



**National Training  
On preparing to negotiate a potential CAREC-wide FTA**

## **Session 2:**

# **Trade in Services in FTAs Positive and Negative List Architectures**

**Almaty, Kazakhstan  
May 2023**



# Outline

**01**

**The GATS  
Approach**

**02**

**Services and  
Preferential  
Liberalization**

**03**

**Positive List  
Approaches**

**04**

**Negative List  
Architectures**

# 01 Introductory Remarks

01

**Competing Interests behind the negotiation of GATS.**

02

**Resulting dual structure of general obligations and specific commitments.**

03

**Specific commitments and the positive list approach**

04

**Contrasting negative list approach**

# General Obligations

01

01

**Most-Favoured Nation (MFN) Treatment**

02

**Transparency**

03

**Regional Integration**

04

**Domestic Regulation**

## KAZAKHSTAN - LIST OF ARTICLE II (MFN) EXEMPTIONS

Sector or sub-Sector	Description of measure indicating its inconsistency with Article II	Country or countries to which the measure applies	Intended duration	Conditions creating the need for the MFN exemption
<p><b>2. Communication services</b> Measures contained in existing and future agreements, concerning:</p> <p><b>D. Audiovisual services</b></p> <ul style="list-style-type: none"> <li>- Production and distribution of television programmes and cinematographic works;</li> <li>- Production and distribution of television programmes and cinematographic works;</li> <li>- Production and distribution of audiovisual works through broadcasting or other forms of transmission to the public</li> </ul>	<p>Measures based upon co production agreements of audiovisual works, which confer National Treatment to audiovisual works covered by such agreements.</p> <p>Measures granting the benefit of support programmes to audiovisual works, and suppliers of such works meeting origin criteria.</p> <p>Measures which extend National Treatment to audiovisual works which meet certain origin criteria regarding access to broadcasting transmission.</p>	<p>All countries with whom cultural cooperation may be desirable</p> <p>All countries with whom cultural cooperation may be desirable</p> <p>All countries with whom cultural cooperation may be desirable</p>	<p>Indefinite.</p> <p>Indefinite.</p> <p>Indefinite.</p>	<p>The aim of these agreement is to promote cultural links between the countries concerned</p> <p>These programmes aim at preserving and promoting the cultural identity of countries with which Kazakhstan has a long-standing cultural links</p> <p>These measures aim, within the sector, to promote cultural values both within Kazakhstan, and with other countries, including in the region and also at promoting Kazakhstan cultural values and linguistic policy objectives toward the youth.</p>

## Article V: Economic Integration

1. This Agreement shall not prevent any of its Members from being a party to or entering into an agreement liberalizing trade in services between or among the parties to such an agreement, provided that such an agreement:

(a) has substantial sectoral coverage<sup>(1)</sup>, and

(b) provides for the absence or elimination of substantially all discrimination, in the sense of Article XVII, between or among the parties, in the sectors covered under subparagraph (a), through:

(i) elimination of existing discriminatory measures, and/or

(ii) prohibition of new or more discriminatory measures,

either at the entry into force of that agreement or on the basis of a reasonable time-frame, except for measures permitted under Articles XI, XII, XIV and XIV bis.

2. In evaluating whether the conditions under paragraph 1(b) are met, consideration may be given to the relationship of the agreement to a wider process of economic integration or trade liberalization among the countries concerned.

3. (a) Where developing countries are parties to an agreement of the type referred to in paragraph 1, flexibility shall be provided for regarding the conditions set out in paragraph 1, particularly with reference to subparagraph (b) thereof, in accordance with the level of development of the countries concerned, both overall and in individual sectors and subsectors.

(b) Notwithstanding paragraph 6, in the case of an agreement of the type referred to in paragraph 1 involving only developing countries, more favourable treatment may be granted to juridical persons owned or controlled by natural persons of the parties to such an agreement.

4. Any agreement referred to in paragraph 1 shall be designed to facilitate trade between the parties to the agreement and shall not in respect of any Member outside the agreement raise the overall level of barriers to trade in services within the respective sectors or subsectors compared to the level applicable prior to such an agreement.

5. If, in the conclusion, enlargement or any significant modification of any agreement under paragraph 1, a Member intends to withdraw or modify a specific commitment inconsistently with the terms and conditions set out in its Schedule, it shall provide at least 90 days advance notice of such modification or withdrawal and the procedure set forth in paragraphs 2, 3 and 4 of Article XXI shall apply.

6. A service supplier of any other Member that is a juridical person constituted under the laws of a party to an agreement referred to in paragraph 1 shall be entitled to treatment granted under such agreement, provided that it engages in substantive business operations in the territory of the parties to such agreement.

7. (a) Members which are parties to any agreement referred to in paragraph 1 shall promptly notify any such agreement and any enlargement or any significant modification of that agreement to the Council for Trade in Services. They shall also make available to the Council such relevant information as may be requested by it. The Council may establish a working party to examine such an agreement or enlargement or modification of that agreement and to report to the Council on its consistency with this Article.

(b) Members which are parties to any agreement referred to in paragraph 1 which is implemented on the basis of a time-frame shall report periodically to the Council for Trade in Services on its implementation. The Council may establish a working party to examine such reports if it deems such a working party necessary.

(c) Based on the reports of the working parties referred to in subparagraphs (a) and (b), the Council may make recommendations to the parties as it deems appropriate.

8. A Member which is a party to any agreement referred to in paragraph 1 may not seek compensation for trade benefits that may accrue to any other Member from such agreement.

# 01 Specific Commitments

- 01 **Market Access**
- 02 **National Treatment**
- 03 **Additional Commitments**

Sector or Sub-sector	Limitations on market access	Limitations on national treatment	Additional commitments
<b>4. DISTRIBUTION SERVICES</b>			
Except in respect of the distribution of the following items: weapon and armament system; military equipment and military materials; explosive materials; equipment and devices for blasting and pyrotechnic items; waste precious metals, precious metals and stones; pharmaceuticals and psychotropic substances.			
A. Commission agents' services (CPC 621, CPC 61111; CPC 6113; CPC 6121)	(1) None. (2) None. (3) None, except the following: - commercial presence is allowed only in the form of a juridical person of the Republic of Tajikistan. (4) Unbound, except as indicated in the horizontal section.	(1) None. (2) None. (3) None. (4) Unbound, except as indicated in the horizontal section.	
B. Wholesale trade services (CPC 622, CPC 61111; CPC 6113; CPC 6121)	(1) None. (2) None. (3) None, except the following: - commercial presence is allowed only in the form of a juridical person of the Republic of Tajikistan. (4) Unbound, except as indicated in the horizontal section.	(1) None. (2) None. (3) None. (4) Unbound, except as indicated in the horizontal section.	
C. Retailing services (CPC 631+632, 61111, 61112, 6113, 6121, 613, including audio and video records and tapes CPC 63234)	(1) None. (2) None. (3) None, except the following: - commercial presence is allowed only in the form of a juridical person of the Republic of Tajikistan. - Unbound for establishments with a commercial surface of less than 6,000 m <sup>2</sup> . (4) Unbound, except as indicated in the horizontal section.	(1) None. (2) None. (3) No less than 70% of the labour force (i.e. workers other than executives, managers and specialists, as defined in the horizontal section of this schedule) in retailing services must consist of citizens of the Republic of Tajikistan. (4) Unbound, except as indicated in the horizontal section.	
D. Franchising services (CPC 8929)	(1) None. (2) None. (3) None, except the following: - commercial presence is allowed only in the form of a juridical person of the Republic of Tajikistan. (4) Unbound, except as indicated in the horizontal section.	(1) None. (2) None. (3) None, except as indicated in the horizontal section. (4) Unbound, except as indicated in the horizontal section.	



**01** Exclude parts of a sector or a mode of supply

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**02** Limit market access

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**03** Discriminate against foreign service providers

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**04** Discriminate amongst foreign service suppliers (MFN exemption or RTA)

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**05** Bind less than the status quo

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**06** Pre-commit to future liberalization

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**07** Maintain horizontal restrictions

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# 01 More Policy Space

01 General and security exceptions

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02 Modify or withdraw a commitment any time after 3 years

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03 The possibility (in future) of emergency safeguards - under negotiation

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# The Rise of Services in FTAs

02

01

**The explosion in FTAs**

02

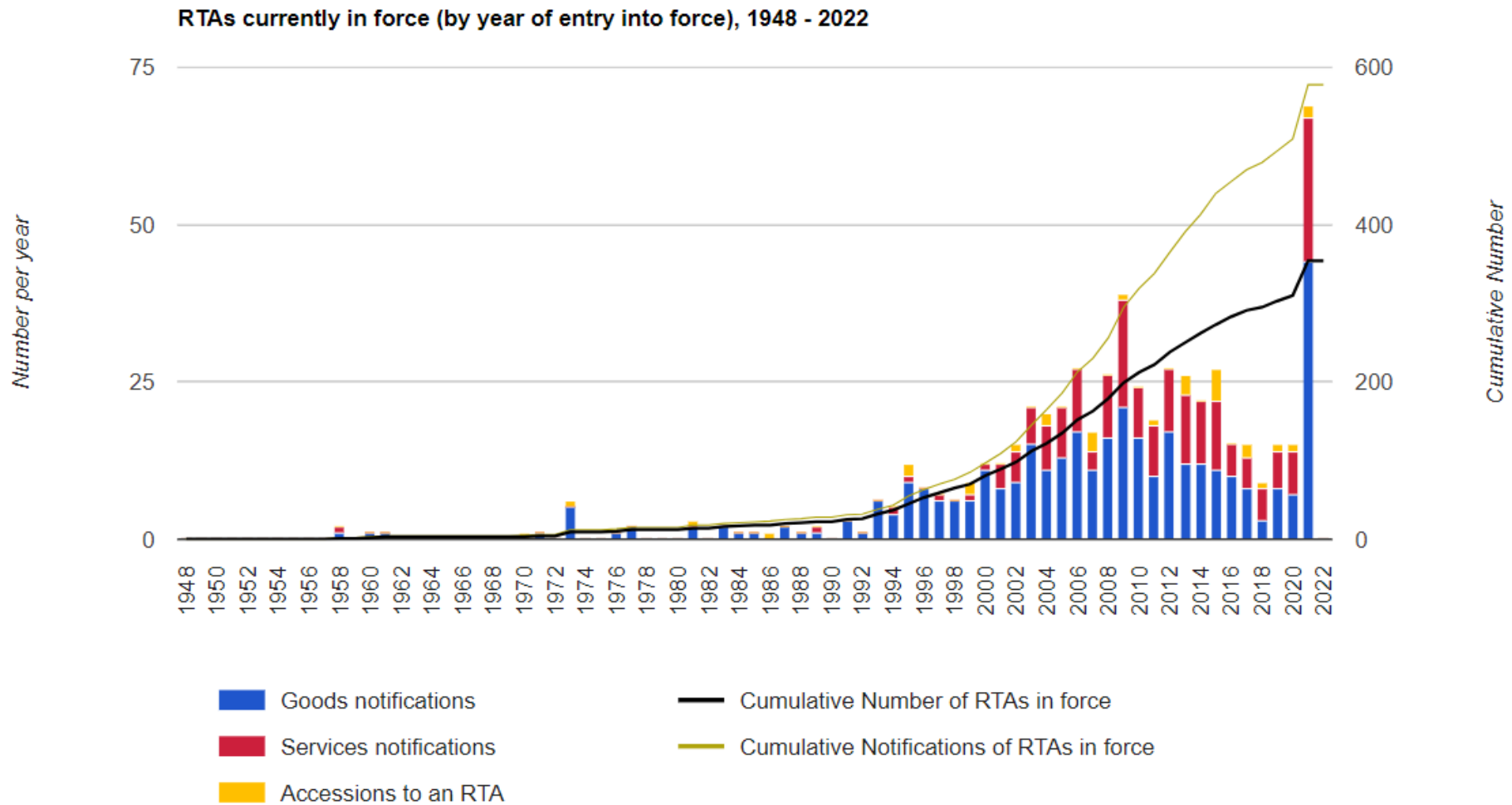
**Trends driving the shift in focus to services**

03

**Technology and “servicification”**

04

**Companies have also transformed themselves**



Note: Notifications of RTAs: goods, services & accessions to an RTA are counted separately. The cumulative lines show the number of RTAs/notifications currently in force.

Source: WTO Secretariat - August 4, 2022

**02**

# Reflection Question



**Why do you think governments turned to preferential liberalization for trade in services?**

01

**FTAs can offer improvements over GATS**

02

**Many RTAs go beyond GATS on Mode 4**

03

**Sectoral distribution of commitments**

04

**Initial sensitivities from GATS persist**

# 02 Stepping Stones or Stumbling Blocks?

01

**Preferential services liberalization and vested interests**

02

**RTAs and political support for further multilateral market opening**

03

**RTAs and the sequence of market opening**

04

**RTAs and their impact on WTO negotiations**



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## Agreement between Japan and Mongolia for an Economic Partnership (2015)

- Chapter 7 Trade in Services
- ✓ Article 7.1 Scope
  - ✓ Article 7.2 Definitions
  - ✓ Article 7.3 National Treatment
  - ✓ Article 7.4 Most-Favored-Nation Treatment
  - ✓ Article 7.5 Market Access
  - ✓ Article 7.6 Additional Commitments
  - ✓ Article 7.7 Schedule of Specific Commitments
  - ✓ Article 7.8 Domestic Regulation
  - ✓ Article 7.9 Recognition
  - ✓ Article 7.10 Monopolies and Exclusive Service Suppliers
  - ✓ Article 7.11 Business Practices
  - ✓ Article 7.12 Payments and Transfers
  - ✓ Article 7.13 Restrictions to Safeguard the Balance of Payments
  - ✓ Article 7.14 Transparency
  - ✓ Article 7.15 Denial of Benefits
  - ✓ Article 7.16 Sub-Committee on Trade in Services
  - ✓ Article 7.17 Review of Commitments

11. TRANSPORT SERVICES					
A. Maritime Transport Services					
a), b) International maritime transport services (including services of passenger transportation and freight transportation) (CPC 7211, 7212)	SS	1)	(a) Liner Shipping: None <sup>30</sup>	1)	(a) Liner Shipping: None <sup>30</sup>
			(b) Bulk, tramp, and other international shipping, including passenger transportation: None <sup>30</sup>		(b) Bulk, tramp, and other international shipping, including passenger transportation: None <sup>30</sup>
		2)	None	2)	None
		3)	(a) Establishment of a registered company for the purpose of operating a fleet flying the flag of Japan: None except that there is a nationality requirement <sup>31</sup> for a ship to fly the flag of Japan.	3)	(a) Establishment of a registered company for the purpose of operating a fleet flying the flag of Japan: None except that there is a nationality requirement <sup>31</sup> for a ship to fly the flag of Japan.
			(b) Other forms of commercial presence for the supply of international maritime transport services (as defined in paragraph 1 of Note below): None		(b) Other forms of commercial presence for the supply of international maritime transport services (as defined in paragraph 1 of Note below): None
		1)	(a) Ships' crews: None except that foreign nationals employed by Japanese juridical persons, except for the seafarers referred to in the relevant official notification, may not work on the vessels flying the Japanese flag.	1)	(a) Ships' crews: None except that foreign nationals employed by Japanese juridical persons, except for the seafarers referred to in the relevant official notification, may not work on the vessels flying the Japanese flag.
			(b) Key personnel employed in relation to a commercial presence as defined under 3) (b) above: None		(b) Key personnel employed in relation to a commercial presence as defined under 3) (b) above: None
					The following services will be made available to international maritime transport suppliers on reasonable and non-discriminatory terms and conditions:
					(a) Pilotage services;
				(a)	Pushing and towing services;
				(b)	Provisioning, fueling and watering services;
				(c)	Garbage collecting and refuse disposal services;
				(a)	Port captain's services;
				(a)	Navigation aids services;
				(b)	Shore based operational services essential to ship operations, including communications, water and electrical supplies;
				(h)	Emergency repair services; and
				(i)	Anchorage, berths and berthing services.

## Excerpt from Japan's Schedule of Specific Commitments in Services

30 Restriction or prohibition of a) entry in Japanese ports and b) loading or unloading of cargoes in Japanese ports for a designated period may be imposed as a countermeasure on operators of vessels who belong to the country in which interests of Japanese operators continue to be substantially damaged, in spite of prior notification of taking such measure, under unfavorable treatment imposed on them by that country or by local authorities or similar entities of that country.

31 In this sector, the term "nationality requirement" means that the ship must be owned by:  
 (a) a natural person having Japanese nationality; or  
 (b) a juridical person established under Japanese law, with all representatives ("daihyosha") and not less than two-thirds of executives administering the affairs of the juridical person ("gyomu-woshikkosuru yakuin") having Japanese nationality.

# 03

## Characteristics of the Positive List Approach

01

**Maximizes flexibility**

02

**Fosters transparency**

03

**Incremental liberalization**

04

**Raises transaction costs for future liberalization**

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# Mechanics of Negative List Scheduling

03

01



Recall that when using a positive list, a Party has to explicitly (“positively”) list those sectors and subsectors in which it undertakes commitments.

02



As a second step, the Party lists all exceptions or conditions to these commitments.

03



When using a negative list, the Parties only need to go through the second step.

04



This is done by inscribing non-conforming measures and reservations.

05



A Party typically uses two different annexes to inscribe its reservations in a negative list.

06



The standstill clause and the ratchet clause.

## Regional Economic Partnership Agreement (RCEP – 2020)

Article 8.1: Definitions

Article 8.2: Scope

Article 8.3: Scheduling of Commitments 

Article 8.4: National Treatment

Article 8.5: Market Access

Article 8.6: Most-Favoured-Nation Treatment

Article 8.7: Schedules of Specific Commitments

Article 8.8: Schedules of Non-Conforming Measures 

Article 8.9: Additional Commitments

Article 8.10: Transparency List

Article 8.11: Local Presence

Article 8.12: Transition

Article 8.13: Modification of Schedules

Article 8.14: Transparency

Article 8.15: Domestic Regulation

Article 8.16: Recognition

Article 8.17: Monopolies and Exclusive Service Suppliers

Article 8.18: Business Practices

Article 8.19: Payments and Transfers

Article 8.20: Denial of Benefits

Article 8.21: Safeguard Measures

Article 8.22: Subsidies

Article 8.23: Increasing Participation of Least Developed Country Parties which are Member States of ASEAN

Article 8.24: Review of Commitments

Article 8.25: Cooperation

### **Article 8.3: Scheduling of Commitments**

1. Each Party shall make commitments under Article 8.4 (National Treatment) and Article 8.5 (Market Access) in accordance with either Article 8.7 (Schedules of Specific Commitments) or Article 8.8 (Schedules of Non-Conforming Measures).
2. A Party making commitments in accordance with Article 8.7 (Schedules of Specific Commitments) shall make commitments under the applicable paragraphs in Article 8.4 (National Treatment) and Article 8.5 (Market Access), and shall also make commitments under either Article 8.6 (Most-Favoured-Nation Treatment) or Article 8.10 (Transparency List). A Party making commitments in accordance with Article 8.7 (Schedules of Specific Commitments) may also make commitments under Article 8.9 (Additional Commitments).
3. A Party making commitments in accordance with Article 8.8 (Schedules of Non-Conforming Measures) shall make commitments under the applicable paragraphs in Article 8.4 (National Treatment), Article 8.5 (Market Access), Article 8.6 (Most-Favoured-Nation Treatment), and Article 8.11 (Local Presence). A Party making commitments in accordance with Article 8.8 (Schedules of Non-Conforming Measures) may also make commitments under Article 8.9 (Additional Commitments).
4. Notwithstanding paragraph 2, Least Developed Country Parties which are Member States of ASEAN making commitments in accordance with Article 8.7 (Schedules of Specific Commitments) are not obliged to make commitments under either Article 8.6 (Most-Favoured-Nation Treatment) or Article 8.10 (Transparency List). These Parties may, however, do so on a voluntary basis.



### Article 8.8: Schedules of Non-Conforming Measures

1. For a Party making commitments in accordance with this Article, Article 8.4 (National Treatment), Article 8.5 (Market Access), Article 8.6 (Most-Favoured-Nation Treatment), and Article 8.11 (Local Presence) shall not apply to:
  - (a) any existing non-conforming measure that is maintained by that Party at:
    - (i) the central level of government, as set out by that Party in List A of its Schedule in Annex III (Schedules of Reservations and Non-Conforming Measures for Services and Investment);
    - (ii) a regional level of government, as set out by that Party in List A of its Schedule in Annex III (Schedules of Reservations and Non-Conforming Measures for Services and Investment); or
    - (iii) a local level of government;
  - (b) the continuation or prompt renewal of any non-conforming measure referred to in subparagraph (a); and
  - (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 8.4 (National Treatment), Article 8.5 (Market Access), Article 8.6 (Most-Favoured-Nation Treatment), or Article 8.11 (Local Presence).
2. Article 8.4 (National Treatment), Article 8.5 (Market Access), Article 8.6 (Most-Favoured-Nation Treatment), and Article 8.11 (Local Presence) shall not apply to any measure that a Party adopts or maintains with respect to sectors, subsectors, or activities set out in List B of its Schedule in Annex III (Schedules of Reservations and Non-Conforming Measures for Services and Investment).

## ANNEX III

### SCHEDULE OF RESERVATIONS AND NON-CONFORMING MEASURES FOR SERVICES AND INVESTMENT

#### MALAYSIA

## Non-Conforming Measures

## Reservations

### LIST A

#### EXPLANATORY NOTES

### LIST B

#### EXPLANATORY NOTES

1. This List sets out, pursuant to Article 8.8 (Schedules of Non-Conforming Measures) and Article 10.8 (Reservations and Non-Conforming Measures), Malaysia's existing measures that are not subject to some or all of the obligations imposed by:
  - (a) Article 8.4 (National Treatment) or Article 10.3 (National Treatment);
  - (b) Article 8.5 (Market Access);
  - (c) Article 8.6 (Most-Favoured-Nation Treatment) or Article 10.4 (Most-Favoured-Nation Treatment);
  - (d) Article 8.11 (Local Presence);

1. This List sets out, pursuant to Article 8.8 (Schedules of Non-Conforming Measures) and Article 10.8 (Reservations and Non-Conforming Measures), the specific sectors, subsectors, or activities, for which Malaysia may maintain existing, or adopt new or more restrictive, measures that do not conform with obligations imposed by:
  - (a) Article 8.4 (National Treatment) or Article 10.3 (National Treatment);
  - (b) Article 8.5 (Market Access);
  - (c) Article 8.6 (Most-Favoured-Nation Treatment) or Article 10.4 (Most-Favoured-Nation Treatment);
  - (d) Article 8.11 (Local Presence);

## Non-Conforming Measure

8.	Sector	:	Education services
	Subsector	:	-
	Level of Government	:	Central
	Obligations Concerned	:	National Treatment (Article 8.4 and Article 10.3) Market Access (Article 8.5) Most-Favoured-Nation Treatment (Article 8.6 and Article 10.4) Local Presence (Article 8.11) Prohibition of Performance Requirements (Article 10.6)
	Description	:	<u>Trade in Services and Investment</u> Education services, skill training centres, and vocational institutions can only be provided by education services suppliers that are registered and established in Malaysia, and with authorisation.
	Measures	:	<i>Education Act 1996 [Act 550]</i> <i>Private Higher Education Institutions Act 1996 [Act 555]</i> <i>National Skills Development Act 2006 [Act 652]</i> Administrative Guidelines

## Reservation

11.	Sector	:	Gambling and Betting
	Subsector	:	-
	Obligations Concerned	:	National Treatment (Article 8.4 and Article 10.3) Market Access (Article 8.5) Local Presence (Article 8.11) Prohibition of Performance Requirements (Article 10.6) Senior Management and Board of Directors (Article 10.7)
	Description	:	<u>Trade in Services and Investment</u> Australia reserves the right to adopt or maintain any measure with respect to gambling and betting.
	Existing Measures	:	Legislation and Ministerial Statements, including the <i>Interactive Gambling Act 2001</i> (Commonwealth).

# Pros and Cons of Different Approaches

01

**Neither approach impacts an RTA partner's right to regulate in a non-discriminatory manner.**

02

**No pure orthodoxy between approaches.**

03

**Hybrid approaches are possible**

04

**The inherently liberalizing effects of negative list approaches are clear**

# Summing-Up and Take-Aways

01



The way a government's objectives in terms of services liberalization are translated into treaty commitments is technically complex.

02



Although the positive list approach tends to be one favoured because of its familiarity and inherent caution – the negative list architecture is the future.

03



Trade officials and anyone dealing with the regulation of services needs to understand what obligations international agreements impose on them.

*Strengthening Knowledge and Capacities for the Design and Implementations of FTAs Involving CAREC Countries*



# Thank you!

