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MODALITIES FOR SCHEDULING SERVICES COMMITMENTS: CONSIDERATIONS FOR THE PHILIPPINES

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Modalities for Scheduling Services Commitments: Considerations for the Philippines

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ABBREVIATIONS

AANZFTA	ASEAN-Australia New Zealand Free Trade Agreement
ACIA	ASEAN Comprehensive Investments Agreement
AFAS	ASEAN Framework Agreement on Services
ASEAN	Association of Southeast Asian Nations
FDI	Foreign Direct Investment
FTA	Free Trade Agreement
GATS	General Agreement on Trade in Services
IPRs	Intellectual Property Rights
MFN	Most-Favored Nation
NAFTA	North American Free Trade Agreement
RCEP	Regional Comprehensive Economic Partnership
RTA	Regional Trade Agreement
TiSA	Trade in Services Agreement
TPP	Trans-Pacific Partnership Agreement
TTIP	Trans-Atlantic Trade and Investment Partnership
TRADE	Trade-Related Assistance for Development Project
USAID	United States Agency for International Development
WTO	World Trade Organization

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1. FOREWORD

The choice of a services negotiating and scheduling modality is a very important one in the context of a free trade agreement. While the WTO General Agreement on Trade in Services (GATS) has followed the positive list approach for scheduling services commitments, other trade agreements have tended to favor the negative list approach as a more comprehensive, transparent and effective scheduling technique, as well as more conducive to regulatory reform and services trade liberalization. The North American Free Trade Agreement (NAFTA) agreement, which came into force one year prior to the WTO GATS (January 1994) was the precursor in setting out a negative list format and associated disciplines. Many countries around the world, including in Asia, have subsequently followed this precedent. The negative list approach is now the one that enjoys by far the largest adherence for countries entering into services trade agreements.

In theory one can achieve the same liberalization outcome using a positive or negative list approach,¹ but a negative list approach has a greater sense of completeness and transparency. The positive list or GATS approach was intended to facilitate “progressive liberalization” in future rounds. It was developed in a multilateral context, with numerous negotiating partners of varying levels of development and differing attitudes toward economic openness. It is not clear whether the positive list approach makes sense in the context of a bilateral FTA where participating countries seek to integrate their economies into a closer economic relationship in order to benefit from complementarities.

Most of the countries around the world negotiating Regional Trade Agreements (RTAs) have opted for the negative list approach over the past two decades in constructing their services agreements because they have experienced the benefits that a negative listing can offer by allowing for more coherence in the construction of a trade agreement and for more completeness in the scope of the agreement. Importantly, governments have been convinced through experience of the benefits of a negative list agreement for their services providers, given the greater transparency of the negative list approach together with the greater ease of use and understanding. The negative list approach is also viewed as facilitating the participation of a country’s firms in global value chains, as it encourages a holistic view of investment and trade in services, which better takes into account the integrated nature of today’s fragmented production networks.

All of the ‘new generation’ trade agreements as well as the recent mega-regional negotiating initiatives have turned to the negative list approach as one of their principal building blocks. This is true of the Trans-Pacific Partnership (TPP) as well as of the Trans-Atlantic Trade and Investment Partnership (TTIP). Even the participants in the plurilateral Trade in Services Agreement (TiSA) negotiations in Geneva have adopted a ‘hybrid’ approach in which the negative list component is prominent.

¹ Under a positive list approach, the country lists the industries/sectors that it offers to open or liberalize (while all others will remain restricted); under a negative list approach, the country lists industries/sectors for which it will maintain restrictions, with the implication that all others not included in the list will be opened without restriction to investors from the other countries, that are part of the trade agreement. In both cases, the country also lists general restrictions it intends to maintain even under the trade agreement.

The negative list approach is thus not a concept that can continue to be set aside but must be understood by Philippine officials and negotiators so that it may be possible for the Philippines to engage in future trade negotiations and agreements on this basis, as it will most likely be demanded by its trading partners. Future adherence to the TPP will require producing a negative list schedule, and the Regional Comprehensive Economic Partnership (RCEP) may also decide to incorporate components of negative listing in its future agreement, as it is being requested by several of the participants, including Australia, New Zealand, Japan, Korea, and some ASEAN members.

Thus this Policy Note seeks to be a timely response to the need for Philippine officials to carefully consider their options in the area of services, particularly to be well prepared for engagement in future trade negotiations. The capacity to undertake negative list scheduling for services will be an important element in such preparation.

2. MODALITIES FOR SCHEDULING COMMITMENTS

Since the time of the WTO GATS and the NAFTA, approaches to modalities for scheduling service trade commitments in more recent FTAs have been evolving to reflect both concerns to increase the effectiveness of commitments, along with the trend towards the inclusion in modern FTAs of substantial chapters on investment and sometimes also temporary movement of natural persons. There is now a wide range of options that can be identified from existing agreements for combining commitments on services, investment and movement of persons, beginning with the familiar GATS framework, which treats services on a standalone basis, but also including a variety of approaches for combining commitments on services with separate chapters on investment and movement of persons.

While the Philippines is most familiar with the GATS framework, it is the case that their dialogue partners in RCEP are advocating consideration of some form of a negative list approach. ASEAN already has a separate investment agreement that has adopted scheduling along the negative list lines. This means that it will be necessary as well to consider what type of modality best allows for combining services commitments with a separate investment agreement, and how to make the commitments between the two compatible.

This Policy Note discusses the range of possible scheduling modalities for undertaking services commitments in free trade agreements, contrasting the positive list approach, the negative list approach and the hybrid approach.

A. Positive List Approach

The traditional approach to scheduling commitments under a positive list approach is familiar to most countries because of their participation in the GATS.

In the GATS framework, a positive list approach is adopted with respect to the choice of services sectors and subsectors to be covered by commitments, as well as the modes of supply within each sector and subsector for which commitments are to be made.² Commitments may be made for any sectors or subsectors, and sectors and subsectors for which a government chooses not to make commitments are simply not included in the schedule. Modes of supply in scheduled sectors for which no commitments are made are scheduled as “unbound,” indicating that they are not subject to any commitments on market access or national treatment, and governments are not constrained by the agreement from adopting more restrictive measures for these modes of supply in the future. Modes of supply that are not scheduled as “unbound” may be then subject to either partial or full commitments to remove market access and national treatment restrictions. When these commitments are partial, then those restrictions that the government wishes to retain should be indicated in the schedule as limitations on its commitments. However, there is no requirement to schedule

² In services agreements, there are four ways or “modes” of trading services, called ‘modes of supply’. These are the following: Mode 1: cross-border trade in services, when the service itself is sent across the border, similar to trade in goods (as in business process outsourcing); Mode 2: consumption abroad, when the consumer of a service goes abroad to consume that service in a foreign location (such as in tourism); Mode 3: commercial presence, when a firm carries out a foreign direct investment in another country in a service sector; the resulting sales from that investment are considered services trade; and Mode 4: movement of natural persons, when a natural person goes abroad to supply services in a foreign location and is remunerated for this. Thus three of the four modes of service supply involve physical movement of either capital or labor.

these limitations at the level of actual practice. They can be scheduled at a more restrictive level than actual practice, in which case the government has the right to alter the restrictiveness of the restrictions in question at any time, up to the ceiling level indicated in the schedule.

In a GATS-style schedule of commitments, restrictions that affect all sectors are inscribed as limitations in the horizontal section of the schedule.

Because they potentially restrict trade in all sectors, restrictions on foreign investment and temporary movement of natural persons will often be recorded in the horizontal section as limitations on commitments. Given the importance of commercial presence and presence of natural persons as mechanisms through which trade in services is conducted, the degree of restrictiveness of the horizontal limitations on FDI and temporary movement of natural persons will play a key role in determining how freely investors can invest and natural persons can work in a given market under the service schedule in question.

At one extreme, horizontal limitations based on highly restrictive foreign investment or temporary entry regimes can largely negate any potential for an agreement to increase openness to foreign supply of services in individual sectors under Mode 3 or Mode 4, respectively, regardless of what commitments may be recorded at the individual sector level. At the other extreme, a very liberal horizontal entry for allowed foreign investment or temporary entry of natural persons means that it will be the openness of the sector-level commitments that will determine the relevant access for investors or workers. However, it is generally the horizontal entries that are determinant in these cases, as they codify the existing Investment Law and Labor Law in force in a given country.

Arguments in Favor of a Positive List Approach

- This approach is most familiar to the Philippines as this was the basis of the commitments it undertook in the Uruguay Round under the GATS, as well as under the ASEAN AFAS and the other free trade agreements since that date (Philippines-Japan EPA, and the various FTAs ASEAN has negotiated with its dialogue partners). Officials understand the schedules of commitments in positive lists.³
- The positive list approach allows the government the flexibility to gradually open its service sectors as it wishes and at the speed it feels appropriate. Market access is granted in only the services and modes of supply that are listed in its schedule. For instance, a particular Department can open only mode 3 (establishment) while keeping cross border trade (mode 1) closed (or vice versa, though the desirability of either of these choices is questionable.)
- Many developing countries, including the Philippines, face information asymmetries in terms of knowledge of their service industries and sectors. In order to undertake comprehensive commitments on all services sectors, it is necessary to know all of the measures affecting services trade in those sectors. It has often been considered difficult to commit or liberalize service sectors in which they do not have sufficient information on these measures and know little about their domestic firms, and thus

³ This is notwithstanding the fact that the general foreign investment policy of the Philippines, especially in reference to manufacturing investments, has been defined on a negative list approach, as embodied in the Foreign Investments Act of 1991. Restrictions in the services sector are embodied in specific laws governing particular services, including those pertaining to professional services subject to regulation and licensing.

may be unable to gauge the implications on domestic stakeholders of greater market access for foreign service suppliers.

- The regulatory regimes for various services activities may still be under-developed in the Philippines. Therefore it is sometimes felt that the government should proceed with caution in allowing foreign entrants into the market while efforts are made to develop and/or strengthen regulations in various service industries.
- Lastly, the fear is often expressed that the negative list approach will remove “policy space” from government actions and its ability to regulate, removing the flexibility to tailor future measures to the needs of specific service sectors, and to allow “space” for pursuing domestic policy objectives.

Arguments Against a Positive List Approach

- This approach is considered more appropriate for a larger, multilateral setting than for a regional agreement among like-minded trading partners with similar levels of ambition.
- The positive list approach is not helpful to business and those actually engaged in services trade, as it does not provide an up-to-date and accurate picture of the existing measures that affect services trade and market access possibilities. This is because the commitments that are included in positive list agreements do not have to be scheduled at the level of regulatory application, or at the level of application of existing laws. Therefore services providers do not really know what are the opportunities for accessing a given market from the services schedules, rendering them basically unhelpful. Having two sets of information for a particular services measure or sector (as in the law and in the schedule) also creates confusion and a feeling of uncertainty on the part of both investors and service suppliers that can have a dampening effect on trade.
- Services measures and regulations change over time, but there is generally no provision in positive list agreements to have these updated. Therefore, the agreements go out of date quickly unless they are regularly renegotiated.
- Positive list agreements generally provide a very partial coverage of services measures and services sectors. Not all sectors nor all measures are included in services schedules as there is no obligation to include all sectors within the scope of a given agreement. Thus there are many gaps or holes in the schedules where those engaged in services trade do not have any information at all about conditions and access in a given market.
- The positive list approach is generally not accompanied by strong disciplines on either market access or national treatment, rendering such agreements very weak and generally quite ineffective. Very little services liberalization has taken place under positive list agreements, as neither the structure nor the disciplines of such agreements underpin a movement in the direction of market opening. Even when the Agreement provides for progressive liberalization, the process only bestows marginal improvement in market opening in each round of negotiation until (and if) the equivalent of the level of regulatory application is reached. And this process supposes that the negotiations in question are undertaken regularly and successfully, as there is no built-in mechanism for automatic incorporation and binding of autonomous liberalization steps.

B. Negative List Approach

The North American Free Trade Agreement (NAFTA) pioneered a modality that differs from the GATS modality both in the structure adopted for covering both services and investment within the trade agreement, and in the adoption of the negative list modality to scheduling commitments. This NAFTA-type approach is usually called the “negative list approach,” although the use of the negative list approach to scheduling is not in practice confined to agreements with this specific structure.

The structural innovation of the “negative list” or “NAFTA-style” approach to trade agreements is to separate the coverage of cross-border services (Modes 1 and 2) from the supply of services under Modes 3 and 4. There is thus a separate chapter for cross-border services, a separate chapter on investment covering investment in both goods and services, and a separate chapter on temporary movement of natural persons.

The investment chapter deals with investment in the same way as a bilateral investment treaty (BIT), with extensive investor protection provisions. It also adopts a much broader definition of investment than just FDI, including investment in intangible assets such as stocks, bonds and investment accounts as well as intellectual property rights (IPRs). The investment chapter covers both goods and services.

The chapter on temporary movement, described as “temporary movement of business persons” (rather than “temporary movement of natural persons”) deals with aspects of the supply of services under Mode 4, including suppliers of services. In many cases these chapters also deal with investors/business visitors or intra-corporate transferees that are not necessarily providing services but may be operating in the goods sector. Thus a typical chapter on “temporary movement of business persons” would cover those persons working in both goods and services alike, thus providing disciplines that are holistic and allow for an integrated approach to production and investment decisions on the part of firms.

The negative list element of this approach consists in requiring that all parties to the agreement respect the core disciplines for all service measures and sectors unless they otherwise specify the restrictive measures they wish to retain and place these in annexes in the form of non-conforming measures. An annex of non-conforming measures would thus be set out for the measures that violate the core disciplines in the cross-border services chapter as well as the investment chapter. A separate annex is usually also set out with respect to financial services. The core disciplines of the cross-border services chapter that must be respected unless otherwise indicated are the following:

- most-favoured nation treatment;
- national treatment;
- market access; and
- no local presence (that is, the requirement not to oblige service providers to carry out an investment in a given market in order to provide cross-border services).

The core disciplines of the investment chapter that must be respected unless otherwise indicated are the following:

- most-favoured nation treatment;
- national treatment;

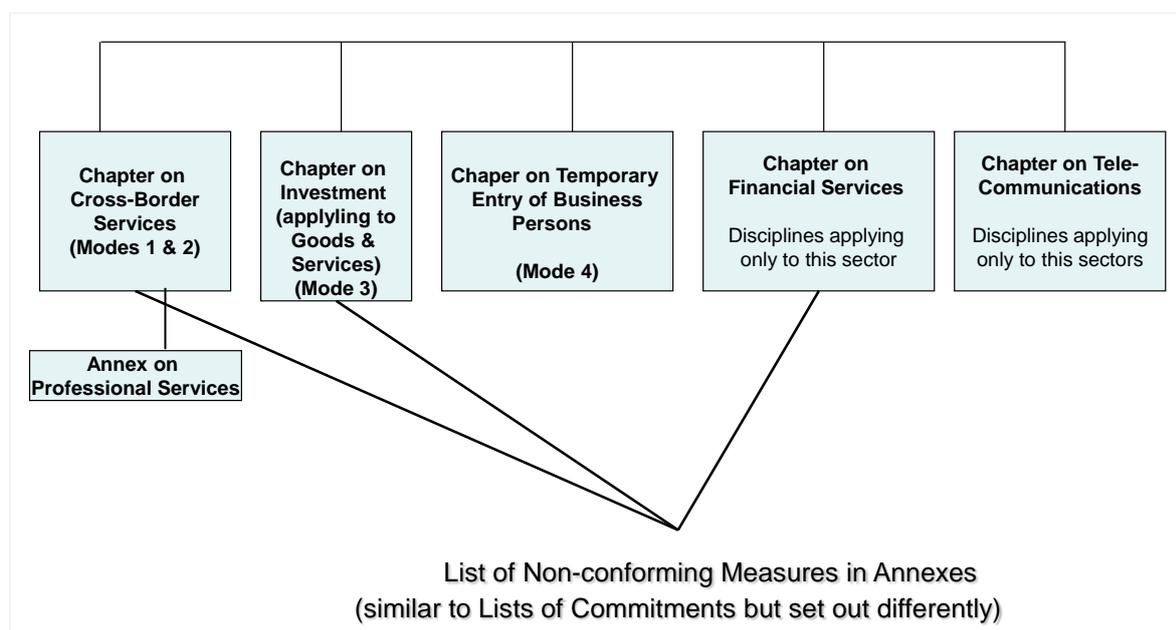
- market access;
- no performance requirements (that is, no requirement for firms undertaking an investment to confirm to any particular type of output undertakings, such as sourcing a certain percentage of inputs from the local market or directing a certain percentage of final production to export); and
- senior management and key personnel (that is, the requirement to allow firms undertaking an investment to bring in a certain number of their own high-level staff to run the activity).

All of the above core disciplines in the cross-border services chapter and in the investment chapter are applied in a horizontal manner across the board, that is to all services and services measures and to all investment undertakings.

The structure of a typical negative list trade agreement is set out in Figure 1 below, which illustrates all of the chapters in such agreements that cover services alone (cross-border chapter; financial services; telecommunications) as well as those chapters that cover both services and goods in a horizontal manner (investment; temporary entry). The diagram also shows how they relate to each other through the annexes of non-conforming measures.

FIGURE 1

STRUCTURE OF "NAFTA-STYLE" NEGATIVE LIST ARCHITECTURE FOR SERVICES



A notable feature of the negative list approach illustrated in the above figure is the inclusion of separate chapters on financial services and telecommunication services. The chapter on financial services is usually a self-contained chapter, dealing with both investment in the financial services sector and the supply of financial services. The chapter on telecommunications addresses the distinctive regulatory issues involved in the opening up to competition of telecommunications markets. Distinctive issues involved in the cross-border supply of professional services are contained in an annex to the chapter on cross-border services. Separate chapters could in theory be developed on any number of individual sectors signalled out for special or more in-depth treatment under a negative list approach, and this

has often been the case in more recent trade agreements with chapters on electronic commerce and environmental services, among others.

A typical table of contents for a negative list agreement, drawn from the recent Korea-U.S. (KORUS) FTA (2012) is reproduced in Appendix I. This shows the numerous places as well as the manner in which services are treated in a negative list framework agreement.

To summarize, the general features of most trade agreements that use the NAFTA-type negative list approach to services include the following:

- separate chapters for the treatment of cross-border trade (modes 1 and 2), and commercial presence (mode 3) as part of investment; and the temporary movement of business persons (mode 4) as a subset of the broader category of natural persons;
- guarantee of the freedom of the cross-border supply of services in an equal way to that of investment to supply services (as set out under the discipline of pre-establishment);
- comprehensive coverage of the universe of service sectors and measures within the disciplines of the agreement (with the exclusion of air transport routing services only);
- integrated disciplines for goods and services in separate chapters dealing with investment (under a much broader definition than commercial presence), government procurement, competition policy, along with the chapters on cross-border trade in services.
- general application of the core disciplines of national treatment, MFN treatment, market access and the no local presence requirement to all service sectors and general application of the core disciplines of national treatment, MFN treatment, market access, no performance requirements and senior management and key personnel to all investment undertakings.

The negative list may not necessarily result in more rapid liberalization of services trade, but it certainly allows participants to move toward that objective in a much more transparent manner through the obligation to list all non-conforming measures.

It may be argued that the negative list has the drawback that all future measures, including sectors that are not known today, are automatically bound and governments give up the right to introduce future discriminatory measures. However, this problem can also arise under GATS as well, when commitments are open-ended or an entire service sector is scheduled. In a negative list context, there is usually not only an Annex of Existing Non-conforming Measures (Annex I) but also an Annex of Future Measures (Annex II) relating to services that have not yet been developed or to measures that a government wishes to fully exempt from the disciplines of the agreement. This allows for an effective “safety valve” for sensitive sectors and measures.

In order to negotiate on the basis of a negative list approach, it is absolutely indispensable to prepare a compendium or inventory of measures affecting trade in services (that is, all measures that in some way treat foreign service providers differently from domestic service providers). Preparing such an inventory allows the officials dealing with services in the Philippines to also conduct a regulatory review at the same time that they determine which measures would need to be included in negative list annexes.

Arguments in Favor of a Negative List Approach

- This approach is the one that is most conducive to facilitate business operations and trade. The structure of a negative list agreement is closer to the reality of business, where firms undertake investments, production and trade in an integrated manner. Thus having all of the disciplines within one agreement is helpful to this process.
- The negative list brings about a more comprehensive coverage of services trade flows due to the fact that all sectors must be included within the agreement. Given that many service sectors are inputs into other services and goods, this comprehensive approach also facilitates trade.
- Under the negative list approach, the core disciplines are applied across the board to all service suppliers and all measures affecting services. Any deviation from these disciplines must be scheduled in lists of non-conforming measures. As these measures must be listed with an accompanying reference to the applicable law or regulation that is in effect, it means that the services are grounded in reality, or undertaken at the level of actual law / practice. This means that the negative list agreements effectively require a standstill commitment to any measure that is not liberalized as the result of the trade agreement. The negative list does not require these measures to all be lifted or liberalized, but it does require that they be scheduled at the level of existing laws and regulations and therefore not be made more restrictive in the future.
- For all very sensitive measures and/or sectors that a government wishes to remove from the disciplines of the agreement, the possibility exists to put these in an “Annex of Future Measures”. Thus the negative list approach can accommodate domestic sensitivities. This feature of negative listing should allay the fear that it will remove “policy space” from government actions and ability to regulate.
- The negative list approach brings about greater stability for services investors and exporters as well as greater transparency. Firms can easily see existing restrictions and can understand that besides these measures specified in the annexes, the market should be open to foreign service providers.
- An important degree of dynamism is incorporated by the negative list approach into trade agreements in the form of the “ratchet clause” whereby any service regulation that is relaxed or liberalized after the agreement has come into force is automatically bound at the new level of openness. The ratchet clause is a valuable element of the negative list approach as it avoids the necessity for renegotiating a trade agreement in the future and serves to extend future openness and liberalization to all partners of the trade agreement.
- If certain aspects of the regulatory regimes for various services activities are still under-developed in the Philippines, it is possible to include a commitment for future opening within a negative list framework, so that the government can proceed with caution in allowing foreign entrants into the market while efforts are made to develop and/or strengthen regulations in various service industries.
- The major argument in favor of the negative list is its greater simplicity and its greater transparency for those who would be using the trade agreement for their export needs. Consulting the annexes of non-conforming measures in a negative list agreement is a much easier task than going through the numerous pages of a services schedule of commitments in a positive list agreement. The annexes of non-conforming measures present a clear and unambiguous picture of the country’s

regulatory regime as these measures are set out at the level of existing regulatory application. This serves to eliminate any confusion or uncertainty on the part of investors and service suppliers.

Arguments Against the Negative List Approach

- It is often stated that the negative list requires full liberalization of all measures affecting services trade. While this is a generally widespread view, it is incorrect. The negative list should more correctly be seen as a discipline of “list or lose”. Governments are able to maintain restrictions or discriminatory measures affecting services, but only if they list these in the annexes of non-conforming measures.
- Certain governments have expressed the fear that the negative list approach will interfere with the right to regulate. This fear is unfounded. The disciplines of the negative list do not stop governments from regulating services and from regulating new services. The right to regulate is fundamental under negative list agreements, as it is under any trade agreement covering services. This is also set out prominently in the agreement.
- Caution has also been expressed over the treatment of new services. As the negative list approach automatically extends the disciplines of the agreement to new services, some feel that this is equivalent to tying their hands in terms of treatment of these services. Here it must be clarified that while the negative list disciplines would effectively prevent a government from regulating new services in a discriminatory manner, it would not prevent them from adopting non-discriminatory regulations it would deem necessary. The right to regulate is preserved no matter what. Also, a government would have the option of excluding new services from the purview of the agreement if it chose to do so in Annex II (Future Measures).
- Governments fear that they may miss out on key measures affecting services trade when they are scheduling non-conforming measures under a negative list approach. This fear can be allayed by adequate preparation for entering into negative list agreements. Such preparation requires putting together a compendium of measures affecting trade in services, including both horizontal measures and sector-specific measures, together with the most recent law or regulation on which they are based. Armed with an exhaustive document of this nature detailing all of the relevant laws and regulations in the Philippines that have elements of discrimination in them vis-à-vis foreign service suppliers, it should be possible for Philippine negotiators to adequately schedule services non-conforming measures. However, such a compendium or inventory is essential for negotiating in this context. It is preferable to put such an inventory in electronic form so that it can be updated on a regular basis.
- Negotiating on a negative list basis is argued to require more resources than negotiating on a positive list basis. This is actually not the case. Negotiating services under any approach should require careful preparation and as much knowledge as possible about the domestic services economy and the regulatory measures in place. Participating in services negotiations also requires the creation of a coordinating team in the capital that can liaison with all of the relevant departments and regulatory agencies responsible for the various services sectors, as well as with the private sector. These coordination and consultation functions need to take place no matter what type of negotiating modality is selected. The major difference with the negative list approach is the need to prepare a detailed inventory of measures in advance, although again, this would be highly desirable under any negotiating modality.

C. “Hybrid” Approach: Combining a Negative List Approach to National Treatment with a Positive List Approach to Inclusion of Sectors (Market Access)

Another option that might be considered by Philippine negotiators would be the “hybrid” approach that combines elements of both the positive and negative listing modalities. This approach has been developed and adopted by the participants in the TiSA or Trade in Services Negotiations in Geneva, which are following this “hybrid” approach as their modality for scheduling services commitments.⁴ It may be fair to say that the hybrid approach is a compromise approach toward scheduling services commitments that has been adopted in a multilateral context, with the hope of broadening acceptance and participation.

Under the hybrid approach as being practiced in the TiSA, a positive list scheduling of market access commitments allows for the choice of participants with respect to the sectors and subsectors for inclusion in the agreement, just as in the basic GATS framework. This choice is combined, however, with a negative list discipline for national treatment so that the commitments applying to the included sectors are scheduled at the level of actual regulatory practice. The actual measures that constitute limitations on commitments to market access and national treatment must be specified, and no restrictions other than these specified measures are permitted. Effectively, this requires a standstill discipline to be followed with respect to all measures affecting services in the included sectors.

This hybrid approach is not as far reaching as the negative list approach described above since it does not oblige the inclusion of all of the service sectors within the agreement. However, the hybrid approach nonetheless presents a scheduling technique for services commitments that is meaningful for all included sectors by requiring the inclusion of measures at the level of existing laws and regulations. In so doing, it removes the “policy space” that permits parties to services agreements to be more restrictive in their market access and national treatment commitments for included sectors than in actual regulatory practice. This negative list discipline lends credibility to participants’ commitments, so that they serve as accurate guideposts for actual services exporters, thus effectively making the hybrid approach a transparent and predictable one for those actually engaged in services trade.

The hybrid approach as being practiced in the TiSA does not require a change in the actual formatting of services commitments. Commitments are set out in a GATS-style format rather than in annexes of non-conforming measures. The hybrid approach thus has the advantage of allowing countries whose main or only experience of services trade liberalization has been under the GATS framework to schedule their commitments according to a familiar presentation. The substance of the commitments is, however, rendered much more economically meaningful by the adoption of a negative list approach to key obligations. The proposed approach in the TiSA will also be accompanied by a “ratchet” mechanism whereby subsequent removal of non-conforming measures will be deemed to be incorporated in the commitments of the member concerned. The disadvantage of the hybrid approach (though

⁴ See ICTSD, Trade in Services Agreement (TiSA): Public Information Session and Discussion, 30 Apr. 2014, available at <http://www.ictsd.org/themes/global-economic-governance/events/trade-in-services-agreement-tisa-public-information-session>. There are 24 TiSA participants, with the EU counted as one (or 50 countries in total) that have been negotiating since early 2013 in Geneva, to reach a plurilateral agreement that will update and expand the WTO GATS through eventually being brought into the WTO once a critical mass of participating parties is reached or once the agreement is applied ‘de fact’ by a critical mass of countries.

no one has seen an actual draft schedule to date, as the negotiations are ongoing) is that the resulting schedules will be extremely lengthy and thus much less compact than a pure negative list technique.

3. CURRENT EXPERIENCE IN THE PHILIPPINES

The Philippine Government may consider which of the above three negotiating approaches to the scheduling of services commitments best suits its needs and ambitions for ongoing or future services trade negotiations.

It is worth mentioning that the Philippines already has some level of familiarity with the concept and use of the negative list approach, so this would not be an entirely new phenomenon. As pointed out above, the schedule of the ASEAN Comprehensive Investment Agreement (ACIA) is based on negative listing. And the Philippines has submitted a list of investment non-conforming measures under the ACIA, which is applied to the manufacturing, agriculture, fishery, forestry and mining activities, as well as to services incidental to these. The Philippines Foreign Investment Act itself has mandated the regular issuance of the “Regular Foreign Investment Negative List” (though its coverage is limited to foreign equity restrictions). The ASEAN-Australia New Zealand FTA (AANZFTA) has likewise adopted this approach.

Thus the Philippines has already been participating in trade agreements close to home that have adopted negative listing in key areas such as investment. It should not be a large stretch to then envisage adopting a negative list approach or a hybrid approach to the full range of services activities and for the other three modes as well.

No matter which approach is selected by Philippine officials, it will be imperative to advance preparations as thoroughly as possible, with adequate training and coordination. It will also be necessary to develop an inventory or compendium of measures affecting trade in services for all of the service sectors in the Philippines, an exercise that will serve both as a review of existing regulations and as an essential guide to develop informed negotiating positions.

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