

Introduction to Trade in Services under Bilateral and Regional Trade Agreements

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Plan of Lecture

- 1. Scheme of Regulation of Trade in Services under WTO GATS – with *positive* list
- 2. Scheme of Regulation under CPTPP – with *negative* lists
 - 2.1 Cross- Border Trade in Services
 - 2.2 Investment Access
 - 2.3 Investor – State Dispute Settlement
- 3. Other FTAs

Take the UN Provisional Central Product Classification ('CPC'), eg.

964			Sporting and other recreational services
	9641		Sporting services
		96411	Sports event promotion services
		96412	Sports event organization services
		96413	Other sporting services
	9649		Other recreational services
		96491	Recreational park and beach services
		96492	Gambling and betting services
		96499	Other recreational services n.e.c.

Used the CPC to create the GATT Secretariat's Services Classification List Doc MTN.GNS/W/120. with 12 Main Services Sectors

1. Business Services
2. Communications services
3. Construction and related engineering services ,
4. Distribution services,
5. Education services ,
6. Environment services,
7. Financial services,
8. Health related services,
9. Tourism and Travel related services
10. Recreation, Cultural and Sporting services
11. Transport Services
12. Other Services not included elsewhere

With the 12 main sectors divided into 160 subsectors each identified by the corresponding CPC number. Eg.

- 1. BUSINESS SERVICES
 - A. Professional Services
 - a. Legal Services (CPC 861)
 - b. Accounting ... services (CPC 862)
 - Etc.,
 - 7. FINANCIAL SERVICES
 - A. Insurance (CPC 812)
 - a. Life, accident and health insurance (CPC8121)
 - b. Non-life insurance services (CPC8129)

Next, unlike supply of imported goods, we need to consider the possible ways of supplying services

- Both the Provider and the Customer stay in their own territory. (call this Mode 1)
- The Customer goes to the Provider's territory (Mode 2)
- The Provider sets up a place of business in the Customers' territory (Mode 3)
- The Provider goes to the Customer's territory temporarily (Mode 4)
 - Think of some examples of each mode of supply.
 - Business firms use all of these modes of supply.

GATS applies to:

- Article I:1 “This Agreement applies to measures by Members affecting trade in services”
- Article I:2 “..., trade in services is defined as the supply of a service:
 - (a) from the territory of one Member into the territory of any other Member;
 - (b) in the territory of one Member to the service consumer of any other Member;
 - (c) by a service supplier of one Member, through commercial presence in the territory of any other Member;
 - (d) by a service supplier of one Member, through presence of natural persons of a Member in the territory of any other Member.

Took a form of the GATT Article XI:1 prohibition on restrictions on imports other than duties by adding GATS Article XVI:2

- In sectors where market access commitments are undertaken, the measures which a Member “shall not maintain or adopt” ... unless otherwise specified in the Schedule
 - (a) Limits on number of Service suppliers [see text]...
 - (b) Limits on total value of service transactions or assets
 - (c) Limits on total quantity of service output
 - (d) Limits on the number of persons that can be employed
 - (e) Restrictions as to type of legal entity
 - (f) Limitations on foreign capital in value or percentage.

Indonesia – GATS Schedule of Specific Commitments

Modes of Supply: 1) Cross Border; (2) Consumption Abroad (3) Commercial Presence (4) Presence of Natural Persons

Here, **Article XVI:2** could not apply to supply of Insurance Broking Services through Mode 1, the cross border mode of supply because even though the sub-sector is listed in the schedule, in column 1 for Limitations on Market Access, Mode 1 is marked Unbound.

Sector or Sub sector	Limitation on Market Access	Limitation on National Treatment	Additional Commitments
FINANCIAL SERVICES			
Insurance Brokerage (CPC8140)	1) Unbound 2) None 3) At least one director ... 4) Unbound except for	1) Unbound 2) Unbound 3) Higher paid up capital is required ... 4) As specified in the Horizontal Measures	

But Article XVI:2 provides “unless otherwise specified in its Schedule”

- So even if the Services sector and mode of services is listed in the Members Schedule,
- The Member can qualify the rules in Article XVI:2 by inserting qualifications or limitations in the Schedule in the column for Limitations on Market Access.
- If the Member inserts the word “None”, then the rules in Article XVI:2 apply without any qualification or limitation.
- But see examples of qualifications:

Philippines – GATS Schedule of Specific Commitments

Modes of Supply: 1) Cross Border; (2) Consumption Abroad (3) Commercial Presence (4) Presence of Natural Persons

Here – Article XVI:2(f) is qualified So measures limiting foreign equity to the 40% specified in the Schedule would not breach Article XVI:2(f).

Sector or Sub sector	Limitation on Market Access	Limitation on National Treatment	Additional Commitments
TOURISM SERVICES			
Travel Agencies	1) Commercial presence is required 2) None 3) Subject to foreign equity limitation of 40 per cent 4) Managers and executives must be resident Filipino citizens.	1) None 2) None 3) None 4) None	

Took a form of GATT Article III on national treatment, by adding GATS Article XVII

- “In the sectors inscribed in its Schedule, and subject to any conditions 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.”

Malaysia – GATS Schedule of Specific Commitments

Modes of Supply: 1) Cross Border; (2) Consumption Abroad (3) Commercial Presence (4) Presence of Natural Persons

Here – **Article XVII** could apply to legal services in the subsector described but could not apply to supply of any other legal services relating to **host country law**

Sector or Sub sector	Limitation on Market Access	Limitation on National Treatment	Additional Commitments
BUSINESS SERVICES A. Professional Services			
Legal Services Covering home country law, international law and offshore corporation laws of Malaysia (CPC8619)	1) None 2) None 3) Only through 4) Unbound except as indicted in ... the horizontal section.	1) None 2) None 3) None 4) Unbound except ...	

But Article XVII provides:

“and subject to any conditions and

qualifications set out [in its Schedule]”

- So even if the Services sector and mode of services is listed in the Members Schedule,
- The Member can qualify the rule in Article XVII by inserting qualifications or limitations in the Schedule.
- If the Member inserts the word “None”, then the National Treatment rule in Article XVII applies without any qualification or limitation.
- But see examples of qualifications:

Indonesia – GATS Schedule of Specific Commitments

Modes of Supply: 1) Cross Border; (2) Consumption Abroad (3) Commercial Presence (4) Presence of Natural Persons

A limitation to 5 foreign suppliers is inconsistent with both XVI:2(a) and XVII..
The qualification in the column for market access qualifies Article XVI:2 and also qualifies article XVII.

Sector or Sub sector	Limitation on Market Access	Limitation on National Treatment	Additional Commitments
COMMUNICATION SERVICES			
<u>Telecommunications Services</u> Voice mail service (CPC 7523)	1) None 2) None 3) Access granted for five foreign service provider companies, in addition to existing companies. 4) Unbound except for	1) Unbound 2) Unbound 3) Higher paid up capital is required of foreign service suppliers than of domestic service suppliers [until 2020] 4) As specified in the Horizontal Measures	

3rd Market Access rule in GATS Article XVI:1

- “With respect to market access through the modes of supply identified in Article I, each Member shall accord services and service suppliers of any other Member treatment no less favourable than that provided for under the terms, limitations and conditions agreed and specified in its Schedule.”
- For example:

China - Schedule of Specific Commitments

Modes of Supply: 1) Cross Border; (2) Consumption Abroad (3) Commercial Presence (4) Presence of Natural Persons

Sector or Sub sector	Limitation on Market Access	Limitation on National Treatment	Additional Commitments
COMMUNICATIONS			
D. Audiovisual Services - Cinema Theatre Services	1) None 2) None 3) Upon accession, foreign services suppliers will be permitted to construct and/or renovate cinema theatres, with foreign investment no more than 49 per cent. 4) Unbound except as indicated in the horizontal section.	1) None 2) None 3) None 4) Unbound except as indicated in the horizontal section.	

So operation of all GATS market access rules depends on content of Schedules.

- In practice, Schedules of Commitments are divided into: two sections
- I. Horizontal Commitments
- II. Sector-Specific Commitments
- You have seen many examples of Sector-Specific Commitments, what is the Horizontal Commitments section of the Schedule used for?
- If matters affect all of the sectors listed in the schedule, then the matter can be written in the Horizontal Commitments section of the schedule and have the same effect as if it had been written in every commitment for each specific sector.
- Usually entries in the Horizontal Commitments section of the Schedule cover:
 - Regulation of legal entities
 - Economy wide foreign investment regulation possibly including restrictions on interests in land
 - Regulation of entry and stay of natural persons

Thailand - Schedule of Specific Commitments

Modes of Supply: 1) Cross Border; (2) Consumption Abroad (3) Commercial Presence (4) Presence of Natural Persons

Sector or Sub sector	Limitation on Market Access	Limitation on National Treatment	Additional Commitments
HORIZONTAL	COMMITMENTS		
All Sectors Included in This Schedule:	<p>3) Commercial Presence ... is permitted only through limited liability company incorporated in Thailand.</p> <p>4) Temporary Movement of natural persons is Unbound except in the following categories</p>	<p>3) In establishing its commercial presence, a legal entity which is owned or controlled by foreigners must ...</p> <p>4) Unbound except as provided in the Market Access column.</p>	

Summary of Market Access Rules

- For scheduled sectors and mode, certain measures are prohibited under Article XVI:2 subject to scheduled exceptions.
- For scheduled sectors and modes, national treatment is required subject to scheduled exceptions
- And Article XVI:1 requires treatment no less favourable than specified in the Schedule.
- Remember: 'Unbound' means the rule does not apply to that service sector by that mode of service
- 'None' means no qualifications to the rule applying to that service sector and that mode of service

MFN Rule in GATS Article II

- II:1 “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.”
- The MFN rule applies to all service sectors regardless of whether they are included in Schedules of Commitments or not

What are the exceptions to the MFN rule?

- II:2 “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.”
- The services sub-sectors which are most commonly the subject of MFN exemptions are maritime transport and audiovisual services.

Philippines – List of MFN Exemptions

For the 8th Package of Commitments under the Framework Agreement on Services

Sector or Sub-Sector	Description of Measure Indicating its Inconsistency with Article II	Countries to which the measure applies	Intended Duration	Conditions Creating the need for the Exemption
Maritime	Transport	Services		
Liner	Cargo	Trade		
	Executive Order 769 provides for a preferential cargo sharing arrangement with countries that are parties to the UNCTAD liner conference	All countries that have acceded to the UNCTAD liner conference.	Indefinite	Ensure effective participation of Philippine ocean-going fleet in Philippine liner cargo trade

Australia – List of MFN Exemptions from Consolidated GATS Schedule 2003

Sector or Sub-Sector	Description of Measure Indicating its Inconsistency with Article II	Countries to which the measure applies	Intended Duration	Conditions Creating the need for the Exemption
Audiovisual	Australia maintains preferential co-production arrangements for film and television productions.	Italy, UK, Canada, France and any other country where cultural cooperation might be desirable and	Indefinite	To promote collaborative efforts between Australian and foreign film producers ...
Services	Official co-production status ,, confers national treatment on works covered by these arrangements. ...	Which is prepared to exchange preferential treatment on the terms		

The exemption from MFN in GATS

- An exception from the MFN rule in GATS Article II.
- GATS Article V – The GATS does not prevent Members entering into integration agreements that
 - Have substantial sectoral coverage;
 - Eliminate substantially all discrimination between the parties to the Agreement;
 - And which do not raise the overall level of barriers to trade in services with Members outside the Agreement.

In FTAs, Chapter on Trade in Services

- Can have clauses like
- GATS Article XVI:2 – prohibition of certain types of restrictions,
- GATS Article XVIII – prohibition of derogations from national treatment
- GATS Article XVI:1 - treatment no less than specified in a Schedule
- Operating on a *positive* list basis to those sectors listed in a Schedule in the same form as the Schedule under the GATS.
- Or
- (as is most common in FTAs) Can have provisions operating on a *negative* list basis, applying to all sectors except those listed in Schedules: could be one Schedule of excluded measures; and another Schedule for excluded sectors
- Or
- A mixture

Comprehensive and Progressive Trans Pacific Partnership Agreement

- *Trans Pacific Partnership Agreement* signed 9 February 2016
- Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) in force for Australia 30 December 2018 (for all 11 original parties on 12 July 2023). UK became 12th party in 2024.
- The text of CPTPP brings text of TPP into force subject to list excluding some provisions in the TPP text.

CPTPP Chapters include

- **Ch 9 Investment** applies to ‘covered investments’
- **Ch 10 Cross-Border Trade in Services**
 - applies to ‘cross border trade’ which includes supply of a service
 - (i) from territory of a Party into territory of another Party
 - (ii) in the territory of a Party to a person of another Party; or
 - (iii) by a national of a Party in the territory of another Party
 - But does not include the supply of a service in the territory of a Party by a covered investment
 - Also applies to measures adopted or maintained by a Party affecting the supply of service in its territory by a covered investment.
- **Ch 12 Movement of Natural Persons**

CPTPP Main Rules on Trade in Services in Chapter 10

- Art 10.3 National Treatment
- Art 10.4 Most-Favoured-Nation Treatment
- Art 10.5 Market Access
- Article 10.6 Local Presence
- **All apply on a *negative* list basis**
- Exception in 10.7.1 for non-conforming measures in Party's Schedule to Annex I.
- Exception in 10.7.2 for measures with respect to sectors, sub-sectors or activities in Party's Schedule to Annex II.

CPTPP Art 10.3 National Treatment

- 10.3.1 “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 services suppliers.”
- 10.7.1 except for measures listed in the Party’s Schedule to Annex I;
- 10.7.2 except for sectors listed in the Party’s Schedule to Annex II.

CPTPP Art 10.4 Most Favoured Nation

- “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 services suppliers of any other Party of a non-Party.”
- 10.7.1 except for measures listed in the Party’s Schedule to Annex I;
- 10.7.2 except for sectors listed in the Party’s Schedule to Annex II.

CPTPP Article 10.5 Market Access

- 10.5 “No Party shall adopt or maintain, ..., measures that:
- (a) impose limitations on”
 - (i) the number of service suppliers; or
 - (ii) the number of service transactions or assets; or
 - (iii) the number of service operations or the quantity of service output; or
 - (iv) the number of persons that may be employed; or
- Or
- (b) restrict or require specific types of legal entity of joint venture
- 10.7.1 except for measures listed in the Party’s Schedule to Annex I;
- 10.7.2 except for sectors listed in the Party’s Schedule to Annex II.

CPTPP 10.6 Local Presence

- “No party shall require a service supplier of another Party to establish or maintain a representative office or any form of enterprise, or to be a resident, in its territory as a condition for the cross-border supply of a service.”
- 10.7.1 except for measures listed in the Party’s Schedule to Annex I;
- 10.7.2 except for sectors listed in the Party’s Schedule to Annex II.

Exception in 10.7.1 for Non-Conforming Measures in Annex I

- Article 10.3 ... , 10.4 ... , 10.5 ... , and 10.6 ... shall not apply to:
- (a) any existing non-conforming measure that is maintained by a party at
 - - central level or regional level of government as set out in its Schedule to Annex I
 - - or at local level of government
- (b) the continuation or prompt renewal of (a)
- (c) “an amendment to any non-conforming measure referred to in subparagraph (a), to the extent that the amendment does not decrease the conformity of the measure, as it existed immediately before the amendment, with [art 10.3, art 10.4, art 10.5 or art 10.6.]”

Exception in 10.7.2 for measures with respect to sectors, sub-sectors or activities in Annex II

- “Article 10.3 (National Treatment), Article 10.4 (Most-Favoured-Nation Treatment), Article 10.5 (Market Access) and Article 10.6 (Local Presence) shall not apply to any measure that a Party adopts or maintains with respect to sectors, sub-sectors or activities, as set out by that Party in its Schedule to Annex II.”

Chapter 12 Movement of natural Persons

- Ch 12 does not apply to measures affecting access to employment or
- Article 12.4.1 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.

Chapter on Investment – 2 Types of Obligations

- Usually combine two types of obligations (not always distinct from each other):
- Obligations (like those previously found in Bilateral Investment Treaties or Investment Protection Agreements) not to engage in expropriation of investments, or creeping or de facto expropriation of investments or similar obligations under public international law and possible some extension of those – with provision for either
 - claims for reparations by one State against another State; or
 - Claims for monetary damages by an Investor of one State against another State (ISDS);
- Obligations (like those found in trade agreements as they affect commercial presence) regarding market access of foreign investors and the establishment, acquisition, conduct, operation, sale or disposition of investments like:
 - national treatment,
 - MFN,
 - not applying performance requirements as conditions for establishment, acquisition, conduct of Investment

CTPP main rules on Investment in Chapter 9

- Art 9.4 National Treatment
- Art 9.5 MFN
- Both cover treatment in establishment, acquisition expansion, management, conduct, operation and sale or other disposition
- Art 9.9 prohibition of performance requirements (re exporting, using domestic content, buying domestic goods, limiting imports, transfer technology)
- Art 9.10 requiring persons of a particular nationality in management or directorships
- **All apply on a *negative list* basis**
- Exception in 9.11.1 for non-conforming measures in Party's Schedule to Annex I.
- Exception in 9.11.2 for measures with respect to sectors, sub-sectors or activities in Party's Schedule to Annex II.

CPTPP Art 9.4 National Treatment

- 1. Each Party shall accord to investors of another Party treatment no less favourable than that it accords, in like circumstances, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory”
- 2. ... to covered investments ...

CPTPP Art 9.5 MFN

- 1 Each Party shall accord to investors of another Party treatment no less favourable than that it accords, in like circumstances, to investors of any other Party or of any non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory.”
- 2. ... covered investments ...

CPTPP Article 9.9 No Performance Requirements

- Art 9.9 prohibits requirements
- (a) to export a given level or percentage of goods or services;
- (b) to achieve a given level or percentage of domestic content;
- (c) to purchase, use or accord a preference to goods produced in its territory, or to purchase goods from person in its territory
- (d) ... (i).

CPTPP Art 9.10 NO Requirements for nationals in senior management or as directors

- Prohibits requiring a covered investment from appointing to a senior management position a natural person of any particular nationality
- Allows a requirement that a majority of board of directors be of a particular nationality
“provided that the requirement does not materially impair the ability of the investor to exercise control over its investment.”

CPTPP Investment Chapter: Exception in 9.11.1 for Non-Conforming Measures in Annex I

- Article 9.4 ... , 9.5 ... , 9.9 ... , and 9.10 ... shall not apply to:
- (a) any existing non-conforming measure that is maintained by a party at
 - - central level or regional level of government as set out in its Schedule to Annex I
 - - or at local level of government
- (b) the continuation or prompt renewal of (a)
- (c) “an amendment to any non-conforming measure referred to in subparagraph (a), to the extent that the amendment does not decrease the conformity of the measure, as it existed immediately before the amendment, with [art 9.4, art 9.5, art 9.9 or art 9.10.]”

CPTPP Investment Chapter: Exception in 9.11.2 for measures with respect to sectors, sub-sectors or activities in Annex II

- “Article 9.4 (National Treatment), Article 10.5 (Most-Favoured-Nation Treatment), Article 9.9 (Performance Requirements) and Article 10.6 (Senior Management) shall not apply to any measure that a Party adopts or maintains with respect to sectors, sub-sectors or activities, as set out by that Party in its Schedule to Annex II.”

Ch9 Investment Protection provisions

- Section A also contains
- Article 9.6 Minimum Standard of Treatment
- Article 9.6bis Treatment in Case of Armed Conflict of Strife
- Article 9.7 Expropriation and Compensation
- Article 9.8 Transfers

CPTPP Chapter 11, Section B on ISDS:

- Article 9.18 provides for ISDS claims in respect of a breach of any obligation under Section A, an investment authorisation or an investment agreement
- Article 9.19 Each State consents to claims — (meets purposes of consenting to jurisdiction of ICSID panel, for purposes of consent to arbitration covered by NY Convention) (subject to art 9.20)
- Article 9.28.1 Final Award can be monetary damages or restitution & monetary damages in lieu
- Article 9.28.10 - A State must provide for enforcement of an award in its territory. An investor may seek enforcement under ICSID or NY Convention.

Investment chapters – trend is to add more exclusions

- CPTPP
- Annex 9A defines customary international law
- Annex 9B defines expropriation whereas NAFTA investment chapter does not contain anything resembling the GATT Article XX general exceptions clause.
- Various forms of exception clauses are becoming more common
- Eg., ChAFTA has an exception corresponding to parts of GATT Article XX including (a) health measures, and XX(g) environmental measures

Any Questions?

- ?
- Slides available from
- www.williamstradelaw.com

Provisions in NAFTA Investment Chapter 11, Section A contains:

- Article 1110 direct or indirect expropriation or “take a measure tantamount to nationalization or expropriation”
- Article 1105 treatment in accordance with international law including:
 - Fair and equitable treatment; and
 - Full protection and security.