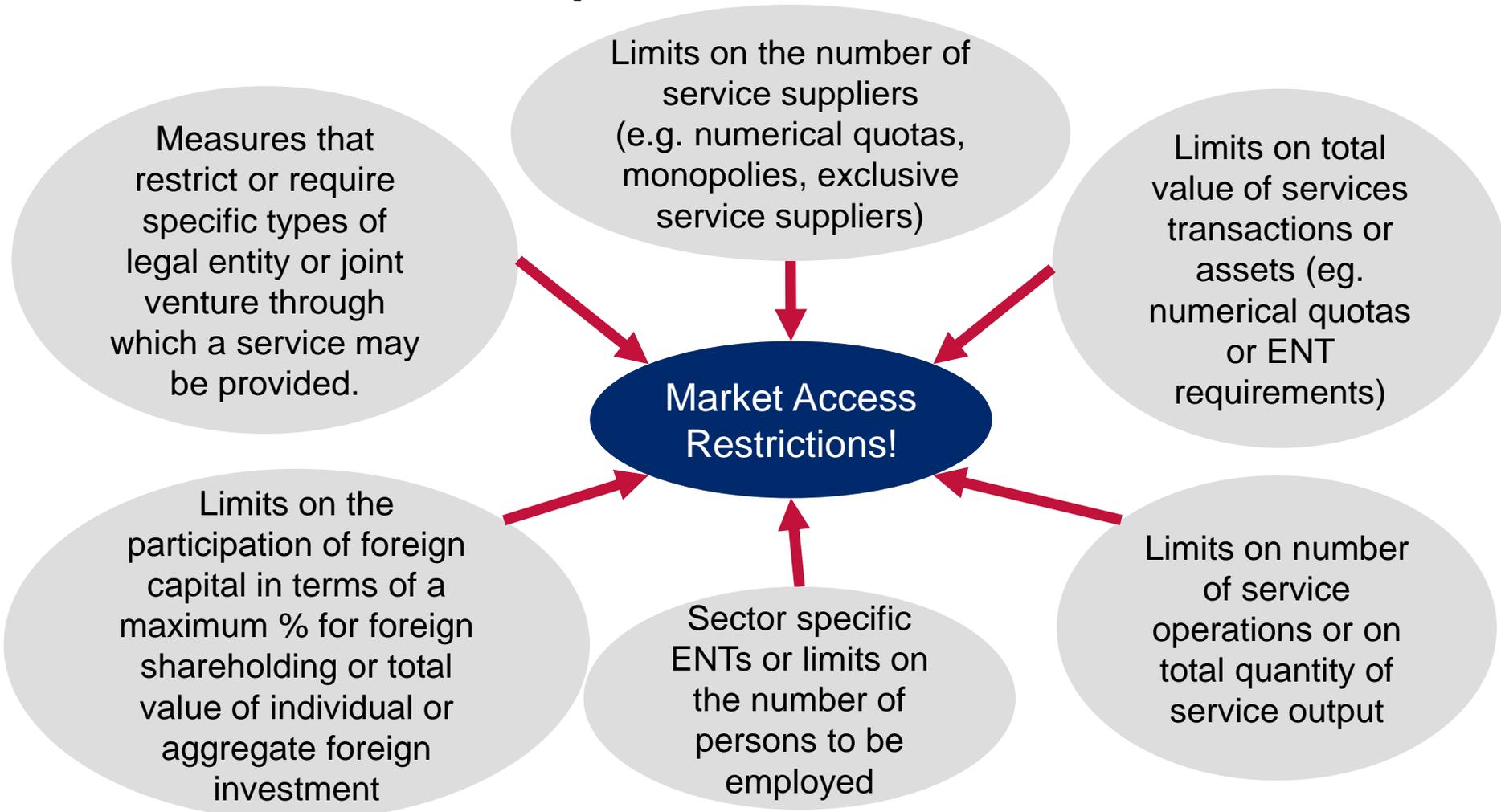


## Positive List Scheduling Approach

- Sector specific commitments
  - Sector/sub-sector (using WTO/ CPC code)
  - 4 modes of service supply
- Market Access Limitations (GATS Art XVI:1)
  - Six exhaustive limitations must be inscribed if partial commitments made (GATS Art XVI:2)
  - Covers both discriminatory and non-discriminatory measures
- National Treatment Limitations (GATS Art XVII:1)
  - Covers de jure & de facto discrimination
  - Includes any measure that modifies competition against imports / foreign suppliers



## GATS Art XVI:2 Requirements





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## **GATS Services Schedules must be read in comprehensively**

- Horizontal Limitations, together with
- Sector Specific Commitments
  - Limitations on Market Access and Limitations on National Treatment
  - When there is limitation under both, listed under MA column or repeated in both.
  - Additional Commitments → Voluntary. Measures other than those subject to Articles XVI and XVII. Exp. qualifications, standards and licensing matters. This column is to be used to indicate positive undertakings, not additional limitations or restrictions.
- Plus....Lists of Article II (MFN) Exemptions



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## List of Article II (MFN) Exemptions

To ensure a complete and precise listing of a country's MFN exemptions, each country is required to provide five types of information for each exemption:

- Description of the sector or sectors in which the exemption applies;
- Description of the measure, indicating why it is inconsistent with Article II;
- The country or countries to which the measure applies;
- The intended duration of the exemption;
- The conditions creating the need for the exemption.



# Example: Horizontal Commitments - GATS

## KENYA - SCHEDULE OF SPECIFIC COMMITMENTS

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	<p>3) Commercial presence requires that foreign service providers incorporate or establish the business locally</p> <p>4) Unbound except for measures concerning the entry and temporary stay of natural persons employed in management and expert jobs for the implementation of foreign investment.</p> <p>The employment of foreign natural persons for the implementation of foreign investment shall be agreed upon by the contracting parties and approved by Government</p>		



# Example: Sector Specific Commitments - GATS

## KENYA - SCHEDULE OF SPECIFIC COMMITMENTS

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>			
<b>2. COMMUNICATION SERVICES</b>			
<b><u>C. Telecommunication Services</u></b>			
Vending of telecommunications terminal equipment <sup>1</sup>	1) None 2) None 3) None 4) Unbound except as indicated in the horizontal section	1) None 2) None 3) None 4) Unbound	
Installation and maintenance of telecommunications terminal equipment <sup>1</sup>	1) Unbound* 2) None 3) None 4) Unbound except as indicated in the horizontal section	1) Unbound* 2) None 3) None 4) Unbound	

\*Unbound due to lack of technical feasibility.



## Example: List of Article II (MFN) Exemptions - GATS

### MFN EXEMPTIONS : ANGOLA - 11.A MARITIME TRANSPORT SERVICES

Sector / Sub-sector	Description of the measure indicating its inconsistency with Article II	Countries to which the measure applies	Intended duration	Conditions creating the need for the exemption
Maritime Transport: (A) -Coastal shipping (cabotage) and liner trade	Present or future laws, decrees and regulations ("règlements") based on bilateral or multilateral agreements on coastal shipping and liner trade rights granted to trade partners.	Not specified	10 years renewable	To stimulate international trade and promote regional economic integration.
(B) - Long-distance maritime transport	Laws, decrees and regulations ("règlements") based on bilateral and/or multilateral agreements. Resolutions of the MCWCF adopted for implementation of specific provisions of the United Nations Code Conduct for Liner Conferences providing for the sharing of cargo 40/40/20.	Not specified	Unlimited	<ul style="list-style-type: none"> <li>- Need to guarantee to national shipowners 40% of regular traffic.</li> <li>- Promote the development of the national fleet by using it as a catalyst of the national economy.</li> <li>- Ensure that exports are more competitive and decrease the cost of imports.</li> <li>- Promote auxiliary maritime and port services.</li> <li>- Promote the development of new installations.</li> </ul>



## 2. Negative List Approach

Presumption → everything liberalized unless otherwise specified.

However.....

Annexes of non-conforming measures provide flexibility to the comprehensive coverage assumed

- Annex I → Stand-still schedule. Existing measures included at the level of regulatory application; commitment to make the sector no more restrictive in the future.
- Annex II → Measures (sectors) permanently excluded from the agreement; government retains full regulatory freedom.



## Annex I: Non Conforming Measures

- **Existing measures** which do not conform with the principles set out in the text of the agreement can be retained or “grandfathered” by listing in Annex 1.
- In a federal system, typical to “grandfather” all existing measures at state and local level (such as U.S. and Canada; however Canada-EU FTA did not do this)
- No new measures which are inconsistent with the text of the agreement can be introduced after finalizing the agreement → a complete services “STANDSTILL”
- Annex I → Measures must be based in existing legislation.

If restrictions (discriminatory treatment) are not listed in Annex 1, they must be liberalized.



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## Example: Annex I of Morocco's Schedule of Non-Conforming Measures. from US-Morocco FTA

### ANNEX I SCHEDULE OF MOROCCO

<b>Sector:</b>	Tourism – Guides and Accompanying Personnel
<b>Obligations Concerned:</b>	National Treatment (Articles 10.3, 11.2)
<b>Level of Government:</b>	Central
<b>Measures:</b>	<p><i>Dahir</i> No. 1-97-05 of January 25, 1997 enacting Law No. 30-96 regulating tour and mountain guides and accompanying personnel</p> <p><i>Dahir</i> No. 1-97-64 of February 12, 1997 enacting Law No. 31-96 regulating travel agencies</p>
<b>Description:</b>	<p><u>Cross-Border Services and Investment</u></p> <p>Only Moroccan nationals may serve as licensed tour or mountain guides.</p> <p>However, foreign nationals may accompany tour groups from a foreign country to Morocco and on tours of Morocco. Such accompanying personnel may not serve as licensed tour or mountain guides.</p>



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# Example: Annex I EU Schedule, from EU-Canada FTA (or CETA)

<b>Sector:</b>	Transport	<b>Description:</b>	<b>Cross-Border Services, Investment, and International Maritime Transport Services</b>
<b>Sub-sector:</b>	Internal Waterways Transport, Supporting Services for Internal Waterways Transport		Goods or passenger transport operations by inland waterway may only be provided by an operator that fulfils the following conditions:
<b>Industry classification:</b>	CPC 722, part of CPC 745		
<b>Type of Reservation:</b>	National Treatment		
	Market Access		
<b>Level of Government:</b>	EU level		<ul style="list-style-type: none"><li>- is established in a Member State,</li><li>- is entitled there to carry out the (international) transport of goods or passengers by inland waterway, and</li><li>- uses vessels registered in a Member State or in possession of a certificate of membership of a fleet of a Member State.</li></ul>
<b>Measures:</b>	<p>Regulation 1991/3921/EEC of 16 December 1991 laying down the conditions under which non-resident carriers may transport goods or passengers by inland waterway within a Member State</p> <p>Regulation 1996/1356/EC of 8 July 1996 on common rules applicable to the transport of goods or passengers by inland waterway between Member States with a view to establishing freedom to provide such transport services</p> <p>Regulation 1995/2919/EEC of 17 October 1995 laying down the conditions for access to the arrangements under the Revised Convention for the navigation of the Rhine relating to vessels belonging to the Rhine Navigation</p>		<p>In addition, the vessels must be owned by natural persons domiciled in a Member State and who are Member States nationals, or owned by legal persons registered in a Member State and the majority of whom are Member State nationals. Derogations from the majority ownership requirement may exceptionally be provided.</p> <p>In Spain, Sweden and Finland there is no legal distinction between maritime and internal waterways. The regulation of maritime transport applies equally to internal waterways.</p>
		<b>Phase-out:</b>	None



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## Example: Annex I Canada Schedule, from EU-Canada FTA (or CETA)

<b>Sector:</b>	Business Services
<b>Sub-Sector:</b>	Examination Services relating to the Export and Import of Cultural Property, Museum services except for historical sites and buildings (limited to cultural property examination services)
<b>Industry Classification:</b>	CPC 96321, 87909 (limited to cultural property examination services)
<b>Type of Reservation:</b>	National Treatment Market Access
<b>Level of Government:</b>	Federal
<b>Measure:</b>	<i>Cultural Property Export and Import Act</i> , R.S.C. 1985, c. C-51
<b>Description:</b>	<b>Cross-Border Trade in Services and Investment</b>

1. Only a resident of Canada or an institution in Canada may be designated as an expert examiner of cultural property for the purposes of the *Cultural Property Export and Import Act*.
2. For the purposes of this reservation:

**institution** means an entity that is publicly owned and operated solely for the benefit of the public, that is established for educational or cultural purposes and that conserves objects and exhibits them;

**resident of Canada** means a natural person who is ordinarily resident in Canada, or a corporation that has its head office in Canada or maintains an establishment in Canada to which employees employed in connection



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## Example: Annex I Canada Schedule, CETA

<b>Sector:</b>	Land Transportation
<b>Sub-Sector:</b>	Scheduled and non-scheduled passenger and freight transportation by road, including courier services.
<b>Industry Classification:</b>	CPC 7121, 7122, 7123, 7512
<b>Type of Reservation:</b>	National Treatment (Article ___) Market Access (Article ___)
<b>Measures:</b>	<i>Motor Vehicle Transport Act</i> , R.S.C. 1985, c. 29 (3rd Supp.), as amended by S.C. 2001, c. 13. <i>Canada Transportation Act</i> , S.C. 1996, c. 10 <i>Customs Tariff</i> , 1997, c. 36
<b>Description:</b>	<b>Cross-Border Trade in Services</b>  Only persons of Canada using Canadian-registered and either Canadian built or duty-paid trucks or buses, may provide truck or bus services between points in the territory of Canada.



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## Annex II: Non-Conforming Measures

- List of measures with respect to which governments wish to retain flexibility and “policy space”: known as **future measures**.
- For these measures there is no “standstill” obligation: the level of protection can be increased in the future; like an “escape valve”.
- These measures usually involve the most domestically sensitive policy areas.
- There will always be negotiating pressure to keep this list short.



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## Example: Annex II Morocco Schedule, Morocco-US FTA

### ANNEX II SCHEDULE OF MOROCCO

**Sector:** Private Education

**Obligations Concerned:** National Treatment (Article 11.2)  
Local Presence (Article 11.5)

**Description:** Cross-Border Services

Morocco reserves the right to adopt or maintain any measure whatever pertaining to natural persons who provide private preschool, kindergarten, primary, and secondary educational services, including teachers and auxiliary personnel providing educational services in such areas.



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# Example: Annex II Morocco Schedule, Morocco-US FTA

## ANNEX II SCHEDULE OF MOROCCO

<b>Sector:</b>	Communications – Radio and Television Broadcasting Services and Cable Radio and Television Services
<b>Obligations Concerned:</b>	National Treatment (Article 10.3) Performance Requirements (Article 10.8) Senior Management and Boards of Directors (Article 10.9) Market Access (Article 11.4)
<b>Description:</b>	<u>Cross-Border Services and Investment</u>  Morocco reserves the right to adopt or maintain any measure pertaining to investment in facilities for the transmission of radio and television broadcasting and cable radio and television.
<b>Existing Measures:</b>	Royal Decree ( <i>Dahir</i> ) No. 1-03-22 of March 24, 2003 enacting Law No. 62-02  Royal Decree ( <i>Dahir</i> ) No. 1-02-0212 of August 31, 2002



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## Example: Annex II EU Schedule, from Canada-EU FTA (or CETA)

<b>Sector:</b>	Distribution and Health Services
<b>Sub-sector:</b>	Retail sales of pharmaceutical, medical and orthopaedic goods, other services provided by pharmacists
<b>Industry classification:</b>	CPC 63211
<b>Type of Reservation:</b>	Market Access
<b>Description:</b>	<p><b>Investment</b></p> <p>The EU, with the exception of <b>EL, IE, LT, LU, NL</b>, and the <b>UK</b>, reserves the right to adopt or maintain any measure which restricts the number of suppliers entitled to provide a particular service in a specific local zone or area on a non-discriminatory basis in order to prevent oversupply in areas of limited demand. An economic needs test may therefore be applied, taking into account such factors as the number of and impact on existing establishments, transport infrastructure, population density and/or geographic spread.</p> <p>National complementary reservations may be found in the schedules of <b>DE, FI, IT</b> and <b>SE</b>.</p>
<b>Existing Measures:</b>	



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## Example: Annex II – EU Schedule – Particular EU Member, CETA

### Reservations Applicable in Spain

<b>Sector:</b>	Business services
<b>Sub-sector:</b>	Executive search, placement services
<b>Industry classification:</b>	CPC 87201, 87202
<b>Type of Reservation:</b>	Market Access
<b>Description:</b>	<b>Investment</b> Spain reserves the right to restrict the number of suppliers of executive search services.  Spain reserves the right to restrict the number of suppliers of placement services.
<b>Existing Measures:</b>	



# Example: Annex II Canada Schedule – particular Canadian province - Alberta, from Canada-EU FTA

## Annex II

### Canada – Cross-Border Trade in Services and Investment

#### ALBERTA

<b>Sector:</b>	Recreational, cultural, and sporting services
<b>Sub-Sector:</b>	Gambling and Betting
<b>Industry Classification:</b>	CPC 96492
<b>Level of Government:</b>	Provincial - Alberta
<b>Type of Reservation:</b>	Market Access Most-Favoured Nation Treatment

#### Measures:

#### Description: **Cross-Border Trade in Services and Investment**

Alberta reserves the right to adopt or maintain any measure relating to lottery schemes, gaming terminals, games of chance, races, bingos, casinos, or similar activities, that:

- (a) limits the number of covered investments or service providers that may carry out a specific economic activity, whether in the form of numerical quotas, monopolies, exclusive service providers or the requirement of an economic needs test;

- (b) limits the total value of transactions or assets in the form of numerical quotas or the requirement of an economic needs test;
- (c) limits the total number of operations or the total quantity of output expressed in terms of designated numerical units in the form of quotas or the requirement of an economic needs test;
- (d) limits the total number of natural persons that may be employed in a subsector or that a covered investment may employ and who are necessary for, and directly related to, the performance of economic activity in the form of numerical quotas or the requirement of an economic needs test; or
- (e) restricts or requires a specific type of legal entity or joint venture through which an investor may perform an economic activity.

For greater certainty, this reservation is without prejudice to the right of Alberta to impose limitations on the participation of foreign capital when selling or disposing of its equity interests in, or the assets of, an existing government enterprise or an existing government entity pursuant to Canada's Annex I reservation on page I - C- 4.



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## **Role of Annex I and II in the Negative List Approach**

- Difference between the Annexes relates to the difference between existing and future measures.
- Existing measures that do not comply with disciplines of the services agreement must be listed in Annex I and cannot be made more restrictive.
- To maintain the freedom to introduce new measures into a sector, they must be listed in Annex II.

***Either way - List it or Lose it***



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## Treatment of New Services in the Negative List Approach

- The default position in negative list agreements is to automatically grant “new services” both MFN and NT.
- **The right to regulate new services is guaranteed, but not right to regulate them in a discriminatory manner.**
- However, a broad exclusion on new services can be taken out. Example: Annex on “Reservations for Future Measures” from Japan’s schedule in Mexico-Japan EPA - 2005

*Japan reserves the right to adopt or maintain any measure relating to new services other than those recognized or that should have been recognized owing to the then circumstances at the time of entry into force of the Agreement.*

From Annex 7 on Future Measures – ALL SECTORS: NEW SERVICES.



### 3. Hybrid Approaches: Examples

- Philippines-Japan Economic Partnership Agreement: Standstill on existing non-confirming measures for scheduled sectors
- KORUS Financial Services Annex uses positive list for Mode 1 and negative list for Commercial Presence
- India WTO proposal (during Doha Round) to use negative list for Modes 1/2, positive list for Modes 3/4
- International Services Agreement's (TISA) positive list for Market Access; negative list for National Treatment



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## TISA: Hybrid Approach

- GATS positive list scheduling for MA but Negative List scheduling for NT
- NT obligation applies to all sectors and sub-sectors, whether or not a MA commitment is undertaken
- NT obligations must be taken out at level of regulatory application
  - Objective of the TiSA participants is to reach an agreement that will go beyond the GATS but also be compatible with the GATS structure, so as to eventually be incorporated into the WTO – or applied on an MFN basis

Combination of positive and negative listing scheduling elements.



# Summary of Scheduling Approaches and Associated Disciplines : Services Trade

## Agreements

POSITIVE LIST	NEGATIVE LIST	HYBRID APPROACH
<p><b>Market Access</b></p> <p>Voluntary sectoral coverage</p>	<p><b>Market Access</b></p> <p>Comprehensive sectoral coverage</p>	<p><b>Market Access</b></p> <p>Voluntary sectoral coverage</p>
<p>Binding restriction / limitation at level of choice</p>	<p>No restrictions maintained unless indicated in non-conforming measures</p>	<p>Binding at level of applied laws for limitations in schedules for those included sectors</p>
	<p>Binding of restrictions at level of applied laws</p>	
<p><b>National Treatment</b></p>	<p><b>National Treatment</b></p>	<p><b>National Treatment</b></p>
<p>Voluntary sectoral coverage</p> <p>Binding restriction / limitation at level of choice</p>	<p>Non-discriminatory treatment obligation unless otherwise specified in exceptions (bound at applied level)</p>	<p>Mandatory inclusion of all service sectors within national treatment obligation</p> <p>Limitations to national treatment taken out and bound at applied level</p>



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## Some Differences between Positive and Negative Listing

- Scheduling technique
- Negative list approach reverses the presumption of the positive list → From **bottom up** to **top down**.
- Positive list approach as usually practiced is very flexible; governments only need to make commitments on what they wish and at the level of restriction they wish – leaves more “policy space” than the negative list approach
  - However... is this flexibility always a good thing?
  - Do positive list schedules make sense to business?



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## **Stronger Disciplines associated with the Negative List Scheduling Approach**

- Locks in the current level of regulations → no ‘water’ in the schedules as is case with GATS at present; reflects actual reality, so clarity for services exporters
- Consolidates the status quo, offering signals for foreign investors that can encourage more FDI → ensures stability and predictability
- More transparent → shows clearly the non-conforming regulations and where discrimination is practiced
- Entering into a negative list services agreement serves as a review and audit of national regulations.

# Structure of Negative List Services Agreements

**SERVICES – INVESTMENT RELATIONSHIP**



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## Typical Structure of Negative List Services Agreements

- Negative List Agreements contain all chapters within one single legal text, including services and investment
- Annexes of Lists of Non-conforming Measures, or exceptions to the core disciplines are attached to the Agreement
- Goods and services are both covered by the disciplines of several of the chapters in the Agreement, including:
  - Investment
  - Competition Policy
  - Government Procurement
  - Electronic Commerce
  - Transparency



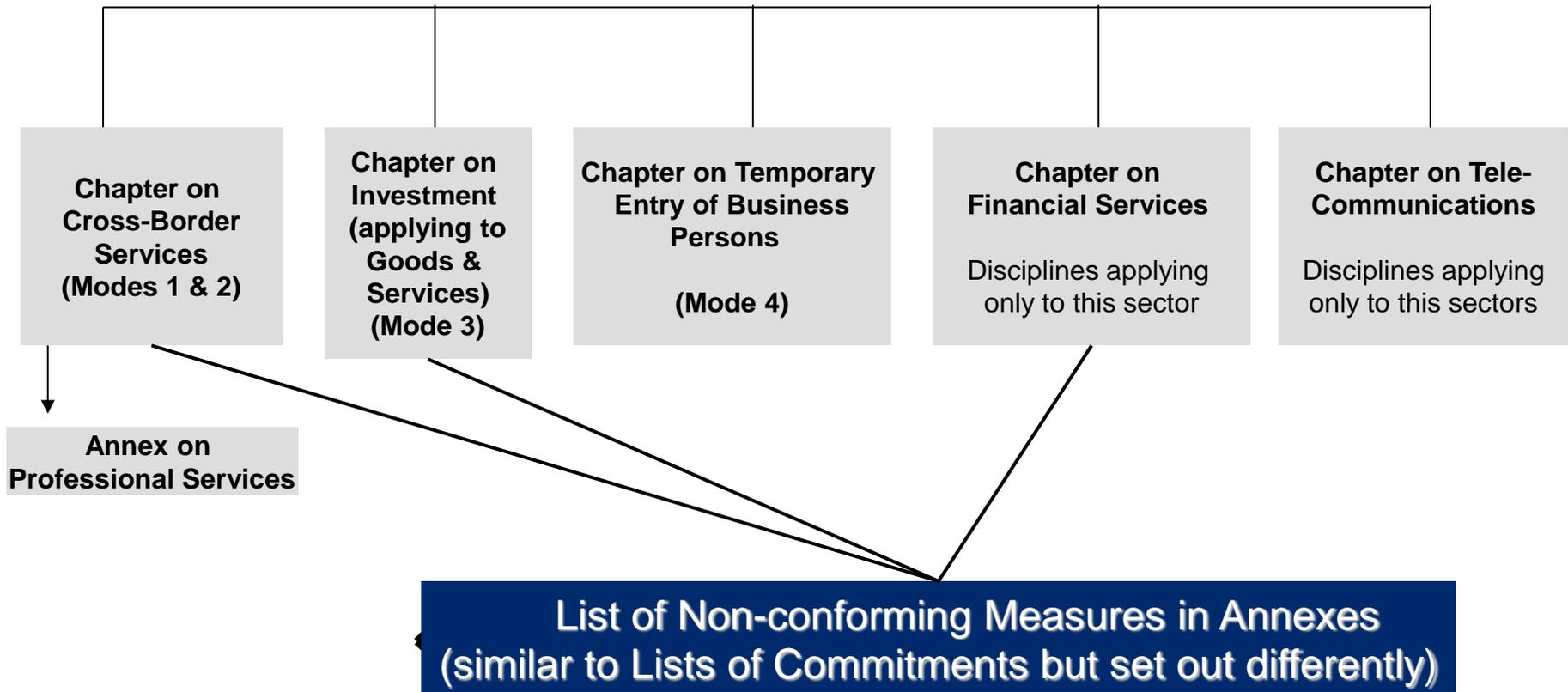
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## **Negative List Agreement Structure/ Content of a typical FTA: Example of SINGAPORE – PERU (2008) – Services are spread throughout the FTA**

- General Definitions
- Trade in Goods (Tariff Schedules)
- Special Agriculture Measure
- Rules of Origin
- Customs
- Sanitary and Phytosanitary Measures
- Technical Barriers to Trade
- Bilateral Safeguards
- **Government Procurement**
- **Investment**
- **Cross-Border Trade in Services (with Annexes for Existing & Future Measures)**
- **Temporary Entry of Business Persons (sometimes with Annex)**
- **Electronic Commerce**
- **Competition Policy**
- **Transparency**
- Administration of the Agreement
- Dispute Settlement
- Exceptions
- Final Provisions



# Structure of typical “negative list” type of FTAs for treatment of Services / Investment





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## **Relationship between Services and Investment in a Negative List Agreement**

### **SERVICES:**

- Modes 1 and 2: Covered in Cross-border Chapter
- Mode 4: Covered in Chapter on Temporary Entry of Business Persons

### **INVESTMENT / SERVICES AND GOODS TAKEN TOGETHER:**

- Mode 3: Included in **Investment Chapter that covers both Goods and Services as well as IP for services**
- **All disciplines in the Investment Chapter apply across the board to all service sectors**



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## Content of Cross-Border Services Chapter in a Negative List Agreement

- Includes disciplines for guaranteeing the freedom of cross-border flows of services (Modes 1 & 2)
- **Core Liberalization Disciplines for Cross-border Services Trade:**
  - MFN;
  - Market Access;
  - National Treatment;
  - **No Local Presence Requirement** (the latter means that a party to the FTA cannot require a services firm to invest through Mode 3 in order to supply services cross-border) –
  - **All exceptions (restrictions) to these core disciplines must be put in Annexes of Non-conforming Measures**



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## Content of Investment Chapter in a Negative List Agreement

- Includes disciplines for Investment Liberalization and for Investor Protection
- **Core Investment Liberalization Disciplines:**
  - MFN;
  - Market Access;
  - National Treatment;
  - No Performance Requirements;
  - Allowance for Senior Management so that a firm can bring a number of high-level personnel with it for its FDI
  - All exceptions (restrictions) to these **core disciplines** must be put in Annexes of Non-conforming Measures



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## Content of Investment Chapter in a Negative List Agreement

- **Investment Protection Guarantees:**
  - Full and Equitable Treatment;
  - Transfers and Payments;
  - Expropriation/ Compensation
- **Broad definition of Investment:** FDI plus Portfolio (stocks and bonds) plus IP/ land associated with the Investment (much broader than GATS Mode 3)
- **NOTE:** Similar content of Investment Chapter in negative list RTAs to that of modern Bilateral Investment Treaties (BITs)
- Investor-State Dispute Settlement (often, not always included; has become very controversial in recent years – not essential for an FTA)



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## **Definition of Investment: Very Broad in Negative List Agreements**

- Includes every asset that an investor owns or controls, directly or indirectly, involving e.g. the commitment of capital or other resources, the expectation of gain or profit or the assumption of risk
- FDI (involving direct participation by the investor in the management of the investment)
- Portfolio Investment (minority holding of shares, bonds or other securities)



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## How to deal with the Investment Regime in a Negative List Services Agreement?

Investment Regime must be specified in the Negative List Approach in the Annexes if it contains reserved sectors or discriminatory elements with regard to:

- Equity limitations
- Foreign investment approval mechanisms
- Land purchases
- Foreign exchange regulations

Additionally, sectors with specific limitations on investment must be included in the Schedules of Non-conforming Measures (for all restrictions not conforming to key liberalization disciplines) in Annex I

Sectoral Schedules of Reserved Sectors (Annex II)

- **The Negative List Approach combines both Services and Investment in the Annexes of Non-conforming Measures**



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## Content of Temporary Entry Chapter in a Negative List Agreement

- Depends very much on the parties to the FTA – can be more or less ambitious
  - **Sets out the conditions for facilitating entry of Business Persons (i.e. qualified personnel)**
    - Categories generally covered are those of : Business Visitors; Traders & Investors; Intra-corporate Transferees; and Professionals
    - No numerical limits associated with these categories
  - **FTA does not cover obligations with respect to either work permits or visas** : No ‘core disciplines’ with respect to this chapter
- **NOTE: Similar entries for Temporary Movement to those that have traditionally been scheduled under Mode 4 in GATS**

Additional and Emerging  
Disciplines/ Chapters often  
included in Negative List  
Services Agreements



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## Standstill

- Requirement under the negative list not to introduce any further discriminatory measures after the FTA has been signed.
- Given the obligatory comprehensive sectoral coverage, this means that there is an effective standstill obligation vis-à-vis new restrictions on services and services suppliers for all FTA members.
- Only exceptions are those sectors/ measures included in Annex II (Future Measures).
- This introduces certainty into trade relations.
- Could be used as well with positive list scheduling.



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## **Binding at level of regulatory application**

- Requirement under the negative list to list all discriminatory measures at the level of regulatory application, or effectively to bind at the level of the 'status quo'
- This means that there cannot be any 'water' in the services agreement with regard to restrictions
- Helps services suppliers understand exactly the nature of the services regulatory regime in the FTA trading partner; listing of restrictions must be accompanied by reference to underlying laws, regulations, decrees, etc.
- Could be used as well with positive list scheduling.



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## Ratchet Clause

- Requirement under the negative list for all new autonomous liberalization – further market opening or reduction in discrimination - introduced subsequent to the coming into force of the FTA, to be applied equally to services and service suppliers from all members of the FTA.
- This introduces a dynamic element into negative list agreements so that all new liberalization is captured with having to renegotiate the market access / national treatment obligations in the future.
- Could be used as well with positive list scheduling.



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## Cross-Border Data Flows

- New FTAs (like TPP, TTIP) may include provisions to prevent restrictions on data transfers and data localization requirements
- Restrictions being put in place often based on reasons of (1) data privacy or (2) domestic sector development : these must be balanced against trade liberalization objectives
- Aim is to protect e-commerce and digital trade from being impaired
- Challenge is to balance policy objectives above with need for firm's financial cost control & risk mitigation?



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## State-owned Enterprises

- Given the prevalence of state-owned enterprises (SOEs) in the services areas, new FTAs (like TPP, TiSA) may include provisions that will apply the obligation for these firms to operate on the same basis as commercial services firms, that is to use price as basis for their competitive behavior
- Objective is to create a level playing field in trade to avoid SOEs using the advantages they often have due to their size or government support
- Example of chp. on SOEs is in 2012 Korea-US FTA



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## Competition Policy

- Usually a separate Chapter in Negative List Agreements covering goods & services
- Negative List Agreements usually contain obligations on monopolies, exclusive service suppliers and business practices
- Applies to any sector with either a monopoly or oligopoly (for latter, it applies where through licensing or other, the government either limits the number of suppliers or restricts their ability to compete)
- Obligation: Government must ensure that such entities do not act inconsistently with competitive obligations



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## Electronic Commerce

- Usually a separate Chapter in Negative List Agreements covering goods & services
- Contains disciplines that prohibit the imposition of customs duties on a good or a digital product that is transmitted electronically across borders
- Guarantees equal treatment (national treatment) to digital products
- Allows for electronic authentication and electronic signatures to be used for digital trade
- Encourages cooperation for online consumer protection
- Obligation: to freely allow for digital trade/ electronic commerce



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## Government Procurement

- Usually a separate Chapter in Negative List Agreements covering goods & services
- Plurilateral Government Procurement Agreement at the WTO is the benchmark
- New GPA II is a more balanced text by leaving open the possibility for developing countries to have:
  - Price preference schemes
  - Offsets (eg. licensing, investment, domestic content requirements)
  - Phase-in of sectors or companies to be covered
  - Higher procurement thresholds



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## **IN CONCLUSION : Many RTAs over past two decades have gone well beyond GATS**

How?

- Have used negative listing scheduling technique, combined with stronger disciplines including in particular those seen above: stand-still provision; comprehensive sectoral coverage; 'ratchet' clause; scheduling restrictions at level of regulatory application and stronger transparency requirements.
- Positive listing scheduling technique or a hybrid approach can be combined with these stronger disciplines as well; it is a question of the degree of ambition one has for a services agreement



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## **IN CONCLUSION : Many RTAs over past two decades have gone well beyond GATS**

- **However, Negative Listing is perceived to have some advantages in addition to that of stronger disciplines  
What are they?**
- Schedules, or Annexes of Non-conforming Measures are easier to read; thus easier to understand on part of private sector/ services firms
- Greater transparency, especially when non-conforming measures are well-defined; references to actual laws & regulations also included
- May promote greater liberalization through need to undertake 'regulatory audit' prior to negotiating



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# Thank You

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