



International
Trade
Centre



Australian Government
Department of Foreign Affairs and Trade



LDC Services: Geneva practitioners' seminar series on making sense of the GATS and applying good practices in services negotiations

Seminar 5: “Services in bilateral, regional and plurilateral negotiations: implications for the GATS and for LDCs”

Session 1: **Services in FTAs: Evolving structure, new directions)**

Andréa Spear

Introduction to Trends in Services Agreements



GATS Principles

Nondiscrimination

embodied in MFN and National Treatment:

- MFN: Treat *all* nations as you would treat your most-favoured nation: favour one, favour all
- NT: Treat imported services and foreign service providers as you treat your local services and service providers

GATS Principles cont.

Transparency

- Prompt publication or wide notification of measures affecting trade in services
- Prompt notification to WTO
- Prompt response to enquiries from other WTO members
- Notification to WTO if other members not complying

GATS Principles cont.

GATS seeks:

- expansion of services trade through **progressive liberalisation** and increasingly **transparent and predictable rules and regulations**
- to promote all members' interests on a **mutually advantageous basis**
- to secure a **balance of rights and obligations**
- to respect members' **right to regulate** the supply of services within their territories in order to meet national policy objectives
- Growing participation of **developing countries** in services trade.

Main GATS Exclusions

Exceptions from MFN:

1. Members of WTO-consistent RTAs
2. Listed MFN exemptions
3. Recognition of professional qualifications

Air transport services

Services provided in exercise of government authority

Prudential, security and similar types of actions

Exceptions from Transparency:

Confidential information that would impede law enforcement, damage public interest or prejudice specific commercial interests

The Sectors

1. **Business Services** (Professional, Computer, R&D, Real estate, Rental/leasing of machinery & equipment, Other)
2. **Communication Services** (Postal, Courier, Telecoms, Audiovisual, Other)
3. **Construction & Related Engineering Services**
4. **Distribution Services** (Agents, Wholesale, Retail, Franchising)
5. **Educational Services** (Primary, Secondary, Higher, Adult Ed, Other)
6. **Environmental Services** (Sewerage, Refuse-disposal, Sanitation, Other)
7. **Financial Services** (Insurance, Banking & finance, Other)
8. **Health & Social Services** (Hospitals, Other human health, Social services, Other)
9. **Tourism & Travel Services** (Hotels & restaurants, Travel agencies & tour operators, Tourist guides, Other)
10. **Recreational, Cultural & Sporting Services** (Entertainment, News agencies, Culture, Sport, Other)
11. **Transport Services** (Maritime, Internal Water-ways, Air, Space, Rail, Road, Pipeline, Auxiliary services, Other)

The Modes

Mode 1: crossborder trade (services flow across the border via telecommunications, post, etc)

Mode 2: consumption abroad (eg, residents of one member country travel to another for tourism, education, healthcare)

Mode 3: commercial presence (service providers of one member set up operations in another – foreign investment)

Mode 4: movement of natural persons (temporary entry of individual service suppliers)

Positive List Approach

The GATS utilises a ‘positive list’ approach in the *Schedules of Specific Commitments*.

This opens to market access and national treatment only the specific sectors selected by each Member for inclusion. In other words, Members are free to choose which sectors they wish to liberalise (or negotiate on) at the time of negotiation.

The Schedule lists all measures, etc, that limit market access and national treatment in these specific sectors.

This is why the ‘positive list approach’ is called a ‘hybrid approach’ by some. In other quarters, a ‘hybrid approach’ involves using positive listing for some sectors and negative listing for others.

GATS Articles

Article I: Scope, sectoral coverage and definitions

Article II: MFN (& review MFN exemptions)

Article III: Transparency

Article IV: Increasing DCs' Participation

Article V: Economic Integration/RTAs/BTAs

Article VI: Domestic Regulation

Article VII: Recognition

Article VIII: Monopolies/Exclusive Suppliers

Article IX: Business Practices

Article X: Emergency Safeguards

Article XI: Payments & Transfers

Article XII: Balance of Payments Safeguards

Article XIII: Government Procurement

Article XIV: Exceptions

Article XV: Subsidies

GATS Articles cont.

Article XVI: Market Access

Article XVII: National Treatment

Article XVIII: Additional Commitments

Article XIX: Negotiations (guidelines, etc)

Article XX: Specific Commitments Schedules

Article XXI: Modification of Schedules

Article XXII: Consultation

Article XXIII: Dispute Settlement

Article XXIV: Council for Trade in Services

Article XXV: Technical Cooperation

GATS Article 5 on RTAs

Members are free to enter into agreements **liberalising** services trade, provided these:

- (1) have 'substantial' sectoral coverage
- (2) do not *a priori* exclude any mode of supply
- (3) provide for the elimination of 'substantially all discrimination' between the parties.

Developing countries have special dispensation for preferential treatment and LDCs have the waiver.

Mode 4 Segments

Business Visitors: People who come for business meetings, to negotiate sales, to set up a commercial establishment, but do not receive any income in the country

Intra-Corporate Transferees: Executives, managers, specialists (including technical specialists) transferred to manage a company's investment

Contractual Service Providers: Specialists sent by their companies to implement a contract with a local company or public service entity

Independent Professionals: eg, architects, lawyers, IT technicians, engineers, scientists, medical specialists, teachers, etc) who come to work under personal arrangements with a firm or public organisation

FTAs: Typical Services Chapter Structure

1. Scope
2. Definitions
3. National Treatment
4. MFN
5. Market Access: Same 6 limitations as GATS
6. Additional Commitments
7. Schedule of Specific Commitments
 - Positive List: GATS-style
 - Negative List: Existing, Future Measures, Reserved lists (*skip to next slide briefly*)

If one party insists on a positive list approach, and the other prefers negative, it may insist on a chapter called 'Transparency' obliging the first party to prepare a 'negative list' of measures. This is a way to get the first party to negotiate on such a list in any future review, and is indeed a path to revise the entire approach in future
8. Recognition
9. Domestic Regulation
10. Monopolies and Exclusive Service Suppliers
11. Business Practices
12. Payments and Transfers
13. Restrictions to Safeguard the BoP
14. 'Transparency': means 'negative list'
15. Denial of Benefits: discrimination
16. Subcommittee on Trade in Services: administrative – but important to give it 'teeth'
17. Review of Commitments: renegotiations, autonomous liberalisation (ratcheting)
18. ITC Cooperation article: Often little or no S&D – rather reference to the overall Cooperation Chapter if such exists.



Negative List Approach

Negative listing is becoming increasingly common in FTAs. Some say it provides greater transparency, but that is not necessarily the case.

The negative-list approach opens up all sectors to market access and national treatment except those on the List(s) of Nonconforming Measures.

FTAs usually feature two sets of negative lists ('lists of nonconforming measures'):

- Existing Measures (which may only be improved)
- Future Measures (basically 'unbound' measures – and sectors - which may be changed; ie, a country can keep its 'policy space' for these sectors and measures).

Nonconforming measures list(s) include all sector-specific measures and other restrictions that do not comply with full openness (therefore called noncomplying or nonconforming measures). These then form the basis for future negotiations.

Parties are not allowed to make these measures more restrictive, unless specifically stated. That is, they agree to a '**standstill**'.

If Parties make them *less* restrictive, they must '**bind**' them at the less restrictive level ('**ratchet mechanism**').

If measures are 'applied' in a less restrictive way than stipulated in the law, the binding must be at the applied level ('**status quo**'). This means that, unlike in the GATS, there is no policy space between applied and bound levels. They must be one and the same.

Positive or Negative List?

Countries are advised to:

- use a GATS-style positive-list approach for lightly or non-regulated sectors and subsectors where a government wishes to maintain policy space.
- use a negative list approach only for well-regulated sectors,

Commitments

Modes 1 and 2: standing alone?

Mode 3 vs Investment Chapters

Mode 4 vs Labour Mobility or Movement of Natural Persons
Chapters