

# Services in FTAS

Cape Town, 22-25 August 2007

# Key References

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# Services in FTAs

## *Topics*

### **A. 'Architectural' Issues**

- Negative and positive listing
- Rules of origin
- MFN
- National treatment
- Market access
- Investment
- Natural persons
- Recognition of professional qualifications
- Domestic Regulations
- Other trade rules

### **B. FTAs – How Much Further than GATS?**

# Negative and Positive Listing Approaches

- Agreements may state what is not covered (negative list) or what is covered (positive list)
- A distinction is drawn in the literature between a NAFTA-type approach (negative list) and a GATS-type approach (positive list)
  - GATS is in effect a hybrid, as the schedules are based on a positive list approach and the measures are scheduled on the basis of a negative list approach

# Negative List (NL) Approach

- Possible listed exceptions:
  - Existing non-conforming measures
  - Exclusion of future measures or activities
- Status quo policy scheduled with NL
- NLs more transparent – policies must be revealed and explained
- Possible ‘ratcheting up’ provision – eliminated measures automatically bound
- If applied to future measures, protection is pre-empted, which could be important for new technologies (especially mode 1-related and new services)

# Positive (PL) List Approach

- PL generally less transparent and far-reaching, BUT
  - Transparency if NL less if list is long (PL and NL equivalence)
  - Hybrids such as GATS exist
  - Status quo policy could be incorporated in PL (e.g. Japan-Malaysia)
  - Gradualism and ‘breathing space’ with PL
- In sum, toughest approach would: i) bind status quo; ii) bind future measures and new services; and iii) ratchet up bindings as exempted measures are modified

# Rules of Origin

- In goods, an intermediate input criterion operates
- Services are more complex because rules of origin deal with services and service suppliers (natural and juridical persons)
- Liberal rules lessen distortions but undermine FTA bargaining power
- Most FTAs are quite liberal, often basing rule on a “substantial business operation” criterion, regardless of origin of mode 3 supplier
- Rules not particularly biting in mode 1, and mode 4 often restricted to citizens and maybe permanent residents
- For third parties, maybe market access conditions as important as rules of origin

# MFN

- MFN not incorporated in all FTAs (i.e. bilaterals)
- MFN effective if guarantees non-discrimination among all other present and future parties to trade agreements (not required in GATS), but this dilutes bargaining power in FTAs
- Beneficial if juridical/natural persons constituted under the laws of a party enjoy preferences regardless of provenance (GATS allows this for mode 3 with substantial business operations criterion)
- MFN departures issue for recognition

# National Treatment (NT)

- Importance of concept of ‘likeness’ – a narrow definition will limit the scope of NT
- GATS refers to “like services and service suppliers”, and *de facto/de jure*
- Many FTAs refer to “like circumstances”
- A lack of definitional precision in GATS and FTAs
- Does NT apply across modes?

# Market Access

- The approach to market access is very similar in GATS and many FTAs
- Mode 3 is sometimes absent in FTAs as it is included in a horizontal investment chapter
- The relationship between market access and regulation and national treatment is complex and not always clear

# Investment

- Two approaches: GATS, where investment is a mode of supply and BITs, with horizontal obligations
- Many FTAs embody a bit of both, but definition of investment tends to be quite broad, going further than GATS
- GATS coverage requires 50% equity or corporate control, but varies approaches in FTAs
- Even with limited equity or control, foreign suppliers might enjoy some horizontal protections
- Many FTAs have investor-state dispute resolution provisions

# Natural Persons

- Most FTAs have not gone much further than the GATS
- Like GATS, many of them exclude access to the employment market, citizenship rights, residency rights, migration and visas
- There is some confusion whether foreign service suppliers employed by domestic businesses are covered

# Recognition of Professional Qualifications

- Recognition is essential to access, regardless of market access obligations, so this is a regulatory issue
- Harmonization of regulations is one option
- Mutual recognition agreements are another, but then the MFN issues – GATS refers to “adequate opportunities” being given to third parties to negotiate MRAs
- Most FTAs are not much further along than GATS, and some have ‘soft law’ provisions or contemplate future negotiations

# Domestic Regulation

- Domestic regulation raises MFN, national treatment and market access issues
- Generally, qualification requirements and procedures, technical standards and licensing requirements are covered
- Regulations are needed to protect consumers, adjust for market failure and ensure quality
- Rules typically cover administration, the notion of necessity and some sectoral applications (telecoms, accountancy, e-commerce)
- **BUT TENSION BETWEEN PUBLIC POLICY AND PROTECTION, especially acute in services**

# Domestic Regulation, GATS

- GATS limits application of most provisions to scheduled commitments – makes negative list more attractive
- Administrative provisions: regulations to be applied in a “reasonable, objective and impartial manner” (specific commitments only)
- Necessity: regulations to be applied on the basis of objective and transparent criteria, not more burdensome than necessary to ensure the quality of a service (specific commitments only)

# Domestic Regulation, GATS (cont.)

- Licensing requirements should not in themselves be restrictive (specific commitments only)
- Also proviso that particular regulations could not have been reasonably expected
- The link with market access arguably constrains regulatory freedom, but in other respects the provisions are weak
- Most FTAs have not gone much further

# Other Trade Rules

These include:

- Safeguards
  - Subsidies (note the role of national treatment)
  - Procurement
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- Negotiating mandates exist in GATS in all three areas, but little progress so far; a similar situation in many FTAs, except in some cases where procurement is treated as a horizontal discipline

# FTAs: How Much Further than GATS?

- Rules:
  - FTAs have not added value in many areas, but some additions in telecoms, financial services, transparency and maybe recognition
- Liberalization
  - Many FTAs have gone further in terms of sectoral coverage and depth of commitments, but variance
  - FTAs with the US especially far-reaching (Bahrain, Central America, Chile, Colombia, Dominican Rep., Morocco, Oman, Peru, Singapore)

# FTAs: How Much Further than GATS? (cont.)

## Fink/Molinuevo analysis

Construction, distribution:	>50% subsectors new or improved in FTAs
Tourism, business, communication, recreational :	Approx 40%
Education, environment, health, transport, financial :	25 – 31%

# FTAs: How Much Further than GATS? (cont.)

## Fink/Molinuevo analysis

Mode 1	29% new or improved
Mode 2	32% new or improved
Mode 3	40% new or improved
Mode 4	46% new or improved, (but small changes)

# FTAs: How Much Further than GATS?

## Concluding Observations

- The US has usually struck more far-reaching FTAs than others, with more GATS+
- The negative list approach has generally yielded more than GATS, on liberalization and GATS+
- FTAs do not exist among major players (EU, US, Japan, China, India)
- Protected sectors under GATS tend to stay protected under FTAs (audiovisual, maritime, some professional services, some cross-border financial services)
- Smaller countries have tended to go further than larger ones
- Seemingly countries that are more open under GATS go further in FTAs