

TRAINING COURSE ON TRADE IN SERVICES NEGOTIATIONS

31 March-1 April 2016

Session 4: Conducting services negotiations-
modalities and implications of different scheduling
approaches *

Dr. Mia Mikic, Chief, TPAS, TIID, ESCAP

mikic@un.org

* Based on materials developed by WTO, ESCAP and Sherry Stephenson
(see list of references for details)

Back to basics of GATS' schedules

STRUCTURE AND TERMINOLOGY

A. Each schedule has 4 columns

1. Description of committed sector or sub-sector
2. Market Access (MA) limitations
3. National Treatment (NT) limitations
4. Additional commitments

B. For each sector/sub-sector, MA and NT commitments per mode of supply

C. Levels of commitments

- **NONE**: no limitations (full commitment to liberalization)
- **UNBOUND**: no commitment, reserves right to use any measures inconsistent with MA or NT
- **LIMITATION**: specific measure(s) departing from full MA and NT that may be maintained or adopted

Illustration

Modes of supply: (1) Cross-border supply (2) Consumption abroad (3) Commercial presence (4) Pres. of natural persons

Sector or sub-sector	Limitations on market access	Limitations on national treatment	Additional commitments
I. HORIZONTAL COMMITMENTS			
	(...)	(...)	
II. SECTOR-SPECIFIC COMMITMENTS			
	(1)	(1)	
	(2)	(2)	
	(3)	(3)	
	(4)	(4)	

Outline

What determines a quality and effectiveness of services agreement? A combination of:

- **Negotiating modality** (technique) used to schedule market access commitments (liberalization)
- **Modal and sectoral coverage**

[and of course DISCIPLINES included (substance) but that will not be covered in this session]

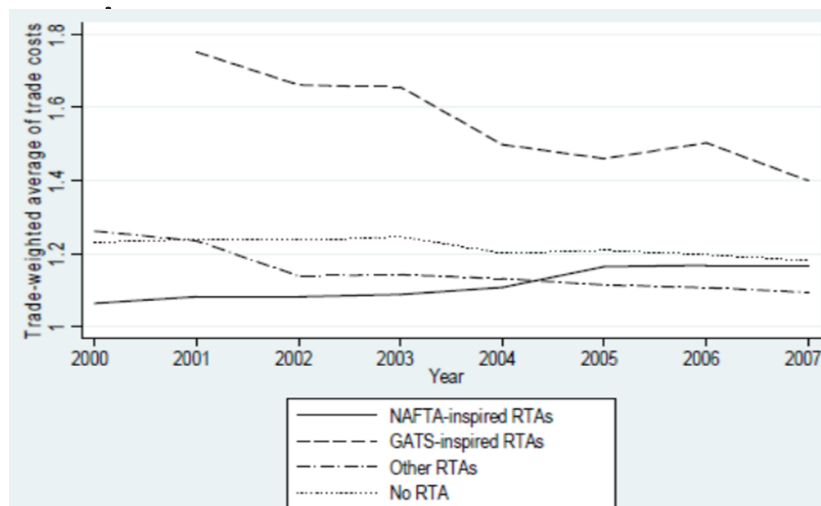
No two services agreements are the same!

Negotiating modality

Review of scheduling techniques/ approaches

Available types

- **Positive list or bottom up**- it is based on WTO GATS; mostly adopted in South-South agreements and deemed to be more realistic and easier, but not necessarily bringing more benefits
- **Negative list or top down**- it is based on NAFTA (and similar agreements) and has been increasingly used in N-N and North-South; deemed less realistic but more desirable due to lower



On average, trade costs are lower in negative list agreements

Source: Stephenson (2015)

- **Hybrid approach**- combination of the above two approaches; used also in TiSA

Positive list or bottom up approach (1)

- Voluntary coverage: Commitments do not apply unless the sector/sub-sector is inscribed (listed) in the schedule
- Commitments are entered for both Market Access (MA) – mostly quantitative restrictions - and National Treatment (NT) – mostly discriminatory measures- in such a [negative] way to express what is inconsistent with the trade agreement [except for mode 4]

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) Negative Element:	(2)	
	(3) inscription	(3)	
	(4) of any	(4)	
	(1) limitations on	(1)	
	(2) Market Access	(2)	
	(3) and	(3)	
	(4) National Treatment	(4)	

Positive list or bottom up approach (2)

- All limitations to MA and NT MUST be listed except in two extreme cases:
 1. Full free trade – full commitment to maintain no restrictions/limitation to foreign service (GATS language is NONE)
 2. No opening at all – no commitment to liberalization / complete regulatory freedom (GATS language is UNBOUND)
- Market access limitations (GATS Art. XVI:1)
 - Six limitations must be listed if partial commitments are made (GATS Art. XVI:2)
 - Covers both discriminatory and non-discriminatory measures
- National treatment limitations (GATS Art. XVII:1)
 - Covers de jure and de facto discrimination
 - Includes any measure that has an impact on competition so to adversely affect imports / foreign supplier

Positive list or bottom up approach (4)

What are the **market access limitations** (GATS Art. XVI: 2) requirements?

- (a) Number of service suppliers* - e.g. numerical quotas, monopolies, exclusive service suppliers
- (b) Value of transactions or assets* - e.g. numerical quotas or ENT requirements
- (c) Number of operations or quantity of output*
- (d) Total number of natural persons* - e.g. the number of people to be employed
- (e) Type of legal entity or joint venture –
- (f) Foreign capital participation – e.g. maximum % for foreign shareholding or total value of individual or aggregate foreign investment

* (a) to (d) apply to non-discriminatory restrictions as well. ENT= economic needs test

Quiz (art. XVI limitations)

- Foreign investors can hold up to 51% of the capital
- The total number of taxi licenses is limited to 75
- Restrictions on broadcasting time for foreign films
- At least 85% of the employees in a joint venture must be nationals
- Foreign companies are required to establish subsidiaries
- Foreign banks must hold more than 30% of total domestic assets of all banks

Positive list or bottom up approach (5)

Limitations on **national treatment** (Art. XVII)

- each member shall extend “treatment no less favourable than that it accords to its own like services and service suppliers”
- ... “either formally identical treatment or formally different treatment” ...
- relevant benchmark: no modification of “the conditions of competition” in favour of own like services or services suppliers

Positive list or bottom up approach (6)

Typical **national treatment** (Art. XVII) limitations

- Discriminatory subsidies and other fiscal measures
- Nationality and residency requirements (mode 3)**
- Discriminatory licensing/registration/qualification/traning requirements
- Technology transfer requirements
- prohibitions on foreign land/property ownership
- Local content requirements

** the scheduling of residency requirements should be decided on a case-by-case basis and in relation to the activity concerned (S/L/92, para 14).

Positive list or bottom up approach (7)

In sum, GATS services schedules should be entered comprehensively:

- Horizontal limitations PLUS
- Sector specific commitments:
 - limitations on MA and on NT*
 - when there is limitation under both, listed under MA column or repeated in both*
- Additional commitments are voluntary.
 - Should refer to measures other than those subject to Art XVI and XVII including on qualifications, standards and licensing matters.*
 - Should indicate positive undertakings, not additional limitations or restrictions.*
 - can be unique to a member or members can agree to a common set of additional commitments (e.g. The Telecom Reference Paper)*
- And list of ART II (MFN) Exemptions

Positive list or bottom up approach (8)

List of **Article II (MFN) exemptions**

Each country is required to provide five types of information for each exemption:

1. description of the sector or sectors in which the exemption applies
2. description of the measure, indicating why it is inconsistent with Article II
3. the country or countries to which the measure applies
4. the intended duration of the exemption
5. the conditions creating the need for the exemption

Positive list or bottom up approach (9)

Horizontal commitments

Apply to the services trade in all scheduled sectors unless otherwise specified.

- Aim to avoid repetition
- Apply to trade in services in all scheduled sectors unless otherwise specified
- Take the form of a limitation (on market access or national treatment) or positive undertaking (as additional commitment)

Negative list or top down approach (1)

- (approach used in GATT – everything liberalized unless otherwise specified)
- first used by Australia and new Zealand in ANCERTA, then in NAFTA
- assumes full liberalization: free trade (and investment) in services
- BUT annexes of non-conforming measures provide flexibility to the comprehensive coverage assumed
- ANNEX I – STAND-STILL schedule: SPECIFIC 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

Negative list or top down approach (2)

ANNEX I: Non- conforming measures

- The party's 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
- No new measures which are inconsistent with the text of the agreement can be introduced after finalizing the agreement → a complete services STANDSTILL
- IF RESTRICTIONS (DISCRIMINATORY TREATMENT) ARE NOT LISTED IN ANNEX 1, THEY MUST BE LIBERALIZED

Negative list or top down approach (2)

ANNEX II: Non-conforming measures

- list of measures with respect to which governments with 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, serves as an escape clause
- These measures usually involve the most domestically sensitive policy areas
- Negotiating pressure to keep this list SHORT

Negative list or top down approach (3)

- In sum:
- the difference between Annex I and Annex II 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
- there is a freedom to introduce new measures into a sector if they are listed in Annex II

LIST IT OR LOSE IT

Negative list or top down approach (4)

RATCHET MECHANISM

Many negative list agreements feature a **ratchet** mechanism aimed at ensuring that any autonomous measure of a liberalizing nature enacted AFTER entry into force or, where envisaged, between periodic negotiating rounds, becomes the liberalizing party's commitment under the agreement, with market-opening benefits automatically extended to agreement's partners on an MFN basis in the plurilateral agreements.

Negative list or top down approach (4)

CONCERNS about negative-list approach

- Administratively burdensome, especially for developing countries as it requires countries to perform a comprehensive audit of existing trade and restrictive measures
- the default position is to automatically grant “new services” both MFN and NT
- the right to regulate new services is guaranteed but not tight to regulate in a discriminatory manner
- thus countries opt for a broad exclusion (carve-out) on new services , e.g. Mexico-Japan)

Hybrid approach (1)

- Combination of the best properties of positive and negative list approaches, i.e. positive list of sectors plus scheduling the regulatory status quo (Japan PTAs, EU-CARICOM)
- mix the positive and negative list approaches within the same agreement (e.g. positive listing for cross border trade (mode 1) and negative listing for commercial presence (mode 3); or even within broad sector such as negative listing for banking services and positive listing for insurance services

TiSA has adopted a hybrid approach:

- GATS positive list scheduling for MA but negative list scheduling for NT
- NT obligation applies to all sectors and subsectors, whether or not a MA commitment is undertaken
- NT obligations must be taken out at level of regulatory application

Summary table - modalities

POSITIVE LIST	NEGATIVE LIST	HYBRID APPROACH
MARKET ACCESS	MARKET ACCESS	MARKET ACCESS
Voluntary sectoral coverage	Comprehensive sectoral coverage	Voluntary sectoral coverage
Binding restriction / limitation at level of choice	No restrictions maintained unless indicated in non-conforming measures	Binding at level of applied laws for limitations in schedules for those included sectors
	Binding of restrictions at level of applied laws	
NATIONAL TREATMENT	NATIONAL TREATMENT	NATIONAL TREATMENT
Voluntary sectoral coverage	Non-discriminatory treatment obligation unless otherwise specified in exceptions (bound at applied level)	Mandatory inclusion of all service sectors within national treatment obligation
Binding restrictions / limitation at level of choice		Limitation to national treatment taken out and bound at applied level

Final comments on scheduling approaches

- Negative list approach reverses the presumption of the positive list → from bottom up to top down
- Positive list approach is very flexible as governments only need to make commitments on what they wish to liberalize and at the level of liberalization they wish, so it leaves more “policy space”
- Negative list approach locks in the current level of regulations → no water in the schedules as in case with GATS at present (what you see, you get: clarity for services exporters)
- Negative list approach consolidates the status quo, offering signals for foreign investors that can encourage more FDI (stability and predictability)
- Negative list approach is more transparent as it shows non-conforming regulations and where discrimination is practiced

Structure

Modal and sectoral coverage

Typical structure (1)

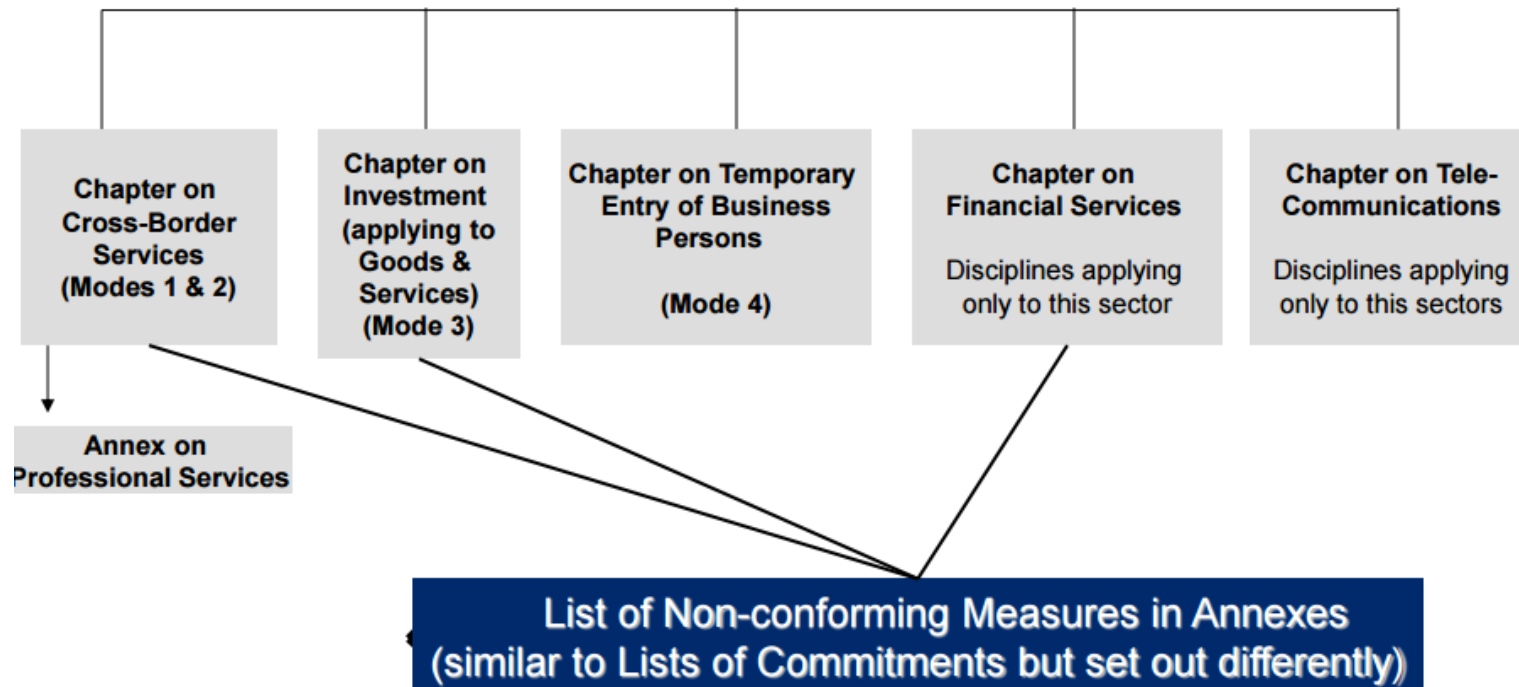
- Negative list agreements tend to contain all chapters within ONE single legal text, including services and investment
- List of non-conforming measures (or exceptions to the core disciplines) attached to the agreement
- Goods and services are both covered by the disciplines of several of the chapters in the agreement, including:
 - investment
 - competition policy
 - government procurement
 - electronic commerce
 - transparency

Typical structure (2)

- services often spread throughout the FTA (Singapore-Peru, 19 chapters and 7 dealing with services)
- relationship between services and investment in a negative list agreement (session 6):
 - services modes 1 and 2 covered in cross-border chapter
 - services mode 4 covered in chapter on temporary entry of business persons (or similar)
 - services mode 3 covered in investment chapter as it deals with both goods and services and IP for services
 - all disciplines in the investment chapter apply across the board to all services sectors

Typical structure

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



In conclusion

- many services agreements done over last 2 decades have gone beyond GATS and contributed to transparency in the implementation of regulations
- negative list approach perceived to have some advantages and stronger disciplines which may help bind reforms and prevent reversals
- one of the benefits is forcing countries to undertake “regulatory audit” (assessment of the domestic regulatory environment)
- more business friendly
- Services liberalization should be associated with a serious effort to open and restructure domestic production.

Illustrative findings cited in Adlung and Mamdouh (2013)

Table 2. Commitments in positive-list and negative-list RTAs compared to GATS schedules^a
(a) Positive-list agreements ('bottom-up' scheduling)

Agreement	Year	Sector-specific departures from GATS schedules				Cross-sectoral GATS –	MFN clause
		Market Access (%)		National Treatment (%)			
		GATS +	GATS –	GATS +	GATS –		
ASEAN - Korea	2009	19.0	0.9	11.5	1.9	■	
China - Singapore	2009	28.6	0.4	20.0	0.0	■	
EFTA - Chile	2004	29.5	7.8	33.3	7.8		■
EFTA - Korea	2006	37.0	0.3	41.2	0.1		■
EFTA - Mexico	2001	0.9	0.0	0.4	0.0	■	■
EFTA - Singapore	2003	23.6	0.2	16.1	1.9	■	■
EC - Chile	2003	44.3	0.2	36.9	0.3	■	
EC - Mexico	2000	1.2	0.0	0.3	0.0	■	■
Japan - Brunei D.	2008	19.8	2.4	17.5	2.5	■	■
Japan - Malaysia	2006	28.3	1.9	25.8	1.6	■	■
Japan - Philippines	2008	34.6	2.4	33.7	2.1	■	■
Japan - Singapore	2002	46.2	1.8	34.8	9.1	■	
Japan - Thailand	2007	31.7	1.3	30.2	4.6	■	
Japan - Viet Nam	2009	15.6	1.4	14.9	1.3		■
Korea - Singapore	2006	62.0	7.3	56.7	6.0	■	
N. Zealand - China	2008	18.2	0.3	17.9	0.0	■	
N. Zealand - Singapore	2001	34.2	3.4	25.7	10.9	■	
Thailand - Australia	2005	13.3	15.4	13.1	16.6	■	
US - Jordan	2001	17.6	0.1	17.4	1.0		
Range		0.9 - 62.0	0.0 - 15.4	0.4 - 56.7	0.0 - 16.6		
Average (19 RTAs)		26.6	2.5	21.9	3.5		

(b) Negative-list agreements ('top-down' scheduling)

Australia - Chile	2009	38.5	0.8	63.1	0.5	■	
Canada - Chile	1997	75.0	5.9	71.9	6.9	■	
Canada - Peru	2009	65.7	4.0	82.6	6.2	■	
Chile - Mexico	1999	57.2	4.8	68.9	6.6	■	
Costa Rica - Mexico	1995	72.4	5.6	72.8	7.2	■	■
El Salvador - Mexico	2001	73.3	2.4	72.3	5.2	■	
Guatemala - Mexico	2001	70.2	0.8	70.7	5.6	■	■
Honduras - Mexico	2001	71.1	2.5	71.9	5.6	■	■
Japan - Chile	2007	57.3	1.6	59.8	1.4	■	
Japan - Mexico	2004	57.7	1.2	57.0	4.4	■	
Korea - Chile	2004	63.1	7.6	66.0	7.6	■	■
Mexico - Nicaragua	1998	0.6	0.0	0.6	0.0	■	■
NAFTA	1994	62.6	5.8	59.5	8.5	■	■
Panama - Chile	2008	42.0	13.7	48.5	13.0	■	
US - Australia	2005	54.1	1.2	54.2	1.6	■	
US - Bahrain	2006	60.1	0.0	66.9	2.4	■	
US - Chile	2004	47.3	1.9	60.6	1.7	■	
US - Morocco	2006	69.5	1.0	69.0	2.7	■	
US - Oman	2009	45.9	2.0	60.0	2.1	■	
US - Peru	2009	67.9	1.2	68.1	0.3	■	
US - Singapore	2004	63.8	1.4	62.3	9.3	■	
Range		0.6 – 75.0	0.0 - 13.7	0.6 - 72.8	0.0 - 13.0		
Average (21 RTAs)		57.9	3.1	62.2	4.7		

a For explanations of the concepts used see Box A.2 (Annex).

Source: Calculations based on Miroudot et al (above n 26) and additional information provided by S. Miroudot.

Box A.2 Measuring GATS-plus and -minus elements (Table 2)

'**GATS +** ' indicates the existence of new or improved commitments as compared to the GATS schedule of at least one of the parties involved (the figures given for each RTA reflect the average for the parties). An improvement could consist of the conversion of a non-binding or of a partial commitment under the GATS into a full, a partial or an improved partial commitment under the RTA concerned. In order to measure new or improved bindings, the authors looked at the market access and national treatment commitments scheduled under the four modes of supply for any of the 155-odd sectors identified in the widely used Services Sectoral Classification List W/120. This means that 1'240 scheduling options were taken into account for each party (155 subsectors, 4 modes of supply and two types of commitments: market access and national treatment). In order to capture higher levels of partial commitments, the authors considered whether and how nine different types of limitations had been changed compared to a party's GATS schedule. The percentages reflect the shares of RTA commitments, out of the 1'240 options, which improve over a party's GATS schedule.

'**GATS –** ' reflects an opposite move: existing GATS commitments were downgraded in the RTA from full to partial commitments or to unbound.

'**Cross-sectoral GATS –** ' denotes the existence of horizontal GATS-minus provisions that apply across all sectors covered by the RTA concerned.

'**MFN clause**' indicates that the RTA contains a cross-reference to the parties' GATS schedules which clearly neutralizes any GATS-minus provisions. More general clauses, best endeavours-type, have been ignored in this context.

Selection of RTAs: Out of the 56 RTAs involving OECD Members, as examined by Miroudot et al, we selected 40 agreements that consistently used either a positive-list ('bottom up') or negative-list ('top down') scheduling approach. Agreements containing elements of both approaches were not taken into account.

Selected references

- Adlung, R. and Mamdouh, H. (2013) How to design trade agreements in services: top down or bottom up? WTO Staff Working Paper ERSD-2013-08
- Low, P. (2016) Rethinking Services in a changing world, ICTSD, The E15 initiative paper, January
- Matoo, A. Stern, R. and Zanini, G. eds (2008) A Handbook of International Trade in Services, Oxford University Press
- Saez, S. (ed) (2010) Trade in Services Negotiations, A guide for developing Countries, The World Bank <http://go.worldbank.org/DLM9JWE9A0>
- Sauve, P. and Lacey, S. (2013) A Handbook on Negotiating PTAs: Services Liberalization, UN ESCAP
- Stepenson, S. (2015) “Overview of various approaches to services liberalization”, Nairobi, Kenya (USAID)
- WTO/ESCAP (2014) Regional workshop on trade in services for Asian economies. Workshop material <http://www.unescap.org/events/regional-workshop-trade-services-asian-economies>