

出國報告(出國類別：出席國際會議)

出席「**2017年 APEC 服務業承諾表
負面清單能力建構研討會**」
出國報告書

服務機關：經濟部國際貿易局

姓名職稱：陳雅玲 二等經濟秘書

派赴國家：韓國仁川松島

出國期間：106年10月20日至10月22日

報告日期：106年12月27日

摘要

「2017 年 APEC 服務業承諾表負面清單能力建構研討會」於 10 月 21 日在韓國仁川松島舉行，由澳洲政府自費辦理，係配合 RCEP 工作小組層級之談判會議於 10 月 23 日至 28 日在松島進行而舉辦，為節省與會者旅費成本，遂於談判會議前辦理，出席人員除 APEC 經濟體之官員外，尚有印度、柬埔寨、寮國及緬甸等非會員體之官員參與，計約 80 人。我方由本局派員與會。

本次活動澳洲政府全程委由澳洲 Lexbridge Lawyer 律師事務所創辦合夥人 Richard Braddock 擔任主講，並降低活動政治敏感性僅由澳洲對外事務及貿易部投資及經濟組政策官員 Kanu Negi(Policy Officer)致開幕及閉幕詞。

APEC 服務業負面清單研討會的目的是讓與會者了解在自由貿易協定中，服務業承諾以負面清單呈現的方法及原則。本次研討會首先介紹負面清單方法的主要原則，包括附件一(現行措施)和附件二(未來政策措施之空間)的區別，同時討論自由貿易協定中服務業和投資章的關係（重點放在模式 3 服務供給的處理上）以及討論如何利用負面清單方法在自由貿易協定中作出服務提供者短期入境之承諾。最後檢視在制作負面清單時，可能發生之實際問題，包括如何確定潛在的不符合措施，決定該措施應在附件一或附件二作保留，以及保留文字之撰寫原則。

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壹、 會議時間

106 年 10 月 21 日

貳、 會議地點

韓國仁川松島假日飯店地下一樓(Holiday Inn Hotel, B1 Michuhal Room)。

參、 會議目的

APEC 服務業負面清單研討會的目的是讓與會者了解在自由貿易協定中，服務業承諾以負面清單方法表示的主要特點和議題。本次研討會介紹負面清單方法的主要原則，包括附件一(現行措施)和附件二(未來政策措施之空間)的區別，同時討論自由貿易協定中服務業和投資章的關係(重點放在模式 3 服務供給的處理上)以及討論如何利用負面清單方法在自由貿易協定中作出服務提供者短期入境之承諾。最後檢視在制定負面清單時，可能發生之實際問題，包括如何確定潛在的不符合措施，決定該措施應在附件一或附件二作保留，以及保留文字之撰寫原則。

肆、 會議議程

APEC 服務業承諾表負面清單能力建構研討會議程

2017 年 10 月 21 日
09:00 - 09:15 開場致詞: 澳洲對外事務及貿易部投資及經濟組政策官員 Kanu Negi(Policy Officer)
09:15 - 10:00 第一節 介紹負面清單

介紹負面清單的主要特徵，包括負面清單的運作方式以及服務業規章如何適用於負面清單。

10:00 - 10:20 休息 茶點時間

10:20 - 12:00

第二節：服務業與模式 3 投資章的關係

分析服務業和投資章的關係，重點在於不同方式的投資(模式 3)如何在協定負面清單中呈現。

12:00 - 13:30 午餐

13:30 - 14:30

第三節：負面清單呈現模式 4 及短期入境承諾

解釋負面清單方式如何呈現模式 4 及短期入境承諾，包括跨境服務業章與自然人移動章的關係，並比較正面清單與負面清單規範模式 4 的不同。

14:30 - 14:50 休息 茶點時間

14:50 - 16:30

第四節：負面清單承諾表的準備

說明如何準備負面清單承諾表，包括附件 1 及附件 2 的內容，第一次準備負面清單考量的要點，並比較正面清單與負面清單的差異處。

16:30 - 17:00

閉幕致詞： 澳洲對外事務及貿易部投資及經濟組政策官員 Kanu Negi(Policy Officer)

註明:原規劃 10 月 22 日上午辦理閉幕活動，後因經濟體要求改為 21 日辦理。

伍、 會議過程

一、 澳洲政府舉辦研討會之動機

本次能力建構研討會由澳洲政府自費辦理，係配合 RCEP 工作小組層級之談判會議於 2017 年 10 月 23 日至 28 日在韓國仁川松島進行而舉辦，為節省與會者旅費成本，遂於談判會議前辦理，出席人員除 APEC 經濟體之官員外，尚有印度、柬埔寨、寮國及緬甸等非會員體之官員參與，計約 80 人。

本次活動澳洲政府全程委由澳洲 Lexbridge Lawyer 律師事務所創辦合夥人 Richard Braddock 擔任主講人，並降低活動政治敏感性，僅由澳洲對外事務及貿易部投資及經濟組政策官員 Kanu Negi (Policy Officer)致開幕及閉幕詞。

我方由經濟部國際貿易局多邊貿易組陳二等經濟秘書雅玲出席與會。

二、 服務業承諾表負面清單能力建構研討會

(一) 講師簡介

本次研討會澳洲政府邀請澳洲 Lexbridge Lawyer 律師事務所創辦合夥人 Richard Braddock 擔任主講人，該律師事務所是亞太地區第一家專業的國際法律業務和諮詢公司，專為亞太地區政府、企業和國際組織提供國際貿易和投資之法律諮詢服務。

Braddock 律師在創辦 Lexbridge Lawyer 律師事務所前，曾在澳洲政府擔任國際法律師和條約談判代表近十年，主管外交和貿易部的貿易和投資法，B 律師是澳洲政府洽簽大部分 FTA 談判的法律顧問和談判代表，包括跨太平洋夥伴關係協定(TPP)、澳洲與中國大陸、日本、韓國、東協、智利和紐西蘭的自由貿易協定。他曾是澳洲在 TPP 和東協談判的首席投資談判代表；目前為澳洲國立大學的客座研究員。

(二) 各場次會議重點：

1. **介紹負面清單：**介紹負面清單的主要特徵，包括負面清單的運作方式以及服務業章如何適用於負面清單。會議重點如下：

- (1) 藉由比較跨太平洋夥伴關係協定(TPP)及東協-澳紐自由貿易協定(AANZFTA)，前者以負面清單呈現，後者為正面清單，說明兩者最大差異在於負面清單的協定會提出不符合措施，這是 FTA 採用正面清單時所沒有的項目，因為正面清單會將可開放的項目逐一列出。
- (2) 負面清單所列的不符合措施是保留項目，分為附件一列出現行法律法規不符合措施，及附件二未來施政空間擬保留的部分，未列在負面清單者一律開放。
- (3) 負面清單所列的不符合措施僅對國民待遇、最惠國待遇、市場進入及當地據點等項目予以保留，不能就一般義務，如國內規章、移轉及透明化要求保留。
- (4) 附件一與附件二的主要差異在於前者係指現行措施不符合國民待遇、最惠國待遇、市場進入及當地據點等措施予以保留，後者則是締約國為未來施政需要而提出的保留措施。
- (5) FTA 採用負面清單時，通常在附件一採用不倒退機制(Ratchet Mechanism)，意指未來的修正措施只能比修正前還開放，不能倒退。例如：澳洲國營電信公司(TELSTRA)依據國營電信公司法對外資之股權限制不得超過 35%，外國個人或合資集團持有該公司之股票數不得超過 5%，以上限制措施列入澳洲在 TPP 負面清單之附件一，如附件講義第 20 頁。假設日後澳洲修法允許個人或合資集團可取得 TELSTRA 股票達 10%(此為講師假設之情況，目前並無修法)，則修改後的法律較之前更為開放，將自動取代 TPP 所列之 5%。

(6) 負面清單的附件二則不受凍結(Standstill)及不倒退機制(Ratchet)的限制。例如:越南在 TPP 附件二對武術俱樂部(Martial art clubs)及極限運動(Extreme sports)列出國民待遇、最惠國待遇及當地據點等三項作出保留(詳附件講義第 22 頁)，則日後越南可就上述運動對外國服務供應商設限，如只允許某一國供應商在越南提供高空彈跳之極限運動服務，或是開放後又改變政策為限制所有外國供應商提供服務，無論採取任何措施，都不受凍結及不倒退機制的影響。

(7) Q & A

Q:如果國內有示範實驗區適用新法，實驗區以外目前不適用，但是未來可能會適用時，並且沒有一定的時程表，完全看新法在實驗區的成效再決定是否擴大或修改時，該如何納入不符合措施？

A:請問實驗區的新法有對外國人士或外資產生歧視待遇或違反國民待遇、最惠國待遇、市場進入及當地據點等原則嗎?如果都沒有違反則不需要列入不符合措施。如果有違反的話，建議附件一及附件二均要納入。

2. **服務業與模式 3 投資章的關係**：分析服務業和投資章的關係，重點在於不同方式的投資(模式 3)如何在協定負面清單中呈現。會議重點如下：

(1) FTA 採用負面清單：從第一個負面表列的 NAFTA 到最近的 TPP，都將服務業章限定範圍在模式 1、模式 2 及模式 4，並將模式 3 納入投資章一併規範。

(2) FTA 採用正面清單：如同東協-澳紐 FTA 在服務業章採用 GATS 規範，涵蓋 4 種模式，其中模式 3 係指締約方服務供應商在締約另一方以商業據點呈現的投資，其商業據點呈現的定義承襲 GATS 而來，係指為提供服務的商業型態包括(1)設立、收購或續存法人，或(2)創

立或存續分支機構或代表處。然而並非所有的服務業投資都足以支持或擁有商業據點，也並非所有服務業投資都是為了提供服務，因此前述非模式 3 的服務業投資就不在服務業章規範，而是落到投資章。

- (3) FTA 不論採用負面清單或正面清單，對投資的定義都相當一致，惟正面清單的 FTA 如東協-澳紐 FTA 在投資章會排除模式 3，強調不適用第 8 章服務貿易所採取之措施(AANZFTA 11.03，附件講義第 26 頁)。
- (4) 例外:日本-澳洲經濟夥伴協定(Japan-Australia Economic Partnership Agreement，JAPEPA)投資章及服務業章都沒有排除模式 3，兩章皆適用。
- (5) 從投資的保護效力來看，FTA 採負面清單時，其投資章適用所有投資，所有投資保護及投資人與地主國爭端解決(ISDS)適用所有投資，涵蓋模式 3。正面清單的 FTA 對模式 3 的保護效力列在服務業章，例如：東協-澳紐自由貿易協定(AANZFTA 8.22)敘明對模式 3 商業據點呈現的待遇及保護，包括投資待遇、損失補償、移轉、徵收和補償、代償權、投資人與地主國爭端解決等(詳附件講義第 29 頁)。
- (6) 小結:正面清單與負面清單對模式 3 商業據點呈現的排除及保護比較

	服務業章	投資章
正面清單	納入模式 3 並訂定模式 3 保護條款，如 AANZFTA 8.22	排除模式 3 採用之措施，如 AANZFTA 11.03
負面清單	僅規範 1、2、4 模式，排除模式 3	投資保護涵蓋所有投資，包括模式 3

例外	日本-澳洲經濟夥伴協定投資章及服務業章都適用模式 3，如 JAEPA 9.01。
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(7) Q & A

Q:請問資產有包括智慧財產權嗎？對智慧財產權的保護是哪一章適用？

A:請看第 9 章投資的定義(9.1)，簡言之投資是指投資人間接或直接可控制之資產，其形式包括智慧財產權，也就是說今日投資者以智慧財產權作為其投資資產時，就受第 9 章投資章的保護，反之若與投資無關係時，則由智慧財產權章保護。

3. **負面清單呈現模式 4 及短期入境承諾**:解釋負面清單方式如何呈現模式 4 及短期入境承諾，包括跨境服務業章與自然人移動章的關係，並比較正面清單與負面清單如何規範模式 4。會議重點如下:

(1) 模式 4 在 GATS 的定義是一會員的服務供應者以自然人呈現方式在其他會員境內提供服務。GATS 自然人移動附則確立了 GATS 不影響會員維持及管制移民措施的權力，此不應視為剝奪或減損其於特定承諾下之利益。換言之，如果自然人無法進入另一會員領土就無法提供服務。該附則也強調「不適用於影響自然人尋求進入會員就業市場之措施，亦不適用於有關永久性公民權、居留或就業之措施 (GATS 自然人移動附則 2)」。

(2) FTA 不論採用正面清單還是負面清單，其服務業章模式 4 的定義皆承襲 GATS，所有服務業章的基本義務如國民待遇、最惠國待遇、市場進入及當地據點等皆適用於模式 4，而且服務業章事實上 GATS 的模式 4 是在邊境之後當服務供應商進入另一方領土後才發生效力，因此這點不影響締約方在邊境控管簽證及入境。

- (3) 有別於 GATS，FTA 對自然人移動及短期入境的特定承諾通常會分在不同章節作規範，其服務業章及自然人移動/短期入境章只限定商務人士的暫時入境，包括邊境簽證措施及允許特定人士入境，當然仍須符合入境措施的基本前提。自然人移動/短期入境章不限於服務貿易，承諾所涵蓋的特定人士包括投資者、跨國企業內部調動人員及獨立高階人員。
- (4) 比較 TPP 第 12 章商務人士短期入境及 AANZFTA 第 9 章自然人移動發現，二者皆一致對商務人士的短期入境予以規範，在自然人移動方面採用正面表列，並保有大部分 GATS 自然人移動附則的條文。
- (5) 小結:FTA 的服務業章不論採用正面清單或負面清單，其對自然人移動/短期入境仍是採用正面清單。

(6) Q&A

Q:在 GATS 規範的是自然人移動，GATS 的原意是進一步對自然人因提供服務而移動之自由化繼續談判開放，但是採用負面清單的 FTA 將自然人移動直接限縮在商務人士短期入境，完全違反 GATS 的原意，我們(印度)認為自從 NAFTA 採用負面清單以來對自然人移動設限，這種作法是不對的。

A:你的觀點很獨特，不過誠如剛才所解釋，不論 TPP 或是 AANZFTA 在自然人移動方面都是保有 GATS 自然人移動附則的條文，例如 TPP 第 12 章第 12.2 條的第 2 項至第 4 項¹即取自 GATS 自然人移動附則

¹ TPP 第 12 章第 12.2 條的第 2 項至第 4 項條文如下:

第 12.2 條：範圍

2. 本章應不適用於影響自然人尋求進入另一締約方就業市場之措施，亦應不適用於與永久公民身分、國籍、居留或就業有關之措施。
3. 本章規定不應禁止締約一方採行措施管制另一締約方之商務人士入境或短期停留其領土，包括為保護其國界之完整，與確保自然人有秩序地移動進入其國界之必要措施。惟該等措施不得以剝奪或減損任締約一方於本章所享利益之方式實施。
4. 僅締約一方要求另一締約方商務人士完成入境手續之事實，不應被視為剝奪或減損任一締約方於本章所享利益。

第 2 及第 4 條²，另 AANZFTA 第 9 章第 2 條的第 2 項也保留 GATS 自然人移動附則第 2 條，所以並不能說 TPP 或是 AANZFTA 違反 GATS 的原意。但是當國家政策對外來人口有安全疑慮時，確實會利用簽證措施等方式限縮自然人的移動，只是這方面的議題已不在 GATS 討論範圍內。我(B 律師)要聲明今日討論的內容是將 TPP 與現行的 FTA 做比較及歸納，讓與會者了解負面清單與正面清單相同與相異之處，沒有預設任何政策立場或指導談判方向之意圖，盼各位瞭解本研討會之目的。

4. **負面清單承諾表的準備**：說明準備負面清單承諾表的步驟，包括分辨不符合措施應納入附件 1 或附件 2，以及草擬不符合措施的原則。會議重點如下：

- (1) 確認保留措施：向各政府部門及機構諮詢，列出不符合國民待遇、最惠國待遇、市場進入及當地據點之現行措施及法規。
- (2) 分辨不符合措施納入附件 1 或附件 2：FTA 生效後仍想保留的不符合措施納入附件 1，該措施必需是現行的法律法規。如果想保留未來措施的彈性空間，則納入附件 2。凍結及不倒退機制不會限制簽署國對法律的修改權，但是在附件 1 修正措施只能比修正前還開放，不能倒退，附件 2 則不受凍結及不倒退機制所限制。
- (3) 草擬保留措施的原則應清楚及明確：清楚讓締約國及服務供應商了解不符合措施的內容，明確範圍，最好不要超出需要的範圍，並避免將排除項目列入，包括補貼、政府採購及政府行使公權力所提供

² GATS 自然人移動附則第 2 及第 4 條原文如下：

2. 本協定不適用於影響自然人尋求進入會員就業市場之措施，亦不適用於有關永久性公民權、居留或就業之措施。
4. 本協定不應禁止會員採取管制自然人進入其領域或在境內短期停留之措施，包括為保護其邊界之完整及確保自然人出入境秩序之必要措施。但該等措施之實施不應造成任一會員於其特定承諾下所獲利益因而喪失或減損。(僅對特定會員之自然人要求簽證，而不對其他會員之自然人要求者，不應視為剝奪或減損其於特定承諾下之利益。)

的服務。所謂政府行使公權力所提供的服務有兩大特點，一是非商業基礎，另一是不與其他服務供應商形成競爭關係。

(4) 此外，一般例外及安全例外的規定也不需列入不符合措施。

(5) Q&A

Q:請問當國內法有改善對外國投資者之待遇，可是法條尚未生效，目前正在談判的不符合措施是要列原先的法律，還是新修正的法律？又 FTA 保留的不符合措施是否可以低於現行法規？還是要一致？

A:如果改善後的法條會在談判完成前生效，建議仍是列新法，如果只列舊法，雖然不能算是錯的，但一般習慣在 FTA 談判階段，會希望不符合措施是與現行法律一致的。如果 FTA 已生效，之後新法才生效，則 FTA 保留的不符合措施會因不倒退機制適用新法。

陸、 綜合觀察及建議

- 一、 B 律師大量引用 TPP 條文作為負面清單的最佳範本，並輔以現行的 FTA 條文搭配說明，如北美自由貿易協定(NAFTA)及東協-澳紐自由貿易協定(AANZFTA)，以實務為優先，再就凍結(Standstill)及不倒退(Ratchet)等理論作說明，讓與會者清楚明白理論在實務作法中的呈現。
- 二、 本次活動 APEC 會員體提問不多，惟印度出席官員發言極力推崇 GATS 的正面表列模式，認為自 NAFTA 引用負面清單以來，在自然人移動方面限縮了 GATS 的原意，並認為負面清單的作法是不妥的（按印度對外談判經驗以正面清單為主）；雖然多數與會者並不贊同印度官員的言論，但是印度的一番言論，讓澳洲藉 APEC 名義進行負面清單的宣傳打了折扣。
- 三、 此次會議出席者有許多人員將出席 10 月 23 至 28 日舉行之 RCEP 談判會議，其中多數 APEC 會員體人員對負面清單已很熟悉，因此提問不多。反觀印度(非 APEC 會員)多次中斷及扭曲主講人擬傳達的意思，直到澳洲官

員出面勸說，僵局才稍微緩和。澳洲政策官員 Kanu Negi 私下向我方表示，這是 APEC 的活動，照理非會員是不應該發言，日後將重新評估是類活動是否有必要開放予非會員參與。

- 四、 經查東協對外洽簽的東協-澳紐自由貿易協定、東協-中國大陸服務貿易協定、東協-印度服務貿易協定、東協-韓國服務貿易協定等均採正面清單，與我國對外洽簽經貿協定服務業承諾慣以負面清單有所不同，此或可為日後我與東協國家交流之強項之一。
- 五、 APEC 此類能力建構活動，已經連年舉辦數次，未來仍會有類似的會議活動，建議我國應持續派員出席，並鼓勵其他部會同仁參與，除能透過討論交流了解其他國家對某些議題的看法及立場外，亦對同仁的專業知識與能力建構培養有助益。

柒、 附件

如後附



Next week 19/3-
ASEAN+6

PROGRAM

APEC CAPACITY BUILDING WORKSHOP ON THE NEGATIVE LIST APPROACH TO SCHEDULING SERVICES COMMITMENTS

Saturday, 21 October 2017

Michuhal Room, Level B1, Holiday Inn Incheon Songdo, Republic of Korea

Presenter: Richard Braddock, Lexbridge Lawyers

09:00 – 09:10
Opening Session: Welcome Remarks , Kanu Negi, Department of Foreign Affairs and Trade, Australia
09:10 – 10:10
Session I: Introduction to a Negative List
This session will introduce the main features of a negative list, including how the negative list scheduling provision operates, and how the services disciplines apply to a negative list.
10:10 – 10:30 Coffee Break
10:30 – 12:00
Session II: The Relationship between the Services and Investment Chapters – Mode 3 and Other Issues
This session will analyse the relationship between the Services and Investment Chapters focusing on different ways Mode 3 can be treated in an agreement (including the application of investment provisions to investment in services) and the scheduling of Services and Investment commitments.
12:00 – 13:30 Lunch
13:30 – 14:30
Session III: The Negative List Approach to Scheduling and Mode 4 and Temporary Entry Commitments
This session will explain how a negative list approach to scheduling deals with Mode 4 and temporary entry commitments, including the relationship between a Services Chapter and Movement of Natural Persons Chapter and comparing positive and negative list approaches to scheduling these commitments.
14:30 – 14:50 Coffee Break
14:50 – 16:30
Session IV: Preparing a Negative List Schedule
This session will explain how a negative list schedule is prepared including what is contained in Annex I and Annex II, things to consider when preparing a negative list for the first time, and comparing the approach to making commitments under a positive list schedule.
16:30 – 16:50 Wrap up Session , Richard Braddock, Lexbridge Lawyers
16:50 – 17:00 Closing Remarks , Kanu Negi, Department of Foreign Affairs and Trade, Australia

APEC - Services Negative Annex Scheduling
Workshop

Session 1: Introduction to the negative list



Richard Braddock
21 October 2017
www.lexbridgelawyers.com

Lexbridge
Public international lawyers

Overview

1. Negative vs positive list
2. How do negative list schedules work?
3. What obligations can you reserve against?
4. What is the difference between Annex I & Annex II
5. Scope: levels of government

1. How do negative list schedules work?

- Two main approaches to scheduling 'market access' commitments in Services Chapters of FTAs:
 - Positive list: relevant treaty obligations only apply to sectors where a Party makes positive commitments in schedules, and subject to any limitations or conditions in the schedules
 - Follows approach in WTO GATS
 - Negative list: relevant treaty obligations apply to all measures affecting services unless specifically carved-out in schedules, and subject to any limitations or conditions in schedules

1. Negative vs positive list Positive list

AANZFTA **Article 3: National Treatment**

1. In sectors inscribed in its schedules of specific commitments in Annex 3 ... and subject to any conditions and qualifications set out therein, each Party shall accord to services and service suppliers of any other Party, ... treatment no less favourable than that it accords to its own like services and service suppliers.

1. Negative vs positive list Positive list

AANZFTA **Article 8: Schedules of Specific Commitments**

1. Each Party shall set out in a schedule the specific commitments it undertakes under Article 3 (National Treatment) ... With respect to sectors where such commitments are undertaken, each schedule shall specify:

...

(b) conditions and qualifications on national treatment;

1. Negative vs positive list Negative list

TPP **Article 10.3: National Treatment**

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

- Unlike positive list approach – not limited to sectors where a Party makes positive commitments

1. Negative vs positive list Negative list

TPP

Article 10.7: Non-Conforming Measures

1. Article 10.3 (National Treatment) ... shall *not* apply to ... any existing non-conforming measure that is maintained by a Party ... as set out by that Party in its Schedule to Annex I.

2. Article 10.3 (National Treatment) ... 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.

2. How do negative list schedules work?

- Ability to take reservations recognises that all Parties have restrictions and sensitivities in particular sectors or policy areas
- Parties use reservations to:
 - (i) preserve existing measures (laws, policies) (Annex I)
 - (ii) reserve policy space to maintain, change, or adopt new measures in certain sectors or areas (Annex II)
- even where these would otherwise be inconsistent with the FTA obligations (eg because they discriminate against foreign service suppliers)

3. What obligations can you reserve against?

- Reservations scheduled against certain specific obligations - involve 'market access' or protect against discrimination:
 - National Treatment
 - MFN
 - Market Access
 - Local Presence
- Different to exceptions - not a carve-out from whole chapter
- Cannot schedule against general obligations: domestic regulation, transfers, transparency.

4. Difference between Annex I and Annex II?

- 2 Annex negative list approach – allows Parties to include reservations in:
- **Annex I: to maintain *existing* non-conforming measures**
 - Where existing laws or policies may be inconsistent with the relevant obligations (eg they treat foreign service suppliers less favourably)
- **Annex II: to preserve ability to modify or adopt new measures in sensitive sectors or activities**
 - Ability to preserve policy space without risk of inconsistency

TPP: Article 10.7: Non-Conforming Measures

1. Article (National Treatment), Article (Most-Favoured-Nation Treatment), Article (Market Access) and Article (Local Presence) shall not apply to:
- (a) any existing non-conforming measure that is maintained by a Party at:
 - (i) the central level of government, as set out by that Party in its Schedule to Annex I;
 - (ii) a regional level of government, as set out by that Party in its Schedule to Annex I; or
 - (iii) a local level of government;
 - (b) the continuation or prompt renewal of any non-conforming measure referred to in subparagraph (a); or
 - (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 Article (NT), Article (MFN), Article (MA) or Article (LP).
2. Article (NT), Article (MFN), Article (MA) and Article (LP) 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.

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TPP: Article 10.7: Non-Conforming Measures

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 - ~~(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 Article (NT), Article (MFN), Article (MA) or Article (LP).~~
2. Article (NT), Article (MFN), Article (MA) and Article (LP) 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**.

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4. Difference between Annex I and Annex II?

4.1 Annex I

- Annex I lists existing measures which are not, or may not be consistent with one or more of the relevant obligations
 - eg: AUS requirement that a person can only practise as a migration agent in Australia if they are a citizen or PR or a citizen of New Zealand with a special category visa.
 - Discriminates against foreign service suppliers - would be inconsistent with NT and MFN unless reserved
 - AUS reserves against NT & MFN - can maintain requirement without being in breach of the FTA commitment

Sector:	Professional Services
Obligations Concerned:	National Treatment (Article 10.3) Most-Favoured-Nation Treatment (Article 10.4)
Level of Government:	Central
Measures:	Migration Act 1958 (Cth)
Description:	Cross-Border Trade in Services

To practise as a migration agent in Australia a person must be an Australian citizen or permanent resident or a citizen of New Zealand with a special category visa.

TPP-ANNEX I-AUSTRALIA -9

4. Difference between Annex I and Annex II?

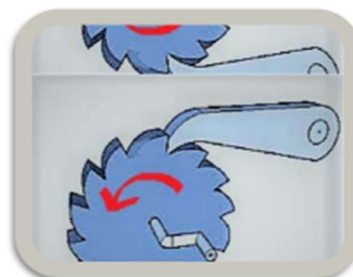
4.1 Annex I

- Measures (laws, policies) scheduled in Annex I subject to 'standstill' - cannot be made more restrictive or less consistent with the relevant obligations
- But - standstill doesn't mean that the laws and other measures covered by Annex I reservations can't be changed.
- Parties free to regulate and change measures so long as the changes do not make the measures less consistent with the relevant obligations.

4. Difference between Annex I and Annex II?

4.1 Annex I - ratchet mechanism

- Negative list FTAs often include a ratchet mechanism for Annex I NCMs
- Unilateral liberalisation / positive change 'locked-in' & can't be wound back to original commitment
- But doesn't mean measure is frozen
- Amended measure qualifies under Annex I NCM carve-out provided change does not make the measure *less consistent* with the relevant obligations
- Promotes progressive liberalisation and certainty for service suppliers / investors



TPP: Article 10.7: Non-Conforming Measures

1. Article (National Treatment), Article (Most-Favoured-Nation Treatment), Article (Market Access) and Article (Local Presence) shall not apply to:

(a) any existing non-conforming measure that is maintained by a Party at:

- (i) the central level of government, as set out by that Party in its Schedule to Annex I;
- (ii) a regional level of government, as set out by that Party in its Schedule to Annex I; or
- (iii) a local level of government;

(b) the continuation or prompt renewal of any non-conforming measure referred to in subparagraph (a); or

(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 Article (NT), Article (MFN), Article (MA) or Article (LP).

2. Article (NT), Article (MFN), Article (MA) and Article (LP) 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.

Sector: Communication Services

Obligations Concerned: National Treatment (Art9.4)
Senior Management and Boards of Directors (Art 9.11)

Level of Government: Central

Measures: *Telstra Corporation Act 1991 (Cth)*

Description:

Aggregate foreign equity is restricted to no more than 35 per cent of shares of Telstra. Individual or associated group foreign investment is restricted to no more than five per cent of shares.

4. Difference between Annex I and Annex II?

4.1 Annex I- ratchet mechanism

- eg. AUS Annex I: Ind. foreign shareholdings in Telstra limited to 5%
- If law changed to allow ind. foreign shareholders to own 10% this new, more liberal requirement is 'locked-in' and becomes the new treaty obligation
- Can't be wound back to original 5% or made less consistent with the relevant obligations
- But AUS could change law to require that *no* single shareholder (domestic or foreign) can acquire more than 5% of shares
 - Non-discriminatory - wouldn't offend NT - as applies to all (but may be issues under other obligations)

4. Difference between Annex I and Annex II?

4.2 Annex II

- Annex II provides broader space to adopt new measures or change existing measures covered by reservations
 - even where measures otherwise inconsistent with relevant obligations; and
 - even where changes make measures less favourable for foreign service suppliers / less consistent with relevant obligations
- Generally used to protect core policy interests / sensitivities
- Focus not on "measures" but sectors, subsectors and activities
 - may not be any existing measures
- Annex II reservations are not subject to standstill or ratchet

TPP: Article 10.7: Non-Conforming Measures

1. Article (National Treatment), Article (Most-Favoured-Nation Treatment), Article (Market Access) and Article (Local Presence) shall not apply to:

(a) any existing non-conforming measure that is maintained by a Party at:

- (i) the central level of government, as set out by that Party in its Schedule to Annex I;
- (ii) a regional level of government, as set out by that Party in its Schedule to Annex I; or
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(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 Article (NT), Article (MFN), Article (MA) or Article (LP).

2. Article (NT), Article (MFN), Article (MA) and Article (LP) 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.

Sector: Recreational, Cultural and Sporting Services

Sub-Sector: Sporting and other recreational services ...

Obligations Concerned: National Treatment
Most-Favoured-Nation Treatment ...
Local Presence

Description: Investment and Cross-Border Trade in Services

Viet Nam reserves the right to adopt or maintain any measure with respect to martial art clubs and extreme sports.

TPP – ANNEX II – VIET NAM – 26

4. Difference between Annex I and Annex II?

- 4.2 Annex II
- Eg. VN reservation for martial arts and extreme sports
 - Reserved against NT, MFN
- VN could:
 - Prevent any foreign service suppliers from supplying extreme sports services in VN
 - Decide to allow a NZ bungee jump provider to operate in VN
 - Change the policy again to prevent any foreign service suppliers from supplying bungee jump services.

5. Scope: levels of government

- Services Ch – NCMs Article - covers measures at both national & sub-national levels of govt
- NCMs at both central and regional (eg State) levels of govt need to be scheduled in Annex I
- Obligations also apply to measures at local level of govt
 - But - no need to schedule existing local gov NCMs – carved-out of NCM article
 - Local gov measures – like all Annex I NCMs – subject to standstill and ratchet
 - Carve-out does not allow a Party to adopt new / less consistent NCMs – unless covered by relevant Annex II reservation

TPP: Article 10.7: Non-Conforming Measures

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 - (i) the central level of government, as set out by that Party in its Schedule to Annex I;
 - (ii) a regional level of government, as set out by that Party in its Schedule to Annex I; or
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2. Article (NT), Article (MFN), Article (MA) and Article (LP) 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.

Thank you



Overview

1. Overlap between Services & Investment
2. Approaches to relationship between Services & Investment
3. Protection of investment in service sectors
4. Scheduling Services & Investment commitments

1. Overlap between Services & Investment

- Investment Chapters have broad scope – apply to wide range of assets – eg: TPP

investment means every kind of asset that an investor owns or controls, directly or indirectly, which has the characteristics of an investment....

Forms that investments may take include:

- (i) an enterprise and a branch of an enterprise;
 - (ii) shares, stocks or other forms of equity participation in an enterprise; ...
- Expressly applies to both an “enterprise” (company or other entity) and shares or equity in an enterprise.

1. Overlap between Services & Investment

- Main area of potential overlap results from how trade in services defined in trade agreements following GATS
 - Combined with the typical broad definition of investment
- One of the modes of service supply (Mode 3) requires an investment in the territory of the other Party
 - Creates potential for overlap
- Two broad approaches to addressing this relationship: GATS & NAFTA
 - We will focus first on the GATS-style approach

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1. Overlap between Services & Investment

- GATS-style Services Chapters: apply to measures affecting trade in services.
- Use GATS terminology - define trade in services by ref to 'modes of supply' (the way a service can be delivered)

AANZFTA

(s) **trade in services** means the supply of a service:

- (i) from the territory of one Party into the territory of any other Party;
- (ii) in the territory of one Party to the service consumer of any other Party;
- (iii) by a service supplier of one Party, through commercial presence in the territory of any other Party;
- (iv) by a service supplier of one Party, through presence of natural persons of a Party in the territory of any other Party;

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1. Overlap between Services & Investment

- 3rd Mode = supply of a service by a service supplier of one Party, through commercial presence in the territory of the other Party
- AANZFTA: commercial presence means any type of business or professional establishment, including through: (i) the constitution, acquisition or maintenance of a juridical person [enterprise]; ... within the territory of a Party for the purpose of supplying a service;
- Mode 3 requires creation or acquisition of a commercial presence (enterprise) in the other Party – requires investment in the host Party

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1. Overlap between Services & Investment

- Mode 3 – results in overlap between Services and Investment Chapters
- Supply of services through com. presence requires ownership or control of commercial presence / enterprise in other Party
- Enterprise is also an *investment* covered by the *Investment Chapter*.
- Investor / service supplier of one Party who owns enterprise in other Party – potentially covered by both Investment and Services Chs
 - Two sets of obligations applying to same investment / business
- Potential for confusion / inconsistency: most likely where both chapters contain similar obligations: NT, MFN.

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2. Approaches to Services & Investment

2.1 GATS-style FTAs

- GATS-style FTAs: all modes supply – including Mode 3 – covered by Services Ch

How do FTAs address overlap?

AANZFTA: Article 3 Relation to other Chapters

1. This Chapter does not apply to measures adopted or maintained by a Party to the extent that they are covered by Chapter 8 (Trade in Services)

- Under most (but not all) GATS-style FTAs Investment Ch not apply to measures to the extent they affect Mode 3 service supply
 - Contrast JAIPA – no carve-out for Mode 3 and so both Services and Investment Chapters apply to Mode 3
- But – not all investment in service sectors qualifies as Mode 3
 - Not all investment in service sector is sufficient to own or control a commercial presence
 - Not all investment in service sectors for the purpose of supplying a service

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2. Approaches to Services & Investment

2.1 GATS-style FTAs

Non-mode 3 investment in service sectors

- If interest in enterprise not sufficient to own / control enterprise (portfolio investment) – not Mode 3 – not covered by Services Ch
- But – still covered by Investment Ch as protects shares / equity in enterprises as investments in addition to enterprises themselves



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2. Approaches to Services & Investment

2.1 GATS-style FTAs

- GATS-style approach to Services and Investment results in differing approach to regulation of investment depending on whether or not it qualifies as Mode 3
 - Mode 3 – regulated by Services Chapter
 - Non-mode 3 service sector investment - regulated by Investment Chapter
- Raises questions when levels of ownership / control change over time
- Eg: X-country Investor acquires 10% interest in internet provider (Y Co)
 - Not Mode 3 – regulated by investment chapter
- X-investor acquires an additional 41% interest in Y Co
 - X now owns Y Co – now regulated by Services Chapter rather than Investment?

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2. Approaches to Services & Investment

2.2 NAFTA-style FTAs

- Other main category of FTAs follows the NAFTA-style approach:
- Different architecture to GATS-approach:
 - Services Chapter applies only to 'Cross-border trade in Services' (Modes 1, 2 and 4) – does not cover Mode 3 (supply of a service through com. presence)
 - Investment Chapter covers all investments – including all investment in service sectors (except FS)
 - Services chapter also applies certain Services obligations to Mode 3 service suppliers: Market Access; Dom Reg; Transparency
- No overlap with S&I Chapters – no potential for inconsistency
- Principle that all investment should be treated the same regardless of sector / level of ownership & control

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2. Approaches to Services & Investment

• 2.2 NAFTA-style FTAs

- Because all investment covered by Investment Chapter (not Services Chapter) – NAFTA-style FTAs eg – TPP – commonly apply certain Services disciplines to Mode 3 investments
- This ensures that these enterprises – when acting as service suppliers – are subject to the same services disciplines as other service suppliers
- But – text clarifies that no Services disciplines can be subject to ISDS – even where they apply to investments which are otherwise regulated by the Investment Chapter

Article 10.2: Scope

1. This Chapter shall apply to measures adopted or maintained by a Party affecting cross-border trade in services by service suppliers of another Party.

cross-border trade in services ... means the supply of a service:

- (a) from the territory of a Party into the territory of another Party;
- (b) in the territory of a Party to a person of another Party; or
- (c) 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:

2. In addition to paragraph 1:
 - (a) Article (Market Access), Article (Domestic Regulation) and Article (Transparency) shall also apply to measures adopted or maintained by a Party affecting the supply of a service in its territory by a covered investment [FN];

[FN] For greater certainty, nothing in this Chapter, ... is subject to investor-State dispute settlement pursuant to Section B of Chapter 9 (Investment).

3. Protection of investment in service sectors

NAFTA approach

- No issue - whole Investment Chapter applies to all investments
- All Investment protections (and ISDS) already apply to Mode 3 investments

GATS approach

- FTAs generally carve-back-in core investment protections for Mode 3: MST; Expropriation; Transfers; ISDS
- Apply to all Mode 3 investments – not limited to specific commitments
- Other investment disciplines: performance requirements & senior management and boards of directors can also be applied to Mode 3
 - Reduce inconsistency of treatment of investment Mode 3 / non-Mode 3

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AANZFTA: Investment Chapter

Article 3 Relation to other Chapters

1. This Chapter does not apply to measures adopted or maintained by a Party to the extent that they are covered by Chapter 8 (Trade in Services) ...
2. Notwithstanding Paragraph 1, Article 6 (Treatment of Investment), Article 7 (Compensation for Losses), Article 8 (Transfers), Article 9 (Expropriation and Compensation), Article 10 (Subrogation) and Section B (Investment Disputes between a Party and an Investor) shall apply, mutatis mutandis, to any measure affecting the supply of service by a service supplier of a Party through commercial presence in the territory of any one of the other Parties pursuant to Chapter 8 (Trade in Services), but only to the extent that any such measures relate to a covered investment and an obligation under this Chapter, regardless of whether such a service sector is scheduled in a Party's schedule of specific services commitments in Annex 3.

AANZFTA Services Chapter

Article 22: Treatment and Protection of Commercial Presence

1. Chapter 11 (Investment) does not apply to measures adopted or maintained by a Party to the extent that they are covered by this Chapter.

2. Notwithstanding Paragraph 1, the following Articles and Section of Chapter 11 (Investment) apply, mutatis mutandis, to measures affecting the supply of services by a service supplier of a Party through commercial presence in the territory of another Party:

- (a) Article 6 (Treatment of Investment);
- (b) Article 7 (Compensation for Losses);
- (c) Article 8 (Transfers);
- (d) Article 9 (Expropriation and Compensation);
- (e) Article 10 (Subrogation); and
- (f) Section B (Investment Disputes between a Party and an Investor).

4. Scheduling Services & Investment commitments

- Under negative list FTAs – generally both services and investment take a negative list approach
 - Allows for single schedule for both services and investment
 - Avoids duplication as many measures / issues apply to both services and investment
 - Avoids potential inconsistency
- More complicated if FTA takes positive list to services and negative list to investment
 - Requires two sets of schedules
 - Some measures need to be scheduled in both Services and Investment schedules (eg. investment approval mechanisms, foreign equity limits)
 - Potential for uncertainty / inconsistency – particularly if relationship between Services and Investment not clear

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Thank you

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APEC - Services Negative Annex Scheduling Workshop

Session 3: Mode 4 & Temporary Entry



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Overview

1. Background to MNP - GATS
2. Services Mode 4 & Temp Entry / MNP
3. Temp Entry / MNP Chapters
4. Temp Entry & Immigration measures
5. Relationship Services and Temp Entry
6. Commitments on TE / MNP

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Background to MNP - GATS

- GATS applies to 4 modes of service supply – including the supply of a service by a supplier of one Member through presence of natural persons of a Member in the territory of another Member (Mode 4)

GATS Article I: Scope and Definition

1. This Agreement applies to measures by Members affecting trade in services.
2. For the purposes of this Agreement, 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.

1. Background to MNP - GATS

- Requires the movement / migration of people from one Member to another Member to supply service
 - But – focus of GATS on trade in services – not migration / temp entry
- *GATS Annex on Movement of Natural Persons* confirms GATS does not affect ability of Members to maintain and apply immigration measures – provided not nullify or impair benefits of a specific commitment
- Significant qualification – if person not able to enter the territory of the other Party they can't provide the service.
- Annex also confirms GATS doesn't apply to measures affecting persons seeking access to employment market, nor citizenship, residency or employment on a permanent basis
 - Temporary movement to work as / for a service supplier

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ANNEX ON MOVEMENT OF NATURAL PERSONS SUPPLYING SERVICES UNDER THE AGREEMENT

...

2. The Agreement shall not apply to measures affecting natural persons seeking access to the employment market of a Member, nor shall it apply to measures regarding citizenship, residence or employment on a permanent basis.

3... Members may negotiate specific commitments applying to the movement of all categories of natural persons supplying services under the Agreement. Natural persons covered by a specific commitment shall be allowed to supply the service in accordance with the terms of that commitment.

4. The Agreement shall not prevent a Member from applying measures to regulate the entry of natural persons into, or their temporary stay in, its territory, including those measures necessary to protect the integrity of, and to ensure the orderly movement of natural persons across, its borders, provided that such measures are not applied in such a manner as to nullify or impair the benefits accruing to any Member under the terms of a specific commitment.[FN]

[FN] The sole fact of requiring a visa for natural persons of certain Members and not for those of others shall not be regarded as nullifying or impairing benefits under a specific commitment.

2. Services Mode 4 & Temporary Entry

- FTA Services Chapters follow GATS – apply to the supply of a service through natural persons of a Party in the territory of (an)other Party (Mode 4)

AANZFTA

(s) **trade in services** means the supply of a service:

- (i) from the territory of one Party into the territory of any other Party;
- (ii) in the territory of one Party to the service consumer of any other Party;
- (iii) by a service supplier of one Party, through commercial presence in the territory of any other Party;
- (iv) by a service supplier of one Party, through presence of natural persons of a Party in the territory of any other Party;

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2. Services Mode 4 & Temporary Entry

- All of the Services disciplines (NT, MFN, MA, LP) apply to Mode 4
- BUT – FTAs generally subject to same qualifications as *GATS Annex on MNP*
 - Services Chapters do not impose obligations with respect to immigration measures (or access to employment market; citizenship & PR)
- In effect Services Mode 4 commitments only operate ‘behind the border’
 - once a person has been granted entry to the territory of the other Party.
- Not effect ability of Parties to control immigration and grant / not grant visas at the border

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3. Temporary Entry / MNP Chapters

- Specific commitments on MNP / TE generally made in separate chapter
- Contrast to GATS, FTA Services Chapters – MNP/TE Chapters apply to ‘measures affecting the temporary entry of (business) persons of one Party into the territory of another Party’
- Include commitments at the border – to allow temp entry of specific categories of persons
- But – still need to satisfy all applicable eligibility requirements of immigration measures
- MNP/TE Chapters – not limited to trade in services
- Commitments commonly to broader categories of ‘business visitors’ including: investors; intra-corporate transferees; independent executives

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Scope of MNP / TE Chapters

TPP Article 12.2: Scope

1. This Chapter shall apply to measures that affect the temporary entry of business persons of a Party into the territory of another Party.
2. This Chapter shall not apply to measures affecting natural persons seeking access to the employment market of another Party, nor shall it apply to measures regarding citizenship, nationality, residence or employment on a permanent basis.

AANZFTA Article 2: Scope

1. This Chapter shall apply, as set out in each Party’s schedule of specific commitments in Annex 4 (Schedules of Movement of Natural Persons Commitments), to measures affecting the temporary entry of natural persons of a Party into the territory of another Party.
2. This Chapter shall not apply to measures affecting natural persons seeking access to the employment market of another Party, nor shall it apply to measures regarding citizenship, residence or employment on a permanent basis.

3. Temporary Entry / MNP Chapters

- Key obligation in MNP / TE Chapter is promise to grant temporary entry to certain categories of business people – provided they satisfy all immigration requirements.
- MNP commitments generally made in a separate schedule to other services commitments.
- Parties generally make commitments with regard to specific categories of temporary entrants
 - typically include: contractual service suppliers; investors; intra-corporate transferees; independent executives; spouses

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AANZFTA

Article 4: Grant of Temporary Entry

1. Each Party shall, in accordance with that Party's schedule of specific commitments in Annex 4 (Schedules of Movement of Natural Persons Commitments), grant temporary entry or extension of temporary stay in accordance with this Chapter to natural persons of another Party provided those natural persons:

- (a) follow prescribed application procedures for the immigration formality sought; and
- (b) meet all relevant eligibility requirements for entry to the granting Party.

Article 5: Schedules of Commitments for the Entry and Temporary Stay of Natural Persons

Each Party shall set out in Annex 4 ... a schedule containing its commitments for the temporary entry and stay in its territory of natural persons of another Party covered by Article 2.1 (Scope). These schedules shall specify the conditions and limitations governing those commitments, including the length of stay, for each category of natural persons included in each Party's schedule of commitments.

Article 12.4: Grant of Temporary Entry

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.

2. A Party shall grant temporary entry or extension of temporary stay to business persons of another Party to the extent provided for in those commitments made pursuant to paragraph 1, provided that those business persons:

- (a) follow the granting Party's prescribed application procedures for the relevant immigration formality; and
- (b) meet all relevant eligibility requirements for temporary entry or extension of temporary stay.

3. Temporary Entry / MNP Chapters

- MNP commitments generally positive list approach – specific commitments apply only to categories of persons in the schedule and subject to limitations / conditions in schedule
- Similar whether FTA takes a positive or negative list approach to services more generally
 - Eg: TPP = negative list for services and investment – but TE commitments positive list approach (similar to AANZFTA)
- Negative list approach in Services doesn't require negative list for TE/MNP

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Description of Category	Conditions and Limitations (including length of stay)
<p>E. Contractual Service Suppliers (Including Independent Professionals and Specialists)</p>	
<p>Australia extends its commitments under this category to each Party that has made commitments under any of the following headings:</p>	
<ul style="list-style-type: none"> • Contractual Service Suppliers • Independent Professionals • Professionals • Professionals and Technicians • Professionals and Technician-Professionals. 	
<p>In accordance with, and subject to, Australia's laws and regulations, Australia shall, upon application, grant the right of temporary entry, movement and work to the accompanying spouse or dependants of a business person that is granted temporary entry or an extension of temporary stay under these commitments.</p>	
<p><u>Definition:</u></p>	
<p>Business persons with trade, technical or professional skills and experience who are assessed as having the necessary qualifications, skills and work experience accepted as meeting the domestic standard in Australia for their nominated occupation, and who are:</p> <p>(a) employees of an enterprise of a Party that has concluded a contract for the supply of a service within Australia and that does not have a commercial presence within Australia; or</p> <p>(b) engaged by an enterprise lawfully and actively operating in Australia in order to supply a service under a contract within Australia.</p>	<p>Temporary entry of business persons is subject to employer sponsorship. Full details of employer sponsorship requirements, including the list of eligible occupations for sponsorship, are available on the website of the Australian government department responsible for immigration matters (as at entry into force, the address of that website was www.border.gov.au). Sponsorship requirements, including eligible occupations, may change from time to time.</p> <p>Entry of business persons is for periods of stay up to 12 months, with the possibility of further stay.</p> <p>Temporary entry of spouses and dependants is for the same period as the business persons concerned.</p>
<p style="text-align: center;">ANNEX 11.A – AUSTRALIA – 1</p>	

4. Temporary Entry & Immigration measures

- Like GATS - FTAs confirm nothing prevents a Party from regulating migration / applying immigration measures
 - except where nullifies or impairs a benefit under TE/MNP Chapter
- The only commitments which affect Party's freedom reimmigration measures are specific commitments made in the TE/MNP Chapter
 - TE / MNP contains commitments which apply at the border
- Clarification affects Services Chapters as well
- Language clearer in TPP – but outcome similar under AANZFTA

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TPP Article 12.2: Scope

3. Nothing in this Agreement shall prevent a Party from applying measures to regulate the entry of natural persons of another Party into, or their temporary stay in, its territory, including those measures necessary to protect the integrity of, and to ensure the orderly movement of natural persons across, its borders, provided that those measures are not applied in a manner as to nullify or impair the benefits accruing to any Party under this Chapter.

4. The sole fact that a Party requires business persons of another Party to obtain an immigration formality shall not be regarded as nullifying or impairing the benefits accruing to any Party under this Chapter.

TPP Article 12.9: Relation to Other Chapters

1. Except for this Chapter, [and other chapters not directly relevant] no provision of this Agreement shall impose any obligation on a Party regarding its immigration measures.

Immigration measures & TE / MNP Chapters

AANZFTA Article 7: Immigration Measures

1. Nothing in this Chapter, Chapter 8 (Trade in Services) or Chapter 11 (Investment) shall prevent a Party from applying measures to regulate the entry of natural persons of another Party into, or their temporary stay in, its territory, including those measures necessary to protect the integrity of, and to ensure the orderly movement of natural persons across, its borders, provided that such measures are not applied in such a manner as to nullify or impair the benefits accruing to another Party under this Chapter or to unduly impair or delay trade in goods or services or the conduct of investment activities under this Agreement.
2. The sole fact of requiring persons to meet eligibility requirements prior to entry to a Party shall not be regarded as nullifying or impairing benefits accruing to another Party under this Chapter, or of unduly impairing or delaying trade in goods or services or the conduct of investment activities under this Agreement.

5. R'ship Services & Temporary Entry

- TPP: No global relationship clause but – TE Chapter is the only Chapter which contains commitments which affect immigration measures
- Most of the TPP Parties have scheduled a broad reservation for the equivalent of Mode 4 against MA in Services & Investment Schedules
 - Effectively carve-out Mode 4 from MA
 - Some of these refer back to commitments under TE Chapter and /or GATS
 - Some broader than others
- A number of TPP Parties took a hybrid positive list approach to MA – broad reservation to adopt or maintain measures except as set out in schedule (and subject to limitations / qualifications in Schedule)

Sector: All

Obligations Concerned: Market Access (Article 10.5)

Description: Cross-Border Trade in Services

Brunei Darussalam reserves the right to adopt or maintain any measure with respect to the supply of a service by the presence of natural persons, including on the total number of foreign natural persons that may be employed in any sector, subject to the provisions of Chapter 12 (Temporary Entry for Business Persons), and in a manner that is not inconsistent with Brunei Darussalam's obligations under Article XVI of GATS.

TPP - ANNEX II – BRUNEI DARUSSALAM – 5

Sector:	All
Sub-Sector:	
Obligations Concerned:	Market Access (Article 10.5)
Level of Government:	Central and Regional
Description:	<u>Cross-Border Trade in Services</u> Mexico reserves the right to adopt or maintain any measure related to Article 10.5 (Market Access), except for the following sectors and sub-sectors subject to the limitations and conditions listed below: ...

Sector or subsector	Limitations on market access
1. BUSINESS SERVICES	
1. A. Professional services ¹	
a) Legal services (CPC 861)	1), 2) and 3) None 4) Unbound except as indicated in the Temporary Entry for Business Persons Chapter.
b) Accounting, auditing and bookkeeping services (CPC 862)	1), 2) and 3) None 4) Unbound, except as indicated in Temporary Entry for Business Persons Chapter.

ANNEX II – MEXICO – 12

5. R'ship Services & Temporary Entry

	AANZFTA	TPP	GATS
Separate Chapter on MNP or Annex	Chapter	Chapter	Annex
Services & MNP commitments	Any specific commitments on MNP & Mode 4 in MNP Schedule	'at the border' commitments in TE Approach to 'behind the border' Mode 4 commitments vary	GATS disciplines apply to Mode 4
MNP commitments separate or combined with Services	Separate schedule	Separate schedule	Single schedule
Services: positive or negative list	Positive	Negative	Positive
MNP: positive or negative list	Positive	Positive	Positive

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APEC - Services Negative Annex Scheduling Workshop

Session 4: Preparing a negative list schedule



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Overview

1. Identifying reservations
2. Annex 1 or Annex 2?
3. Drafting reservations: key principles
4. Drafting reservations: scope & carve-outs

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1. Identifying reservations

- Audit of existing NCMs & consultation with relevant agencies
 - review of general / sectoral rules & restrictions that impact on ability of foreign service suppliers to supply service
- Review guided by key requirements of relevant (scheduling) obligations
 - Eg: Does a requirement treat foreign service suppliers less favourably? (NT)
 - Is there a limit on the number of suppliers allowed to provide a service? (MA)
 - Are service suppliers required to establish presence / be resident in the Party to supply a service? (LP)
- Precedent agreements / positive list can provide guidance in identifying NCMs – but can't just copy into negative list
 - need to take account of differences in obligations & structure

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1. Identifying reservations

- Practice of other States can provide useful guidance
 - Highlights sensitivities and concerns that other countries have identified
- Some kinds of reservations very common:
 - MFN for existing agreements;
 - Privatisation and devolution of SSEG to private sector;
 - social services (education, health, social security);
 - treatment of disadvantaged groups;
 - Cultural heritage, creative arts

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Sector: All

Obligations Concerned: Most-Favoured-Nation Treatment (Article 9.5 and Article 10.4)

Description: Investment and Cross-Border Trade in Services

1. Japan reserves the right to adopt or maintain any measure that accords differential treatment to countries under any bilateral or multilateral agreement in force on, or signed prior to, the date of entry into force of this Agreement.

2. Japan reserves the right to adopt or maintain any measure that accords differential treatment to countries under any bilateral or multilateral agreement, other than the agreement referred to in paragraph 1, involving:

- aviation;
- fisheries; or
- maritime matters, including salvage.

Existing Measures:

ANNEX II - JAPAN - 11

ANNEX II

SCHEDULE OF NEW ZEALAND

Sector: All

Obligations Concerned: National Treatment (Article 9.4 and Article 10.3)
Most-Favoured-Nation Treatment (Article 9.5 and Article 10.4)
Performance Requirements (Article 9.10)
Senior Management and Boards of Directors (Article 9.11) Local Presence (Article 10.6)

Description: Investment and Cross-Border Trade in Services

New Zealand reserves the right to adopt or maintain any measure with respect to:

- the provision of public law enforcement and correctional services; and
- the following, to the extent that they are social services established for a public purpose:
 - childcare;
 - health;
 - income security and insurance;
 - public education;
 - public housing;
 - public training;
 - public transport;

Sector:	Indigenous Communities, Peasant, Native and Minority Affairs
Sub-Sector:	
Obligations Concerned:	National Treatment (Article 9.4 and Article 10.3) Most-Favoured-Nation Treatment (Article 9.5 and Article 10.4) Performance Requirements (Article 9.10) Senior Management and Boards of Directors (Article 9.11) Local Presence (Article 10.6)
Description:	<u>Investment and Cross-Border Trade in Services</u> Peru reserves the right to adopt or maintain any measure according rights or preferences to socially or economically disadvantaged minorities and ethnic groups. For purposes of this entry, "ethnic groups" means indigenous, native, and peasant communities.
Existing Measures:	

ANNEX II-PERU -4

2. Annex 1 or Annex 2?

- Annex 1: can only apply to *existing* measures
 - Must be laws, requirements etc in existence at time of entry into force of FTA
- Qn: Is there an existing measure?
- Are you prepared to bind (not freeze) it?
 - points to Annex 1
- Qn: Is the regulation of a certain sector under development / in flux?
- Are you seeking to preserve broader flexibility to adopt new measures in sensitive areas with core policy concerns?
 - points to Annex 2
- Standstill & ratchet don't prevent Party from regulating / changing requirements – but they do prevent changes which would make the measure *less consistent* with the relevant obligations

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2. Annex 1 or Annex 2?

- Possible to limit the operation of Annex 2 reservations to increase certain and transparency
- Can qualify the flexibility reserved in a particular area or provide greater clarity on what you (do not) intend to do
 - Useful if there is ongoing reform or policy change or you are planning on introducing a new law or measure but it is not yet existing
 - In this case – can't address entirely in Annex I – but can draft Annex II reservation to provide more certainty
- Example:
 - TPP – AUS Annex II reservation for privatisation & devolution of SSEGA to private sector
 - Broad space to take measures – but any measures adopted after EIF are deemed to be *existing* measures – subject to Annex I standstill & ratchet

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Sector:	All	TPP
Obligations Concerned:	National Treatment (CBTS and Investment) Market Access Performance Requirements Senior Management and Boards of Directors	
Description:	<p><u>Cross-Border Trade in Services and Investment</u></p> <p>...</p> <p>At [sub-national] levels of government, Australia reserves the right to adopt or maintain any measure with respect to:</p> <p>(a) the devolution to the private sector of services provided in the exercise of governmental authority at the time that the Agreement comes into force; and</p> <p>(a) the privatisation of government owned entities or assets.</p> <p>For the purposes of this reservation, any measure adopted after the date of entry into force of this Agreement in relation to subparagraphs (a) or (b) shall be deemed an existing non-conforming measure subject to ... paragraph 1 of Article (Non-conforming Measures).</p>	

ANNEX II – AUSTRALIA – 7

3. Drafting reservations: key principles

- Key principles in drafting: clarity & precision
- Important to clearly and accurately reflect non-conforming aspects of measure (list 1); or policy space being reserved (list 2)
- Clarity important for both the Party making the reservations and for service suppliers
 - Both officials and service suppliers can be confident of scope of commitments – and how they would be interpreted
- Focus on aspects of measure that are, or may be, inconsistent (non-conforming) with the obligations
- Not just a general description of measure

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3. Drafting reservations: key principles

- Best not to draft reservations broader than necessary (in light of policy settings)
 - Reduces certainty and transparency – what is the Party committing to?
 - Risk of overlap with other reservations and carve-outs
- Avoid scheduling measures which do not need to be scheduled (because of scope, exceptions, or carve-outs etc) as this can create uncertainty
 - Why would you need the reservation if already covered by an exception?
 - Does this mean the exception should be interpreted more narrowly?

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4. Drafting reservations: scope & carve-outs

- Scope & carve-outs
- If measure covered by a carve-out or exception – no need to schedule.
- Typically FTAs carve-out from entire Services Chapter:
 - subsidies and grants
 - government procurement; and
 - services supplied in the exercise of governmental authority (SSEGA)
- Don't need to schedule measures if they fall within these carve-outs
 - Applies to whole Chapter – including scheduling obligations
- What are SSEGA?
 - service not supplied on a commercial basis and
 - not in competition with one or more service suppliers
 - Eg: police force; state-owned monopoly postal service

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TPP: Article 10.2: Scope

...

3. This Chapter shall not apply to:

- (a) financial services ...;
- (b) government procurement;
- (c) services supplied in the exercise of governmental authority; or
- (d) subsidies or grants provided by a Party, including government-supported loans, guarantees and insurance.

4. Drafting reservations: scope & carve-outs

Scope & carve-outs

- Exceptions also relevant - don't need to schedule a reservation if falls within the scope of an exception
- But need to consider disciplines / limitations on exceptions in light of policy objectives – whether exceptions adequate / appropriate
- Standard (WTO-style) General Exceptions subject to disciplines
 - Eg. Requires measures to protect human health are “necessary”; and not amount to ‘unjustifiable discrimination’ or a ‘disguised restriction on trade’
- Standard (WTO-style) Essential Security exception is limited
 - Only applies to certain specific essential security interests
 - Not cover full range of requirements that may be imposed for security reasons

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GATS Article XIV: General Exceptions

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where like conditions prevail, or a disguised restriction on trade in services, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any Member of measures:

- (a) necessary to protect public morals or to maintain public order;
- (b) necessary to protect human, animal or plant life or health;
- (c) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement including those relating to:
 - (i) the prevention of deceptive and fraudulent practices or to deal with the effects of a default on services contracts;
 - (ii) the protection of the privacy of individuals ... ; (iii) safety;

...

GATS Article XIV bis: Security Exceptions

1. Nothing in this Agreement shall be construed:

- (a) to require any Member to furnish any information, the disclosure of which it considers contrary to its essential security interests; or
- (b) to prevent any Member from taking any action which it considers necessary for the protection of its essential security interests:
 - (i) relating to the supply of services ... for the purpose of provisioning a military establishment;
 - (ii) relating to fissionable and fusionable materials ...;
 - (iii) taken in time of war or other emergency in international relations; or
- (c) to prevent any Member from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security. ...

Thank you



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