ISBN 978-92-64-04202-5
International Investment Law:
Understanding Concepts and Tracking Innovations

Chapter 4

The Interaction Between Investment and Services Chapters in Selected Regional Trade Agreements*

This report analyses the interactions between the investment and services chapters of 20 regional trade agreements. It classifies agreements into two broad categories of NAFTA-inspired and GATS-inspired agreements and identifies four major types of interaction between the investment and trade in services chapters. The report then looks at the implications of the services/investment interface for levels of investment protection and liberalisation.

* This study has been prepared by Marie-France Houde and Akshay Kolse-Patil of the OECD Directorate for Financial and Enterprise Affairs (DAF) and Sébastien Miroudot of the OECD Trade and Agriculture Directorate (TAD), under the supervision of Dale Andrew, Head of the Trade Policy Linkages and Services Division of TAD and Pierre Poret, Head of the Investment Division of DAF. It has been discussed in the Investment Committee and Working Party of the Trade Committee and was declassified on the responsibility of the Secretary-General. The authors wish to thank Martin Molinuevo and Martin Roy for helpful comments and discussions during the preparation of this study. The study is also available as OECD Trade Working Paper No. 55.

Key findings

This report analyses the interactions between the investment and services chapters of 20[1] Regional Trade Agreements (RTAs), in terms of the implications for levels of investment protection and liberalisation.

RTAs can generally be classified into two broad categories of NAFTA-inspired and GATS-inspired agreements. Investment disciplines in the former are lodged in the investment chapter and there is limited interaction with the services chapter. In GATS-inspired agreements, investment disciplines are divided between the services and the investment chapters and as a consequence interactions between them are more prevalent and are governed in either the investment or in the services chapter.

The level of investment protection is determined by the scope and coverage of the investment protection provisions and not by the type of interaction between the two chapters. In both types of RTAs, investment in services industries may benefit from the protections provided by the investment chapter (such as on expropriation, transfers, compensation for losses or investor-to-state dispute settlement). As investment provisions vary from one RTA to another, some countries have decided to maintain a former BIT alongside the more recently negotiated RTA.

Concerning the level of investment liberalisation, NAFTA-inspired agreements tend to have an advantage in terms of the number of sectors covered by non-discrimination disciplines and the degree of transparency and predictability through a "one-shot" liberalisation encompassing all sectors and a "ratchet" mechanism that locks in future reforms. GATS-inspired agreements are often favoured by countries that want to preserve a certain flexibility and progressiveness in their liberalisation, while they reform and establish new regulatory frameworks. But the differences between the two approaches should not be overstated. Provisions on future liberalisation and transparency can add transparency and predictability in the context of GATS-inspired agreements,

1. The list includes one North/North agreement (AUSFTA), 13 North/South agreements (NAFTA, US-CAFTA-DR, US-Morocco, Japan-Singapore, Japan-Mexico, Japan-Malaysia, TAFTA, EC-Chile, EC-Jordan, EFTA-Korea (EFTA-Singapore, TPSEP and ANZSCEP) and six South/South agreements (Chile-Korea, India-Singapore, ASEAN agreements, COMESA and Andean Community Decisions).

while flexibility also exists in NAFTA-inspired agreements through reservations on existing and future non-conforming measures.

An ambitious level of investment liberalisation in a GATS-inspired agreement is possible by taking commitments in additional sectors or by increasing the transparency of schedules. Progressive liberalisation of investment can in principle also be pursued in NAFTA-inspired RTAs. Even more recently, some GATS-inspired agreements provide insights into the possibilities offered by a combination of positive and negative listing.

Several factors influence the choice of a GATS- or NAFTA-inspired approach: existing liberalisation of the negotiating partners' regimes; their administrative capacity; past approaches; and the pace at which they wish to liberalise. Choosing between positive or negative listing (or a hybrid approach) is a matter for negotiation between partners.

Not all agreements include a most-favoured-nation clause (MFN). When they do, GATS-inspired agreements tend to prevent the MFN rule from applying to third parties through a regional economic integration organisation (REIO) exception clause. Nonetheless, new investment liberalisation in third party agreements may be extended to parties of earlier RTAs, following a review of commitments. A difference in NAFTA-inspired agreements tends to be that the MFN rule can apply as regards future agreements that might contain better treatment for investors. However some countries have listed reservations in specific sectors limiting the extension of any possible better treatment. In the light of this, one can question the effectiveness of the MFN rule with respect to investment liberalisation in creating a level playing field between investors from various Parties.

Synthesis

This document presents the results of the joint work carried out in 2006-07 by the Working Parties of the Investment and Trade Committees on the interaction between investment and trade in services provisions in regional trade agreements (RTAs). The study is divided in three parts preceded by a one page summary of the Key Findings and synthesis. Part I analyses the interactions between the investment and services chapters in a representative sample of 20 agreements. Part II analyses their implications for the level of investment protection provided. Part III analyses the implications of the services/investment interface and of the MFN rule for the level of the liberalisation provided.[2]

The embracing trend of RTAs

After the abandonment of the Havana Charter of the International Trade Organisation in 1950, rule-making in international trade and investment largely

evolved along two separate tracks, the first largely dominated by the GATT system, the second by the conclusion of bilateral investment treaties (BITs) aimed at "protecting", "promoting" and in the case of some later agreements, "liberalising" foreign investment. This general pattern started to change, however, with the entry into force of North American Free Trade Agreement (NAFTA) in 1994 and the establishment of the World Trade Organisation (WTO) in 1995. The NAFTA was the first agreement to combine BIT-like disciplines with comprehensive trade in services disciplines. The WTO brought in, for the first time, through the GATS, the supply of services into the realm of multilateral trade rules. These two important developments have expanded the landscape of regional agreements and the possible types of interactions between investment and service disciplines.

Since 1994, some 180 regional agreements combining investment and trade in services rules, mainly in the form of Free Trade Areas (FTAs), have come into existence as compared with 38 RTAs during the previous forty years altogether. The pace has markedly picked up since 2000. Over forty per cent of the cumulative total has come into being since 2000, cutting across countries or regions increasingly further apart and with more diversified economic backgrounds. Some 70 more agreements are reported to be under active consideration or negotiation. Mexico, Chile, Singapore, the United States, Australia and New Zealand are leading in terms of agreements concluded. EFTA, the EU and ASEAN stand out as the most active country groupings.

Two distinct cultures and sets of disciplines

RTA investment chapters essentially take their origins in BITs introduced in the late 1950s or early 1960s to provide absolute standards of protection for the foreign investor and their investments as regards transfers, expropriation and compensation, fair and equitable treatment, and investor-to-state-arbitration of investment disputes. Comprehensive obligations on national treatment and MFN treatment obligations at all phases of operation including establishment as well as the prohibition of performance requirements were later introduced in the US and Canadian treaties in the early 1990s. Today's RTA investment chapters typically provide broad investment coverage, strong protection and non-discrimination commitments and recourse to investor-state international arbitration.

2. In the present study, the term "investment protection" is intended to cover the typical core protections found in BITs while the term "investment liberalisation" is principally intended to cover the non-discrimination obligations found in OECD liberalisation instruments as well as the WTO and other trade liberalisation agreements. The BITs and FTA/RTA investment chapters of some OECD countries also include some of the non-discrimination obligations characterised here as "investment liberalisation" provisions.

Investment disciplines lodged in RTA services chapters, are, on the other hand, usually based on the GATS. Investment is covered only in the narrower form of a "commercial presence". Transparency and MFN treatment are the only general obligations. Obligations on market access and national treatment arise only to the extent liberalisation commitments are listed in separate schedules. Because of the importance they play in the ability to supply a service, domestic regulatory issues are also addressed. Avoidance of restrictions on international payments and transfers is the only significant "protection" provided by the trade in services chapters, and even so, only in sectors where liberalisation commitments are scheduled.

The Investment and Services chapters of NAFTA-inspired and GATS-inspired agreements differ, therefore, in their coverage of investment in services.[3] This leads to four major types of interaction between these chapters.

1) *NAFTA-inspired agreements – Limited interaction*

The first type of interaction is characterised by a clear separation between the Investment chapter and Cross-Border Trade in Services (CBTS) chapters designed to limit the interaction between the two chapters. The Investment chapter acts as the depositary of, or controls, all the investment provisions of both goods and services (except for financial services). The CBTS chapter, which is partly inspired by the GATS, is uniquely devoted to the liberalisation of services provided without a commercial presence. Both chapters use a negative list approach for lodging reservations to their respective obligations.

NAFTA provides the classical example of no interaction between the Investment and Services chapters. More recent NAFTA-inspired agreements (US-CAFTA-DR or US-Morocco for example) allow for a limited interaction. In this latter case, the Market Access, Domestic Regulation and Transparency articles of the CBTS chapter apply to the Investment chapter subject to certain limitations.

The Financial Service chapters may incorporate from the Investment chapter and the Trade in Services chapters the provisions to be applied to this sector.

A "Relations to Other Chapters" clause states that in the event of any inconsistency between the Investment chapter and other chapters, these other chapters shall prevail to the extent of the inconsistency.

3. The two EU agreements examined here due to their specificities are separately discussed in paragraph 25.

2) *GATS-inspired agreements where the interaction is stated in the Investment chapter*

GATS-inspired agreements also generally have separate chapters on investment and services. However, investment in services is typically covered by both chapters. Liberalisation of the supply of services, including through commercial presence is controlled by the Trade in Services chapter whereas the protection of investments in services, notably the clauses on expropriation, compensation for losses, investor state dispute resolution, is located in the chapter on Investment. In addition, these agreements also usually employ a positive list approach for specific commitments for Trade in Services.

A majority of these agreements have adopted a second type of interaction between the investment and services chapters which is stated in the Investment chapter. The Trade in Services chapter comes first and contains the market access and non-discrimination obligations on commercial presence. The Investment chapter – which has a broader coverage based on an asset-based definition of investment – identifies the scope of its application and rules to deal with potential inconsistency between this chapter and the Trade in Services chapter(s). The Financial Service chapters however are responsible for the core obligations on financial services.

EFTA agreements provide clear examples of this mode of interaction. In these agreements, the limitations mainly take the form of the non-application of the National Treatment and Most Favoured Nation Treatment obligations to Mode 3 (commercial presence) operations. A similar approach is followed by other agreements such as TAFTA or New Zealand-Singapore Agreement. Japan's Economic Partnership Agreements also generally fall in this category as the Investment chapter's scope article describes how inconsistencies between overlapping provisions should be resolved. In the case of Japan-Singapore FTA, the interaction is not stated in the Investment chapter but in the parties' reservations to this chapter.

3) *GATS-inspired agreements where the interaction is stated in the Trade in Services chapter*

In a third type of interaction between the investment and services chapters, it is the Trade in Services chapter through a "Service-Investment" linkage clause which determines which provisions from the Investment chapter listed therein would apply. This approach has recently been introduced by the India-Singapore CECA. The specific provisions borrowed from the Investment chapter concern compensation for losses, expropriation, repatriation, subrogation, measures in public interest, special formalities and information requirements, access to courts of justice, senior management, investment disputes, other obligations and performance requirements. This

type of interaction seeks to minimize any possible conflict between the two chapters by listing the various liberalisation and protection obligations that would apply to investment in services.

4) *GATS-inspired agreements where no interaction is stated*

A fourth group of agreements are silent on the interaction. This approach solely relies on the rules of interpretation of international law to sort out the relationship between the investment and services provisions. This case mainly concerns separate agreements on investment and trade in services (ASEAN agreements and Andean Community Decisions). But this situation may also arise within individual agreements. For example, in the Japan-Singapore or EFTA-Korea agreements, the clause on transfers is contained in two chapters, the Trade in Service and Investment chapters, with one less permissive than the other. However, this duplication does not necessarily lead to conflict. Rather, both these obligations apply simultaneously to investments in services, which are subject to the obligations of both chapters. More recent agreements, however, are abandoning this approach in favour of an explicit and more precise mode of interaction between the investment and services chapters.

EC Trade Agreements

Even though European Communities (EC) Association Agreements with non-European partners generally follow the GATS approach, other features set them apart from the GATS-inspired agreements described above. The European Community and the member states share competence in the investment area. The coverage and structure of EC agreements are also unique. For example, the EC-Chile Agreement, which is the most comprehensive agreement concluded so far, has separate chapters on Trade in Services (covering all four modes of supply of services), Financial Services, Establishment and Current Payments and Capital Movements. In this case, it is the establishment chapter which excludes services from its coverage. In the EC-Jordan Association Agreement, however, the services chapters only cover the cross-border supply of services while the establishment chapter applies to all investments. The methodology for listing liberalisation commitments also differs in the two agreements, the EC-Chile agreement follows a positive list approach while the EC-Jordan agreement list the reservations to the obligations. EC agreements provide for national treatment (and MFN in some cases) on post-establishment and for protection of transfers-capital movements. Other protection issues are addressed by the BITs concluded by member States.

Level of investment protection provided

The level of investment protection does not seem to be affected by the types of interaction chosen. In all the agreements reviewed with dual coverage of investment in services, all investment in services benefits from the basic protections provided by the Investment chapter (such as on expropriation, transfers, compensation for losses or investor-to-state dispute settlement). This is because the "asset-based" definition of investment normally used for applying the basic standard protections of the Investment chapter obligations includes the narrower concept of "commercial presence", which is used for the liberalisation of investment in services in GATS-inspired agreements. This broad-asset based definition typically includes, in addition to majority or controlling participations in an enterprise, minority interests, intellectual property rights, concessions and other forms of property.

If the level of investment protection is indifferent to the type of RTA adopted, it is certainly determined by the scope and coverage of the investment protection provisions. Judging from the sample, the level of investment protection provided by RTAs is largely comparable if not interchangeable to that traditionally provided by BITs (as in the case of US BITs and RTA Investment chapters). Nonetheless, the investment provisions may still vary from one RTA to another. For a significant number of agreements reviewed (such as NAFTA, AUSFTA, Japan EPAs, India-Singapore CECA, Australia-Thailand), these obligations are new in the absence of former BITs between the parties. But in a number of other agreements reviewed, BITs remain in place alongside RTAs, with both sets of rules complementing each other (EC agreements, ASEAN agreements, Andean Community Decisions). BITs have been replaced by RTAs only when the latter's contents and coverage are clearly superior to that of BITs (for example EFTA-Korea Investment Agreement, as compared to Korea-Switzerland BIT).

Levels of liberalisation commitments achieved

The study provides a detailed analysis of the schedules of commitments in ten RTAs,[4] focusing on investment in services. The difference between the NAFTA-inspired and the GATS-inspired approach that was described before is also relevant for the analysis of the schedules of commitments. It is often presented as a difference between the negative list (or "top-down") approach and the positive list (or "bottom-up") approach, but it should be understood mainly as a difference in the objective of the agreements and their coverage with respect to investment liberalisation. Although it is technically possible to

4. The list includes five NAFTA-inspired agreements (AUSFTA, NAFTA, US-Morocco, Japan-Mexico and Chile-Korea) and five GATS-inspired agreements (Japan-Singapore, TAFTA, EU-Chile, EFTA-Singapore and India-Singapore).

offer the same level of commitments with a negative list of reservations or with the hybrid approach used in GATS (with a positive list of sectors where commitments are made and a list of reservations for these commitments), this is not the case from what can be observed in the schedules of the agreements analysed.

The NAFTA-inspired agreements aim at liberalising all kinds of investments and grant national treatment and MFN in all sectors covered. The coverage of the agreements is generally wider than in GATS-inspired agreements and reservations are fewer, although some of them can be quite general and give an opportunity to parties to maintain or to adopt non-conforming measures in a certain number of activities. The "ratchet" effect of NAFTA-inspired agreements locks in the investment regime and includes as commitments under the RTA any new effort towards liberalisation. Therefore, these agreements generally bring a higher degree of certainty and predictability for investors. Their higher degree of transparency should however be nuanced in cases where not all restrictions are listed in the Annex (*e.g.*, sub-federal non conforming measures). There are other provisions in NAFTA-inspired agreements that also illustrate the liberalisation intent such as phasing-out commitments for certain non-conforming measures and other disciplines beyond national treatment and MFN on performance requirements or citizenship and residency requirements.

GATS-inspired agreements (where investment in services is covered in the services chapter) provide schedules of commitments with commitments in a higher number of sectors and sub-sectors compared with those made at the multilateral level (under the GATS). On the other hand, there is no willingness to expand the coverage of non-protection disciplines to all sectors. The approach remains close to GATS with commitments in a set of sectors and sub-sectors, flexibility and progressive liberalisation through a review of the commitments.[5] An important perceptible difference is that the number of commitments tends to be more reciprocal in RTAs than in GATS schedules.

From countries' experience, the "hybrid" approach of GATS-inspired agreements is appreciated for its flexibility, as it allows countries to conduct a selective liberalisation of investment and to keep options in sectors where there are on-going regulatory reforms, while the NAFTA-inspired approach is

5. While some of the NAFTA-inspired RTAs can organise a gradual liberalisation of investment through phasing-out reservations, the approach is different in the sense that GATS-inspired agreements foresee a review of their commitments and further negotiations with a view to deepening liberalisation. In NAFTA-inspired agreements, such mechanisms are not necessary as almost all sectors are already committed and the ratchet effect locks in any new liberalisation. The negative list approach is also embodied in other mechanisms such as in the OECD Codes of Liberalisation for instance.

favoured for its higher degree of predictability and transparency for investors through a "one-shot" liberalisation encompassing all sectors. However, there is no specific constraint coming from one approach or the other and countries can use either a positive list or negative list to achieve an ambitious degree of liberalisation. The negative list approach can also be flexible through its reservations on existing and future measures while transparency and predictability can be improved in the context of a positive list by providing enough information to investors, simplifying the way schedules of commitments are presented and by a clear commitment to future liberalisation.

The comparison between the schedules of commitments in the RTAs and GATS commitments in Mode 3 confirms that all agreements analysed are WTO-plus. The liberalisation of investment in services goes further than in the GATS both in NAFTA- and GATS-inspired agreements. This should be the case as these regional agreements need to provide for a higher degree of liberalisation in order to be consistent with WTO rules (GATS Article V). In the regional trade agreements, there is a tendency to create a degree of bilateral reciprocity in the commitments, unlike what can be observed in the GATS. It is particularly the case in agreements between developed countries and developing or emerging countries that have made fewer commitments under the GATS. This may well be a positive sign of how RTAs have the potential of promoting further investment liberalisation in services.

The MFN rule and its implications

The most-favoured-nation clause (MFN) is a common provision found both in the investment and trade in services chapters of RTAs. The MFN clause requires a party to a given agreement to provide investors and investments from the other party treatment "no less favourable" than that it accords to investors and investments of any other party or non-party to the agreement. MFN provisions in RTAs tend to be unconditional and to apply to all covered investments both pre- and post-establishment. However, not all of the agreements analysed in this study have an MFN provision. COMESA, EC-Chile, Japan-Singapore, Korea-Singapore and the India-Singapore Comprehensive Economic Co-operation Agreement have no MFN treatment for investment.

In services chapters modelled after the GATS, MFN clauses are generally inspired by GATS article II with a negative list of exemptions. The MFN clause found in investment chapters inspired by NAFTA has its scope more precisely defined, as the "no less favourable treatment" applies to both "investors" and "investment of investors" with respect to "the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments". However, the clause specifies that such treatment should be granted "in like circumstances". Another important distinction between the NAFTA and the GATS approach is that no further exceptions can be negotiated

in a GATS-type agreement after it has entered into force. The NAFTA approach allows for members to adopt new exceptions and non-conforming measures when they have listed the sectors concerned in the annex on future measures.

As some countries have signed both NAFTA-inspired and GATS-inspired agreements with different levels of liberalisation commitments, one could wonder if through the MFN rule there is a "multilateralisation" of regional commitments. In an RTA, the MFN rule is not only designed to ensure non-discriminatory treatment between the parties to the agreement but also to benefit from better treatment in third-party agreements. In the case of bilateral RTAs, it is only as regard to third-party investors that the MFN rule has any application. However, many agreements tend to prevent the extension of some liberalising commitments from one agreement to another through the MFN rule.

In GATS-inspired agreements, there is often a regional economic integration organisation (REIO) exception similar to GATS article V where a more favourable treatment granted to members of a third party RTA is not automatically extended to the parties of the current RTA on the basis of MFN treatment. The existence of an REIO exception does not *require* discriminatory treatment between members of different RTAs but it does allow for it and therefore can undermine the effect of the MFN clause. The result therefore is a risk of discriminatory treatment between the parties of different RTAs signed by the same country. To prevent this from happening, GATS-inspired agreements rely on a review of commitments to extend the more favourable treatment of a new agreement to parties of a prior RTA. In practice, commitments can be easily extended through a simple exchange of letters or a joint meeting between the Parties.

In NAFTA-inspired agreements, there is, in principle, an automatic extension of the more favourable treatment granted in a new agreement through the MFN clause (in many agreements, this principle applies to new agreements only, as there is often an MFN exception for past agreements). In some NAFTA-inspired agreements however, countries have also listed certain sectoral exceptions for future agreements. Such sectors will not automatically benefit from the better treatment of future agreements through the MFN clause. But very few sectors are concerned.

It is also possible to avoid investment distortions by signing RTAs with the same commitments as some countries tend to do. While the MFN rule can still operate in NAFTA-inspired agreements to extend new liberalisation commitments to investors from countries parties to a former agreement, a review of commitments is necessary in GATS-inspired agreements to ensure a level playing field between investors. Hence, one may question the *de facto* impact of the MFN clause in RTAs and its capacity to "multilateralise" regional commitments.

Part I. Interactions Amongst Investment and Trade in Services Chapters of Different Types of RTAs

1. *The study sample*

At the end of 2005 around 218 RTAs.[6] were known to contain investment provisions of one kind or another. While initially they belonged to the same region with similar levels of economic development, an increasing number of RTAs are being concluded between countries with different level of economic development and located in regions or continents far apart. Individually, Mexico, Chile, Singapore, the United States, Australia and New Zealand are leading in terms of the number of agreements concluded while EFTA, the EU and ASEAN stand out as the most active country groupings. A rapid rise in the number of agreements between developing countries is also apparent. This picture is far from frozen as a relatively large number of RTAs – 70 or so – are under negotiation or under consideration. RTAs are therefore covering a growing share of world trade and investment, increasingly moved by strategic market considerations unbound by geographical considerations, and this trend is likely to continue.[7]

Not all these agreements are comparable, however, in terms of objectives and purposes, coverage, depth, legal robustness, sophistication or impact. RTAs are also in constant evolution and various types of RTAs co-exist. This study examines a sample of 20 North/North, North/South and South/South agreements that would appear to represent the latest approaches across countries, regions or continents, about the role of investment-related

6. In a speech delivered in mid-January 2007, WTO Director General Pascal Lamy estimated that the number of these agreements could rise to 400 by 2010, See WTO News – 17 January 2007. For a comprehensive inventory of regional agreements with investment content up the end of 2005, see *www.unctad.org/en/docs/iteiit200510annex_en.pdf*. "Economic integration" is the expression used by Article V for designating preferential trade in service liberalisation agreements. GATT Article XXIV refers to customs unions and free trade areas. Customs unions require the establishment of a common external tariff and harmonization of trade policies. In an FTA, each party maintains its own trade policy *vis-à-vis* third parties. "Regional Trade Agreements" is the generic term used for notification to WTO of all these preferential agreements. See also Jo-Ann Crawford and Robertino V. Fiorentino, the "Changing Landscape of Regional Trade Agreements" Discussion Paper No. 8, WTO, *www.wto.org/english/res_e/booksp_e/discussion_papers8_e.pdf*.
7. According to the WTO, at least one half of world trade now takes place between members of RTAs and all WTO Member engaged in RTAs of one sort or another A similar trend has been observed on the investment side. It is estimated that RTAs capture about 60 per cent of outward investment in Australia, 44 per cent in Canada and 20 per cent in the United States. See "Novel Features in OECD Countries' Recent Investment Agreements: An Overview", pp. 1-2, *www.oecd.org/dataoecd/42/9/35823420.pdf*.

provisions in RTAs, including on services.[8] All but one[9] have been notified to the WTO:

1. North/North Agreements

- **(1) Australia-United States Free Trade Agreement (AUSFTA)** (2004) as the most recent example of a comprehensive **North/North Agreement**.

2. North/South Agreements

- **(2) The North American Free Trade Area (NAFTA) –** The first RTA to combine the disciplines of Services and Investment.
- **(3) Free Trade Agreement between Central America, the Dominican Republic and the United States of America (US-CAFTA-DR) (2006)** as an example of the last generation of NAFTA-inspired agreements concluded by the United States with Latin American countries.
- **(4) US-Morocco Free Trade Agreement (2006)** as an illustration of a US FTA with a MENA region country.
- **(5), (6) and (7) Japan-Singapore New-Age Economic Partnership Agreement (JSEPA) (2002), Japan-Mexico Economic Partnership (2005) and Japan-Malaysia Economic Partnership (JMEPA) (2006)** as an illustration of FTAs concluded between countries with different levels of economic development.
- **(8) Thailand-Australia Free Trade Agreement (TAFTA) (2005)** as example of an Australia's FTA with an Asian developing country.
- **(9) and (10) EC-Chile Association Agreement (2003-05) and Euro-Mediterranean Agreement establishing an Association with Jordan (2002)** as representatives of the last generation of EU trade agreements, one with a Latin American country, the other as part of the Euro-Mediterranean Free-Trade Area initiative.
- **(11) and (12) Free Trade Agreement between EFTA States (Switzerland, Liechtenstein, Norway and Iceland) and Singapore (ESFTA) (2003) and Free Trade Agreement between EFTA States and Korea (2006)** as examples of the new generation of EFTA FTAs. ESFTA is also the first FTA concluded between the continents of Europe and Asia and the first EFTA agreement to

8. A deliberate decision has been made to leave intra-European RTAs – that is the European Community and the European Free Trade Association and their agreements with other European countries – outside the scope of this study on the grounds that they constitute a unique process of economic and political integration. The study also leaves out the RTAs that have succeeded the trading arrangements between former Soviet republics.
9. Namely the India-Singapore Comprehensive Economic Co-operation Agreement (2005).

address the right of establishment. The Investment Agreement between Korea and Iceland, Liechtenstein and Switzerland is, in addition, the most comprehensive investment agreement ever concluded by EFTA.

- **(13) and (14) Trans-Pacific Strategic Economic Partnership among Brunei Darussalam, Chile, New Zealand and Singapore (TPSEP) (May 2006)** as an example of an intercontinental agreement combining four APEC economies including one OECD country. **The New Zealand-Singapore Closer Economic Partnership (ANZSCEP)** (2001) is also analysed separately.

3. *South/South RTAs*

- **(15) and (16) Free Trade Agreement between the Republic of Korea and the Republic of Chile (2004) and Free Trade Agreement between the Republic of Korea and the Republic of Singapore (KSFTA) (2006)** as examples of one intercontinental FTA between two successful emerging market economies and one economically successful Asian economies.
- **(17) India-Singapore Comprehensive Economic Co-operation Agreement (2005)** as an illustration of India's new policy towards FTAs.
- **(18) ASEAN Agreement for the Promotion and Protection of Investment (1987),** as amended by the 1996 Protocol, and 1998 Framework Agreement on ASEAN Investment Area and the **ASEAN Framework Agreement on Services (1995) as amended by the 2003 Protocol,** as an example of a more gradual approach but with the potential of serving as a platform for the negotiation of FTAs with major players (such as China, India, EU, Australia or New Zealand).
- **(19) Common Market for Eastern and Southern Africa (COMESA) (1993)** although created to be a common market, is included as an illustration of a co-operative arrangement on investment among African countries.
- **(20) Andean Community – Community instruments on Foreign Investment and Transfer of Technology (Commission Decisions 291 and 292 (1991)** and **Decision 439 on a General Framework for the Liberalisation of Trade in Services (1998)** as an illustration of a sub-regional initiative to liberalise investment and trade in services.

2. *Key features of the investment and trade in services chapters of RTAs*

As elaborated in Annex 4.A1 to the present document, recent RTAs address an increasing number of issues with the general intent of creating opportunities for developing the parties' economic potential and growth in a more integrated and complementary way.[10] Investment and services chapters

10. For a recent survey, see *Investment Provisions in Economic Integration Agreements*, UNCTAD, 2005.

are one of the most important additions to recent RTAs.[11] The disciplines in the investment chapters are usually based on those of BITs while the disciplines in the services chapters are usually based on those of the GATS. Taken together, these two chapters create two sets of disciplines for investment in services, one horizontal which applies to goods and services and the other exclusively devoted to services.

Table 4.1 below lists the broad categories of disciplines and associated measures that can be found in RTA Investment chapters. They typically include a broad asset-based definition of investment, universal coverage of goods and services, core legal protections, establishment and non-discriminatory treatment, investment promotion and facilitation and capacity building, and recourse to investor-state international arbitration. These chapters also employ, as a general rule, a negative list of reservations or exceptions with respect to liberalisation. Annex 4.A1 provides an overview of how these various provisions are covered in the sampled agreements.

Table 4.2 lists the broad categories of investment disciplines and associated measures that can be found in GATS-based RTA trade in services chapters. Striking differences emerge from a comparison with the investment template provided in Table 4.1. Trade in services is generally defined as the supply of a service through four distinct modes: cross-border trade (Mode 1), consumption abroad (Mode 2), commercial presence (Mode 3) and temporary movement of natural persons (Mode 4). All the measures listed in the chapter apply to these four modes of supply. If the inclusion of Modes 3 and 4 underlines the importance of factor mobility to trade in services, these two Modes are also those that come the closest to the activities covered by investment chapters.

The concept of "commercial presence" for trade in services is significantly narrower than the standard definition of investment in the investment chapter. While it covers matters relating to both the establishment and post-establishment phase and applies to both existing and *de novo* agreements, it remains an "enterprise-based"[12] as opposed to an "asset-based" definition of investment. In other words this definition only encompasses foreign investment in services where the foreign investor holds more than 50 per cent of the equity interest or exercises control over the

11. In addition, in addition to trade in goods, RTAs may cover intellectual property, government procurement competition, labour, environment, e-commerce, capacity building issues among others.
12. The standard definition of commercial presence given by Article XXVIII (d) of the GATS consists of any type of business or professional establishment, including through the constitution, acquisition or maintenance of an enterprise or the creation of maintenance of a branch or a representative office.

Table 4.1. **Assessing Investment chapters of RTAs**[1]

Definition	Coverage	Investment liberalisation	Investment protection	Investment Promotion/ Facilitation	Dispute Settlement	Schedule of commitments
– Asset Based definition of investment Open/Closed Direct/Indirect – Definition of investor	– National measures – Sub-national measures – State enterprises – Corporate responsibility	**General obligations** – Transparency – Establishment – Post-establishment – National treatment – MFN treatment – Performance requirements – Senior management/ Board of directors – Temporary movement of key personnel – Standstill/ Rollback – Country exceptions – Economic integration clause – General exceptions – Monopolies and concessions – Taxation – Environment – Labour – Origin requirements/ Denial of benefits	**General obligations** – Payments and transfers – Fair and equitable/ Minimum standard – Full protection and security – Expropriation – Compensation	– Investment promotion – Co-operation/ Capacity building mechanisms	– State-to-State arbitration – Investor-State arbitration	Negative or positive

1. Investment liberalisation covers the provisions which essentially aim to promote and secure non-discriminatory treatment and limit departures from this treatment. These provisions correspond to the traditional obligations of the OECD Codes of Liberalisation, the WTO and other trade liberalisation agreements, Investment protection covers the obligations typically found in bilateral investment protection and promotion agreements that provide absolute levels of protection. The dividing line between these two concepts is not always clear cut however. The provisions aimed at protecting the investment of an investor may reinforce liberalisation commitments. Conversely liberalisation commitments can also be viewed as providing legal security against future changes in the investment regimes of host countries. This categorisation of the various provisions of investment chapters helps highlight the main differences with the main provisions of trade in services chapters as presented in Table 4.2.

Table 4.2. **GATS-based investment provisions in RTA services chapters**

Definition	Coverage	Investment liberalisation	Investment protection	Investment promotion/ facilitation provisions	Dispute settlement provisions	Schedule of commitments
Commercial presence (Mode 3) as one of four modes[1] of supplying services	– All services with carve-outs[2] – National measures – Sub-national measures – State enterprises	**General obligations** – Transparency – MFN treatment – Domestic regulation – Recognition – Monopolies and exclusive service suppliers – Business practices – BOP safeguards – General exceptions – Security exceptions – Origin requirements/ denial of benefits **Specific commitments** – Market access – National treatment – Specific commitments – Annexes[3] and decisions	**Specific commitments** – Transfers	– Co-operation/ Capacity building mechanisms	State-to-State (separate chapter) Investor-to-state (investment chapter)	Positive list

1. The other three are: cross-border supply (Mode 1), Movement of consumer (Mode 2), Movement of Supplier (Mode 4).
2. The GATS does not apply to air traffic rights and services supplied in the exercise of a governmental authority.
3. These include special annexes on financial services, telecommunications and air transport services.

foreign investment enterprises.[13] The coverage of Mode 4 may generally be considered broader, on the other hand, to that of key personnel and the movement of business persons covered by Investment or other RTA chapters. Transparency and MFN treatment are usually framed as "general obligations" in contrast to that of market access[14] and national treatment which apply solely in sectors listed in separate schedules of commitments. Other obligations are conditioned by these schedules such as the objective administration of domestic regulations and the avoidance of restrictions on international payments and transfers. The latter is often the only investment protection provision incorporated in trade in services chapters. At the same time, the Trade in Services chapters normally contain special disciplines on non-discriminatory quantitative restrictions and other behind-the-border regulatory issues.[15] These chapters usually employ a positive list approach for specific commitments. Annex 4.A1 describes how these various provisions are covered in the sampled agreements.

While the new generation of FTAs often feature separate chapters on Investment and Services, the interactions are largely a function of the respective contents of these chapters. NAFTA-inspired and GATS-inspired agreements markedly differ in their coverage of investment in services. This leads to four major types of interaction between the investment and services chapters in the investment area.

1) *NAFTA-inspired Agreements – Limited interaction*

The first type of interaction is characterised by a clear separation between the investment and cross-border trade in services chapters designed to limit the interaction between the two chapters. The Investment chapter acts as the depositary of, or controls, all investment protection and liberalisation obligations (except for financial services). The Cross-border Trade in Services (CBTS) chapter excludes services supplied through an

13. Article XXVIII (g) of the GATS defines a "service supplier" as "any person that supplies a service". "A person means either a natural person or a juridical person" [Article XXVIII (j)]. A juridical person means in the case of a supply of a service through commercial presence any person "owned" or "controlled" by juridical persons from a member. Ownership requires holding more 50 per cent of the equity interest in the commercial presence; control requires the power to name a majority of the directors or the direct control over the actions of the juridical person in question. [Article XVIII, paragraph (m)(ii), (n)(i) and n(n)(ii)].
14. Article XVI(2) of the GATS defines six limitations to market access, namely limitations on the number of service suppliers, service operations or employees in a sector, the value of transactions, the legal form of the service supplier, or the participation of foreign capital.
15. These paragraphs are derived from Chapter 3 "Investment", Regionalism and the Multilateral Trading System, OECD, 2003.

investment, akin to Mode 3 of the GATS (commercial presence). As in GATS, the CBTS chapter also addresses some behind-the-border regulatory issues.

NAFTA was the first RTA to introduce this form of agreement. Countries in the Western Hemisphere have been especially influenced by this approach. They have also subsequently "exported" this model to nations in different parts of the world through bilateral agreements. For instance, the US-Singapore FTA, the Australia-US FTA, the US-Morocco FTA, the Japan-Mexico EPA and Chile-Korea FTA are clearly inspired by the NAFTA approach. The NAFTA model has also been adopted by a number of Asian countries in their FTAs with regional partners such as in the case of Singapore-Australia or Singapore-Korea FTAs. As a result, this approach has proliferated beyond the Americas.

NAFTA provides the classical example of no interaction between the Investment and Services chapters. Therefore NAFTA has a separate Investment Chapter, which covers investment in goods and services, and an independent chapter on Cross Border Trade in Services (CBTS). This means that none of the obligations contained in the CBTS chapter apply to investment in services.

More recent NAFTA-inspired agreements provide, however, for a limited interaction between the Investment and the CBTS chapter by allowing application of specific provisions from the CBTS chapter to investment in services. For example, Article 11.1(2) of the Chapter on CBTS in US-Morocco Agreement provides that "*Articles 11.4 (Market Access), 11.7 (Transparency in Developing and Applying Regulations), and 11.8 (Domestic Regulation) also apply to measures by a Party affecting the supply of a Service in its territory by a covered investment*". This enables to bring in behind-of-the border issues of particular relevance to services, including investment. However, a footnote provides that "*nothing contained in the Chapter on CBTS, including in paragraph Article 11.1(2) shall be subject to investor-state dispute settlement.*" Thus, this approach, whilst generally separating Investment in Services from CBTS, does allow for a limited interaction between the two. It affords the protections provided in the investment chapter for investments in services while simultaneously allowing more limited benefits from the CBTS chapter.

A "*Relation to Other Chapters*" clause removes any possible ambiguities in regard to the application of other chapters. This clause states that "*in case of an inconsistency between the Investment chapter and another chapter, the other chapter shall prevail to the extent of the inconsistency*". This implies that commitments contained elsewhere in the agreement takes precedence over commitments in the investment chapter in case of conflict.

In short, NAFTA-inspired agreements establish a clear distinction between the Investment chapter and the CBTS chapter. The end result is to

provide investors in services with the same protections that are offered to other investors, while a separate set of protection provisions applies to cross-border suppliers of services.

2) *GATS-inspired agreements where the interaction is stated in the Investment chapter*

GATS-inspired agreements also generally have separate chapters on investment and services. However, investment in services is typically covered by *both* the Investment and Trade in Services chapters (and the Financial Services chapter when this sector is treated separately). Liberalisation of the supply of services, including through commercial presence, is controlled by the services chapter(s) whereas the protection of investments in services, notably the clauses on expropriation, compensation for losses, investor state dispute resolution, is controlled by the chapter on Investment. In addition, these agreements usually employ a positive list approach for specific commitments for Trade in Services.

In the majority of the agreements reviewed, the interaction is stated in the Investment chapter. This is the second type of interaction observed in the sampled agreements. The Trade in Service chapter comes first and contains liberalisation obligations on commercial presence. The Investment chapter – which has a broader coverage due to its asset-based definition of investment – then identifies the limitations that need to be applied to ensure consistency with the Trade in Services chapter. Financial Service chapters are responsible for the obligations on financial services.

This approach has also the advantage of preserving the integrity of the GATS Agreement whose provisions are often reproduced *verbatim* in the services chapters. EFTA, TAFTA, JSEPA, JMEPA provide concrete examples of this approach despite significant variations in the number and coverage of the provisions of the chapters concerned.

EFTA. EFTA agreements provide for a GATS-based chapter on Trade in Services followed by a chapter on Investment. Investment in services (commercial presence) is covered by both the Trade in Services chapter and the Investment chapter. The Investment chapter explicitly states the limitations concerning its application to services. This approach can be seen in the EFTA-Singapore and EFTA-Korea FTAs (the EFTA-Korea FTA has a separate Investment Agreement to which Norway is not a party), which belong to the second generation of EFTA's FTAs. The Trade in Services chapter includes commercial presence as defined by GATS. As the narrower concept of "commercial presence" is included in the "asset-based" definition of an investment in the Investment Chapter, investment in services through this mode of supply is entitled to all the rights and protections provided to

investments. The EFTA approach borrows heavily, in the form of definitions, clauses, etc., from the GATS and uses a positive listing methodology to specify each party's commitments.

For example Article 2(2) of the separate Investment Agreement[16] between Korea, Iceland, Liechtenstein and Switzerland defining the scope and coverage of this agreement provides that "*Article 4 (National and MFN Treatment) shall not apply to measures affecting trade in services, provided that the sector concerned is covered by Chapters 3 (Trade in Services) or 4 (Financial Services) of the EFTA-Korea Free Trade Agreement*". Thus the Investment Agreement provides for interaction with the services chapters of the EFTA-Korea Agreement. A service provider falling within the definition of an investor or an investment would be entitled to all the rights provided for in the Trade in Services or Financial Services chapters as well as those provided in the Investment chapter, except to the extent of the express limitations relating to National Treatment and MFN Treatment. An investor can, however, raise a dispute with a Party only with regards to infringements of his rights under the Investment chapter.

It is also interesting to note that the scope and coverage of the investment provisions varies across EFTA agreements. So whilst the agreement with Korea excludes sectors covered by the Trade in Services and Financial Services chapters of the EFTA-Korea Trade Agreement, the EFTA-Singapore FTA exclusion is somewhat broader in stating that in Article 38.2 and 38.3 on Scope and Coverage that "*Article 40(1) (National and Most Favoured Nation Treatment) shall not apply to measures affecting trade in services whether or not a sector concerned is scheduled in Chapter III (Trade in Services) […] as well as to investors of a Party in services sectors and their investments in such sectors*". The EFTA-Korea FTA is therefore more "liberal" than the EFTA-Singapore agreement, which could be considered more "prudent" on the subject of services and investment in services.

New-Zealand-Singapore. The New Zealand-Singapore Agreement has a similar approach. The Investment chapter at the outset proclaims in Article 26.1 that it applies *to all investments in goods and services* and then lays down exceptions to its scope and coverage. Article 26.2 states that *Article 28 (Most Favoured Nation Status), Article 29 (National Treatment) and Article 30 (Standard of Treatment) shall not apply to any measures affecting investments adopted or maintained pursuant to Part 5* (of the Agreement relating to Services) *to the extent that they relate to the supply of any specific service through commercial presence […] whether they or not they are covered by Annex 2* (devoted to the parties schedules of specific commitments).

16. This agreement does not include Norway.

Thailand-Australia Free Trade Area (TAFTA). The TAFTA FTA also provides for an interaction between the Trade in Services and Investment chapters. The Trade in Services chapter (Chapter 8) follows the GATS approach by defining commercial presence. At the same time the Investment chapter (Chapter 9) does not exclude from its ambit trade in services unless a limitation is provided for. Clause 903 states that the part on "*Liberalisation of Investments*" does not apply to "*the measure which is a measure by that Party affecting trade in services as set out in Article 803(1)*". Similarly, the Post-Establishment National Treatment is also excluded. However, the part on "*Promotion and Protection of Investments*" would apply to investment in services. Unlike the general practice in GATS-inspired agreements, there is also a single country schedule of commitments for presentation of the schedule of commitments on investment and services. This enhances the transparency of investment liberalisation commitments.

Japan EPAs. The Japan-Singapore Economic Agreement for a New Age Partnership (JSEPA) provides an example of an agreement with dual coverage of investment in services but where the Services and Investment chapters remain silent on the interactions. It is an annex to the JSEPA which provides an answer to this ambiguity. Annex V(b), which contains the list of Singapore's exceptions in the area of investment, provides that "*National treatment and prohibition of performance requirements shall not apply to services sectors not scheduled in Chapter 7*" (Trade in Services). This entry also goes to state that "*Where a service sector is scheduled in Chapter 7, the provisions, terms, limitations, conditions and qualifications in Chapter 7 (including market access measures) shall apply to investments in that service sector under Chapter 8*". Thus investment in a sector listed under Chapter 7 (Trade in Services) is entitled to coverage both under the Chapter on Trade in Services and Chapter on Investment subject to any stated conditions or qualifications. It is worth noting that the list of Japan's exceptions in the area of investment does not provide for any limitations of that sort.

This would not appear; however, to be a general trend in more recent Japanese EPAs.[17] The Japan-Malaysia EPA which entered into force in July 2007 establishes a clearer articulation between the Investment chapter (Chapter 7) and the Trade in Services chapter. Article 73 of the Investment chapter states that with respect to matters covered by the National Treatment, MFN and

17. Japan is actively pursuing FTAs and particularly in their broader form, the economic partnership agreements (EPAs), which cover trade liberalisation and extend to other areas. Japan's EPAs with Singapore, Mexico and Malaysia took effect in November 2002, April 2005 and July 2006 respectively. In addition, Japan has signed an EPA with the Philippines and the texts of the EPAS with Thailand, Indonesia and Chile are largely completed. In addition, Japan is currently negotiating a broad agreement with the ASEAN as a whole.

Performance Requirements the Trade in Services chapter "shall prevail to the extent of any inconsistency". With respect to any other matter, the Investment chapter shall prevail to "the extent of inconsistency". This approach implies that all the obligations should be applied simultaneously in the absence of any inconsistency. The two chapters also provide for own separate lists of reservations/exceptions and commitments following a negative scheduling approach in the first instance and a positive one in the second. The construction requires nevertheless a full analysis of the relevant provisions and annexes of the agreement.

There are exceptions. Japan's EPA with Mexico follows the NAFTA approach by clearly separating investment from services obligations. In addition to the standard NAFTA Relation to Other Chapter article (Article 69), the Investment chapter excludes financial services from its coverage. This is stated in its Article 57 (Scope and Coverage) which provides that *Nothing in this Chapter shall apply to measures adopted or maintained by a Party to the extent that they are covered by Chapter 9 (Financial Services)*. The Financial Services chapter states in turn, in its Article 111 (Relation to Other Chapters), that the provisions of Chapter 7 (Investment Chapter) and 8 (CBTS) shall not apply to measures mentioned in paragraph 1 of Article 107 which refers to *measures adopted or maintained by a Party affecting (a) cross-border trade in financial services; (b) financial institutions of the other Party; and (c) investors of the other Party, and investments of such investors, in financial institutions in the Party*.

3) *GATS-inspired agreements where the interaction is stated in the Trade in Services chapter*

According to the third type of interaction, it is the Trade in Services chapter through a "Service-Investment" linkage clause which determines which provisions from the Investment chapter listed therein would apply. This approach has recently been introduced by the India-Singapore CECA. The order of the two chapters is also reversed as compared to other GATS-based agreements, with the Investment chapter preceding the Trade in Services chapter.

CECA's Trade in Services (Chapter 7) covers all four modes of supply of service. A "*Services-Investment Linkage*" clause (Article 7.24) states that a number of clauses in the chapter on Investment apply, *mutatis mutandis,* to "*measures affecting the supply of a service by a service supplier of a Party through commercial presence in the territory of the other party, only to the extent that they relate to an investment, regardless of whether or not such service sector is scheduled in a Party's Schedule of Specific Commitments*". These clauses cover compensation for losses, expropriation, repatriation, subrogation, measures in public interest, special formalities and information requirements, access to courts of justice, senior management, investment disputes, other obligations and

performance requirements. Article 6.2 of the Investment chapter[18] also states that "*In the event of any inconsistency between the Investment chapter and another Chapter, the other Chapter shall prevail to the extent of the inconsistency.*"

This type of interaction thus selectively chooses rights and protections provided under the Chapter on Investment to apply to commercial presence. It is a clear but a la carte approach. This approach leads to transparency and leaves no room for ambiguity in the relationship between provisions on investment and those on services.[19]

4) *GATS-inspired agreements where no interaction is stated*

A fourth group of agreements, accounting for a minority of those reviewed, are silent on the interaction(s). This approach therefore would rely on the rules of interpretation of international law[20] to determine the relationship between investment and services provisions. This case mainly concerns separate agreements on investment and services or agreements with a partial coverage of investment or services issues. This situation can arise as well within individual agreements where there is a duplication of clauses of general application in the investment and services chapters.

ASEAN. ASEAN provides a clear example of the absence of a stated interaction between investment and service provisions. Instead of a comprehensive all inclusive agreement, ASEAN has separate "Agreements" on Investment and Services, namely the ASEAN Agreement for Promotion and Protection of Investment, 1987 (amended in 1996), the Framework Agreement on ASEAN Investment Area (AIA), 1998 and the ASEAN Framework Agreement on Services, 1998 (amended in 2001). The ASEAN Agreement for Promotion and Protection of Investment offers to all investments, including investment in services, the typical protections found in BITs. The ASEAN Framework Agreement on Services includes "commercial presence" and related schedules of liberalisation commitments. The AIA covers "investment in incidental services" in five sectors, namely manufacturing, agriculture, fishery, forestry and mining and quarrying. This means that instead of providing interlinking between these two agreements, the AIA lists the specific sectors and related

18. Paragraph 6.2.3 of this Scope of Application article also states that "*The Provisions of this Chapter as specified in Article 7.24 shall apply mutatis mutandis to the measures affecting the supply of services by a service provider of a Party through commercial presence in the territory of the other Party*".
19. As regards other interesting innovations introduced by CECA, see "Salient Features of India's Investment Agreements", OECD, *Investment for Development,* Annual Report 2006.
20. For a succinct clear description of the applicable principles of public international law, see OECD Working Paper Moshe Hirsch, "Interactions between Investment and Non-Investment Obligations in International Law", Section II, in Trade Dispute Management, 2006, Vol. 3, Issue 5.

services sectors which are entitled to the liberalisation provisions of the agreement while liberalisation of services in general is covered by the ASEAN Framework Agreement on Services.

Andean Community. Decision 439 of the Andean community provides for liberalisation of trade in services. The decision lays down that the Commission will adopt an inventory of all the measures that are inconsistent with the principles of Article 6 (Market Access) and Article 8 (National Treatment) with the intention to eventually eliminate these measures and create an Andean Common Market in Services. Protection to investments in general is provided by Andean Decision 291. It is worth mentioning that both Decisions follow a negative list approach to the scheduling of specific commitments.

Trans-Pacific Strategic Economic Partnership (TPSEP). The TPSEP contains a GATS based chapter on trade in services but no chapter on investment. The agreement however uses the negative list approach for the parties' non-conforming measures. Therefore, even though the agreement does provide for liberalisation of the services sector, it does not provide for protection of investment in the services sector.

COMESA. COMESA contains a BIT-like chapter on Investment Promotion and Protection. COMESA is still negotiating the liberalisation of services.

Duplication of clauses. Another characteristic of Japan's EPAs is the duplication, in both the Investment and Trade in Services chapters, of certain clauses which are of general application and not subject to country specific exceptions of reservations. This concerns in particular the Transfers clause, which, as in the case of the JSEPA, is much broader in scope in the Investment chapter than in the Trade in Services chapter. Neither chapter however addresses the issue of possible conflict in applying these two provisions. The obligations should therefore be looked at as "cumulative" where each party has to abide by the two transfer provisions. The duplication would not always lead to conflict.[21] In case of conflict, unless otherwise provided, when issues fall under the coverage of the two different chapters, the parties would have to abide by the higher standard as provided by the rules of interpretation of international law.[22]

21. Martin Roy, "Implications for the GATS Negotiations on a Multilateral Investment Framework", Journal of World Investment 4 (6, 2003) pp. 963-986.
22. Relationships between Investment Agreements, OECD Working Papers on International Investment 2004/1.

EC Trade Agreements. The EC Trade Agreements with the Mediterranean region.[23] and Chile.[24] provide two variations in the EC's FTAs. The EC Agreements with countries in the Mediterranean mainly seek to liberalize services and investment in the future and to that end establish the necessary institutional framework and co-operation mechanisms. The EC-Chile Agreement is more recent and achieves greater liberalisation of Trade in Services and allows for "commercial presence/investment in services". Other features set them apart, however, from other agreements described above.

First, because of the shared competence between the European Community and the member states in the investment area, investment protection is largely covered by the member states' own bilateral investment treaties while liberalisation of establishment and trade in services is covered by EC agreements. The structure of the investment obligations is also unique. These agreements may have separate chapters on trade in services, financial services, establishment and current payments and capital movements.

The EC-Chile agreement has a chapter on Trade in Services (Title III, Chapter 1) inspired from the GATS.[25] The chapter on Trade in Services defines a commercial presence and provides for specific commitments (positive lists) on both national treatment and market access. The Establishment chapter provides for National Treatment with respect to establishment in sectors listed in a separate Annex and subject to any conditions and qualifications set out therein (Article 132) but it "*shall not apply to trade in services or financial services*" (Article 130).[26] The freedom of current account transactions and free movements of capital relating to direct investments is provided by Title V (Current Payments and Capital Movements) subject to certain exceptions.[27]

23. The relevant articles on investment are Articles 1, Title III (Right of Establishment and Services), Article 30-36 Title IV (Payments, Capital Movements and Other Economic Matters), Articles 48-52, 67 and Annexes V and VI (EU-Jordan). See *http:/europa.eu.int/comm./external_relations/euromed/med_ass_agreements.htm*.
24. The relevant articles on services investment in the Association Agreement with Chile: Part I, Title I, Articles 20-21; Part IV, Titles III, V, Annexes VII, VIII, X and XIV. See *http:/europa.eu.int/comm./trade/issues:bilateral/countries/chile/euchlagr_en.htm*.
25. Financial services are covered however separately by Chapter II of Title III.
26. Article 133 also states that each Party may regulate the establishment of legal and natural persons subject to the provisions of Article 132.
27. Article 164 provides that the *the Parties shall allow, in freely convertible currency and in accordance with the Articles of Agreement of the International Monetary Fund, any payments and transfers of the Current Account between the Parties*. Article 165 provides that the Parties *shall allow the free movements of capital relating to direct investments made in accordance with the laws of the host country and investments established in accordance with the provisions of Title III (Trade in Services and Establishment) of this Part (of the Agreement) and the liquidation or repatriation of these capitals and of any profit stemming there from* Article 165 provides that the Parties *shall allow the free movements of capital relating to direct investments made in accordance with the laws of the host country and investments established in accordance with the provisions of Title III (Trade in Services and Establishment) of this Part (of the Agreement) and the liquidation or repatriation of these capitals and of any profit stemming there from. In addition, under Annex XIV, Chile reserves the right to maintain certain requirements regarding the transfers of the proceeds from the sale or liquidation of investments in Chile.*

The EC-Jordan Association Agreement is different. As for NAFTA-inspired agreements, it provides for a separate chapter on CBTS. With regards to investment, the agreement has a chapter on Establishment and a chapter on Payments and Capital Movements which apply to both goods and services. The chapter on establishment contains MFN and National Treatment obligations[28] as well as certain provisions on key personnel. The Chapter on Payments and Capital Movements provides for the freedom of current and capital transactions subject to certain exceptional safeguards. The agreement, however, does not provide for other issues relating to investment protection such as expropriation.[29]

The methodology for listing liberalisation commitments also differ in the two agreements, the establishment and trade in services chapters in the EC-Chile agreement follow a positive list approach while the disciplines of the EU-Jordan agreement apply unless excluded by explicitly listed reservations.

Financial Services

NAFTA-inspired Agreements

All the NAFTA-inspired agreements reviewed, except for the Korea-Chile agreement, have separate chapters for financial services. The Financial Services chapter acts, in this case, as the depositary of the obligations with respect to investment and cross-border trade in financial services and states the interaction with the Investment and CBTS chapters. Only the provisions that are explicitly incorporated in the Financial Services chapter shall apply subject to any stated qualifications. This interaction has the effect of minimising the relationship with other chapters while allowing it to define provisions adapted to the special needs and requirements of this sector.

For example, the chapter on Financial Services in the AUSFTA begins by first stating in Article 13.1 that the scope of the chapter is limited to *measures adopted or maintained by a Party relating to a) financial institutions of the other Party;*

28. Article 30.1 provides for MFN treatment for the establishment of Jordanian companies and National Treatment (post-establishment) by the Community and its member states to Jordanian companies; Article 30.2 provides for the best of MFN treatment or National Treatment as regards the establishment and post-establishment of Community companies.
29. In the realm of investment protection the chapter on Capital Movements provides:
    i) Article 48 of the agreement says that "*Subject to the provisions of Articles 51 (difficulties for the operation of exchange-rate policy or monetary policy) and 52 (Balance of Payments), current payments connected with the movement of goods, person, services and capital within the framework of this Agreement shall be free of restrictions.*"
    ii) Thereafter Article 49 provides that "*there shall be no restrictions on the movement of capital from the Community to Jordan and on the movement of capital involving direct investment from Jordan to the Community*".

b) investors of the other Party, and investments of such investors, in financial institutions in the Party's territory; and c) cross-border trade in financial services (which excludes supply of a financial service in the territory of a Party by an investment in that territory). Thereafter article 13.1[1(2)] states that Chapters Ten (Cross-Border Trade in Services) and Eleven (Investment) *apply to measures described in paragraph 1 only to the extent that such Chapters or Articles of such Chapters are incorporated into this Chapter.* Then it goes on to incorporate Articles 10.11 (Denial of Benefits), 11.7 (Expropriation and Compensation), 11.8 (Transfers), 11.11 (Investment and the Environment), 11.12 (Denial of Benefits), and 11.14 (Special Formalities and Information Requirements). It also provides that *Article 10.10 (Transfers and Payments) is incorporated into and made a part of the Chapter to the extent that cross-border trade in financial services is subject to obligations pursuant to Article 13.5* (National Treatment of Cross-Border Trade in Financial Services).

Dispute settlement is also given a special treatment. Article 13.18 of the AUSFTA states that *Section B (Dispute Settlement Proceedings) of Chapter Twenty-One (Dispute Settlement) applies as modified by this Article to the settlement of disputes arising under this Chapter*. The scope and coverage of the financial services in KSFTA is more precise; Article 12.12(*c*) states that *Section C of Chapter 10 (Investment) is hereby incorporated into and made a part of this Chapter solely for claims that a Party has breached Article 10.11 (transfers), 10.13 (expropriation and compensation), 10.16 (special formalities and information requirements) and 10.17 (denial of benefits), as incorporated into this Chapter.* When an investor invokes the national treatment clause of the investment or the country exceptions on financial services, Article 12.13 (investment disputes in financial services) requires that the matter be referred to the Financial Services Committee for decision.

GATS-inspired Agreements

Among the GATS-inspired agreements reviewed, only the EFTA-Korea, EFTA-Singapore and EC-Chile agreements contain a chapter on financial services. In the other agreements, financial services are covered by the Trade in Services Chapters.

The *EFTA-Korea* chapter is clearly inspired by GATS as it contains verbatim many of its provisions. The chapter on Financial Services also provides that the provisions of chapter 3 (Trade in Services) apply to financial services only where specifically stated. Thereafter, the chapter goes on to include some of the definitions contained in GATS Annex on Financial Services and chapter on Trade in Services. All the provisions of the Investment Agreement apply to the chapter on Financial Services except to the extent of express limitations contained in the agreement. The Investment Agreement also has a specialised investor-state dispute settlement mechanism for issues relating to financial services. *The EFTA-*

Singapore agreement contains additional provisions relating to Financial Services in Annex VIII agreement. This Annex mainly defines the relevant terms and provides for national treatment of financial service suppliers.

The *EC-Chile* agreement contains a separate chapter on Financial Services which covers all four modes of supply. Annex IV to the Agreement lists the specific commitments by each Party on Market Access and National Treatment.

Part II. Implications for Investment Protection

Since the Investment chapters of the RTAs are the main depositary of the traditional protections offered by bilateral investment treaties, the implications that various types of interaction may have for the level of investment protection thus impinge upon whether these disciplines apply to services as well to non-services sectors. Three key findings emerge from the analysis of the sampled agreements.

First, the level of investment protection does not seem to be affected by the types of interaction followed. In all the agreements reviewed, investment in services benefits from the basic protections provided by the Investment chapter (namely expropriation, transfers, compensation for losses or investor-state dispute settlement). This is because the broad "asset-based" definition of investment which generally delineates the scope of application of these protections encompasses the narrower concept of "commercial presence" upon which the liberalisation obligations of GATS-inspired agreements are normally based. This is illustrated in Table 4.3. Even when the Trade in Services chapters incorporates basic protections from the Investment chapters – as it is the case of the India-Singapore Comprehensive Economic Co-operation Agreement or some Financial Services chapters – the Investment chapters' protections apply to other investments that meet the asset-based definition of these chapters. Put differently, "commercial presence" defines the level of liberalisation provided by GATS-inspired services disciplines but not the level of investment protection.

Second, if the protection accorded by the Investment chapters appears to be indifferent to the mode of interaction chosen, the level of investment protection is no doubt determined by the coverage and scope of the protection provisions. As with any other obligations, this depends on what the negotiators set themselves to achieve at the beginning of the negotiations and what they ultimately obtain at the end of the negotiating process. As no negotiation is the same, the types of investment protection included and/or the way they are formulated may vary from one agreement to another. This is illustrated by Table 4.4. Although both the NAFTA-inspired and GATS-inspired

Table 4.3. **Scope of application of Investment chapters' protections**[1]

Agreement(s)	Definition of investment in Investment chapter	Definition of commercial presence in Services chapter	Scope of application of investment protection disciplines
NAFTA and NAFTA-inspired agreements			
NAFTA	Asset based definition – Closed list – includes FDI, portfolio investment and various forms of tangible and intangible property		All protection (and liberalisation) disciplines of the Investment chapter apply to goods and services.
Japan-Mexico EPA	Asset based definition – Closed list – includes FDI, portfolio investment and various forms of tangible and intangible property		All protection (and liberalisation) disciplines of the Investment chapter apply to goods and services.
US-CAFTA-DR US-Morocco FTA Australia-US FTA Chile-Korea FTA Korea-Singapore FTA	Asset based definition – Open List – includes FDI, portfolio investment and various forms of tangible and intangible property		All protection (and liberalisation) disciplines of the Investment chapter apply to goods and services.
GATS-inspired agreements			
EFTA-Singapore FTA New Zealand-Singapore FTA EFTA-Korea FTA	Asset-based definition – Open list – includes FDI, portfolio investment and various forms of tangible and intangible property	GATS definition of commercial presence	All the protections of the Investment chapter (separate Investment Agreement in the case of EFTA-Korea FTA) apply to commercial presence.
Japan-Singapore EPA Japan-Malaysia EPA	Asset based definition – Open list – includes FDI, portfolio investment and various forms of tangible and intangible property	GATS definition of commercial presence	All the protections of the Investment chapter apply.
Australia-Thailand FTA	Foreign direct investment, as defined by IMF	GATS definition of commercial presence	The protection of the Investment Chapter (limited to post-establishment, fair and equitable treatment and full protection and security of investment) apply to commercial presence.
India-Singapore ECA	Asset based definition – Open list: includes FDI, portfolio investment and various forms of tangible and intangible property	GATS definition of commercial presence	The Services chapter incorporates selected protections of the Investment chapter to be applied to commercial presence. The protection of the Investment chapter applies to other investments.
ASEAN Agreement for Promotion and Protection of Investment, 1987 (AAPPI) and ASEAN Framework Agreement on Services (AFAS)	Asset-based definition of investment in AAPI – Open list	Commercial presence in AFAS not explicitly defined, but implicitly follows GATS	AAPPI protection applies to investment in services.
Andean Community	Direct Foreign Investment	GATS definition of commercial presence	Except for Free Transfers of intra-Andean direct investments, no investment protection disciplines.
EC-Chile Association Agreement	Direct investment including branches	GATS definition of commercial presence	Free Transfers.
EC-Jordan Association Agreement	Direct investment including branches	GATS definition of commercial presence	
Trans-Pacific EPA		GATS definition of commercial presence	No investment disciplines (only GATS-inspired obligations.
COMESA	Closed list		Non investment protection disciplines.

1. These are the general obligations on payments and transfers, fair and equitable/minimum standard, full protection and security, expropriation and compensation.

Table 4.4. **Key investment Protections of Investment chapters**

Agreement(s)	Fair and equitable treatment	Full protection and security	Transfers	Protection from strife/ Compensation for losses	Expropriation		Investor-State arbitration
					Direct	Indirect	
NAFTA and NAFTA-inspired agreements							
NAFTA	Yes	Yes	Yes[1]	Yes	Yes	Yes	Yes
Japan-Mexico EPA	Yes[1]	Yes[1]	Yes[1]	Yes	Yes	Yes	Yes
Korea-Singapore FTA							
Australia-US FTA	Yes[1]	Yes[1]	Yes[1]	Yes	Yes	Yes[2]	Yes[3]
US-CAFTA-DR							
US-Morocco FTA							
GATS-inspired agreements							
EFTA Singapore FTA	Yes	Yes	Yes[1]	Yes	Yes		Yes[2]
EFTA-Korea	Yes	Yes	Yes[1]	Yes	Yes	Yes	Yes[1]
Japan-Singapore EPA	Yes	Yes	Yes[1]	Yes	Yes	Yes	Yes
Japan-Malaysia EPA	Yes	Yes	Yes[1]	Yes	Yes	Yes	Yes
India-Singapore ECA	No	Yes	Yes[1]	Yes	Yes	Yes	Yes
Australia-Thailand FTA	Yes	Yes	Yes[1]	Yes	Yes	Yes	Yes[3]
ASEAN Agreement for Promotion and Protection of Investment, 1987 (AAPPI) as confirmed by ASEA Investment Framework	Yes	Yes	Yes[1]	Yes	Yes	Yes	Yes[3]
New-Zealand Singapore CER	No	No	Yes[1]	No	No	No	Yes[1]
EC-Chile Association Agreement			Yes[2]				
EC Jordan	No	No	Yes[2]	No	No	No	No
Andean Community	No investment protection disciplines						
Trans-Pacific EPA	No investment disciplines						
COMESA	No Investment disciplines						

F&ET – Fair and equitable treatment
1. Interpretative Note on minimum standard of treatment.

Full protection and security
2. Interpretative Note on minimum standard of treatment.

Transfer of funds
1. Allows for current and capital transactions.
2. Free movements of capital relating to direct investment and the liquidation and repatriation of these capitals.

Expropriation

Investor-state arbitration
1. No automatic consent given by the states.
2. No automatic consent for pre-establishment disputes.
3. Post-establishment only.

agreements are largely based on BIT-like protections[30] and are thus broadly similar, some differences can still be observed.

A number of the reviewed NAFTA-inspired agreements have developed interpretative notes to clarify the scope of application of the fair and equitable treatment standard and/or that of the expropriation provisions. If this practice is not apparent in GATS-inspired agreements, there are other distinctive features. The India-Singapore ECA does not contain any fair and equitable treatment standard. Some pre-conditions are imposed on the recourse to investor-state arbitration in the case of the EFTA-Singapore and EFTA-Korea agreements and New-Zealand Singapore agreement. In the case of the ASEAN agreements and the Australia-Thailand FTA, investor-to-state arbitration applies only to post-establishment. Three agreements (Andean Decisions, Trans-Pacific EPA and COMESA) do not contain any investment protection or investment disciplines.

A great majority of the reviewed agreements contain robust provisions on transfers however. In EC agreements, they apply to free movements of capital relating to direct investment and the liquidation and repatriation of these capitals. These observations are consistent with the recent findings of the work of the Investment Committee on international investment agreements.[31]

Third, if there are no apparent legal or technical impediments to the inclusion of BIT-like protections into RTAs, this does not necessarily imply that RTAs' investment chapters always supplant BITs. Again this depends on the particular circumstances and outcome of each negotiation. As Table 4.5 shows, various situations are possible.

For a majority of the RTAs reviewed, the basic protections of the Investment chapters constitute, in the absence of BITs, the first obligations ever contracted by the parties between them. This is the case for AUSFTA, NAFTA, KSFTA, TAFTA, Japan's EPAs or CECA. But the pre-existence of BITs may also lead the parties to continue maintain them along side RTAs, with both set of rules complementing each other. This is the case for several other agreements reviewed (EFTA-Chile agreement, EC agreements, ASEAN Agreements and Andean Decisions). In other words, BITs seem to be replaced by RTAs only when the latter's contents and coverage are considered to be clearly superior or more comprehensive to those of BITs (for example EFTA-Korea Investment Agreement as compared to Korea-Switzerland BIT or US-Morocco FTA as compared to US-Morocco BIT). In the absence of any RTA

30. These provisions were initially elaborated by the 1967 OECD Draft Convention on the Protection of Foreign Property.
31. Stocktaking of Developments in Investment Agreements, DAF/INV/WD/(2005)10/FINAL and International Investment Law: A Changing Landscape, (2005).

Table 4.5. **BITs concluded by RTA partners**

Agreement(s)	BITs?	Partners
		NAFTA and NAFTA-inspired agreements
NAFTA (1994)	No	
Japan-Mexico EPA (2006)	No	
Japan-Singapore EPA (2006)	No	
Korea-Singapore FTA (2006)	No	
Australia-US FTA (2005)	No	
US-CAFTA-DR FTA (2006)	Yes	US-Honduras (2001).
US-Morocco FTA (2006)	Yes	US-Morocco (1991).
		GATS-inspired agreements
EFTA Singapore FTA (2003)	Yes	Singapore-Switzerland (1978).
EFTA-Korea (2006)	Yes	Korea-Switzerland (1971).
Japan-Singapore EPA (2006)	No	
Japan-Malaysia EPA (2006)	No	
India-Singapore ECA (2005)	No	
Australia-Thailand FTA (2005)	No	
ASEAN Agreement for Promotion and Protection of Investment, 1987 (AAPPI) and AIA (1998)	Yes	Cambodia-Indonesia (1999), Cambodia-Malaysia (1994), Cambodia-Philippines (2000), Cambodia-Singapore (1996), Cambodia-Thailand (1997), Cambodia-Viet Nam (2001), Indonesia-Lao People's Democratic Republic (1994), Indonesia-Malaysia (1994); Indonesia-Philippines (2001), Indonesia-Singapore (2000), Indonesia-Thailand (1998), Lao People's Democratic Republic-Malaysia (1992), Lao People's Democratic Republic-Myanmar (2003), Lao People's Democratic Republic-Singapore (1998), Lao People's Democratic Republic-Thailand (1990), Lao People's Democratic Republic-Viet Nam (1996), Malaysia-Viet Nam (1990), Myanmar-Philippines (1998), Myanmar-Viet Nam (2000), Philippines-Thailand (1996), Philippines-Viet Nam (1993), Singapore-Viet Nam (1992) and Thailand-Viet Nam (1992).
New-Zealand Singapore CER (2001)	No	
EC-Chile Association Agreement (2005)	Yes	Chile-Poland (2000), Chile-Portugal (1998), Chile-Spain (2003), Chile-Romania (1997), Chile-Sweden (1995) and Chile-United Kingdom (1997).
EC-Jordan (2003)	Yes	Jordan-Austria (2001), Jordan-Bulgaria (2003), Jordan-Czech Republic (2001), Jordan-France (1979), Jordan-Germany (1977), Jordan-Greece (2005), Jordan-Italy (2001), Jordan-Netherlands (1998), Jordan-Poland (1999), Jordan-Romania (1999), Jordan-Spain (2000), Jordan-Switzerland (2001) and Jordan-United Kingdom (1980).
Andean Community (1991)	Yes	Bolivia-Ecuador (1997), Bolivia-Peru (1995), Columbia-Peru (1994), Ecuador-Peru (1999), Ecuador-Venezuela (1995) and Peru-Venezuela (1997).
Trans-Pacific EPA (2006)	No	
COMESA (1994)		Burundi-Comoros (2001), Comoros-Egypt (2000), D.R. Congo-Egypt (1998), D.R. Congo-South Africa (2004), D.R. Congo-Switzerland (1973), Djibouti-Egypt (1998), Egypt-Malawi (1999), Egypt-Mauritius (2003), Egypt-Sudan (2003), Egypt-Swaziland (2000), Egypt-Uganda 1995), Egypt-Zambia (2000), Egypt-Zimbabwe (1999), Eritrea-Uganda (2001), Ethiopia-Libya (2004), Ethiopia-Mauritius (2003), Ethiopia-Sudan (2000), Ethiopia-Uganda (2003), Libya-Egypt (1991), Madagascar-Mauritius (2005), Malawi-Zimbabwe (2003), Mauritius-Burundi (2001), Mauritius-Comoros (2001), Mauritius-Rwanda (2001), Mauritius-Swaziland (2000), Mauritius-Zimbabwe (2000), Uganda-Ethiopia (2003), Uganda-Zimbabwe (2003), and Zimbabwe-Malawi (2003).

Sources: Andean Community, COMESA, OECD and UNCTAD.

investment disciplines, the parties have to rely on the legal guarantees provided by BITs. Those contracted between COMESA partners, for instance, are listed in the last entry of the table.

Part III. Implications for Investment Liberalisation

1. GATS and the NAFTA-inspired approach to the liberalisation of investment in services

Part I of the study has described the interaction between provisions on investment and trade in services and Part II has addressed the implications for the protection of investment. We turn now to the implications for the degree of liberalisation achieved. Two models of liberalisation commitments can be identified. The first model is represented by NAFTA, the first major RTA with investment content, which groups provisions on investment for all sectors and grants national treatment and most-favoured-nation treatment in all covered sectors with a negative list of reservations. The second model is based on the GATS approach that is followed in other types of agreements and combines the positive listing of sectors where countries undertake commitments with a negative list of limitations that countries wish to maintain in scheduled sectors.

This part of the study focuses on investment in services and assesses the degree of liberalisation achieved according to the approach adopted with respect to the investment/services interaction. The first section describes the GATS approach and the second section the NAFTA-inspired lists of reservations. Section three provides the results of the analysis of the schedules of commitments in ten of the RTAs presented in Part I.[32] Section four compares the regional schedules of commitments with GATS schedules of commitments. It identifies to what extent the regional agreements are "WTO-plus", that is whether they offer more at the regional level than the multilateral liberalisation of investment in the GATS (Mode 3). The methodology used to analyse the schedules of commitments is detailed in Annex 4.A2. It is also in this Annex that can be found the tables describing the commitments on investment in services in the RTAs and the comparison with GATS schedules of commitments on Mode 3.

a) The GATS-inspired approach to scheduling commitments

The General Agreement on Trade in Services (GATS) covers all forms of trade in services, including Mode 3, "the supply of a service […] by a service

32. Five of these agreements have NAFTA-inspired lists of reservations (AUSFTA, NAFTA, US-Morocco, Japan-Mexico and Chile-Korea) and the other five have GATS-inspired schedules of commitments (Japan-Singapore, TAFTA, EU-Chile, EFTA-Singapore and India-Singapore).

supplier of one member, through commercial presence in the territory of any other member" (Article I). It organises "a multilateral framework of principles and rules for trade in services with a view to the expansion of such trade under conditions of transparency and progressive liberalisation". The liberalisation of investment in GATS is undertaken through commitments in sectors and sub-sectors.

Although the GATS is often presented as a model of a "positive list" approach, it can be more accurately described as an hybrid model where specific commitments on market access (Article XVI) and national treatment (Article XVII) are made in a positive list of sectors, but where limitations to these commitments are presented in a negative list. The MFN principle in GATS is a general obligation and applies to all services sectors covered by the agreement with a negative list of exemptions. Another characteristic of GATS schedules is that limitations are listed by mode of supply.

GATS schedules of commitments are considered by some authors as difficult to read or lacking transparency (Hoekman, 1995; Stephenson, 2002; Mattoo, 2005).[33] To assess the real level of market access, it is necessary to determine the activities covered in a given sector, to read the limitations on market access and national treatment listed for this sector according to the mode of supply, to check that there is no horizontal limitation that could apply and also to look at the possibility of MFN exemptions that can be found in a separate table. As only sectors where commitments are made are listed, it is necessary to make a deduction to find the sectors or sub-sectors that were excluded from the schedule and a minimum knowledge of the classification is therefore required. The absence of a commitment in a sector does not mean that foreign investment is prohibited or that discriminatory treatment is effectively applied to foreign investors. There is simply no information on the kind of restrictions that can exist in non-committed sectors (and it could be the case that no restriction exists). Additional research would be needed to know the kind of regulation applicable and the information cannot be in the schedule of commitments. Hence the "lack of transparency" pointed out by some analysts. In financial services, parties have the option to schedule their commitments in accordance with the negative list approach of the GATS Annex on Understanding on Commitments in Financial Services. Virtually all OECD countries and a few non-OECD countries have indicated to use this option.

33. Guidelines for the scheduling of specific commitments under GATS have been adopted by the WTO Council for Trade on Services (S/L/92, 28 March 2001). Transparency is a general obligation of GATS (Article III) requiring that all measures affecting trade in services shall be made publicly available.

Moreover, as GATS covers the four modes of supply of services, the definitions provided for market access, national treatment and most-favoured-nation treatment are not specific to investment (which is "commercial presence" in GATS, already a somewhat more restrictive concept). In particular, there is no distinction made in GATS between pre- and post-establishment. Market access is defined in Article XVI through a list of limitations that cannot be adopted or maintained in sectors where market access commitments are taken.[34] While the concept of "market access" could be understood as an equivalent of "pre-establishment" in the realm of investment, this definition does not lend itself to such an interpretation as national treatment limitations can also cover the pre-establishment phase. As a consequence, some authors point out that there is some confusion in GATS about the relationship between market access and national treatment, especially in the case of investment (Low and Mattoo, 2000).[35] A generally accepted interpretation(although not shared by all) is that national treatment applies to any existing or future market access commitment even when they are not scheduled (Mattoo, 1997).

Despite these issues, the GATS approach to scheduling commitments on investment in services has been quite popular in regional trade agreements. In the list of RTAs analysed in this study, TAFTA, Japan-Singapore, Japan-Malaysia, EC-Chile, EFTA-Singapore, EFTA-Korea, New Zealand-Singapore, and India-Singapore have GATS-like schedules of commitments.

There are several reasons to explain why the GATS approach is followed in these agreements. First, it is an easy way to ensure the consistency of the regional liberalisation with multilateral disciplines and to use a model well-known by negotiators where commitments are fully understood. Reproducing GATS at the regional level certainly help negotiators to strike a deal and ensure consistency with the GATS, at least for governments who are used to the GATS approach and have already determined in the GATS context the kind of commitments they are willing to make (or not make). Second, it is likely that those countries that used the GATS as a model endorsed its approach and in particular the flexibility offered not to bind themselves in a given sector even if no restriction may actually apply. In that sense, one can expect agreements

34. This list includes limitations on: (1) the number of service suppliers; (2) the value of service transactions or assets; (3) the total number of service operations or total quantity of service output; (4) the total number of natural persons that may be employed; (5) the type of legal entity or joint venture that may supply a service; and (6) the participation of foreign capital.
35. The confusion comes also from a scheduling convention set out in Article XX:2 of GATS. This article states that when a limitation is relevant for both Articles XVI (market access) and XVII (national treatment), it should be entered in the "market access" column of the schedule and should be understood as being also a limitation to national treatment.

with a GATS approach to reproduce the same kind of commitments as in GATS, going further at the regional level or with a bilateral partner than it is possible at the multilateral level.

When an agreement is described as reproducing the GATS approach, it goes further than simply having a positive list of commitments or a schedule of commitments presented in the same way as in a GATS schedule. These agreements tend to incorporate different provisions of the GATS and make many explicit references to it. First, they generally refer to GATS for the definitions of the main terms used in the services chapter and their schedules of commitments such as "trade in services", "service supplier" or "market access". For example, Article 3.3 of the EFTA-Korea agreement says that "The following definitions of Article I of the GATS are incorporated into and made part of this Chapter [...]" and subsequently "The following definitions of Article XXVIII of the GATS are hereby incorporated and made part of this Chapter [...]". Similarly, the articles on MFN treatment, market access, and national treatment usually refer to, respectively, Article II, Article XVI and Article XVII of the GATS.

Most of the GATS-inspired RTAs tend to reproduce a schedule of commitments similar to their GATS schedule, with additional commitments in specific sub-sectors (see Section 4 below). In the case of the Thailand-Australia Free Trade Agreement (TAFTA), the presentation of the schedule is however different. Instead of reiterating the commitments made in the GATS, only the additional sub-sectors liberalised are listed. In particular, while limitations are scheduled both horizontally, and by reference to specific sectors and sub-sectors, per the GATS approach, they are not scheduled by reference to mode of supply, market access or national treatment. Instead, all limitations in relation to each horizontal commitment and sector specific commitment are listed together.

Future liberalisation is often foreseen in the RTAs along the same lines as in GATS Article XIX on progressive liberalisation. The mechanism involved is generally a review of the commitments after the entry into force of the agreement. For example, in the EU-Chile association agreement, Article 100 indicates that the Parties shall review Chapter 1 on services "three years after the entry into force of [the] Agreement, with a view to further deepening liberalisation and reducing or eliminating remaining restrictions on a mutually advantageous basis and ensuring an overall balance of rights and obligations". An agreement like the EFTA-Singapore FTA shows a stronger commitment to future liberalisation, as it aims at "the elimination of substantially all remaining discrimination between the Parties with regard to trade in services [...] at the end of a transitional period of ten years from the date of entry into force of [the] Agreement". It also indicates that "such review

shall continue if substantially all remaining discrimination has not been eliminated at the end of this transitional period".

b) NAFTA-inspired lists of reservations

In NAFTA Chapter 11, national treatment (Article 1102) and MFN (Article 1103) are granted to all covered investments "with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments". However, there are exceptions and reservations to the application of these two obligations. Article 1108 states that national treatment and MFN do not apply to a list of non-conforming measures set out in Annex I (Reservations for existing measures and liberalisation commitments), Annex II (Reservations for future measures), Annex III (Activities reserved to the State) and Annex IV (Exceptions from most-favoured-nation treatment).

The reservations are all presented according to the same layout with information on the sector and sub-sector concerned, the industry classification (where national classifications can be used), the obligations against which a reservation is taken, level of government, the measure, and its description. Some guidelines on the interpretation of the schedules are provided at the beginning of each annex. In that sense, the NAFTA-inspired schedules of commitments are easier to read. They also tend to be shorter as a consequence of the top-down approach, since it is not necessary to give an exhaustive list of all the sectors and sub-sectors where commitments are made.

Originally, Annex I of NAFTA was to have listed all non-conforming measures maintained at the sub-national level, within two years of the date of entry into force of the agreement. However, in 1996, NAFTA countries decided to "grandfather" existing restrictions (that is to freeze existing measures with a commitment to not make measures more non-conforming in the future) and no list of non-conforming measures at the local or sub-federal level is annexed to the agreement.

The difference between existing and future measures (between Annex I and Annex II in NAFTA) is important. Existing non-conforming measures that are listed in Annex I cannot be changed unless it is to increase the conformity of the measure with the obligation ("ratchet" effect). Only for activities or sectors listed in Annex II can future non-conforming measures be adopted. That is why the NAFTA scheduling has been presented as a "list it or lose it" approach. If a government has not included a reservation in its schedule in the period where it could do so, it cannot adopt any new measure that would be discriminatory for foreign investors. For each reservation listed, a phase-out commitment can be taken. However, there is no obligation to commit to future liberalisation and the phase-out element in the schedule can be filled in with

"none". However, as in the GATS, nothing prevents the parties from progressively liberalising measures and lifting reservations if they so wish. A key difference between the GATS and NAFTA approaches is that the ratchet mechanism of the latter locks in liberalisation as it occurs and thus provides an added degree of predictability for investors.

In the Annex on future measures (Annex II in NAFTA), some reservations can be very broad with potentially a wide impact on the investment regime. For example, it is not uncommon to find reservations such as Country X "reserves the right to adopt or maintain any measure relating to investment in [...]." In that case, the outcome is not different than an "unbound" in a GATS schedule. In the Annex on future measures, it is possible to identify sectors that may be subject to non-conforming measures without listing a specific measure. It should also be kept in mind when comparing NAFTA lists of non-conforming measures and GATS-inspired schedules of commitments that in the latter, a broad reservation with a potentially discriminatory treatment affecting different sectors will have to be reiterated for each sector (unless it can be put in the horizontal section of the schedule). With the negative list approach it is possible to state one time the law involved and to list the actual sectors implicated by the reservation.

The NAFTA approach seems to have gained ground among regional trade agreements. In the sample of RTAs analysed in this study, AUSFTA, CAFTA-DR, US-Morocco, Japan-Mexico, the Trans-Pacific Strategic Economic Partnership, Chile-Korea and Korea-Singapore have NAFTA-like schedules of commitments. The approach has diffused beyond original NAFTA signatories, as the Trans-Pacific Strategic Economic Partnership, Chile-Korea or Korea-Singapore are agreements where no party is a member of NAFTA.

What is common to these agreements is not only the negative list approach but also the way the lists are organised and presented, in particular the difference between existing measures and future measures. There are however small variations in the NAFTA-inspired agreements. For example, the phase-out element is not always present and some agreements, such as US-Morocco, have reservations that apply during a transitory period. But the way investment is liberalised and commitments are made is the same.

NAFTA-inspired agreements are nonetheless influenced by GATS in the financial services chapters which incorporate the results of the WTO negotiation on financial services that took place after the signature of GATS. An equivalent to the concept of "market access" appears in Article 1403 of NAFTA as "establishment of financial institutions". There is even a more explicit reference to GATS in the agreement between Mexico and Japan where GATS commitments on financial services are incorporated in the agreement.

It highlights that GATS schedules and NAFTA lists of reservations are not incompatible and can be combined.

In the NAFTA approach, new services are automatically granted national treatment and most-favoured-nation treatment, since no reservation could have been taken for them at the time the agreement was signed (another manifestation of the "ratchet" effect previously mentioned). In a GATS-like schedule of commitments, these new services would not be covered if they are in sectors or sub-sectors without commitments.[36] However, it is possible in the NAFTA approach, through the list of reservations on future measures, to prevent new services from falling automatically under the disciplines of the agreement. In the Mexico-Japan FTA for example, Japan has a reservation to deal with new services.

As highlighted before regarding GATS, the defining characteristic of the approach is not solely in the way commitments are scheduled. If a negative list approach can be seen as contributing to promote the liberalisation of investment, the pro-liberalisation approach in NAFTA relies on a broader set of disciplines that supplement national treatment and MFN treatment disciplines and that have been described in Part I:

- Article 1104 (standard of treatment) accords to investors the better of MFN or national treatment.
- NAFTA includes provisions on performance requirements (Article 1106) that are very comprehensive and that are extended to services.
- There are also provisions prohibiting certain types of nationality requirements for senior management (Article 1107).[37]
- Lastly, as emphasised before, the definition of the investor is broader than the GATS commercial presence of a service provider. The origin requirement is thus more liberal and all types of established companies benefit from the liberalisation commitments (Stephenson, 2002).

To the extent that NAFTA-inspired RTAs follow this approach – and they generally do so – they have the same liberalising bias that can be found in NAFTA.

36. An example often mentioned is the case of sectors "unbound due to lack of technical feasibility". Mode 3 is however not concerned. When the new service is in sectors or sub-sectors where commitments have been made, its classification and the existence of the commitment could be questioned.
37. Article 1107 of NAFTA prohibits in its first paragraph requirements that an investor "appoint to senior management positions individuals of any particular nationality". The second paragraph specifies that a Party may require that a majority of a board of directors, or any committee thereof, "be of a particular nationality, or resident in the territory of the Party", provided that such requirements do not materially impair an investor's control over its investment.

c) The degree of liberalisation achieved in the RTAs

To assess to what extent investment in services has been liberalised in regional trade agreements and to compare the NAFTA and GATS approaches, an analysis of the schedules of commitments on investment in services has been conducted for ten RTAs. The details of the methodology are presented in Annex 4.A2, including a certain number of caveats that have to be acknowledged in such an analysis. The exercise aims to provide some transparency on the schedules of commitments in RTAs and to understand the underlying forces of liberalisation of investment in services.

The interesting question is to know if there is a relationship between the approach followed in scheduling commitments and the degree of liberalisation achieved. One might expect GATS-inspired agreements to reproduce the same level of commitments as in the GATS and some authors have questioned the real liberalisation of services trade in regional trade agreements of this type (as GATS schedules at the time of the end of the Uruguay round were seen as a *status quo* rather than a higher level of access to the market). While NAFTA and the negative list approach are often considered as more favourable to liberalisation, it is also important to check if lists of reservations do not introduce restrictions that would make these agreements not so different than the ones following a GATS approach. Many authors have asked such questions but there is very little detailed analysis of the schedules of commitments in RTAs.[38]

Tables 4.A2.1 to 4.A2.3 summarise the results of the analysis. Table 4.A2.1 shows the commitments in five RTAs with a NAFTA-inspired approach to liberalisation (Australia-US, NAFTA, US-Morocco, Mexico-Japan and Chile-Korea). All the agreements using a negative list approach are agreements with very few reservations and where no sector has been totally excluded. There are some sectors where some activities or sub-sectors have no commitments, either because of a public monopoly ("activities reserved to the State" in the schedules of Mexico) or because of a broad reservation on future measures (where the country reserves the right to maintain or adopt any measure in a given sub-sector). There are only a few reservations of this type in sectors that have been traditionally more regulated with a certain degree of state intervention (communication services, health related and social services, transport services and some specific business services).

No sector is however in our analytical category of "commitments in a limited number of sub-sectors" (where less than 75% of the sector has no limitations). A number of reservations are listed, in particular in business

38. Such an analysis can be found in Stephenson (2002) and recently in Roy *et al*. (2006) and Fink and Molinuevo (2007).

services, communication services, financial services, health-related and social services and transport services. But their number is again not very high and these reservations are not here to exclude some services from the liberalisation but to pinpoint exceptions to national treatment or most-favoured-nation treatment (that is the difference in the table between the colour of the cell – which shows the level of commitments – and the number reported – which indicates the reservations listed).

Table 4.A2.2 presents the results of an analysis carried out for five agreements with a GATS-inspired schedule of commitments on investment in services. There is a definite difference with Table 4.A2.1. Entire sectors can be without commitments in the case of these agreements. For example, Chile in the EU-Chile Association Agreement has no commitments in educational services, health related and social services and "other services not included elsewhere". India in its agreement with Singapore has also 3 out of 12 sectors without any commitment (educational services, environmental services and "other services not included elsewhere"). There are also sectors where only a limited number of commitments have been made (appearing as grey plain cells in the Table). This means that less than 75% of the sub-sectors of the GATS W/120 classification have commitments. It is often the case for communication services (where few or no commitments are made in postal and courier services, as well as audiovisual services) or transport services (where not all of the means of transportation are generally included).

There are very few "blank cells" that would indicate a commitment in the whole sector and the most frequently found category is "commitments in most of the sector". Here the positive rather than negative listing approach plays a role. Countries generally do not list the "other" sub-category in their schedules. It is often the case that commitments are made in all the sub-sectors of the classification but not the last one which is the "other" category, grouping services of the same sector not listed before.[39] The comparison between Tables 4.A2.1 and 4.A2.2 should therefore be made carefully. In practice, there might be a very small difference in the investment regime when the cell is blank or has a lattice pattern in the Table, especially if the "other" sub-sector does not correspond to any meaningful activity. The difference that is worth taking note of is in the sectors where few commitments or no commitments are made. This is the main difference between agreements in Tables 4.A2.1 and 4.A2.2.

39. This is true for the twelfth sector "Other services not included elsewhere" where only 8 countries among all WTO Members have taken commitments. But it is also the case that few commitments are made inside each of the other eleven sectors where there is also a sub-category for sub-sectors not listed in the classification.

As far as the number of limitations is concerned, there is a tendency to find higher numbers in the GATS-inspired agreements, but as pointed out before, this can be a consequence of the way the limitations are listed. The limitations are also concentrated in a few sectors, in particular financial services and business services. Another characteristic of the GATS-inspired agreements seems to be that countries prefer to exclude a sub-sector (*i.e.* to not list it in the schedule) rather than including it with all the existing limitations. This cautious approach is not possible in the top-down approach of NAFTA where all reservations must be listed. Another caveat regarding the number of limitations concerns the non-conforming measures at the local or sub-federal level. In GATS-inspired agreements, the schedule generally covers all government levels. Limitations that apply only in a province or state and not at the federal level are separately listed. In NAFTA-inspired agreements, while this need not be inherent to the negative list approach, non-conforming measures at the sub-federal level are generally not listed, as previously mentioned regarding NAFTA.

Technically, there could be the same level of commitments with a positive list or a negative list. Results similar to those found in Table 4.A2.1 for NAFTA-inspired agreements could be reproduced in GATS-type agreements by scheduling all the sectors of the W/120 classification. Looking at the schedule of Japan in the Japan-Singapore FTA, it is interesting to see that there are several sectors with full coverage of all sub-sectors (construction, distribution, education, environmental and financial services). Conversely, it would be possible for countries in NAFTA-inspired agreements to reserve the right to maintain or adopt any measure in a whole sector, such as educational services or health related and social services. But this is not the case in the agreements analysed. Parties to the US-Australia, NAFTA, US-Morocco, Japan-Mexico and Chile-Korea FTAs have listed reservations, including the possibility of taking any discriminatory measure in some activities or even prohibiting investment when the sub-sector is a public monopoly but it does not lead to the exclusion of full sectors of the scope of the liberalisation commitments.

From the comparison between Table 4.A2.1 and 4.A2.2 in Annex 4.A2, it is clear that NAFTA-inspired agreements have the advantage in terms of sectors covered by non-discriminatory principles when the agreement is signed. However, the analysis should be completed by taking into account several differences in the GATS-inspired and NAFTA-inspired approaches to scheduling liberalisation commitments. Table 4.6 provides a summary of these main differences. It is not the objective of this study to settle the debate on positive *versus* negative lists of commitments but the following points should be considered:

- GATS-inspired agreements establish a progressive and selective liberalisation of investment in services. The full liberalisation is generally

referred to as an objective in the agreement and the RTA provides for reviews of commitments in order to achieve this objective. NAFTA-inspired agreements in contrast can be described as "one-shot agreements" where from the onset all sectors are covered by the non-discriminatory disciplines and where further liberalisation is likely to occur through autonomous liberalisation (automatically binding in the agreement through the "ratchet" mechanism). To fully assess the degree of liberalisation achieved in each type of agreement would require taking into account future liberalisation in the GATS-inspired agreements.[40]

- While the sectoral coverage of agreements provides useful information on the degree of liberalisation achieved, the type of commitments also matters. For example, GATS-inspired agreements cover non-discriminatory quantitative restrictions as one type of limitation to market access while NAFTA-inspired agreements do not deal with this type of barriers in their investment chapter. On the other hand, while commitments are bound in both GATS- and NAFTA-inspired agreements, there is in addition a ratchet mechanism in NAFTA-inspired agreements that locks in further liberalisation of non-conforming measures.
- Regarding the transparency achieved, the top-down approach of NAFTA-inspired agreements lists in theory all reservations to non-discriminatory disciplines and can offer predictability and certainty to investors as the investment regime is fully stated in the agreement. The idea of greater transparency for negative lists can however be nuanced when not all limitations are listed (*e.g.* sub-federal non-conforming measures). In GATS-inspired agreement, if schedules of commitments can be said to a certain extent to be less transparent, transparency is a general obligation (that applies therefore to all sectors) and information on the investment regime has to be provided to investors.
- Moreover, the way reservations are listed in the GATS-inspired agreements is not very different than in the NAFTA-inspired agreements. In both cases, it is a negative list explaining where there are exceptions to the non-discriminatory treatment. The positive *versus* negative list approach concerns only the coverage of the schedule (the number of sectors where commitments are made). There is a complexity inherent to the nature of the exercise and negative lists as well as positive lists have to manage the issue of limitations that apply to all sectors, the interpretation of "national treatment", "MFN" or "market access" in the context of the specific measure scheduled, the issue of the definition of services sectors and activities, the

40. As the agreements analysed are relatively recent it is not possible to assess yet the pace at which new sub-sectors or sectors are added in schedules of commitments that are reviewed.

difference between temporary, existing and future non-conforming measures, etc. One advantage of NAFTA-inspired schedules is that the reservation can be explained in greater detail and more information provided (in particular on the domestic laws involved).

- The negative list approach is also more favourable to liberalisation when new services are introduced or become tradable as a consequence of technological progress. These new services are automatically covered by non-discriminatory disciplines in NAFTA-inspired RTAs (unless provided otherwise in the Annex on future reservations), whereas measures can be adopted if these new services are not in a sector scheduled in the case of a GATS-inspired agreement.
- GATS-inspired agreements can be said to provide for a higher degree of flexibility because a country can have a more liberal investment policy than reflected in its schedule of commitments while preserving options to regulate a given sector. As long as the sector is not committed or reservations have been made, it is possible to (re-)introduce non-conforming measures. Of course, this added flexibility reduces the transparency and predictability of the investment regime, thus creating a trade-off. In NAFTA-inspired agreements, the ratchet and standstill mechanisms automatically bind any liberalisation of a non-conforming measure that was listed in the Annex on reservations for existing measures. Any liberalisation of a measure becomes a commitment in the RTA. In the context of NAFTA-inspired agreements, flexibility can however be introduced through the Annex on future reservations, where full sectors can also be exempted from non-discriminatory treatment with the possibility of introducing non-conforming measures in the future.

What emerges from the above points is that the differences between the positive and negative list approach are not so marked in the sense that any country can use one approach or the other to achieve the same degree of liberalisation, transparency, flexibility and predictability. It is important to make a distinction between the practice (the current investment regime in GATS-inspired and NAFTA-inspired regional trade agreements) and what would be theoretically possible to achieve through one model or the other. So far, GATS-inspired agreements tend to have a smaller number of sub-sectors liberalised, as illustrated by Table 4.A2.2, and as a consequence may offer less transparency and predictability for investors while being more suitable for a certain number of developing countries to reform and establish their regulatory framework. The analysis however shows that this flexibility can also be sought in agreements with a negative list approach or that transparency, if not through the schedules of commitments, is also part of GATS-inspired agreements.

Table 4.6. **A comparison between the GATS-inspired and NAFTA-inspired approach to scheduling liberalisation commitments in regional trade agreements**

	NAFTA-inspired negative list approach	GATS-inspired "hybrid" approach with a positive list of sectors where commitments are made
Type of commitments or reservations listed	National treatment and MFN reservations are listed.[1]	Market access and national treatment commitments (covering also non-discriminatory quantitative restrictions).[2]
Bound commitments?	Commitments are bound. Standstill and ratchet mechanism (any new liberalisation of non-conforming measures becomes a commitment in the agreement).	Commitments are bound. Standstill in sectors where commitments are made (subject to reservations listed).
Further liberalisation?	No further liberalisation foreseen. The agreement might include phasing out non-conforming measures (but already stipulated when the agreement is signed).	Further liberalisation foreseen in the agreement through a review of commitments (sometimes with a view to provide for the elimination of all remaining discrimination at the end of a certain period).
Transparency	The top-down approach offers a higher degree of transparency for investors as all sectors are covered by non-discriminatory disciplines and only listed limitations apply. This transparency is reduced when some of these reservations are not listed (*e.g.,* non-conforming measures at the sub-federal level).	No information is provided in the schedules of commitments on the liberalisation of investment in services sectors where no commitments are made. However, transparency is a general obligation of the agreement and information on the investment regime in all sectors should be made available.
Flexibility	Flexibility can be introduced through reservations on future measures but such reservations have to be taken when the agreement is signed.	Countries can take commitments in the sectors of their choice and limitations are listed only in committed sectors, leaving some flexibility on the degree of liberalisation offered in other sectors.
Predictability	The ratchet mechanism locks in any new liberalisation of a non-conforming measure. New services sectors are automatically covered by non-discriminatory disciplines.	Predictability is limited to the sectors where commitments are made.

1. Some NAFTA-inspired agreements also list reservations to obligations related to performance requirements and citizenship or residency requirements for senior managements and boards of directors.
2. The MFN principle is a general obligation that is not found in all agreements.

Therefore, countries are not constrained by one approach or the other. It is possible to reach an ambitious level of investment liberalisation in a GATS-inspired agreement by taking commitments in new sectors or to increase the transparency of GATS-like schedules of commitments. It is also possible to pursue a progressive and cautious liberalisation of investment through negative lists that include enough reservations on existing and future measures. The most recent agreements give some insights of the many possibilities offered by the combination of positive and negative lists in GATS-inspired agreements (see Part I).

To conclude, it should also be recalled that whether the negative or positive list approach is adopted in an agreement depends on several factors:

- First, the degree of liberalisation of the negotiating partners and their willingness to create a substantially preferential investment regime. The advantages of the negative list approach have been emphasised for countries aiming at a high degree of investment liberalisation in a relatively short term.
- Countries are also inclined to stay with the same approach once they have started to negotiate NAFTA-style or GATS-style agreements. It is easier for them to draft annexes and schedules of commitments following the same model and it becomes an updating exercise. It also ensures the consistency of commitments across different regional trade agreements.
- The administrative capacity of countries can be another factor. Some lesser developed countries may not have the expertise or resources to develop a negative list for the first time. Negative lists can be demanding as the transparency achieved requires a detailed description of non-conforming measures and a full assessment of the reservations that have to be introduced to preserve some flexibility in future public policies.[41]
- For developing countries that consider in their interest to preserve flexibility to introduce new restrictions in the future or to liberalise gradually at a pace that remains to be determined, the GATS-inspired approach has attraction. Table 4.A2.1 and 4.A2.2 show that India or Thailand are part of regional agreements that follow a GATS-approach, while early reformers such as Korea, Mexico and Chile are the developing countries that are signatories of NAFTA-inspired agreements. Developed countries and emerging economies are more likely to use the negative list approach (Fink and Molinuevo, 2007).
- Last but not least, the choice between the positive or the negative list approach is matter of negotiation between the Parties to the agreement. While some Parties may favour positive list and others the negative list, they have sometimes to negotiate on the basis of another approach than the one they would have preferred to use.

41. However, once it has been done, it requires much less level of effort to update such a list. There is also the possibility of using a negative list approach without explicitly listing non-conforming measures as it is the case in some Bilateral Investment Treaties signed by Canada or the US. These agreements do not list reservations for existing measures (reservations for future measures are however listed).

d) Regional agreements and multilateral liberalisation: to what extent are the regional agreements "WTO-plus"?

Another question that has been asked regarding the schedules of commitments in regional trade agreements is to what extent these agreements go beyond GATS commitments in investment in services. It has been argued that RTAs are not offering much in terms of liberalisation, especially when they reiterate GATS schedules for trade in services. This section looks at what happens in Mode 3.

Table 4.A2.3 includes the GATS schedules in Mode 3 for all the countries parties to RTAs analysed in Table 4.A2.1 and 4.A2.2. A comparison between the regional and multilateral commitments is thus possible. It is clear that NAFTA-inspired agreements offer a much wider schedule of commitments than in GATS. The difference is especially striking for countries like Mexico, Morocco or Singapore. They make full commitments with very few reservations in the bilateral agreements in sectors where they have no commitments at the multilateral level. And the US, Australia or Japan have also more commitments in their bilateral agreements than in their GATS schedules. For this group of countries, the regional agreement is clearly a way of liberalising investment in services with specific partners by offering them a substantially preferential treatment.

Comparing Tables 4.A2.2 and 4.A2.3 throws up a less clear-cut result but a careful analysis also shows that the GATS-inspired RTAs go further in terms of liberalising investment than what is committed under the GATS. Again there is a difference between developing countries (as defined in WTO) and developed countries. In the case of the EFTA-Singapore agreement for example, Switzerland has almost the same schedule of commitments as in GATS. The regional schedule has however additional commitments, in particular in supporting services for railway transport (CPC 743) and in freight transportation (CPC 7123). But Singapore offers a lot more than it does under GATS. The country has commitments in distribution services, educational services, environmental services and health-related and social services in the RTA, whereas these sectors were excluded from their GATS schedule. The regional agreement thus represents an opportunity for Singapore to liberalise services trade in Mode 3 with EFTA countries. The same analysis can be applied to the Singapore-Japan Economic Agreement for a New Age Partnership. The difference is that Japan has a schedule also with a substantial improvement in its commitments. Japan – together with Australia – is a country that has used both the negative and the positive list approach with different trading partners. Commitments from Japan under the positive list of the GATS-inspired agreement are closer to the ones that can be found in Table 4.A2.1 in NAFTA-inspired agreements where Japan is a party.

A similar analysis can be carried out in the case of the EU-Chile agreement. Sectors where there are EU commitments in the RTA that are not in GATS are the following: interdisciplinary R&D services (CPC 853), services relating to the handling of postal items (a list of sub-sectors in postal and courier services), electronic mail, voice mail, on-line information and data retrieval, electronic data interchange (EDI), code and protocol conversion, libraries, and some maritime and internal waterways transport services. For Chile, commitments are extended to the following sectors in the RTA: legal services (not limited to public international law or international commercial law), computer and related services, research and development services, real estate services, many business services in the category "other business services", a few additional financial services, but also new commitments in construction, distribution services, environmental services, recreational, cultural and sporting services that had no equivalent in their GATS schedule. Reciprocity in the commitments is an objective of the agreement. Article 94 of Title III on Trade in Services and Establishment states that "The Parties shall reciprocally liberalise trade in services, in accordance with the provisions of this Title and in conformity with Article V of the GATS". This reciprocity element is not part of GATS and implies larger commitments from Chile.

The analysis shows that all the agreements studied are "WTO-plus" and that even agreements following the GATS model offer a more liberal schedule of commitments. This is not surprising since RTAs have to achieve a higher degree of liberalisation to be consistent with multilateral rules. Of course, there is again a difference between NAFTA-inspired and GATS-inspired agreements. In the case of the NAFTA approach, the agreements show that they aim at universal coverage of all sectors in the schedules of commitments, an approach different than GATS flexibility and progressive liberalisation. This is true for both countries from the North and the South in the case of North-South RTAs. In GATS-inspired schedules of commitments, the same philosophy as under GATS applies at the regional level. However, the fewer commitments the country has in its GATS schedule, the more the effort towards liberalisation in the regional agreement is visible. As pointed out in the case of EU-Chile, there is also a tendency for more reciprocal commitments than in GATS.

To the extent that regional liberalisation can serve as a laboratory for future liberalisation and that RTAs can be "building blocks" towards multilateral liberalisation, the two kinds of RTAs described can help to make progress in this evolution. Developing countries that can be reticent about liberalising investment and trade in services have achieved a much higher degree of liberalisation with bilateral or regional partners in GATS-inspired as well as NAFTA-inspired agreements. To be complete, the analysis should take into account the future liberalisation that is foreseen in GATS-inspired

agreements as well as future developments at the WTO in the services negotiations. We have assessed only one type of agreement, but liberalisation of investment in services can also rely on other types of agreements, including bilateral investment treaties, and also on domestic (unilateral) reforms.

2. The implications of the Most-Favoured-Nation clause for the liberalisation of investment[42]

To complete the analysis of the role of regional trade agreements in promoting the liberalisation of investment in services, it is also interesting to look at the implications of the most-favoured-nation clause (MFN). This clause is a common element of trade agreements and creates specific interactions between investment and services agreements, as well as regional and multilateral agreements. The MFN clause aims to put foreign investors on a level playing field within a particular host country by extending to investors from one foreign country the same treatment given to investors from any other foreign country.

Preferential trade agreements are by definition an exception to the MFN principle as they can give more favourable treatment to parties to the agreement. They nonetheless include various types of MFN clauses that can serve as a guarantee that investors from non-parties will not receive better treatment or that this more favourable treatment can be extended to the parties of this agreement. MFN clauses in investment chapters of the RTAs tend to be unconditional and to apply to all covered investments and investors, although exceptions may be added through the RTA schedules of commitments.

This section first describes the different types of MFN clauses that can be found in the sample of RTAs studied and the exemptions to MFN treatment, distinguishing between GATS-inspired and NAFTA-inspired agreements. It then examines to what extent the provisions of the regional trade agreements are extended to other RTAs or "multilateralised" and what is the value of the MFN provision in practice.

Among the 20 RTAs covered in this study, five have no MFN provision (COMESA, EC-Chile, Japan-Singapore, Korea-Singapore and the India-Singapore Comprehensive Economic Co-operation Agreement).[43] In other cases, when investment in goods and services is dealt with in separate chapters, it may be the case that MFN treatment is accorded to either goods or

42. This section will not address the application and interpretation of the MFN clause in regard to the investment protection and procedural aspects of investment agreements. These issues have been addressed by a recent study by the Investment Committee "Most-Favoured-Nation in International Investment Law", OECD (2005), International Investment Law: A Changing Landscape, Chapter 4.
43. See Table 4.A1.5 for a summary table.

services or partly to certain obligations relating to both. This is another consequence of the interaction between investment and services chapters described in Part I. For example, TAFTA and the New Zealand-Singapore CEP grant MFN treatment for goods but not for services, while the Trans-Pacific SEP has a MFN clause only in the services chapter (that covers Mode 3).[44] A first observation is hence that there is less regularity in the prevalence of MFN treatment as compared to national treatment.

a) The MFN provision in GATS-inspired agreements

In services chapters dealing with investment, MFN clauses are generally inspired by GATS Article II with a list of exemptions. Article II of the GATS (that can be found reproduced – sometimes with slight changes – in some of the RTAs) states that "With respect to any measure covered by this Agreement, each Member shall accord immediately and unconditionally to services and service suppliers of any other Member treatment no less favourable than that it accords to like services and service suppliers of any other country".

As the MFN clause is the same for all kinds of trade in services in GATS-inspired agreements (that is for the 4 modes of supply), the scope of the provision can be ambiguous regarding the pre- or post-entry MFN treatment. There is however no doubt that the MFN provision inspired from Article II of GATS covers both pre- and post-establishment.

MFN treatment does not come without exceptions and RTAs with a MFN clause include a list of specific exceptions. The NAFTA and GATS approach come close to each other in this area, as both have a negative list of reservations. There is nonetheless a difference. In GATS-inspired agreements, the member countries may make any exemption to the MFN clause that they can negotiate, but exemptions have to be made at the time the agreement enters into force. The elimination or narrowing of MFN exemptions may be negotiated in at a later time.

An important exception to the MFN treatment that can be found in certain GATS-inspired agreements is the regional economic integration organisation (REIO) exception. According to this clause, a more favourable treatment granted to members of another (third party) regional grouping by a Party of a given RTA is not (automatically) accorded on an MFN basis to the other Parties of the current (first) agreement. It is only through a request, a review of commitments, a renegotiation or through the unilateral decision of this Party to extend the more favourable treatment to its partners that the other Parties could benefit from the more favourable treatment.

44. In the case of the Trans-Pacific SEP, the investment chapter has not yet been negotiated and will be added later in the framework of the agreement.

The REIO exception in GATS-like agreements is generally inspired by Article V of GATS. This article provides that any member of GATS may be a party to a REIO while containing safeguards for non-REIO members. EFTA-Singapore and EFTA-Korea are examples of the GATS approach for investment in services. EFTA-Korea excludes from MFN treatment the "other agreements concluded by one of the Parties and notified under Article V or Article V*bis* of the GATS". Article 3.4 adds that "If a Party enters into an agreement of the type referred to in paragraph 2, it shall upon request from another Party afford adequate opportunity to that Party to negotiate the benefits granted therein." It is thus through a renegotiation that the benefits of another (third party) RTA can be extended to the parties of the (first) RTA and not through the application of the MFN clause.

When a GATS-inspired agreement has no REIO exception clause, it is assumed that the commitments are already reflecting the "most favoured" treatment available in a preferential trade agreement. There is then an article about the better treatment that could be granted in the future to a third party in another RTA. For example, in the Japan-Malaysia EPA, article 101 indicates that "if a Country has entered into an agreement on trade in services with a third State or enters into such an agreement after this Agreement comes into force [...], it shall, upon the request of the other Country, consider according to services and service suppliers of the other Country, treatment no less favourable than that it accords to like services and service suppliers of that third State pursuant to such an agreement". In some cases the request has to be "favourably" considered or the Party has to "afford adequate opportunity to the other Parties" to negotiate the new benefits, but there is no binding obligation to grant a no less favourable treatment than the one accorded in the more recent agreement.

b) The MFN provision in NAFTA-inspired agreements

The scope of the MFN clause is more precisely described in NAFTA-inspired agreements. The treatment "no less favourable" applies "with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments" (Article 1103 of NAFTA). It is also clear that both "investors" and "investments of investors" benefit from the MFN standard. However, the MFN clause found in NAFTA and the NAFTA-inspired agreements specifies that the treatment "no less favourable" is accorded "in like circumstances".[45] The Australia-United States FTA, the FTA between Central America, the Dominican Republic and the United States (CAFTA-DR), US-Morocco and the Japan-Mexico Economic

45. See OECD (2005), *International Investment Law: A Changing Landscape*, Chapter V for a discussion of the implications of the "like circumstances".

Partnership are other examples of NAFTA-like agreements, according pre- and post-establishment MFN treatment "in like circumstances."

In EFTA-Singapore and EFTA-Korea, the MFN clause reflects the hybrid inspiration of these agreements with a MFN clause in the services chapter modelled after GATS and a MFN clause in the investment chapter modelled after NAFTA (with the difference that NT and MFN are merged in a single article). It remains to be seen if the difference in the way the two MFN clauses are drafted has practical implications.

In NAFTA-inspired agreements, an equivalent to the REIO exception can be found as a reservation in the annex on reservations for future measures or in a specific annex on exceptions from MFN treatment (as in the NAFTA treaty, see Box 4.1). This creates another difference between GATS-inspired and NAFTA-inspired agreements. There is a wide exception to MFN treatment for all other RTAs in the case of GATS-inspired agreements, while in NAFTA-inspired agreements the parties can benefit from better treatment granted to third parties in another RTA signed after the entry into force of the later one.

c) The difference between a multilateral and regional MFN rule

The implications of the MFN rule are different at the regional and bilateral level as compared to the multilateral level since in the former group only the partner countries benefit from "no less favourable" treatment. The multilateral MFN rule ensures that all partners to the (global) trade agreement are given non-discriminatory treatment. It is a guarantee for an investor to receive treatment no less favourable than other investors from other countries. If more favourable treatment is granted to one of these investors it is automatically extended to all investors from all parties. At the multilateral level, the MFN rule is a principle of non-discriminatory treatment between a broad number of countries (*e.g.* currently 150 in the WTO).

The MFN rule has a different function in a regional trade agreement. To begin with, RTAs are the major exception to the above mentioned non-discriminatory treatment at the multilateral level. With the multiplication of RTAs, the scope of application of the multilateral MFN rule is reduced as most-favoured-nation treatment is replaced by preferential treatment not extended to other parties in the multilateral agreement because of REIO exception clauses. The preferential treatment of the RTA is thus not "multilateralised" (unless it is a unilateral decision from the country to do so – the MFN treatment is a guarantee of non-discrimination but nothing prevents a country from applying non-discriminatory treatment to all partners and extending a more favourable treatment to them in the absence of any MFN obligation or any RTAs).

Box 4.1. **NAFTA-inspired reservations on MFN treatment**

In NAFTA-like agreements, there is often an exception to MFN treatment regarding commitments made in other regional or multilateral agreements signed before the entry into force of the RTA in question. The exception is listed as a non-conforming measure in the annex of the agreement. However the exception does not cover future regional or multilateral agreements (with the exception of a few designated sectors).

For example, the US schedule in NAFTA (Annex IV) says: "The United States takes an exception to Article 1103 [MFN] for treatment accorded under all bilateral or multilateral international agreements in force or signed prior to the date of entry into force of this Agreement. For international agreements in force or signed after the date of entry into force of this Agreement, the United States takes an exception to Article 1103 for treatment accorded under those agreements involving: *a)* aviation; *b)* fisheries; *c)* maritime matters, including salvage; or *d)* telecommunications transport networks and telecommunications transport services […]". Apart from the four sectors mentioned, there is no reservation for future agreements and parties to RTAs in force can benefit from more favourable treatment granted in later agreements signed by the US. In that sense it is better than a provision excluding all other RTAs from the application of MFN treatment.

In CAFTA-DR, the Dominican Republic has the same MFN reservation about past and future agreements as the US in its schedule, while El Salvador, Guatemala, Honduras and Nicaragua have included it only *vis-à-vis* the United States and the Dominican Republic. US-Australia, US-Morocco and Japan-Mexico also have this wide MFN reservation.* The Chile-Korea FTA, although inspired by NAFTA does not use a reservation in the annex to exclude other regional trade agreements from the application of MFN. It has a REIO exception stated in the MFN Article (Article 10.4). The Trans-Pacific Strategic Economic Partnership has a GATS-inspired services chapter that lists reservations through a NAFTA-inspired negative list. It also reproduces the NAFTA-approach towards MFN exemptions with the same kind of reservation regarding past and future third-party RTAs in the schedules of Chile, New Zealand and Singapore.

* In the other agreements than NAFTA, only three sectors are concerned for future agreements: aviation, fisheries and maritime matters (including salvage).

The "regional" MFN rule, which is the same most-favoured nation treatment included this time in a regional or bilateral trade agreement, organises non-discrimination among countries that benefit from preferential treatment (as an exception to the multilateral MFN rule). The purpose is different as parties are less interested by the no less favourable treatment granted to the other parties *within* the RTA than by a more favourable treatment that could be granted to other parties in *another* RTA and could be extended to them through the MFN principle. The first RTA that includes the MFN provision can be called the "basic agreement" while the other agreement with more favourable treatment can be referred to as the "third-party agreement".

In the case of a bilateral RTA, it is clear that the MFN rule is not there to guarantee a treatment no less favourable than the one granted to other parties since there is only one partner in the agreement. In RTAs with a sufficiently large number of parties, the MFN rule could have a similar purpose than at the multilateral level. But even in a regional agreement with several parties, the value of the MFN rule will lie more often in comparing the preferential treatment of the basic agreement with the treatment obtained in third-party RTAs, in particular in more recent agreements that could offer more favourable treatment. To put it in a nutshell, the MFN clause in a RTA has a value for investors, not only as a standard to prevent any discriminatory treatment *vis-à-vis* other investors, but also if it can create a liberalisation dynamic.

One can even question if a MFN clause is required in a regional trade agreement. If national treatment is also granted (both pre- and post-establishment), the usefulness of the MFN clause may be questioned. The treatment afforded to domestic companies can generally be expected to be more favourable and the national treatment standard could be sufficient. It is only if market access is limited and reservations on national treatment have been listed that, as a "second best", investors can turn to the MFN principle to be at least treated as well as other foreign investors. However, once again, this rationale is less likely to apply in the context of a regional trade agreement. The MFN provision at the multilateral level already offers the level playing field that is sought by foreign investors. A regional trade agreement is interesting only if it creates a preferential treatment that would give an advantage to investors from the signatory countries.

Regarding investment, a noticeable difference is that there is a MFN rule at the multilateral level for investment in services, as MFN is a general obligation of the GATS. But there is no corresponding principle for non-services sectors. There is no multilateral agreement with non-discriminatory provisions for investment in the production of goods. In this context, the MFN principle in regional trade agreements has certainly more value for goods than for services. But that would suppose that through the MFN rule, countries could be granted the same kind of treatment than provided to investors from third-party agreements.

The only case where the MFN treatment might be *more* advantageous than national treatment is for investment incentives granted to foreign investors only (UNCTAD, 2004). In this case, foreign investors are favoured over domestic companies and the MFN treatment can be more enjoyable than the national treatment.

Another difference between the multilateral and regional MFN rule is that at the multilateral level the MFN clause can create a "free rider" situation,

by unilaterally extending to all partners any additional rights that are granted to other parties in future agreements. Such a situation has the potential of creating an asymmetrical contractual imbalance between parties. This is not the case in a RTA where the MFN provision has a more limited scope of application.

To conclude, it seems that in a regional trade agreement, the MFN principle can have value for investors only if it creates a link with the treatment granted to foreign investors in third-party agreements. Either these other agreements provide an equivalent treatment and the MFN principle acts as a guarantee of non-discrimination among investors receiving a preferential treatment, or this third-party agreement is more advantageous for foreign investors and the MFN rule plays a positive role in extending this better treatment to all investors from signatory countries.

c) Are liberalising commitments extended to third parties through the MFN rule?

However, there are several obstacles for the MFN clause to operate in the context of RTAs. As pointed out before, RTAs themselves have exceptions to the application of the MFN treatment. REIO exception clauses or NAFTA-inspired reservations can prevent the commitments made in a third-party RTA to be extended to parties of the basic agreement.

As GATS-inspired agreements reproduce the multilateral MFN clause found in GATS Article V, they often include a REIO exception where non-parties to the RTA cannot claim the benefits of the preferential treatment accorded at the regional level under the multilateral MFN clause. The result therefore is a risk of discriminatory treatment between the parties of different RTAs signed by the same country. To prevent this from happening, GATS-inspired agreements rely on a review of commitments or further negotiations to extend the more favourable treatment of a new agreement to parties of a prior RTA.

In GATS-inspired agreements, the existence of an REIO exception does not *require* discriminatory treatment between members of different RTAs but it does allow for it. The selective liberalisation in GATS-inspired agreements (where countries choose sectors where commitments are taken) can to some extent encourage a different treatment for investors from different RTAs. However, there is no tangible sign of such a practice when looking at Table 4.A2.2. A detailed analysis at the sub-sector level could say otherwise, but one observes in the Table a certain consistency in the schedules of commitments made by the same country in different RTAs. The only visible trend is that more recent agreements tend to include more commitments.

If not through the MFN rule, the extension of more favourable treatment across RTAs can take place in GATS-inspired agreements through a request or a review of commitments. For example, the Thailand-Australia FTA allows for different mechanisms to incorporate treatment more favourable made in a newer agreement. Article 812 states that "If, after the Agreement enters into force, a Party enters into any agreement on trade in services with a non-Party, it shall consider a request by the other Party for the incorporation in this Agreement of treatment no less favourable than that provided under the former agreement". A requirement that is however sometimes found for such an extension is that it be made on a reciprocal basis. But nothing prevents a party from unilaterally extending the benefit of new commitments to all parties of other RTAs.

Of course, the review of commitments is less interesting for investors than the MFN rule, as additional rights from future third party agreements are not granted automatically. But it should be noted that the review of commitments tends to be different from a renegotiation of the treaty, *e.g.* by not creating a new agreement that would have to be ratified and to go through the Parliament in each country. A simple exchange of letters between Parties or the decision taken during a joint meeting may be sufficient for commitments to be improved or to be aligned on new concessions made in third-party agreements.

In NAFTA-inspired agreements, there is an automatic extension of the more favourable treatment granted in a new agreement through the MFN clause, as there is no REIO exception clause and the general MFN exception mentioned applies only to past agreements. It is the only example of a MFN rule that could be applied to extend the commitments of newer agreements to parties of former RTAs. However, in most of the NAFTA-inspired agreements, countries have listed exceptions in certain sectors. Such sectors will not automatically benefit from the better treatment of future agreements through the MFN clause.

Another way of limiting the risk of investment distortions is to negotiate RTAs with the same liberalisation commitments and same reservations (and this is true for both GATS-inspired and NAFTA-inspired agreements). By looking at Tables 4.A2.1 and 4.A2.2, it seems to be what most countries have done. The US schedules of commitments for example show very few variations from one agreement to another. However, the situation of countries having negotiated a NAFTA-inspired agreement with a partner and a GATS-inspired agreement with another country can lead to distortions as the coverage of commitments varies between the two kinds of agreements.

As far as non-discrimination among investors is concerned, the question of the scope of the MFN clause is an important issue that is beyond the scope

of this paper but should be kept in mind. Special privileges or incentives can be granted to an individual investor without falling under the scope of the MFN provision.[46] Some agreements specify that the MFN principle apply "in like circumstances" but even without such a mention, international law has recognised the *ejusdem generis* principle according to which a MFN clause can only apply to the same subject matter.[47] In the context of BITs, different ICSID cases have also brought questions on the scope of application of the MFN principle, in particular if it applies to procedural matters in addition to substantive matters.[48] As the exact scope of application of the MFN principle is not always clear, it seems that a cautious approach has been followed in recent RTAs with the different forms of "neutralisation" of the MFN rule that we have described.

In sum, one may question the *de facto* impact of the most-favoured nation clause in regional trade agreements. It certainly has a value as a principle of non-discrimination among the parties of the agreement when the RTA has a large number of parties. However, while the MFN clause has also the potential to bestow additional benefits on investors and investments that are not specially negotiated by that party, it is unclear that this happens in practice. In GATS-inspired agreements where the MFN rule cannot apply because of the REIO exception clause, the review of commitments offers no guarantee of a non-discriminatory treatment, especially if the agreement asks for reciprocity in the new concessions made. In NAFTA-inspired agreements, the practice so far has been to have very few reservations on MFN treatment as regard to future RTAs, but as noted above newer agreements are generally signed with very similar schedules of commitments. In other words, the scope for MFN benefits is very limited and one can question the potential liberalising effect of RTAs and their capacity to "multilateralise" investment commitments.

46. UNCTAD (2004).
47. OECD (2005), *International Investment Law: A Changing Landscape,* Chapter V provides a review of the principle and its application.
48. *Idem*.

References

Crawford, J.A. and R. Fiorentino (2005), "Changing Landscape of Regional Trade Agreements", Discussion Paper No. 8, *www.wto.org/english/res_e/booksp_e/discussion_papers8_e.pdf*.

Fink, C. and A. Mattoo (2002), "Regional Agreements and Trade in Services: Policy Issues", World Bank Policy Research Working Paper 2852, June.

Fink, C. and M. Molinuevo (2007), "East Asian Free Trade Agreements in Services: Roaring Tigers or Timid Pandas?", mimeo.

Hirsch, M. (2006), "Interactions Between Investment and Non-Investment Obligations in International Investment Law" in Trade Dispute Management, Vol. 3, Issue 5.

Hoekman, B. (1995), "Tentative First Steps. An Assessment of the Uruguay Round Agreement on Services", World Bank Policy Research Working Paper 1455, May.

Kemp, S. (2000), "Trade in Education Services and the Impacts of Barriers to Trade", in Findlay, C.and T. Warren (Eds), Impediments to Trade in Services: Measurement and Policy Implications, Routledge: London and New York, 231-44.

Lesher, M. and S. Miroudot (2006), "Analysis of the Economic Impact of Investment Provisions in Regional Trade Agreements", OECD Trade Policy Working Paper No. 36, TD/TC/WP(2005)40/FINAL.

Low, P. and A. Mattoo (2000), "Is There a Better Way? Alternative Approaches to Liberalisation under the GATS", World Bank.

OECD (Organisation for Economic Co-Operation and Development) (2002), *The Relationship between Regional Trade Agreements and the Multilateral Trading System-Services*, Working Party of the Trade Committee, TD/TC/WP(2002)27/FINAL.

OECD (2003), Regionalism and the Multilateral Trading System, *http://publications.oecd.org/acrobatebook/2203031E.PDF*.

OECD (2005), "Novel Features in OECD Countries' Recent Investment Agreements: An Overview", *www.oecd.org/dataoecd/42/9/35823420.pdf*.

OECD (2005), *International Investment Law: A Changing Landscape*, Paris.

OECD (2005), *Relationships Between International Investment Agreements*, Working Paper 2004/1.

OECD (2006), "Novel Features in Recent OECD Bilateral Investment Treaties", in International Investment Perspectives.

OECD (2006), "Salient Features of India's Investment Agreements".

Roy, M. (2003) "Implications for the GATS of Negotiations on a Multilateral Investment Framework: Potential Synergies and Pitfalls", *Journal of World Investment,* 4(6), 963-986.

Roy, M., J. Marchetti and H. Lim (2006), "Services Liberalisation in the New Generation of Preferential Trade Agreements (PTAs): How Much Further than the GATS?", WTO Staff Working Paper, ERSD-2006-07.

Stephenson, S.M. (2002), "Regional *Versus* Multilateral Liberalisation of Services", *World Trade Review*, 1(2), 187-209.

Szepesi, S. (2004), *Comparing EU Free Trade Agreements: Investment*, (ECDPM InBrief 6D), Maastricht: ECDPM, *www.ecdpm.org*.

Ullrich, H. (2004), *Comparing EU Free Trade Agreements: Services*, (ECDPM InBrief 6C), Maastricht: ECDPM, *www.ecdpm.org*.

UNCTAD (United Nations Conference on Trade and development) (1998), Country-Specific Lists of BIT's, *www.unctad.org/Templates/Page.asp?intItemID=2344&lang=1*.

UNCTAD (2004), *International Investment Agreements: Key Issues*, Vol. I, New York and Geneva, United Nations.

UNCTAD (2005), Series on International Investment Policies for Development: International Investment Agreements in Services, *www.unctad.org/en/docs/iteiit20052_en.pdf*.

UNCTAD (2005), Investment Provisions in Economic Integration Agreements, *www.unctad.org/en/docs/iteiit200510_en.pdf*.

UNCTAD (2005), International Investment Arrangements: Trends and Emerging Issues, *www.unctad.org/en/docs/iteiit200511_en.pdf*.

UNCTAD (2006), Systemic Issues in International Investment Agreements (IIAs), *www.unctad.org/sections/dite_dir/docs/webiteiia20062_en.pdf*.

Websites

Andean Community – Treaties and Legislation, *www.comunidadandina.org/ingles/treaties.htm*.

Australian Government – Department of Foreign Affairs and Trade, *www.dfat.gov.au/trade*.

Europa – Trade – Trade Issues, *http://ec.europa.eu/comm/trade/issues/bilateral/countries/index_en.htm*.

Organisation for Economic Co-operation and Development, *www.oecd.org*.

Singapore Free Trade Agreement, *http://app.fta.gov.sg/asp/index.asp*.

Foreign Trade Information System (SICE), *www.sice.oas.org*.

United Nations Conference on Trade and Development, *www.unctad.org*.

USTR – Bilateral Trade Agreements, *www.ustr.gov/Trade_Agreements/Bilateral/Section_Index.html*.

WorldTradeLaw.Net – Bilateral and Regional Trade Agreements Notified to the WTO, *www.worldtradelaw.net/fta/ftadatabase/ftas.asp*.

ANNEX 4.A1

Key Features of the RTAs Reviewed

A. General contents of recent RTAs

Today's RTAs cover diverse policy areas with the purpose of developing the parties' economic potential and growth in a more integrated and complementary way. Their obligations often go beyond the WTO regulatory framework and include issues not traditionally covered by trade agreements such as investment, trade services, competition policy, intellectual property protection, technical co-operation and policy capacity building. The review of the general contents of the 20 RTAs included the present study leads to the following observations.

- Apart from the preambles and general sections on objectives and purposes, and definitions, the agreements are typically divided into three distinct parts covering *a)* trade in goods; *b)* trade in investment, services and/or other related issues; and *c)* implementation and review. Schedules of commitments and special understandings are usually lodged in separate annexes. In some cases, exchanges of letters also clarify the scope of application of the agreements.
- All but two of the agreements contain separate chapters on Investment and Trade in Services. In the case of ASEAN, services and investment disciplines are lodged in two separate "Framework Agreements", the first concluded in 1995,[49] the second in 1998.[50] In the case of the Andean Community, the main obligations are contained in two separate Decisions, Decision 291[51] and Decision 439[52] respectively adopted in 1991 and 1998.

49. The ASEAN Framework Agreement on Services (AFAS).
50. The Framework Agreement on ASEAN Investment Area (AIA).
51. Decision 291 establishes a Regime for the Common Treatment of Foreign Capital and Trademarks, Patents, Licensing Agreements and Royalties.
52. Decision 439 establishing a General Framework of Principles and Rules and for Liberalising the Trade in Services in the Andean Community.

- The investment and services disciplines are embedded in a wider web of mutually supportive and complementary disciplines. In addition to trade rules for goods, which still remain the core of the agreements, all but 4 contain separate chapters on government procurement and intellectual property, all but 5 contain separate chapters on competition policy and all but 5 contain separate chapters on transparency. Ten agreements also have a chapter on the movement of natural persons or business persons and 7 on environment and labour. New subjects (E-commerce) or forms of co-operation (science and technology, education and media) are also emerging. Corporate responsibility is included in one instance.
- The agreements are based on the trade-in-goods rules developed in the WTO. They all contain binding obligations on market access and non-discrimination, detailed provisions on rules of origin, customs procedures, sanitary and phytosanitary measures and technical barriers to trade. Trade remedies and safeguards are also covered in separate chapters in most of the cases.[53]
- On the implementation side, all agreements contain their own special administrative and institutional arrangements to monitor compliance of the obligations and dispute settlement provisions to resolve disputes over the application of the agreement. In the majority of cases dispute settlement provisions also include investor-to-state procedures as regards investment disputes.

B. Key features of investment chapters

RTA investment chapters typically include different types of disciplines and associated measures dealing with the subjects of investment liberalisation, investment protection, investment promotion and facilitation and dispute settlement. The review of the investment chapters of the 20 RTAs covered by the present study leads to the following observations. Tables 4.A1.1a, Table 4.A1.3a and 4.A1.4 present the observed features in a schematic form.

Regarding coverage

- All the investment chapters are tri-dimensional in that they provide for, albeit to various degrees, *a)* investment liberalisation; *b)* investment protection; and *c)* investment promotion, co-operation and facilitation.
- All agreements (except for those concluded by the EU and the ASEAN Investment Area which follow an FDI based approach) have adopted an "asset-based" definition of investment. The list of assets is also an open one

53. Except in the case of Japan-Singapore EPA, EFTA-Korea and EU-Jordan.

except for Japan-Mexico EPA (which follows an exhaustive closed list). They also cover investment directly or indirectly owned or controlled except for CECA, the ASEAN Investment Agreement and Decision 291 of the Andean Community.

- Only the EFTA agreements reviewed contain umbrella clauses, provisions that place undertakings made by host States *vis-à-vis* investors under the investment chapter's protective umbrella.[54]

Regarding liberalisation

- Transparency – which may range from the publication of laws and regulations to procedural transparency – is provided for in all the agreements but, as a general rule, as a horizontal obligation lodged in a separate chapter applicable to the whole RTA. The investment chapters of the EFTA-Korea FTA, India-Singapore CECA and the ASEAN Investment Area include provisions in this area. COMESA or the Andean Community agreements do not contain such provisions.
- All agreements provide for national treatment with respect to establishment and post-establishment – except for COMESA and the EU Agreements which do not cover establishment. EFTA agreements and the New Zealand-Singapore CERTA excludes Mode 3 delivery of services from this obligation. In TAFTA, the National Treatment obligation at the establishment phase applies to covered "direct" investment and investments other than Mode 3; at the post-establishment to all investments other than Mode 3. In Japan-Malaysia FTA, the National Treatment obligation in the Investment chapter does not apply to the establishment, acquisition and expansion of portfolio investments. The ASEAN Investment Agreement only applies to five listed sectors and incidental services.[55]
- Similarly all agreements provide for MFN treatment, except CECA, Japan-Singapore FTA (concerning establishment), Korea-Singapore and the Andean Pact. TAFTA, however, has an unqualified coverage of MFN treatment as it applies across the board, including to Mode 3.
- Obligations on performance requirements are absent from the EU and EFTA agreements, the New-Zealand-Singapore CERTA, the ASEAN Investment Area and COMESA. The NAFTA-based agreements have "TRIMS plus" obligations.

54. See "*Interpretation of Umbrella Clauses in Investment Agreements*", OECD Working Papers on International Investment, 2006/3.
55. Manufacturing, agriculture, fishery, forestry, mining and quarrying.

- Obligations on key personnel (Senior Management and Boards of Directors) are also absent from Japan-Singapore EPA, TAFTA, EC-Chile Agreement, New-Zealand-Singapore FTA, ASEAN, COMESA and the Andean Pact. The investment chapter in EFTA agreements and Japan-Malaysia EPA also include provisions on the temporary movement of business or certain other natural persons, as do Japan-Singapore EPA, Korea-Singapore FTA, TAFTA, New-Zealand-Singapore CERTA and India-Singapore CECA but in a separate chapter.
- All agreements except COMESA provide for country exceptions for non-conforming measures to the investment chapters. The scheduling of these commitments follows a negative list approach in all cases except for India's commitments under India-Singapore CECA and the EC-Chile Agreement which follow a positive list approach.
- Economic integration: except for the EC-Jordan and EU-Chile agreements, all the others do not contain a special regional integration clause.
- Horizontal exceptions, often lodged in separate chapters, relating to the protection of essential security interests or taxation is a common feature of all agreements.
- General exceptions based on GATT Article XX and/or GATS Article XIV provisions are also provided for except for COMESA and the Andean Community Decision 291.
- Some agreements (AUSFTA, CAFTA-DR, US-Morocco FTA, CECA) also maintain separate provisions in separate chapters (except for CECA) on disclosure of information.
- Most of the reviewed agreements (except CAFTA-DR, US-Morocco FTA, COMESA, Andean Community) contain balance of payments safeguards to deal with BOP difficulties and/or temporary safeguard measures for addressing serious difficulties for the operation of monetary and exchange rate policy. These provisions generally share the features of temporality, non-discrimination, necessity, phase out, notification and consistency with IMF Articles. In addition, CAFTA-DR, US-Morocco, Japan-Malaysia Japan-Mexico and Japan-Singapore EPAs, Chile-Korea FTA, EFTA-Korea FTA and Korea-Singapore have included prudential derogation provisions that deal with more precision and in detailed situations relating to the need for preserving the parties' financial and monetary stability and integrity.
- The chapter on Investment in a majority of agreements contains a clause on *Denial of Benefits* that denies the benefits of the agreement to investors not conducting substantial business operations in the territory of a party and certain other circumstances.

Regarding protection

- All but the EU agreements and the Andean Decisions give guarantees on both direct and indirect expropriation. In the New-Zealand Singapore Agreement, the protection and expropriation obligations are subject to MFN and National Treatment.
- Free transfers are provided for by all agreements studied.
- Clauses on standard treatment or minimum standard of treatment are found, on the other hand, in only five agreements (Australia-USA FTA, CAFTA-DR, US-Morocco FTA, Japan-Mexico EPA and Korea-Singapore FTA). The Japan-Singapore FTA does not contain a general treatment clause.
- As indicated above, umbrella clauses have been found only in EFTA-based agreements.

Regarding dispute settlement

- All the agreements reviewed except AUSFTA, the EC agreements, COMESA and the Andean Community provisions contain investor-to-state dispute settlement procedures. Prior consent is given in a majority of these cases except for the EFTA-Singapore FTA[56] and New Zealand-Singapore Agreement. Transparency of awards or proceedings, amicus curiae submissions and consolidation of claims are only provided for in a handful of agreements, namely the US-modelled agreements.

Investment promotion and facilitation

- Investment promotion and facilitation provisions are clearly on an upward trend, particularly in Japan EPAs. These provisions may be of the co-operation mechanisms set up for implementing the agreement. In some more recent agreements (EFTA-Singapore and EFTA-Korea Agreements, TAFTA, Japan-Malaysia and Japan-Singapore EPAs), these issues are singled out in the investment chapters or separate chapters (EC agreements) for further action.

C. Key features of services chapters

Tables 4.A1.2a, Table 4.A1.3b and 4.A1.4 list the investment disciplines and associated measures that can be found in the 20 agreements reviewed. Two different approaches are taken. RTAs based on the GATS provide only for cross-border trade-in-services and excludes investment in services unless

56. Article 48(3) provides that "A Party may conclude contractual agreements with investors of another Party giving its unconditional and irrevocable consent to the submission of all or certain types of disputes to international conciliation or arbitration in accordance with paragraph 2 above".

otherwise specified. From the sampled agreements it can be particularly observed that:

Market access

- All the agreements make market access commitments in the chapter on services (except for EC-Jordan which aims for future liberalisation of services). The commitments may be in the form of a positive list or a negative list depending on whether the agreements subscribe to the GATS approach or are NAFTA based. In the case of some NAFTA based agreements which distinguish between Investment in Services (contained in the Investment chapter) and Cross-Border Trade in Services the provisions on Market Access are contained in the Chapter on Cross-Border Trade in Services. However, as elaborated in Part III of the study, these provisions also apply to Investment in Services.

National treatment

- All the agreements also provide for pre and post-establishment national treatment. The commitments again can be in the form of positive or negative lists.

Most Favoured Nation treatment

- Except for EC-Chile, New Zealand-Singapore, Japan-Singapore, India-Singapore, Korea-Chile, all other agreements provide for pre and post establishment MFN.

Temporary movement of natural persons

- All the agreements except US-Australia, US-Morocco and CAFTA-DR provide for movement of natural persons either in the chapter on trade in services or in a different chapter. The EC-Chile contains a review provision to improve the liberalistation commitments on Mode 4. In the EC-Jordan agreement, Mode 4 is to be liberalised in the course of future negotiations.

Domestic regulation

- The Domestic regulation clause requires parties to apply measures relating to services in a reasonable, objective and impartial manner. All agreements except for Japan-Mexico, Chile-Korea and the Andean Community decision provide for a clause on domestic regulation.

Recognition

- All the agreements provide for working towards the recognition of qualifications of service providers who are nationals of other parties. Some

of the agreements provide for a specific time frame within which the parties shall work towards recognition. For example, the EFTA-Singapore agreement provides that within three years rules shall be framed for mutual recognition.

Monopoly service providers

- GATS based agreements like Japan-Singapore and Japan-Malaysia, EFTA-Korea, EFTA-Singapore, New Zealand-Singapore and India-Singapore generally address monopoly service providers. The Korea-Singapore FTA's CBTS chapter includes this provision. The clause on Monopoly service providers requires parties to prevent any abuse of monopolies.

Horizontal exceptions

- All the agreements analysed provide for General and Security exceptions either in the chapter on services or in an independent chapter. The agreements based on a NAFTA approach do not provide for general exceptions dealing with investment but some do provide General Exceptions for Cross-Border Trade in Services by referring to Article XIV of GATS.

Country exceptions

- Depending on whether they are based on the GATS approach (except for Andean Community and Trans-Pacific SEP) or the NAFTA approach, agreements use positive or negative lists.

Clause for further liberalisation

- Korea-Singapore, TAFTA, EC-Jordan, India-Singapore, ASEAN Framework Agreement and the Andean Community Decision 439 contain a clause for further liberalisation.

Transparency

- All the agreements, except for EC-Jordan agreement have either an independent clause on transparency in the chapter on services or elsewhere in the agreement.

Denial of Benefits

- All agreements, except for EC-Chile and EC-Jordan agreements, EFTA agreements with Singapore and Korea, New Zealand-Singapore and the Andean Community Decision 439, contain this provision a Denial of Benefits clause. This clause extends preferential treatment to all legal persons conducting substantial business operations in the territory of a party.

Services promotion and facilitation

- Almost all the agreements establish the necessary institutional mechanisms for aiding in the implementation of the agreement, review of commitments and future negotiations on the commitments made under the agreements.

Business Practices

- For ensuring fair competition GATS has the Business Practices clause (Article IX). This clause seeks to remedy the inequities that maybe caused due to monopolies and unfair competition. Only Japan-Singapore, EFTA Korea and India-Singapore provide for an independent clause on Business Practices, based on GATS Article IX.

Transfers

- On the protection front most agreements allow for free transfers in the chapter on services. Except for Japan-Mexico, EFTA-Singapore and Korea-Chile all agreements have clauses relating to transfers. Some of the GATS based agreements refer only to transfers relating to "current transactions" in accordance with GATS, while NAFTA based agreements allow all transfers related to cross border supply of services and also list exceptions to the rule.

Expropriation

- Only the India-Singapore agreement provides for provision on expropriation in the services chapter. The services chapter in Article 7.24 provides for services investment linkage. This article lists provisions of the investment chapter which apply mutatis mutandis to the services chapter. This includes expropriation of a commercial presence.

Table 4.A1.1a. **Substantive provisions in Investment and related chapters of recent RTAs – Part 1**

Agreement	Date of agreement	Definitions/scope/coverage				Umbrella clause	Treatment of Investment						Senior management/ key personnel	Temporary movement of business/ natural persons	Investment protection				
		Asset based		Investment			Establishment			Post establishment					Standard of treatment/ fair and equitable	Transfers	Compensation for losses	Expropriation	
		Open list	Closed list	Direct	Indirect		NT	MFN	Performance requirements	NT	MFN	Performance requirements						Direct	Indirect
North-North																			
Australia-USA	1 Jan. 2005	+		+	+		+	+	+	+	+	+	+		+	+	+	+	+
North-South																			
NAFTA	1 Jan. 2004		+	+	+		+	+	+	+	+	+	+	±	+	+		+	+
CAFTA-DR	1 July 2006	+		+	+		+	+	+	+	+	+	+		+	+	+	+	+
US-Morocco	1 July 2006	+		+	+		+	+	+	+	+	+	+		+	+	+	+	+
Japan-Malaysia	13 July 2006	+		+	+		+ (except portfolio investments	+	+	+ (portfolio investment is excluded from establishment, acquisition, expansion of investment)	+	+	+	+	+	+	+	+	+
Japan-Mexico	1 Jan. 2006		+	+	+		+	+	+	+	+	+	+		+	+	+	+	+
Japan-Singapore	1 May 2006	+		+	+		+		+	+		+		±	+	+	+	+	+

Table 4.A1.1a. **Substantive provisions in Investment and related chapters of recent RTAs – Part 1** *(cont.)*

Agreement	Date of agreement	Definitions/scope/coverage				Umbrella clause	Treatment of Investment						Senior management/ key personnel	Temporary movement of business/ natural persons	Investment protection				
		Asset based		Investment			Establishment			Post establishment					Standard of treatment/ fair and equitable	Transfers	Compensation for losses	Expropriation	
		Open list	Closed list	Direct	Indirect		NT	MFN	Performance requirements	NT	MFN	Performance requirements						Direct	Indirect
TAFTA	1 Jan. 2005	+		+	+		+ (only for covered direct investment and other than Mode 3)	+		+ (other than Mode 3)	+			±	+	+	+	+	+
EC-Chile	1 Apr. 2005						+												
EC-Jordan	1 Feb. 2003							+		+	+		+			±			
EFTA-Singapore	1 Jan. 2003	+		+	+	+	+ (other than Mode 3)	+ (other than Mode 3)		+ (other than Mode 3)	+ (other than Mode 3)		+	+	+	+		+	+
EFTA-Koreaa	1 Sept. 2006	+		+	+	+	+ (other than Mode 3)	+ (other than Mode 3)		+ (other than Mode 3)	+ (other than Mode 3)		+	+	+	+	+	+	+
Trans-Pacific SEP	1 May 2006																		
New Zealand-Singapore	1 Jan. 2001	+		+	+		+ (other than Mode 3)	+ (other than Mode 3)		+ (other than Mode 3)	+ (other than Mode 3)			±	+ (other than Mode 3)	+			

Table 4.A1.1a. **Substantive provisions in Investment and related chapters of recent RTAs – Part 1** *(cont.)*

Agreement	Date of agreement	Definitions/scope/coverage				Umbrella clause	Treatment of Investment						Senior management/ key personnel	Temporary movement of business/ natural persons	Investment protection				
		Asset based		Investment			Establishment			Post establishment					Standard of treatment/ fair and equitable	Transfers	Compensation for losses	Expropriation	
		Open list	Closed list	Direct	Indirect		NT	MFN	Performance requirements	NT	MFN	Performance requirements						Direct	Indirect
South-South																			
Chile-Korea	1 Apr. 2004	+		+	+		+		+	+	+	+	+		+	+	+	+	+
Korea-Singapore	2 March 2006	+		+	+		+		+	+		+	+	±	+	+	+	+	+
India-Singapore CECA	1 Aug. 2005	+		+			+		+	+		+	+	±		+	+	+	+
ASEAN Investment Areab	1998			+			+	+							+	+	+	+	+
COMESA	8 Dec. 1994		+					+			+				+	+		+	+
Andean Community (Decisions 291 and 292)	1 Jan. 1991	+		+			+									+			

a) Separate Agreement on investment, referred to in FTA, between Korea, Iceland, Liechtenstein and Switzerland.

b) Protection of Investment contained in ASEAN Agreement for Promotion and Protection of Investment, 1987. Article 12 of the AIA provides that "Member States affirm their existing rights and obligations under the 1987 ASEAN Agreement for the Promotion and Protection of Investments and its 1996 Protocol."

Key:

1. + Provisions contained in the Investment chapter.
2. ± provisions are contained in a different chapter.

Table 4.A1.1b. **Substantive provisions in Investment and other related chapters of recent RTAs – Part 2**

Agreement	Transparency	Exceptions					Future Liberalisation	Balance of payments/ safeguards	Denial of benefits	Disclosure of information	Taxation	Environment	Investment promotion and co-operation		
		EIA	General exceptions	Security interests	Prudential measures	Country exceptions							Investment promotion	Co-operation mechanisms	Review
North-North															
Australia-USA	±			±		+			+	±	±	+		±	±
North-South															
NAFTA	±			±		±			+		±	+		±	±
CAFTA-DR	±			±		+			+	±	±	+			
US-Morocco	±			±		+			+	±	±	+		±	±
Japan-Malaysia			+	+	+	+		+	+		+	+	+	+	±
Japan-Mexico	±			±		+		+	+		±	+			
Japan-Singapore			+	±	+	+		+			+			+	+
TAFTA	±	+	±	±	±	+		±	+		±		+	±	+
EC-Chile	±	±	+	±		+	+	±			±		±	+	
EC-Jordan	±	±	+	±		+	+	±			±		±	±	
EFTA-Singapore	±	±	+	±		+		±			+		+	±	±
EFTA-Korea	+	±	+		+	+		+			+	+		+	+
Trans-Pacific SEP															
New Zealand-Singapore	±		±	±		+		+		±	±				±
South-South															
Chile-Korea	±			±		+	+	+	+		±	+		±	
Korea-Singapore	±		±	±		+	+	+	+	+	±	+	±	±	±
India-Singapore CECA	+		+	+		+		+		+					+

Table 4.A1.1b. **Substantive provisions in Investment and other related chapters of recent RTAs – Part 2** *(cont.)*

Agreement	Transparency	Exceptions					Future Liberalisation	Balance of payments/ safeguards	Denial of benefits	Disclosure of information	Taxation	Environment	Investment promotion and co-operation		
		EIA	General exceptions	Security interests	Prudential measures	Country exceptions							Investment promotion	Co-operation mechanisms	Review
ASEAN Investment Area	+		+			+									
COMESA															
Andean Community (Decisions 291 and 292)						+									

Key:
1. + Provisions contained in the Investment chapter.
2. ± means that the stated provisions are contained in a different chapter.

Table 4.A1.2a. **Substantive provisions in Services and related chapters – Part 1**

Agreements	Date of entry into force	Definitions/Scope/Coverage		Umbrella clause	Treatment of services								Temporary movement of business persons/ professionals	Recognition	Protection of services	
					Establishment				Post establishment						Transfer of payments	Expropriation
		Mode 3/ Commercial presence	Investment chapter covers Mode 3/ Commercial presence		Market access	NT	MFN	Performance requirements	Market access	NT	MFN	Performance requirements				Direct / Indirect
North-North																
Australia-USA*	1 Jan. 2005		+		+	+	+		+	+	+			+	+	
North-South																
NAFTA**	1 Jan. 2004		+			+	+			+	+		±	+		
CAFTA-DR*	1 July 2006		+		+	+	+		+	+	+			+	+	
US-Morocco*	1 Jan. 2006		+		+	+	+		+	+	+			+	+	
Japan-Malaysia	13 July 2006	+	+		+	+	+		+	+	+			+	+	
Japan-Mexico**	1 Apr. 2005		+			+	+			+	+		±	+	+	
Japan-Singapore	30 Nov. 2002	+	+		+	+			+	+			±	±	+	
TAFTA	1 Jan. 2005	+			+	+			+	+			±	+	+	
EC-Chile	1 March 2005	+			+	+			+	+			+ (future lib)	+	±	
EC-Jordan	1 May 2002														±	
EFTA-Singapore	1 Jan. 2003	+			+	+	+		+	+	+		+	+		

Table 4.A1.2a. **Substantive provisions in Services and related chapters – Part 1** *(cont.)*

Agreements	Date of entry into force	Definitions/Scope/Coverage		Umbrella clause	Treatment of services								Temporary movement of business persons/ professionals	Recognition	Protection of services	
					Establishment				Post establishment						Transfer of payments	Expropriation
		Mode 3/ Commercial presence	Investment chapter covers Mode 3/ Commercial presence		Market access	NT	MFN	Performance requirements	Market access	NT	MFN	Performance requirements				Direct / Indirect
EFTA-Korea	1 Sept. 2006	+			+	+	+		+	+	+		+	+	+	
Trans-Pacific SEP	1 May 2006	+			+	+	+		+	+	+		±	+	+	
New Zealand-Singapore	1 Jan. 2001	+			+	+			+	+			±	+		
South-South																
Chile-Korea**	1 Apr. 2004		+		+	+	+		+	+	+		±	+	+	
Korea-Singapore	2 March 2006		+		+	+			+	+				+	+	
India-Singapore CECA	1 Aug. 2005	+			+	+		+	+	+		+	+	+	+	+
ASEAN Framework Agreement on Services	1995	+			+	+	+		+		+			+		
COMESA	8 Dec. 1994															
Andean Community (Decision 439)	25 May 1998	+			+	+	+		+	+	+		+	+	+	

Key:

1. + Provisions contained in the Services chapter.
2. ± provisions are contained in a different chapter.

* Contains chapter on Cross Border Trade in Services. Only provisions on Market Access, Domestic Regulation and Transparency in Developing and Applying Regulation apply to Investment in Services.

** Contains chapter on Cross Border Trade in Services which does not apply to Investment in Services.

Table 4.A1.2b. **Substantive provisions in Services and related chapters – Part 2**

Agreement	Exceptions					Clause for further liberalisation	Balance of payments/ Safeguards	Financial services	Telecom	Monopoly service providers	Domestic regulation	Transparency	Taxation	Denial of benefits	Disclosure of information	Services promotion and facilitation		Business practices
	General Exceptions	Security Interests	Prudential measures	Country exceptions +ve List	Country exceptions –ve List											Co-operation mechanisms	Review of commitments	
North-North																		
Australia-USA	±	±			+			±	±		+	+	±	+		±	±	
North-South																		
NAFTA	±	±					±						±		±	±	±	
CAFTA-DR		±			+			±	±		+	+	±	+		±	±	
US-Morocco	±	±			+			±	±		+	+	±	+		±	±	
Japan-Malaysia	±	±		+		+	+			+	+	+	±	+	±		+	
Japan-Mexico	±	±			+		±	±	+			±	±	+		+	+	
Japan-Singapore	+	±		+			+	+	+	+	+	±	±	+		±	±	+
TAFTA	±	±	±	+		+	±	+	+			±	±	+		+	+	
EC-Chile	+	±		+			±	±	+		+	+	±			±	+	
EC-Jordan	+					±	±						±			±		
EFTA-Singapore	+	+		+		+	+	+	+	+	+		±			±	+	
EFTA-Korea	+	+		+			+	±	+[1]	+		+				±	+	+
Trans-Pacific SEP	±	±			+		±		+		+	+	±	+			+	
New Zealand-Singapore	±	±		+			±	+	+	+	+	±	±		±	±	±	

1. Applies only to interstate disputes.

Table 4.A1.2b. **Substantive provisions in Services and related chapters – Part 2** *(cont.)*

Agreement	Exceptions					Clause for further liberalisation	Balance of payments/ Safeguards	Financial services	Telecom	Monopoly service providers	Domestic regulation	Trans-parency	Taxation	Denial of benefits	Disclosure of information	Services promotion and facilitation		Business practices
	General Excep-tions	Security Interests	Prudential measures	Country exceptions												Co-operation mecha-nisms	Review of com-mitments	
				+ve List	–ve List													
South-South																		
Chile-Korea	±	±			+		±		±			±	±	+		±		
Korea-Singapore	±	±			+		±	±	±	+	+[1]	±	±	+	+ (Financial services)	±	±	
India-Singapore CECA	+	+		+		+	+	+	+	+	+	+		+	+	±	±	+
ASEAN Framework Agreement on Services				+		+			+					+				
COMESA																		
Andean Community (Decision 439)	+	+			+	+	+	+			+	+						
Chile-Korea	±	±			+		±		±			±	±	+		±		

1. Also applies to investments covered by the Investment Chapter.

Key:

1. + Provisions contained in the Services chapter.
2. ± provisions are contained in a different chapter.

Table 4.A1.3a. **Country exceptions/commitments in Investment chapter**

Agreement	Date of entry into force	Establishment						Post-establishment					
		Markets access		National treatment		Most Favoured Nation treatment		Market access		National treatment		Most Favoured Nation	
		Positive list	Negative list	Positive list	Negative list	Positive list	Negative list	Positive list	Negative list	Positive list	Negative list	Positive list	Negative list
North-North													
Australia-USA	1 Jan. 2005				+		+				+		+
North-South													
NAFTA	1 Jan. 2004				+		+				+		+
CAFTA-DR	1 July 2006				+		+				+		+
US-Morocco	1 July 2006				+		+				+		+
Japan-Malaysia	13 July 2006				+		+				+		+
Japan-Mexico	1 Jan. 2006				+		+				+		+
Japan-Singapore	1 May 2006				+						+		
TAFTA	1 Jan. 2005			+			+			+			+
EC-Chile	1 Apr. 2005			+									
EC-Jordan	1 Feb. 2003						+			+			+
EFTA-Singapore	1 Jan. 2003				+		+				+		+
EFTA-Korea	1 Sept. 2006				+		+				+		+
Trans-Pacific SEP	1 May 2006												
New Zealand-Singapore	1 Jan. 2001				+		+				+		+
South-South													
Chile-Korea	1 Apr. 2004				+		+				+		+
Korea-Singapore	2 March 2006				+						+		
India-Singapore CECA	1 Aug. 2005			+ India	+ Singapore					+			
ASEAN Investment Area	1998				+		+				+		+
COMESA	8 Dec. 1994												
Andean Community (Decisions 291 and 292)	1 Jan. 1991				+						+		

Table 4.A1.3b. **Country exceptions/commitments in Services chapter**

Agreement	Date of entry into force	Establishment						Post-establishment					
		Markets access		National treatment		Most Favoured Nation treatment		Market access		National treatment		Most Favoured Nation	
		Positive list	Negative list	Positive list	Negative list	Positive list	Negative list	Positive list	Negative list	Positive list	Negative list	Positive list	Negative list
Australia-USA	1 Jan. 2005		+		+		+		+		+		+
NAFTA					+		+				+		+
CAFTA-DR			+		+		+		+		+		+
US-Morocco	1 Jan. 2006		+		+		+		+		+		+
Japan-Malaysia	13 July 2006	+		+			+	+		+			+
Japan-Mexico	1 Apr. 2005				+		+				+		+
Japan-Singapore	30 Nov. 2002	+		+				+		+			
TAFTA	1 Jan. 2005	+		+				+		+			
EC-Chile	1 Feb. 2003	+		+				+		+			
EC-Jordan	1 Jan. 2005												
EFTA-Singapore	1 Jan. 2003	+		+			+	+		+			+
EFTA-Korea	1 Sept. 2006	+		+			+	+		+			+
Trans-Pacific SEP	1 May 2006		+		+		+		+		+		+
New Zealand-Singapore	1 Jan. 2001	+		+						+		+	
Chile-Korea	1 Apr. 2004				+						+		
Korea-Singapore	2 March 2006		+		+			=	+		+		
India-Singapore CECA	1 Aug. 2005	+		+				+		+			
ASEAN Framework Agreement on Services	1995	+					+	+					+
COMESA	8 Dec. 1994												
Andean Community Decision 1998	28 May 1998		+		+		+		+		+		+

Table 4.A1.4. **Dispute settlement with respect to Investments**

			Specific Investor/State provisions															
	State/State	Investor/State	Claims by an investor of a party on its own behalf and on behalf of an enterprise	Prior consent	Waivers of initiating/ continuing a proceeding before local courts/ Non-exhaustion of local remedies	Participation by the non-disputing party	Transparency (access to filing, minutes, transcripttions and decisions)	Open hearings	Protection of sensitive information	Amicus curiae submissions	Monetary awards and no punitive damages	Comment period before effectiveness of awards/delay of enforcement	Enforcement	Interim measures	Experts	Consolidation	Applicable law	Appeals
North-North																		
AUSFTA	±						±		±	±	±							
North-South																		
NAFTA	±	+	+	+		+	+		+	+	+	+	+	+	+	+	+	
CAFTA-DR	±	+	+	+		+	+	+	+	+	+	+	+	+	+	+	+	
US-Morocco	±	+	+	+		+		+	+		+	+	+	+	+	+	+	
Japan-Malaysia	±	+		+ (for authorised invest-ments)		Article 85 (3) allows non-disputing Party to submit interpretation of the Agreement to arbitral tribunal.					(it provides monetary award but there is no prohibition clause for punitive damage)		+ (Article 85 (15)	+				
Japan-Mexico	±	+	+	+		+	+		+		+		+	+	+	+	+	
Japan Singapore	±	+		+									+					
(Article 82 (10 (e))	+																	
TAFTA	±	+															+	
EC-Chile	+														+			
EC-Jordan																		

Table 4.A1.4. **Dispute settlement with respect to investments** *(cont.)*

	State/State	Investor/State	Specific Investor/State provisions															
			Claims by an investor of a party on its own behalf and on behalf of an enterprise	Prior consent	Waivers of initiating/ continuing a proceeding before local courts/ Non-exhaustion of local remedies	Participation by the non-disputing party	Transparency (access to filing, minutes, transcripttions and decisions)	Open hearings	Protection of sensitive information	Amicus curiae submissions	Monetary awards and no punitive damages	Comment period before effectiveness of awards/delay of enforcement	Enforcement	Interim measures	Experts	Consolidation	Applicable law	Appeals
EFTA-Singapore[a]	±	+							±			±	±		±			
EFTA-Korea	±	+		+								±	±	+	±			
Trans-Pacific SEP																		
New Zealand-Singapore[b]	±	+							±						±			
South-South																		
Chile- Korea	±	+	+	+							+	+	+	+	+	+	+	
Korea-Singapore	±	+	+	+							+							
India-Singapore CECA	±	+		+		±						±	±	+				
ASEAN Investment Area	+	+[c]		+														±[d]
COMESA	±																	
Andean Community (Decisions 291 and 298)	±	1 Jan. 1991																

Key:

1. + Provisions contained in the Investment chapter.
2. ± provisions are contained in a different chapter.

c) In the EFTA-Singapore agreement the provisions marked by "±" symbol apply only to State/State dispute.
d) In the New Zealand-Singapore agreement the provisions marked by "±" symbol apply only to State/State dispute.
e) Obligation contained in the 1987 ASEAN Agreement for the Promotion and Protection of Investments.
f) Applies only to interstate disputes.

Table 4.A1.5. **MFN treatment provisions in selected regional trade agreements**

Agreements	Chapter	MFN treatment?	Reservations on MFN treatment	REIO exception clause?	Specific MFN reservation regarding third party agreements?	Request for incorporation of treatment no less favourable in a third party agreement	Review of commitments foreseen in the agreement with the aim of improving overall commitments?
NAFTA and NAFTA-inspired agreements							
AUSFTA	Investment	Yes	Negative list	No	Reservation for all past agreements and in 3 sectors for future agreements	No	No
NAFTA	Investment	Yes	Negative list	No	Reservation for all past agreements and in 4 sectors for future agreements	No	No
US-CAFTA-DR	Investment	Yes	Negative list	No	Reservation for all past agreements and in 4 sectors for future agreements (US, Dominican Republic); only *vis-à-vis* the US and Dominican Republic for the other countries	No	No
US-Morocco	Investment	Yes	Negative list	No	Reservation for all past agreements and in 3 sectors for future agreements	No	No
Japan-Mexico	Investment	Yes	Negative list	No	Reservation for all past agreements and in 3 sectors for future agreements	No	No
Korea-Chile	Investment	Yes	Negative list	Yes	–	Yes	Every two years
Korea-Singapore	Investment	No	–	–	–	Yes	Annually
GATS-inspired agreements							
Japan-Singapore	Investment	No	–	–	–	Yes	No
	Services	No	–	–	–	Yes	No
Japan-Malaysia	Investment	Yes	Negative list	No	Malaysia has a reservation with respect to preferential treatment granted in any ASEAN agreement	–	No
	Services	Yes	Negative list	No	No	Yes	Within five years
TAFTA	Investment	Yes	None	No	No	Yes	No
	Services	No	–	–	–	Yes	Within three years

Table 4.A1.5. **MFN treatment provisions in selected regional trade agreements** *(cont.)*

Agreements	Chapter	MFN treatment?	Reservations on MFN treatment	REIO exception clause?	Specific MFN reservation regarding third party agreements?	Request for incorporation of treatment no less favourable in a third party agreement	Review of commitments foreseen in the agreement with the aim of improving overall commitments?
EFTA-Singapore	Investment	Yes	Negative list	Yes	–	Yes	Every two years
	Services	Yes	Negative list	Yes	–	Yes	Every two years
EFTA-Korea	Investment	Yes	Negative list	Yes	–	Yes	Within three years and in regular intervals thereafter
	Services	Yes	Negative list	Yes	–	Yes	Every two years
Trans-Pacific SEP	Services	Yes	Negative list	No	Chile, New Zealand and Singapore have a reservation for all past agreements and in 3 sectors for future agreements	–	Within two years and every three years thereafter
New Zealand-Singapore CEP	Investment	Yes	Negative list	No	No	–	Every two years
	Services	No	–	–	–	No	Every two years
India-Singapore CECA	Investment	No	–	–	–	Yes	Every two years
	Services	No	–	–	–	Yes	Every two years

ANNEX 4.A2

Analysis of the Schedules of Commitments: Methodology, Caveats and Summary Tables

This Annex explains the methodology used in Part II to assess the degree of liberalisation achieved in the RTAs and to make a comparison between the schedules of commitments contained in RTAs and GATS schedules.

A. Methodology

The analysis has been conducted on 10 of the agreements listed in Part I: AUSFTA, NAFTA, US-Morocco, Japan-Mexico, Japan-Singapore, Thailand-Australia, EC-Chile, EFTA-Singapore, Chile-Korea, and India-Singapore. To illustrate the commitments from EFTA countries, the schedule of Switzerland has been used in the analysis of the agreement between EFTA states and Singapore.

The assessment of liberalisation commitments focuses on services as it is in the services sector that the main obstacles to FDI remain. The analysis of the schedules of commitments shows that most reservations, exceptions, non-conforming measures listed deal with services. There are very few entries on manufacturing goods in the schedules. There are sometimes reservations in the primary sector (in particular mining and fishing activities) but the vast majority are in services sectors. This is not surprising since FDI in services accounts for 60% of total FDI flows; and this share of total FDI flows is considerably lower than the 80 to 90 per cent of total reservations or limitations in the schedules taken by services.

There are several difficulties involved in analysing schedules of commitments on investment in services and making comparisons among different trade agreements (and in particular between RTA schedules and GATS schedules for Mode 3):

- First, there is no agreed and official classification of services sectors and countries can schedule their liberalisation commitments according to their

own definitions of services sectors. During the Uruguay Round which established the GATS, a services sectoral classification list (GNS_W/120) was widely used and is reproduced in Annex 4.A3. WTO members were free to use this classification or the UN Central Product Classification (CPC)[57] to which the GATS list refers (or their own classification). Many RTAs – especially when they follow a GATS approach – list commitments using W/120.

- Liberalisation commitments are presented differently in NAFTA-inspired agreements (with a negative list of reservations) and GATS-inspired agreements (with a positive list of sectors where commitments are taken and a list of limitations that apply in these sectors). There are also several models and concepts involved in "liberalising" investment: national treatment (pre- and post-entry), most-favoured-nation treatment (pre- and post-entry), right of establishment, market access. Foreign investors have access to domestic markets and benefit from non-discriminatory treatment according to different models of liberalisation.
- There are also several issues with the definition of national treatment, MFN and market access. In the NAFTA approach, the two principles are national treatment and MFN and they are granted pre- and post-establishment. Things become more complicated in GATS and in agreements that reproduce the GATS approach for investment in services. In the GATS, there is no distinction between pre- and post-establishment and it is not always clear whether limitations listed as "market access" are not also, *de facto,* limitations on "national treatment".
- Lastly, there is an intrinsic difference between a RTA covering investment in services and a multilateral agreement on trade in services covering Mode 3 (the GATS). For several of the RTAs analysed, their objective is to liberalise all forms of investment between two countries, while the GATS is a multilateral agreement on trade in services including supply through commercial presence (Mode 3). Also the GATS allows countries to take varying degrees of commitments. RTA schedules and the GATS schedules should be compared bearing in mind this difference. There is also a difference in chronology as the GATS was negotiated in 1994 and the agreements analysed are more recent (with the exception of NAFTA) and therefore may reflect policy developments towards investment in services.

An early methodology to quantitatively assess GATS schedules by creating an index (Hoekman, 1995) cannot be extended to analyse investment commitments in RTAs where liberalisation commitments take various forms.

57. The CPC has been updated twice, in 1997 and 2002, and CPC 2.0 is foreseen for 2007.

An index of the extensiveness of commitments would not be robust enough when calculated in the context of negative lists of reservations in NAFTA-inspired agreements and GATS-inspired schedules in other agreements. The comparison between a GATS index and an index of commitments in RTAs could also be misleading.

Here therefore a simpler methodology has been developed based on a graphical and numerical analysis at a less disaggregated level (the 12 services sectors in W/120).[58] The W/120 classification covers all sectors relevant for investment, although their economic importance may vary. The W/210 classification has often been criticised for inadequately reflecting the reality of trade in services (for example, regarding environmental services or energy services). An analysis at a more aggregated level has the advantage of limiting the distortions inherent to classification issues.

Tables 4.A2.1 and 4.A2.2 summarise the results of the analysis. They provide a "mapping" of the schedules of commitments in the RTAs with respect to the three disciplines usually found in the agreements: national treatment, MFN treatment and market access commitments. The first column of the table reports the reservations that apply to all sectors or "horizontal limitations" in GATS language (this is why the column is tagged with "H"). The subsequent columns describe the 12 sectors of the W/120 classification. Box 4.A2.1 details how the schedules were analysed to construct the tables.

For each sector, the tables report two kinds of information:

- First, the degree of commitments in the sector is indicated by the colour (or pattern) of the cell. The typology is the following:
  - ***No commitments in the sector or sector excluded*** (dark cell with black hatched lines).
  - ***Commitments in a limited number of sub-sectors:*** it means that the number of sub-sectors liberalised is less than 75% of the sub-sectors where commitments can potentially be made (dark grey cell).
  - ***Commitments in most of the sector:*** more than 75% of the sub-sectors where commitments can potentially be made are scheduled. Only a few sub-sectors have been excluded (light grey lattice pattern).
  - ***Commitments across the entire sector*** describes the situation where there are commitments in the totality of the sector (no sub-sector is excluded).

58. Roy *et al.* (2006) analyse commitments undertaken by 29 WTO members under mode 1 and mode 3 in 28 RTAs at the level of the 152 sub-sectors (for mode 3) of the W/120 Classification List. For each country and each RTA, they report the proportion of sub-sectors where commitments are made. They also indicate if in comparison to GATS schedules and GATS offers the commitments are further improved in the regional agreement.

Box 4.A2.1. **Specific rules that were followed when analysing the schedules and counting the limitations**

- Only limitations or reservations on investment in services are taken into account. For NAFTA-inspired agreements, the services sectors were identified on the basis of their description in the relevant annex. Reservations for "all sectors" are reported when they are relevant for investment in services. For GATS-like schedules of commitments, only information on Mode 3 has been used (including for horizontal limitations).
- Only limitations to national treatment, MFN treatment and market access are reported. The definition used is the one from the agreement (and can therefore be different according to the RTA analysed).
- Non-conforming measures that are phased-out (NAFTA-inspired agreements) are not counted and pre-commitments in GATS-inspired schedules are included (we look at the degree of liberalisation achieved at the end of the transitory periods).
- There are commitments in the totality of the sector (blank cells) if no reservation is listed in the case of a negative list or if all the sub-sectors of the W/120 classification have commitments in the case of a GATS-inspired schedule.
- The number of limitations tries to reflect the real number of measures that are inconsistent with the disciplines of the agreements but maintained by the parties. When several measures are listed in a same paragraph or a same "entry" in the schedule, they are counted separately. When a non-conforming measure is described through lengthy paragraphs that detail the reservation, it is counted as one. However, the number of limitations is still influenced by the way the schedule is organised (the same measure that applies to several sectors can be counted several times).
- When a sector or sub-sector is listed in the annex on future measures in a NAFTA-inspired agreement and the country can take any measure in the future, it is treated in the same way as an unbound sector in a GATS schedule (absence of commitment).

If no figure appears in the cell, there are no limitations at all, *i.e.* full non-discriminatory treatment applies (white cells).

- The second information reported in the table is the number of limitations in each sector. It is indicated by a figure in the middle of the cell. There is no figure when no limitations are listed in the schedule.

B. Caveats

This methodology comes with certain caveats. It should be kept in mind that commitments do not reflect the actual level of liberalisation of investment. A country that makes no commitment in a sector can nonetheless allow foreign investment. But it will be without guarantee of non-discriminatory treatment and the country may take any kind of measure in the sector. The schedules may be understood as reflecting the minimal treatment that is guaranteed.

On the other hand, investment may be restricted more than indicated by the schedules of commitments. "Liberalisation" in the context of services is measured through non-discriminatory treatment (national treatment, MFN) and/or the concept of "market access" (as defined in the agreements). For example, a restrictive investment regime can be applied equally to domestic and foreign investors. The analysis is about the schedules of commitments and not the actual level of investment liberalisation (or the implementation of these schedules).

The number of limitations should be interpreted with care, especially when comparing different agreements.[59] Countries have adopted different approaches in reporting their limitations to national treatment, MFN treatment, or market access. In particular, schedules of commitments that are provided at a disaggregated sectoral level will tend to have a higher number of limitations reported, some of them being reiterated for different sub-sectors. Some double-counting may therefore occur. The number of limitations is also not a very good indicator of how detrimental these limitations are for investment. A limitation can be very general and wide with a potentially high impact on investment. It can also be very specific and not essential. While limitations reported can be real barriers to foreign investment (such as a limitation on the percentage of foreign participation or a citizenship requirement), they can also be clarifications or indications about domestic legislation that does not necessarily represent a barrier to investment.

The number of limitations can also be higher when there are more commitments in the schedule. It can be surprising to see in the tables that there are sometimes more limitations in a RTA than in the GATS schedule but it is important also to consider the number of sub-sectors where commitments are taken. A country can open up to its bilateral partner more sub-sectors while listing additional limitations for these sub-sectors. The number of limitations is thus higher but the schedule has a greater coverage.

59. In the case of the EU, it should be noted that most limitations concern specific Member states and only limitations that exist across all EU countries are reported in the tables.

From the point of view of investors, this situation is better than facing sectors with no commitments or where many sub-sectors are excluded (rather than included with limitations).

Despite these limitations, the advantage of the methodology is to its simplicity and providing a quick snapshot of the level of commitments by looking along the line which adds up the different sectors. It is also easy to make a comparison between the schedules of the parties to a same agreement or with schedules in another agreement.

Annex Table 4.A2.1. **Commitments and reservations in 5 NAFTA-inspired regional trade agreements**

Investment commitments	All sectors H			Business services 1			Communication services 2			Construction and related engineering services 3			Distribution services 4			Educational services 5			Environmental services 6			Financial services 7			Health related and social services 8			Tourism and travel related services 9			Recreational, cultural and sporting services 10			Transport services 11			Other services not included elsewhere 12		
	NT	MA	MFN	NT	MA	MFN	NT	MA	MFN	NT	MA	MFN	NT	MA	MFN	NT	MA	MFN	NT	MA	MFN	NT	MA	MFN	NT	MA	MFN	NT	MA	MFN	NT	MA	MFN	NT	MA	MFN	NT	MA	MFN
US-Australia FTA																																							
Australia	4	n/a	2	1	n/a	1	5	n/a	3		n/a		1	n/a		1	n/a			n/a		3			2	n/a	1		n/a			n/a		6	n/a			n/a	
United States	3	n/a	4	1	n/a	1	2	n/a	2		n/a			n/a			n/a			n/a		10	11	5	1	n/a	1		n/a			n/a		4	n/a	3		n/a	
NAFTA																																							
Canada	8	n/a	2	2	n/a		1	n/a	1		n/a			n/a			n/a			n/a		1			1	n/a	1		n/a			n/a		2	n/a	2		n/a	
Mexico	6	n/a	1	3	n/a	2	10	n/a	4	1	n/a		3	n/a		1	n/a			n/a		10	12	1	1	n/a			n/a			n/a		10	n/a	2		n/a	
United States	4	n/a	5	2	n/a	2	3	n/a	2		n/a			n/a			n/a			n/a		7		4	1	n/a			n/a			n/a		5	n/a	4		n/a	
US-Morocco FTA																																							
Morocco	2		1	10	4	5	1	6						2			2					1		7	11		7	4	5	1						3	4	2			
United States	3	1	4	1		1	1		1															10	11	5	1		1							4		3			
Japan-Mexico Economic Partnership*																																							
Mexico	8	n/a	1	9	n/a	2	8	n/a	4	1	n/a		1	n/a		1	n/a			n/a		GATS & OECD			1	n/a			n/a		1	n/a	1	18	n/a	1		n/a	
Japan	4	n/a	1	5	n/a	1	4	n/a			n/a			n/a			n/a		1	n/a		GATS & OECD			1	n/a			n/a			n/a		11	n/a	4		n/a	

* The commitments in financial services are those of the OECD Code of Liberalisation of Capital Movements and of the GATS.

Chile-Korea FTA*																																							
Chile	5	n/a		8	n/a		11	n/a			n/a			n/a			n/a			n/a					1	n/a			n/a			n/a		24	n/a			n/a	
Korea	8	n/a		6	n/a		26	n/a			n/a			n/a		3	n/a			n/a					3	n/a			n/a		3	n/a		9	n/a			n/a	

* Financial services are not in the agreement yet (a negotiation is scheduled four years after the entry into force of the agreement)

No commitments in the sector - sector excluded
Commitments in a limited number of sub-sectors
Commitments in most of the sector
Commitments across the entire sector

Horizontal limitations (affect all sectors) * first column only *

Number of limitations **2**

Non applicable n/a

Table 4.A2.2. **Commitments and reservations in 5 GATS-inspired regional trade agreements**

Investment commitments	All sectors H			Business services 1			Communication services 2			Construction and related engineering services 3			Distribution services 4			Educational services 5			Environmental services 6			Financial services 7			Health related and social services 8			Tourism and travel related services 9			Recreational, cultural and sporting services 10			Transport services 11			Other services not included elsewhere 12		
	NT	MA	MFN	NT	MA	MFN	NT	MA	MFN	NT	MA	MFN	NT	MA	MFN	NT	MA	MFN	NT	MA	MFN	NT	MA	MFN	NT	MA	MFN	NT	MA	MFN	NT	MA	MFN	NT	MA	MFN	NT	MA	MFN
Japan-Singapore New Age Economic Partnership Agreement																																							
Japan	2			8	14		1	1		10	5		3				1					1	2											7	7				
Singapore	3			5	5			2						1			1					15	34		2	2								1	1				
Thailand-Australia FTA (TAFTA)																																							
Australia	4	9		2	3			5														2	13			1							1	2				
Thailand	1	12		32			15	10		3			2			4	1		9			6	29					5	4		2	4		15	9				
EU-Chile Association Agreement																																							
Chile	5	5		7	8		1	4			1											1	25								1	1		6	7				
EU*	2*	1*		*	1*			1			*		*			*			*			3*	3*			*			*		*	*		3	3*				

* Limitations that apply in specific EU Member States are not reported but an asterisk signals their presence

EFTA-Singapore FTA																																							
Singapore	3			3	3								3			1	1					7	22		2	2								2	2				
Switzerland	3			7	2								3									2	2					2	1					3	4				
India-Singapore Comprehensive Economic Co-operation Agreement																																							
India	7	2		9	13		8	19		1	1			2								3	30		1	2					1		1	2				
Singapore	3			4	6			5						5			1					42	45		1	2							1	1				

No commitments in the sector - sector excluded
Commitments in a limited number of sub-sectors
Commitments in most of the sector
Commitments across the entire sector

Horizontal limitations (affect all sectors) * first column only *

Number of limitations **2**

Table 4.A2.3. **Mode 3 commitments in GATS schedules**

GATS Mode 3 commitments	All sectors H			Business services 1			Communication services 2			Construction and related engineering services 3			Distribution services 4			Educational services 5			Environmental services 6			Financial services 7			Health related and social services 8			Tourism and travel related services 9			Recreational, cultural and sporting services 10			Transport services 11			Other services not included elsewhere 12		
	NT	MA	MFN	NT	MA	MFN	NT	MA	MFN	NT	MA	MFN	NT	MA	MFN	NT	MA	MFN	NT	MA	MFN	NT	MA	MFN	NT	MA	MFN	NT	MA	MFN	NT	MA	MFN	NT	MA	MFN	NT	MA	MFN
Australia	4	1		2	2			3	2													2	13											1					
European Union*	2	1*	2*	*	1*			*	5*		*			*			*					*	2*	1*		*			*			*		2		1*	2*		
Canada	8	2	1	4	4		1	3	2	1	1			3								9	9	2				1	2					1	5	3			
Chile	4	3	1		4			4	1													1	21												5			
India	1				4		3	12	3		1											8	20			1			2				1		2			
Japan					8												1			1		1	3												2				
Jordan	1	1	1	2	14	3		4	2		1			2			2					1	8			2			4	1		1	1	1	5	1			
Korea	4	2			4			3			6			5						4		4	36						1					4	8	1			
Mexico	1	1		2	33		1	17			7			4			4						30			4			10	2				5	6	1		6	
Morocco		1			1			4			1												1						3						3	1			
Singapore	3		2		5	1		2	2													10	16	2					1						2			
Switzerland	3			7	2				3					3	1							2	2	1				2	1					2	4	4			
United States	3		3		4		1	3	1							2						5	36	5		1			2			1			2	5			
Thailand	1	2		29		3	9	10		3			1			3			9			6	29					5			2			15	8	3			

* Limitations that apply in specific EU Member States are not reported but an asterisk signals their presence

No commitments in the sector - sector excluded
Commitments in a limited number of sub-sectors
Commitments in most of the sector
Commitments across the entire sector

Horizontal limitations (affect all sectors) * first column only *

Number of limitations **2**

ANNEX 4.A3

The GATS W/120 Services Sectoral Classification List

Sectors and sub-sectors

1. Business services

A. Professional services

a. Legal Services
b. Accounting, auditing and bookkeeping services
c. Taxation Services
d. Architectural services
e. Engineering services
f. Integrated engineering services
g. Urban planning and landscape architectural services
h. Medical and dental services
i. Veterinary services
j. Services provided by midwives, nurses, physiotherapists and paramedical personnel
k. Other

B. Computer and related services

a. Consultancy services related to the installation of computer hardware
b. Software implementation services
c. Data processing services
d. Data base services
e. Other

C. Research and development services

a. R&D services on natural sciences
b. R&D services on social sciences and humanities
c. Interdisciplinary R&D services

D. Real estate services

a. Involving own or leased property
b. On a fee or contract basis

E. Rental/leasing services without operators

a. Relating to ships
b. Relating to aircraft
c. Relating to other transport equipment
d. Relating to other machinery and equipment
e. Other

F. Other business services

a. Advertising services
b. Market research and public opinion polling services
c. Management consulting service
d. Services related to management consulting
e. Technical testing and analysis services
f. Services incidental to agriculture, hunting and forestry
g. Services incidental to fishing
h. Services incidental to mining
i. Services incidental to manufacturing
j. Services incidental to energy distribution
k. Placement and supply services of Personnel
l. Investigation and security
m. Related scientific and technical consulting services
n. Maintenance and repair of equipment (not including maritime vessels, aircraft or other transport equipment)
o. Building-cleaning services
p. Photographic services
q. Packaging services

r. Printing, publishing

s. Convention services

t. Other

2. Communication services

A. Postal services

B. Courier services

C. Telecommunication services

a. Voice telephone services

b. Packet-switched data transmission services

c. Circuit-switched data transmission services

d. Telex services

e. Telegraph services

f. Facsimile services

g. Private leased circuit services

h. Electronic mail

i. Voice mail

j. On-line information and data base retrieval

k. Electronic data interchange (EDI)

l. Enhanced/value-added facsimile services, incl. store and forward, store and retrieve

m. Code and protocol conversion

n. On-line information and/or data processing (incl. transaction processing)

o. Other

D. Audiovisual services

a. Motion picture and video tape production and distribution services

b. Motion picture projection service

c. Radio and television services

d. Radio and television transmission services

e. Sound recording

f. Other

E. Other

3. Construction and related engineering services

A. General construction work for buildings

B. General construction work for civil engineering

C. Installation and assembly work

D. Building completion and finishing work

E. Other

4. Distribution services

A. Commission agents' services

B. Wholesale trade services

C. Retailing services

D. Franchising

E. Other

5. Educational services

A. Primary education services

B. Secondary education services

C. Higher education services

D. Adult education

E. Other education services

6. Environmental services

A. Sewage services

B. Refuse disposal services

C. Sanitation and similar services

D. Other

7. Financial services

A. All insurance and insurance-related services

a. Life, accident and health insurance services

b. Non-life insurance services

c. Reinsurance and retrocession

d. Services auxiliary to insurance (including broking and agency services)

B. Banking and other financial services (excl. insurance)

a. Acceptance of deposits and other repayable funds from the public

b. Lending of all types, incl., *inter alia*, consumer credit, mortgage credit, factoring and financing of commercial transaction

c. Financial leasing

d. All payment and money transmission services

e. Guarantees and commitments

f. Trading for own account or for account of customers, whether on an exchange, in an over-the-counter market or otherwise, the following:

- money market instruments (cheques, bills, certificate of deposits, etc.)
- foreign exchange
- derivative products incl., but not limited to, futures and options
- exchange rate and interest rate instruments, inclu. products such as swaps, forward rate agreements, etc.
- transferable securities
- other negotiable instruments and financial assets, incl. bullion.

g. Participation in issues of all kinds of securities, incl. under-writing and placement as agent (whether publicly or privately) and provision of service related to such issues

h. Money broking

i. Asset management, such as cash or portfolio management, all forms of collective investment management, pension fund management, custodial depository and trust services

j. Settlement and clearing services for financial assets, incl. securities, derivative products, and other negotiable instruments

k. Advisory and other auxiliary financial services on all the activities listed in Article 1B of MTN.TNC/W/50, incl. credit reference and

analysis, investment and portfolio research and advice, advice on acquisitions and on corporate restructuring and strategy

l. Provision and transfer of financial information, and financial data processing and related software by providers of other financial services

C. Other

8. Health related and social services
(other than those listed under 1.A.h-j.)

A. Hospital services

B. Other human health services

C. Social services

D. Other

9. Tourism and travel related services

A. Hotels and restaurants (incl. catering)

B. Travel agencies and tour operators services

C. Tourist guides services

D. Other

10. Recreational, cultural and sporting services
(other than audiovisual services)

A. Entertainment services (including theatre, live bands and circus services)

B. News agency services

C. Libraries, archives, museums and other cultural services

D. Sporting and other recreational services

E. Other

11. Transport services

A. Maritime transport services

a. Passenger transportation

b. Freight transportation

c. Rental of vessels with crew

d. Maintenance and repair of vessels

e. Pushing and towing services

f. Supporting services for maritime transport

B. Internal waterways transport

a. Passenger transportation
b. Freight transportation
c. Rental of vessels with crew
d. Maintenance and repair of vessels
e. Pushing and towing services
f. Supporting services for internal waterway transport

C. Air transport services

a. Passenger transportation
b. Freight transportation
c. Rental of aircraft with crew
d. Maintenance and repair of aircraft
e. Supporting services for air transport

D. Space transport

E. Rail transport services

a. Passenger transportation
b. Freight transportation
c. Pushing and towing services
d. Maintenance and repair of rail transport equipment
e. Supporting services for rail transport services

F. Road transport services

a. Passenger transportation
b. Freight transportation
c. Rental of commercial vehicles with operator
d. Maintenance and repair of road transport equipment
e. Supporting services for road transport services

G. Pipeline transport

a. Transportation of fuels
b. Transportation of other goods

H. Services auxiliary to all modes of transport

a. Cargo-handling services

b. Storage and warehouse services

c. Freight transport agency services

d. Other

I. Other transport services

12. Other services not included elsewhere