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East Asian Free Trade Agreements in Services: Roaring Tigers or Timid Pandas?

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East Asian Free Trade Agreements in Services: Roaring Tigers or Timid Pandas?

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1. Introduction

Bilateral and regional free trade agreements (FTAs) are proliferating across the globe, fundamentally altering the governance of world trade. From 1950 to 1995, less than three of these agreements were on average notified annually under the General Agreement on Tariffs and Trade (GATT). Since 1995, this number has jumped to 11 agreements per year. Between January 2004 and February 2005 alone, the World Trade Organization (WTO) received 43 notifications, setting a historical record.[1]

There are various reasons why governments seek bilateral or regional trade agreements. Foreign policy considerations often play an important role. Improving trade relations may be a vehicle to strengthen strategic ties between nations or to overcome historic animosities. But notwithstanding politics, economic considerations are more often the driving force behind the conclusion of FTAs. Trade agreements can enhance commercial opportunities abroad for domestic businesses, while offering a vehicle for anchoring home-grown policy reforms. Multilateral trade negotiations have in recent years not been successful in fostering an exchange of market opening commitments. Despite more than five years of negotiations, there has been no conclusion to the WTO's Doha Development Agenda (DDA). In fact, DDA negotiations were suspended in July 2006 with uncertain prospects for their revival. For countries ready to commit to market opening, a bilateral or regional forum may deliver quicker results.

Many of the recently concluded FTAs are comprehensive in their coverage, seeking not only the dismantling of barriers to traditional trade in goods but also the liberalization of trade in services—the focus of this paper. The widening of the scope of FTAs reflects underlying economic forces. Technological progress and the trend towards private and competitive provision of infrastructure services have enabled international commerce in a wide range of service activities that were previously considered non-tradable. In many countries, services account for the fastest growing segment of international trade (World Bank, 2002).

What have FTAs in services accomplished? Have they established stronger disciplines on measures affecting trade in services? Have they led to liberalization undertakings that go beyond those to which countries are committed under the WTO's General Agreement on Trade in Services (GATS)? Few analyses have been conducted to answer these questions. Stephenson (2000), OECD (2002), and Sauvé (2005) review some of the key architectural innovations of services FTAs. Stephenson (2005) and Roy et al. (2006) evaluate the liberalization content of selected bilateral and regional agreements.

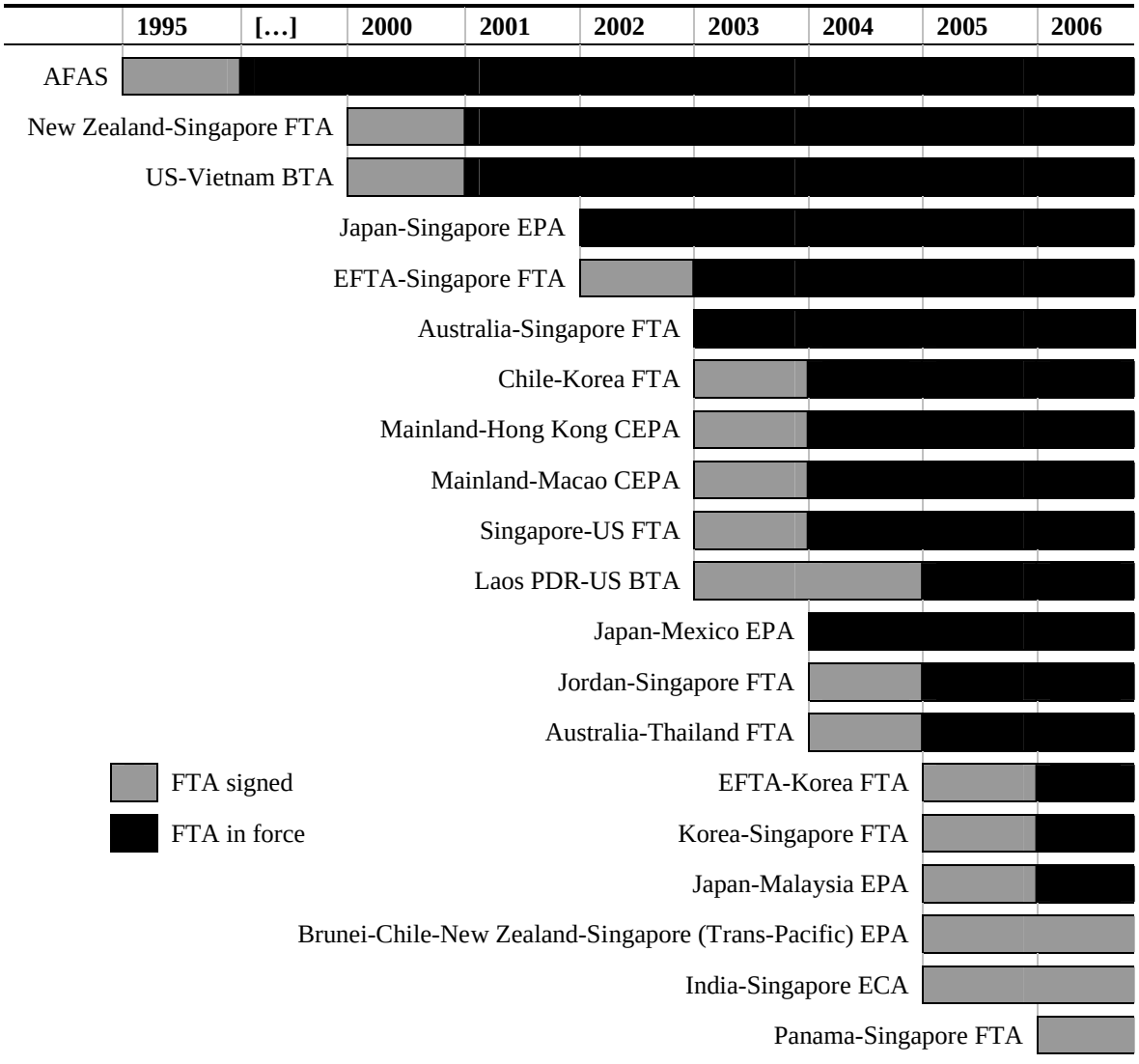
This paper offers a comprehensive assessment of the new generation of services agreements that have been concluded in the East Asia region. Until recently, this region had been hesitant in entering into bilateral or regional arrangements. As of 2003, there were only 2 FTAs per country in East Asia, compared to a world average of 5 FTAs per country (World Bank, 2005a). But the region is catching up fast. Figure 1 lists the existing East Asian FTAs that have a substantial services component.[2] Until 2000, the only trade agreement in services in the region was the ASEAN Framework Agreement on Trade in Services (AFAS). Since 2000, nineteen agreements were signed with trading partners inside and outside of East Asia.

[1] See Crawford and Fiorentino (2005). These figures underestimate the number of concluded FTAs, as numerous agreements have not (or not yet) been notified to the WTO.

[2] Thailand has concluded bilateral agreements with Bahrain, India, New Zealand, and Peru that foresee the negotiation of trade in services in future. The same holds for the Bangladesh-India- Myanmar-Sri Lanka-Thailand Economic Cooperation (BIMSTEC) Free Trade Area.

Table 1 shows all FTAs that are currently being negotiated. This list is changing frequently and not all envisaged FTAs may include a services component. But if all negotiations were concluded successfully, there would be another 42 agreements with at least one party in East Asia.

Figure 1: East Asian FTAs with a substantial services component



Notes: As of August 2006. Some agreements have not yet been included in the analysis presented in this study, partly due to their recent vintage. These agreements include Taiwan's FTAs with Guatemala, Nicaragua, and Panama, as well as the Japan-Philippines EPA. They will be incorporated in the final version of this study.

Our analysis consists of two main parts. The first part—presented in Section 3—will provide a comparative review of the key architectural elements of the 20 East Asian FTAs shown in Figure 1. In particular, we will consider the scheduling approach adopted by agreements, the main disciplines that determine their liberalization content, the treatment of investment in services, the treatment of labor mobility, the rules of origin adopted, trade rules, and provisions for the settlement of disputes. In reviewing the various architectural choices encountered, we will specifically assess to what extent those choices create incentives for liberal negotiating outcomes, promote the transparency of services policies, and foster the credibility of these policies.

Table 1: FTAs under negotiation

Country	FTA partner(s)
ASEAN	Australia & New Zealand, China, India, Japan, Korea
Brunei	Japan
China	Australia, ASEAN, Chile, Gulf Cooperation Council, New Zealand, Pakistan, Southern African Customs Union
Indonesia	Japan
Japan	ASEAN, Brunei, Chile, Indonesia, Korea, Philippines, Thailand, Vietnam
Korea	ASEAN, Canada, India, Japan, Malaysia, United States
Malaysia	Australia, India, Korea, New Zealand, Pakistan, United States
Philippines	Japan
Singapore	Bahrain, Canada, Egypt, Kuwait, Mexico, Pakistan, Peru, Qatar, Sri Lanka, United Arab Emirates
Taiwan	Dominican Republic, El Salvador, Honduras
Thailand	Japan, United States
Vietnam	Japan

Note: As of August 2006.

The second part—presented in Section 4—will evaluate the liberalization content of the 20 FTAs, drawing on a database in which we recorded the valued added of FTA liberalization undertakings relative to pre-existing multilateral services commitments. This database enables us to assess the depth and breadth of liberalization undertakings by the main service sectors, the four modes of supplying services, and the scheduling approach of agreements. It also allows us to evaluate how far individual East Asian countries have liberalized across all their FTAs and whether market opening commitments to different FTA partners have been alike or dissimilar.

To motivate our analysis, Section 2 will first discuss the main economic and bargaining considerations surrounding FTAs in services. By their nature, FTAs create trade preferences from which only member countries benefit, thereby discriminating against service suppliers from non-members. This type of discrimination raises several important economic and bargaining issues, which need to be taken into account in assessing the accomplishments of FTAs.

Finally, the proliferation of FTAs has important implications for the multilateral trading system. The GATS has established certain requirements for FTAs in services that WTO members need to meet. Our analysis can shed light on the considerations that might be relevant in assessing compliance with these requirements. We will discuss these considerations in Section 3. More broadly, economists have long debated whether FTAs are building blocks or stumbling blocks towards further multilateral integration. In the concluding section, we will ponder on what our findings can say in support or opposition of either camp.

2. Economic and bargaining considerations

FTAs seek the liberalization of trade in services among a small number of countries—often only two trading partners.[3] FTAs are thus *preferential* in nature. Only parties to an agreement benefit from the trade commitments negotiated under an FTA. Service suppliers from non-parties are discriminated against. By contrast, services liberalization under the GATS takes place on non-discriminatory terms. The WTO's most-favored-nations (MFN) principle requires members of the multilateral trade body to extend any trade benefit immediately to all other members.

Most East Asian countries are members of the WTO. The only two exceptions are Laos and Vietnam, which are currently in the process of acceding to the WTO. In other words, service suppliers from most countries—inside or outside the region—have access to East Asian service markets at least at the level of existing GATS commitments. Thus, in order for a bilateral or regional agreement to be meaningful, its parties need to commit to additional market opening beyond their liberalization undertakings under the GATS.

Liberalizing trade in services promises significant economic gains, but also imposes unique challenges—mainly in ensuring the sound regulation of private service markets. These gains and associated policy challenges have been well documented elsewhere (see, for example, World Bank, 2002). However, there are certain economic and bargaining considerations from liberalizing trade in services on a preferential rather than MFN basis. In this section, we briefly outline these considerations, setting the scene for the assessment of East Asian FTAs in the subsequent sections of this paper.

Before proceeding, one clarifying remark is in order. In principle, parties to an FTA may choose to implement their preferential trade commitments on an MFN basis. In addition, FTAs commitments may go deeper than the GATS, but may not provide for actual policy liberalization and, as such, no actual trade preferences. In these cases, FTAs do not discriminate against non-parties and most of the arguments developed in this section do not apply. The economic effects of non-discriminatory liberalization under FTAs approximate those from unilateral liberalization and, again, are well-documented elsewhere.

Economic considerations

Mattoo and Fink (2004) analyze the economic effects of preferential versus MFN-based liberalization of trade in services. They draw the following main conclusions, from the viewpoint of a country that engages in liberalization:

- First, relative to the status quo, preferential liberalization in services brings about static welfare gains. This finding differs from the more ambiguous conclusion drawn in the goods case. The key difference is that protection in services does not generate fiscal revenue, as do tariffs on imported goods. Thus, trade diversion effects associated with preferential liberalization in services do not lead to any loss in government revenue that can lead to negative welfare effects in the case of goods.

[3] Throughout the paper and unless other terms are employed, we use the term 'FTA' loosely to also include other types of trade agreements that seek the liberalization of trade in services—such as bilateral trade agreements (BTAs) or economic partnership agreements (EPAs). Similarly, we refer to 'countries' in a broad sense, so as to encompass any geographical entity with international personality and capable of conducting an independent foreign economic policy. The designations employed do not imply the expression of any opinion concerning the legal status of any country or territory.

- Second, MFN liberalization generally yields greater welfare gains than preferential liberalization. Non-discriminatory market opening does not bias competition from abroad and therefore promotes entry of the most efficient service providers. Additional gains from trade, associated with greater economies of scale and knowledge spillovers, are also likely to be greater if liberalization proceeds on an MFN basis. There is one exception to this conclusion. If 'learning by doing' effects are important, preferential liberalization may enable domestic service suppliers from member countries to become more efficient, as they face some competition from within the FTA territory, but are not yet exposed to global competition. In theory, preferential liberalization can thus prepare infant domestic suppliers for competition at the global level.[4]

- Third, there is a special long-term trade diversion effect to worry about. Preferential liberalization offers a first-mover advantage to potentially second-best service providers from within the FTA territory. Since many service industries are characterized by high location-specific sunk costs, first-best providers from outside the FTA territory may not enter the market when trade is eventually liberalized on an MFN basis. Thus, even if preferences are temporary, they may have long-term implications for a country's ability to attract the world's most efficient service providers.

The degree of trade preferences—and thus the potential for trade diversion effects—depends critically on the rules of origin adopted by an FTA. In a nutshell, rules of origin in the services context determine the extent to which service suppliers from non-parties established in the territory of a party benefit from the market opening negotiated under an FTA. If rules of origin are restrictive, the set of service suppliers eligible for trade preferences is small and trade diversion effects will be more pronounced. If rules of origin are liberal, preferential liberalization approaches MFN liberalization. However, it will always fall short of the latter, because non-party service suppliers will need to have at least some presence in one FTA party.[5]

Additional considerations apply from the viewpoint of a country that would see an expansion in services exports as a result of market opening in an FTA partner country. What may be considered as trade diversion from a global perspective amounts to an export opportunity from the perspective of the country benefiting from preferential market access abroad. Such export opportunities may underpin possible 'learning-by-doing' effects mentioned above. In addition, preferential access to foreign markets may attract export-oriented investment from abroad. Indeed, a country with liberal entry conditions for suppliers from outside the FTA area can become a hub for companies wishing to access markets within this area. The benefits from export-oriented foreign investment depend on the nature of the services supplied, but can include short-term employment gains, increased tax revenues, and the transfer of knowledge and managerial skills.

Again, the rules of origin adopted in an FTA are critical in shaping the eventual economic outcome. If they are restrictive, the benefits of preferential access would mostly be captured

[4] The 'learning-by-doing' rationale has mainly been invoked for agreements among developing countries, where firms operate below best-practice productivity levels.

[5] For a more detailed discussion of the economic effects of different rules of origin in services, see Fink and Nikomborirak (2006). Section 3.E offers a comprehensive review of the rules of origin found in the East Asian FTAs.

by domestic firms and the learning-by-doing rationale would be strengthened. If they are liberal such that it is easy for service suppliers from outside the FTA area to become eligible for trade preferences, incentives for export-oriented foreign investment would be strengthened.

In sum, the welfare implications of preferential versus MFN-based liberalization differ for the preference-granting and preference-receiving countries and depend on a number of complementary factors—such as the rules of origin adopted and the significance of learning-by-doing effects. Unfortunately, the economic literature provides only little guidance on what type of economy would gain or lose under which circumstances.[6]

Bargaining considerations

Why do countries sign trade agreements, be they preferential or non-discriminatory? As Krugman (1997) famously pointed out, the economist's case for open markets is essentially a unilateral case. If trade liberalization brings about economic benefits and governments are convinced of these benefits, market opening should be pursued regardless of what other countries may do. In addition, experience has shown that the success of services reforms hinges on the development of sound regulatory institutions, which is primarily a challenge of domestic policy.

Notwithstanding these considerations, can trade agreements somehow support governments in their pursuit of greater openness? In principle, trade agreements can make three types of contributions:

- First, trade negotiations are mercantilist in nature, involving the reciprocal exchange of market opening concessions. While trade economists would object to the notion of liberalization as a concession, mercantilism can serve a useful political economy purpose. Suppose that a government is convinced that certain liberalization measures will generate overall economic benefits, but those measures are opposed by vested interests that stand to lose from foreign competition. Negotiated as part of a package of trade commitments, a government may be in a better position to proceed with market opening, because it can muster support from those constituents that stand to gain from improved market access in foreign countries.

- Second, trade agreements offer a forum for regulatory cooperation between trading partners. In certain regulation-intensive service sectors, the removal of explicit trade barriers may be insufficient for foreign service suppliers to compete. Differences in regulatory standards or professional qualification requirements may pose de facto barriers to foreign participation. Regulatory cooperation—in the form of harmonization of standards and recognition of professional qualifications—can overcome these barriers without compromising legitimate regulatory objectives.

- Third, trade agreements can enhance the transparency and credibility of the domestic trade regime. Lack of information about how to do business in a foreign country can in itself represent a trade barrier. In addition, commitments in trade agreements are bound under international law and are not easily reversible. They can thus assure foreign traders and investors that policy will not become more restrictive. This aspect

[6] Mattoo and Fink (2005) review available evidence from the EU's Single Market Program. However, they note that this evidence remains difficult to interpret in welfare terms.

is particularly important for infrastructural services, for which foreign participation typically requires commercial establishment in the importing country and non-recoverable investments in location-specific assets.

Where are these benefits of trade agreements best pursued—at the multilateral level or at bilateral and regional levels? As pointed out in the introduction, the choice of negotiating forum may be dictated by political considerations. From a more narrow negotiating perspective, multilateral agreements offer both advantages and disadvantages. One key advantage is that countries can form negotiating alliances at the WTO, allowing members with small economies to leverage their bargaining power. In addition, certain trade policy measures—particularly agricultural subsidies—by nature cannot be reduced on a preferential basis. Countries seeking to offer deeper liberalization in services in exchange for the reduction of agricultural subsidies abroad can only do so at the WTO.

At the same time, bargaining itself may be more productive at the bilateral or regional level, where negotiations involve only few players. The WTO now has 149 members at all levels of development and the multilateral trade agenda has much expanded since the GATT days. Trade negotiations at the multilateral level therefore tend to be complex and time-consuming. As already pointed out, the WTO's Doha Development Agenda was suspended in July 2006, after more than five years of negotiations. As prospects for concluding the multilateral negotiations remain uncertain, a bilateral or regional forum may deliver quicker results.

Another handicap of multilateral negotiations is that countries can free-ride on the bargaining efforts of others. Multilateral services negotiations have proceeded on a bilateral request and offer basis, but eventual commitments are made on an MFN basis. Thus, even though one WTO member may be interested in improved market access in another member, it may be reluctant to engage in reciprocal bargaining if there are third members interested in the same market access. The end result may be a less ambitious negotiating outcome. In principle, FTAs offer a way out, as the smaller number of players reduces the scope for free-riding on the bargaining efforts of others.[7]

Yet again, the greater bargaining effectiveness of preferential agreements depends critically on the rules of origin of these agreements. Under liberal rules of origin, non-parties would to some extent benefit from the trade concessions of FTA parties, reintroducing the free-rider problem. For free-rider problems to be less severe in a bilateral or regional context, FTAs need to adopt restrictive rules of origin.

This argument has an important corollary, which is of relevance to the bargaining situation of many East Asian countries. Suppose a country negotiates sequentially two or more bilateral FTAs. If it commits to open service markets in the first FTA and this FTA adopts a liberal rule of origin, the trading partner for the second FTA may be unwilling to 'pay' for obtaining the same commitment in the second FTA. In other words, with a liberal rule of origin, it may not be possible to 'sell' the same market opening commitment twice.

As to the pursuit of regulatory cooperation, bilateral and regional trade agreements may also be a more productive negotiating forum. Harmonizing regulatory standards and recognizing professional qualifications may not be feasible among the 149 members of the WTO. But it may well be achievable among smaller groups of countries that share similar legal and

[7] This point is elaborated more fully in Schwartz and Sykes (1996).

educational systems. In Sections 3E and 3F, we will review to what extent East Asian FTAs have been able to deliver on this potential.

Finally, the transparency and credibility benefit of binding trade policies under domestic law can, in principle, be harnessed at the WTO and in FTAs. The precise transparency and credibility value of policy bindings will depend on the nature and clarity of trade commitments and the mechanism available to enforce them. Throughout Section 3, we will evaluate how key architectural elements of the East Asian FTAs have affected the transparency and credibility of services trade policies.

3. Architecture

In this section, we review key architectural elements of the 20 East Asian FTAs that have a substantial services component. Ultimately, trade agreements seek to promote international commerce. They can do so in three ways: by reducing barriers to foreign participation, by making trade policies more transparent, and by enhancing the credibility of the trade regime. Architectural choices can make an important difference in this respect. In comparing the different approaches found in East Asia, we specifically seek to evaluate to what extent agreements promote trade along these three dimensions.

Our review starts with the scheduling approach adopted by FTAs—one of the key distinguishing characteristics of trade agreements in services. We then consider the main disciplines that determine the liberalization content of FTAs, the treatment of investment in services, the treatment of labor mobility, the rules of origin adopted, trade rules, and provisions for the settlement of disputes.

A. Scheduling approach

No trade agreement in services has established immediate free trade in all service sectors. The East Asian FTAs make no exception in this regard. For a variety of reasons, governments wish to exempt certain activities from the coverage of trade disciplines or maintain certain trade-restrictive measures. A critical question in the design of an FTA is how these exemptions and limitations are inscribed into an agreement.

As a first step, most FTAs allow for *sectoral carve-outs* that exempt one or more activities from the scope of the agreement. Activities falling under such an exemption are not subject to any of the disciplines established in the agreement. Table 2 summarizes the sectoral carve-outs found in the 20 East Asian FTAs analyzed here. The most frequently encountered carve-out pertains to air transport. Thirteen FTAs exempt core air transport services related to the exercise of air traffic rights.[8] This exemption is also found in the GATS and is explained by the fact that the provision of these services has historically been negotiated through separate bilateral treaties. Four FTAs also carve out cabotage in maritime transport—a sector in which foreign participation is often deemed sensitive. More significantly, three FTAs fully

[8] However, this exception usually does not apply to aircraft repair and maintenance services, the selling and marketing of air transport services, and computer reservation system services.

exempt financial services from the scope of the agreement—an issue to which we will return later.[9]

Table 2: Sectoral carve-outs

Agreement(s)	Carve-out(s)
Australia-Singapore FTA, India-Singapore ECA, EFTA-Korea FTA, EFTA-Singapore FTA, Jordan-Singapore FTA, Korea-Singapore FTA, Panama-Singapore FTA, Singapore-US FTA	Core air transport services
Japan-Malaysia EPA, Japan-Singapore EPA	Core air transport services and cabotage in maritime transport
Chile-Korea FTA, Trans-Pacific EPA	Core air transport services and financial services
Japan-Mexico EPA	Core air transport services, cabotage in maritime transport, and financial services
ASEAN Framework Agreement on Services, Australia-Thailand FTA, Lao PDR-US BTA, Mainland-Hong Kong CEPA, Mainland-Macao CEPA, New Zealand-Singapore FTA, Vietnam-US BTA	None

Seven FTAs do not provide for any carve-out of service activities, making all service sectors subject to the agreements' underlying provisions. However, it does not automatically follow that all sectors are subject to liberalization undertakings. The liberalization content of FTAs is detailed in country-specific market-opening schedules. A variety of approaches exist in drawing up these schedules. Fundamentally, these approaches differ along two dimensions: (i) the listing of service activities subject to liberalization commitments and (ii) the listing of levels of openness. Lists can either be done on a *positive* basis—identifying what is covered or allowed—or on a *negative* basis—identifying what is not covered or not allowed, though mixed approaches are also possible.

Table 3 indicates the scheduling approaches adopted by the 20 East Asian FTAs, which for ease of reference are also graphically illustrated in Figure 2. In what follows, we first describe key features of these scheduling approaches. We then compare and assess these approaches, focusing on the three dimensions outlined above: incentives for liberalization, transparency and credibility.

Agreements with a positive list of sectors

Thirteen East Asian FTAs have adopted a positive list of sectors in which trade commitments are undertaken. In other words, only the sectors that parties have expressly identified are subject to market opening undertakings. Countries are free to maintain or impose trade-restrictive measures in all non-scheduled sectors, although those measures may still be subject to an agreement's general disciplines (such as on transparency).

[9] In addition to the sectoral carve-outs found in the services chapters of FTAs, investment chapters may also exclude certain activities from the scope of investment disciplines. For example, under the Japan-Mexico EPA, Mexico scheduled a list of activities reserved to the state—including telegraph services, postal services, and electricity distribution—for which foreign entry may be refused.

Table 3: Scheduling approaches

Agreement(s)	Listing of sectors	Listing of level of openness
Lao PDR-US BTA	Positive	Not applicable, as no trade-restrictive measures are scheduled
Mainland-Hong Kong CEPA; Mainland-Macao CEPA	Positive	Positive
ASEAN Framework Agreement on Services, Australia-Thailand FTA, India-Singapore ECA, Japan-Malaysia EPA, Japan-Singapore EPA, EFTA-Korea FTA, EFTA-Singapore FTA, Jordan-Singapore FTA, New Zealand-Singapore FTA, Vietnam-US BTA	Positive	Hybrid
Australia-Singapore FTA, Chile-Korea FTA, Japan-Mexico EPA, Trans-Pacific EPA	Negative	Negative
Singapore-Panama FTA, Singapore-US FTA	Negative, except for cross border trade in financial services for which a positive list is adopted	Negative
Korea-Singapore FTA	Negative, except for financial services for which a positive list is adopted	Negative, except for financial services for which a hybrid list is adopted

Once a sector is scheduled, the next question is how to set the level of openness in that sector. Interestingly, this question is not relevant for one of the East Asian FTAs—the Lao PDR-US BTA. For this agreement, Laos is committed to unrestricted market access in all listed sectors. National treatment is a general obligation, not subject to the scheduling of limitations.[10] However, the Lao PDR-US BTA should be considered a special case and, indeed, is unparalleled in its ambition. All other trade agreements in services allow parties to not immediately commit to free trade in sectors subject to liberalization undertakings. For the remaining twelve East Asian FTAs with a positive list of sectors, we observe two approaches for specifying levels of openness: pure positive lists and GATS-style hybrid lists.

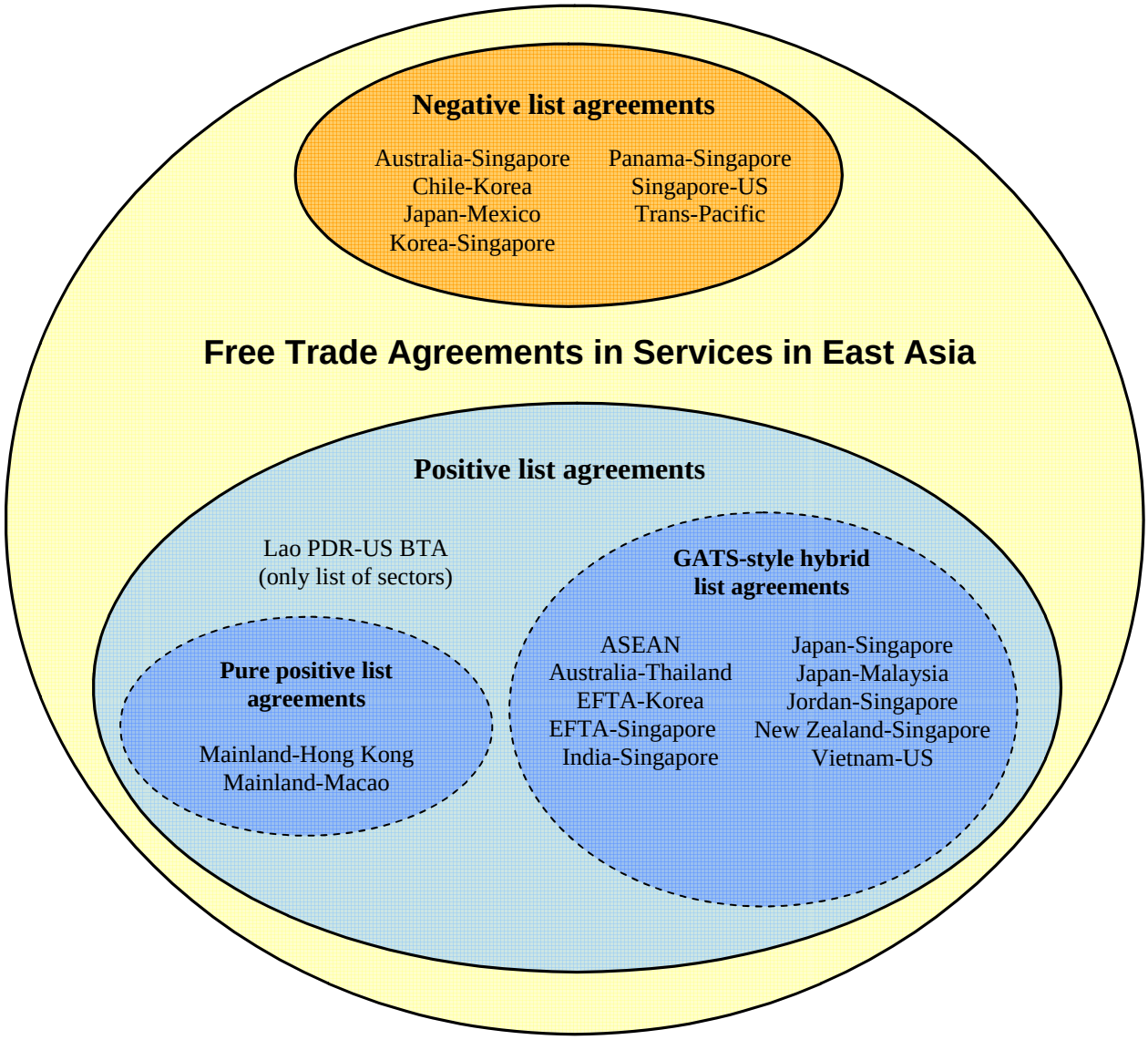
Pure positive list agreements

Under a pure positive list, parties to an agreement specify for each listed service sector the level (and type) of foreign participation that is allowed. Only two East Asian FTAs follow this approach: the Mainland-Hong Kong and the Mainland-Macao CEPAs. Interestingly, these two agreements do not establish classes of trade-restrictive measures, such as the ones created by the GATS market access and national treatment provisions (see Section 3.B). They also do not define any modes of supply, as is done for most other trade agreements in services (see below). In fact, the legal disciplines established by the agreements' services chapters are arguably the weakest among all the East Asian FTAs. Yet, China's market

[10] In principle, the agreement specifies that "*each party*" is not allowed to maintain any restriction on market access in the listed sectors and on national treatment. However, the agreement also provides that the obligations of the US are subject to the market access and national treatment limitations scheduled by the US under the GATS (see Articles 32 and 33 of the Lao PDR-US BTA). In addition, market access and national treatment do not apply to the United States with respect to the financial services sector (see Article 35 of the agreement).

opening undertakings under the two CEPAs grant service providers from Hong Kong and Macao substantial trade preferences—as will be further discussed in Section 4.

Figure 2: Classification of East Asian FTAs by scheduling approach



GATS-style hybrid list agreements

Under a GATS-style hybrid list, parties may define the level of openness in listed sectors either on a positive or negative list basis. In particular, agreements following this approach typically adopt the market access and national treatment provisions of the GATS (see Section 3.B). Schedules of commitments then specify the market access "terms, limitations and conditions" and national treatment "conditions and qualifications".[11] In other words, countries are free to describe either how trade is restricted or what type of services transactions are allowed in a listed sector. As a rule of thumb, an entry in a GATS schedule that takes the form "None, except …" signifies a negative list of trade-restrictive measures,

[11] See GATS Articles XVI.1 and XVII.1.

whereas an entry that takes the form "Unbound, expect …" signifies a positive list of market-opening concessions.[12]

One clarifying remark is in order. The GATS approach to the scheduling of commitments has frequently been referred to in the literature as a positive list approach. This terminology focuses only on the selection of sectors subject to trade commitments. For the purposes of this paper, we refer to GATS-style agreements as hybrid list agreements, because the fixing of the level of openness under this approach involves elements of both negative and positive listings.[13] We use the term positive list agreements to describe all agreements that adopt a positive list of sectors subject to trade commitments, encompassing the special case of the Lao PDR-US BTA, the pure positive list agreements, and the hybrid list agreements (see Figure 1).

Several features associated with the GATS-style hybrid list approach are worth pointing out. First, commitments in each listed sector are made with respect to four different modes of supply: cross-border trade (mode 1), consumption abroad (mode 2), commercial presence (mode 3), and movement of natural persons (mode 4).[14] In actual GATS schedules, most entries for modes 1, 2, and 3 set the level of openness on a negative list basis, whereas the great majority of entries for mode 4 are made on a positive list basis.

Eleven of the twelve East Asian hybrid list FTAs follow the structure of the GATS by distinguishing between four modes of supply and between market access and national treatment measures. The only exception is the Australia-Thailand FTA. Commitments under this agreement neither distinguish between modes of supply nor between market access and national treatment measures. To which mode and to which class of measures a particular commitment applies is determined by the nature of the scheduled entry. Compared to the GATS, this scheduling approach appears to reduce difficulties in scheduling measures that that may be inconsistent with both market access and national treatment obligations.[15]

Second, several GATS-style hybrid list agreements adopt an MFN obligation which is subject to the scheduling of reservations. However, MFN reservations are always inscribed on a negative list basis in relation to both service activities and trade restrictive measures. The precise meaning of MFN in a bilateral or regional agreement will be further discussion in Section 3.B.

Third, GATS-style schedules allow for horizontal commitments. Measures scheduled in these horizontal commitments apply to all listed service sectors, unless the wording of a sectoral commitment unambiguously indicates otherwise. In assessing the level of openness of specific service sectors, it is therefore critical to take these horizontal commitments into account. Sometimes they can be far-reaching—for example, a joint venture requirement with foreign equity participation limited to 49 percent, or an entry that limits the movement of individual service providers to specific types of intra-corporate transferees. In such cases they effectively set a low ceiling to the level of openness in all sectors. As will be further

[12] A negative list of trade-restrictive measures also prevails, when a scheduling member does not explicitly indicate "*None, except* …", but inscribes one or more limitations applying to a listed sector. For further details on the scheduling of GATS commitments, see WTO document S/CSC/W/19.

[13] Hoekman and Sauvé (1994), OECD (2002), and UNCTAD (1999) also characterize GATS-style agreements as hybrid list agreements.

[14] For a more comprehensive discussion of modes of supply, see Adlung and Mattoo (2006).

[15] The relationship between the GATS market access and national treatment disciplines has been subject to conflicting legal interpretations. See Mattoo (1997).

discussed in Section IV, some East Asian countries have reduced horizontal limitations in their FTA schedules relative to the GATS, whereas others have reproduced entirely what they committed horizontally under the GATS.

Fourth, GATS-style hybrid list agreements typically do not require signatories to make bindings at the level of actual openness. In fact, existing GATS commitments are often characterized as being less liberal than status quo policies—not least because substantial unilateral liberalization has taken place in many countries since the conclusion of the Uruguay Round of Trade Negotiations in 1994. A gap between bound and actual policies—a so-called binding overhang—may introduce uncertainty, because governments at any point can restrict foreign participation in their domestic service markets, as long as they stay within their trade commitments. The East Asian hybrid list FTAs similarly do not impose any requirement to bind at the actual level of actual openness.

However, the Japan-Malaysia EPA introduces an innovation that serves to reduce the uncertainty associated with a binding overhang. This agreement offers parties the possibility to identify in their schedules those service sectors in which a party agrees to bind status quo policies. In addition, the identified service sectors are subject to upward ratcheting: once a party eliminates a trade-restrictive measure, policy will automatically be bound at the more liberal level.[16]

Negative list agreements

Seven East Asian FTAs have adopted a negative list approach in scheduling their market opening commitments. Negative listing generally applies to both sectors and measures. In other words, trade is unrestricted across all service activities (except where a sectoral carve-out applies), unless scheduled limitations indicate otherwise.

Historically, one of the first major agreements to adopt the negative list model was the North American Free Trade Agreement (NAFTA) between Canada, Mexico, and the United States, which came into force in 1994. It is interesting to observe how this model found its way to East Asia. Singapore was the first country to adopt a negative list agreement in its FTA with the United States in 2003. Singapore has since pursued the negative list model in four other agreements, including its FTA with Korea. Japan adopted a negative list in the Japan-Mexico EPA in 2003. Finally, Korea's first negative list agreement was concluded with Chile in 2004—after Chile had concluded a negative list FTA with the United States in 2003. It appears that countries that conclude one negative list agreement seek to promote this model in subsequent agreements, an issue to which we return later.

Again, it is useful to review several key features of negative list agreements. First, these agreements typically establish separate disciplines for cross-border trade and investment in services. Cross-border trade in services in the negative list model covers the GATS equivalent of modes 1, 2, and 4, although commitments do not formally distinguish between these three modes of supply. The GATS equivalent of mode 3 is covered by a horizontal investment chapter that applies to both goods and services, though the typical investment disciplines go beyond those established by the GATS. Two agreements depart from this

[16] Article 99.3 of the Japan-Malaysia EPA provides that "*[w]ith respect to sectors or sub-sectors where the specific commitments are undertaken […] and which are indicated with "SS", any terms, limitations, conditions and qualifications […] other than those based on measures pursuant to immigration laws and regulations, shall be limited to those based on non-conforming measures, which are in effect on the date of entry into force of this Agreement*."

basic model. The Trans-Pacific EPA does not establish separate investment disciplines, but services supplied through commercial presence are covered under the agreement's services disciplines—reverting to the structure of the GATS. Similarly, the Australia-Singapore FTA covers commercial presence in the services chapter, but in this case separate investment disciplines still apply (see also the discussion in Section 3.C).

Second, trade in financial services receives separate treatment in several of the negative list FTAs. Two agreements—the Panama-Singapore FTA and the Singapore-US FTA—adopt a positive list of sub-sectors for cross-border trade in financial services. Trade restrictive measures continue to be scheduled on a negative list basis. The Korea-Singapore FTA extends the positive list of sub-sectors to investment in financial services and allows parties to determine the level of openness in each sub-sector through a hybrid list approach. In other words, the Korea-Singapore FTA fully adopts the GATS approach for the scheduling of financial services commitments. As illustrated in Table 2, three negative list FTAs—the Japan-Mexico EPA, the Korea-Chile FTA, and the Trans-Pacific EPA—carve out trade in financial services entirely from the scope of the agreement, leaving the Australia-Singapore FTA as the only agreement for which the negative list applies, in principle, to financial services.[17]

Third, negative list agreements establish additional classes of measures for the scheduling of specific commitments. Table 4 lists the classes of measures identified by the seven negative list FTAs in East Asia in the three areas subject to trade commitments: cross-border trade in services, investment, and trade in financial services. All seven FTAs provide for the scheduling of national treatment limitations. However, only 5 negative list FTAs establish market access obligations. Interestingly, the Chile-Korea FTA follows the original NAFTA model in requiring that quantitative restrictions be only notified. Four FTAs subject MFN treatment to the scheduling of limitations (see also Section 3.B).[18]

For cross-border trade in services, negative list agreements introduce a new class of measures: local presence requirements. This class reflects the fact that negative list agreements do not separately identify the GATS equivalent of mode 1. In hybrid list agreements, local presence requirements are implicitly dealt with by commitments under mode 1.

For investment, there are two new classes of measures: performance requirements and limitations on the nationality or residency of senior managers and boards of directors. These two classes of measures have their origin in bilateral investment treaties, on which the horizontal investment chapters of FTAs are based (see Section 3.C). Finally, for financial services, Singapore's FTAs with Panama and the United States allow for the scheduling of limitations on cross-border purchases of financial services—again, reflecting the absence of a distinction between modes of supply in the scheduling of commitments.

Fourth, negative list agreements allow for the scheduling of two categories of limitations: existing non-conforming measures and future measures. Existing non-conforming measures include all current laws and regulations that a country seeks to maintain, but which would be inconsistent with one or more of the obligations listed in Table 4. By definition, limitations scheduled in this category reflect status quo policies. In addition, all seven negative list

[17] As described further below, however, Singapore scheduled several broad future measures in financial services, substantially limiting the scope and depth of its liberalization undertaking.

[18] As explained in Section 3.B, a negative list of MFN exemptions is also found in several hybrid list agreements.

FTAs provide for upward ratcheting of policy bindings: once a trade-restrictive measure identified in this category is eliminated, policy will automatically be bound at the more liberal level.

Table 4: Classes of measures in negative list agreements

	(Cross-border) trade in services	**Investment**	**Trade in financial services**
Australia-Singapore FTA	National treatment, market access	National treatment	(Not treated separately)
Trans-Pacific EPA	National treatment, MFN treatment, market access	(No separate investment disciplines, but investment is covered by commercial presence mode of supply in services chapter)	--
Chile-Korea FTA	National treatment, local presence requirements Quantitative restrictions (notifications only)	National treatment, performance requirements, limitations on senior managers and boards of directors	--
Japan-Mexico EPA	National treatment, MFN treatment, local presence requirements	National treatment, MFN treatment, performance requirements, limitations on senior managers and boards of directors	--
Korea-Singapore FTA	National treatment, market access, local presence requirements	National treatment, performance requirements, limitations on senior managers and boards of directors	National treatment and market access
Panama-Singapore FTA, Singapore-US FTA	National treatment, market access, MFN treatment, local presence requirements	National treatment, market access, MFN treatment, performance requirements, limitations on senior managers and boards of directors	Cross-border trade: national treatment, MFN treatment, limitations on cross-border purchases of financial services Investment: national treatment, market access, MFN treatment, and limitations on senior managers and boards of directors

Future measures are reservations that do not necessarily relate to existing laws and regulations. They allow a country to introduce new measures in the relevant sectors at any point after an agreement enters into effect. The scope of future measures is defined through their sectoral coverage and the description outlining the reserved policy actions. Broad future measures can de facto exclude full sectors from an agreement's market opening obligations—equivalent to not listing a sector or inscribing 'unbound' for one or more modes of supply under a positive list scheduling approach. For example, under the Korea-Singapore FTA, Korea scheduled a future measure under which the government reserves "*the right to adopt*

or maintain any measure with respect to (a) broadcasting services […] (b) foreign investment in the broadcasting services sector".

Positive versus negative list scheduling: an assessment

Does an FTA's approach towards scheduling commitments matter? Some observers have argued that a negative list approach provides for greater transparency and lends greater credibility to services trade policies.[19] Knowing what is not allowed—rather than allowed—may help service providers better understand how they can do business in a foreign country.[20] In addition, as described above, non-conforming measures scheduled under a negative list reflect status quo policies. Thus, businesses are better informed about the actual level of openness in an FTA partner and are directly pointed to the laws and regulations affecting their ability to contest the FTA partner's market. Status quo bindings also maximize the credibility value of trade commitments, as foreign service suppliers are assured that actual policies will not become more restrictive.

The scheduling approach may affect an FTA's negotiating outcome, too. Under a negative list, governments need to reveal existing non-conforming measures in the course of FTA negotiations and, if they wish to maintain those restrictions, defend their rationale. This process may create greater incentives for eliminating unwarranted restrictions. Another pro-liberalization feature of negative list agreements is that they apply to future service activities, because those activities would not be subject to limitations at the time FTAs are concluded. New service activities may emerge from technological progress or new ways of organizing business and an automatic commitment to free trade may pre-empt protectionist pressures.

Having said this, there are several considerations that question the superiority of negative list agreements along these lines. First, the transparency value of knowing what is not allowed would seem to depend on the level of openness. Where few trade restrictions prevail, a negative list may indeed be more transparent. But where trade-restrictive measures take the size of a 'telephone book', knowing what is allowed may equip foreign businesses with a better understanding of how they can do business.

Second, it is in principle possible to replicate every negative list schedule with a positive list schedule. In addition, GATS-style hybrid list agreements allow for the scheduling of measures on a negative list basis, preserving possible transparency benefits associated with negative listing. Theoretically, a positive list of sectors can even apply to future service activities by covering residual service sectors, such as 'other business services,' 'other financial services,' or 'other services not included elsewhere.'[21]

Third, benefits associated with status quo bindings are not necessarily limited to negative list agreements. The Japan-Malaysia EPA illustrates that a requirement to schedule at the level of existing policies can also be incorporated into a pure positive list or hybrid list agreement. Conversely, the possibility of scheduling future measures opens the door for excluding certain service activities from liberalization undertakings and binding policy above status quo

[19] For example, see Hoekman and Sauvé (1994) and Stephenson (2002).

[20] See OECD (2002).

[21] In practice, however, commitments with a positive list of sectors do not seem to provide substantial coverage of these residual categories. Negative list agreements therefore appear to be more liberalizing with respect to future service activities.

levels in negative list agreements—diluting the difference between hybrid list and negative list agreements.[22]

Some observers have also argued that a positive list of sectors combined with the possibility of binding above status quo policies may provide important breathing room to governments.[23] Such breathing room may be needed in cases where governments have limited administrative capacity to compile an inventory of all trade-restrictive measures, including at the sub-federal level, or in sectors where there are sensitivities towards foreign participation.

In this context, it is interesting to note that three of the East Asian negative list FTAs have partially or fully reverted to a positive list in scheduling commitments for financial services—a sector where regulatory sensitivities towards foreign participation are common. As pointed out above, three of the remaining four negative list FTAs have carved out the financial service sector altogether, leaving the Australia-Singapore FTA as the only agreement in which the negative list applies to financial services. However, Singapore scheduled several broad future measures under this FTA, preserving its freedom to maintain or impose restrictions on the supply of financial services by Australian institutions. For example, one such future measure reserves Singapore's right "*[…]to adopt or maintain any measure affecting the supply of services by foreign full banks or in relation to Qualifying Full Bank licenses.*"[24]

In sum, the structure of negative list agreements may not be conducive to promote market opening in particularly sensitive sectors. In contrast, positive list agreements seem to afford governments the ability to tailor commitments to better accommodate regulatory concerns. They may thus give governments the confidence to embark on some liberalization rather than fully excluding sensitive sectors.

Finally, possible transparency and liberalization benefits of negative list agreements depend crucially on the nature of non-confirming and future measures scheduled. If non-conforming measures do not list all relevant laws and regulations, businesses may not be able to draw an accurate picture of the level of openness of an FTA partner. Reservations that exempt a broad range of measures can seriously reduce the liberalization content of trade commitments. Three examples of non-conforming measures and future measures in East Asian negative list FTAs that are seemingly incomplete and broad are worth pointing out:

- In the Singapore-US FTA, the United States scheduled a non-conforming measure that effectively exempts "*[a]ll existing non-conforming measures of all states of the United States, the District of Columbia, and Puerto Rico.*"[25] No state law or regulation is explicitly listed under this reservation, making it difficult for a Singaporean service provider to assess possible US trade barriers at the state level.[26]

[22] This point is discussed more fully in World Bank (2004).

[23] See UNCTAD (2004) for further elaboration.

[24] See Annex 4-II(B) of the Australia-Singapore FTA.

[25] See Annex 8A of the Singapore-US FTA.

[26] The Japan-Mexico EPA recognizes the burden of collecting information on all trade-restrictive measures applied at the sub-federal level. But instead of scheduling a single reservation like the one described for the US, Mexico committed to list all non-conforming measures applied by Mexican states within one year after entry into force of the FTA.

- In the same FTA, the United States scheduled a non-conforming measure under which it "*[…] reserves the right to adopt or maintain any measure that is not inconsistent with the United States' obligations under Article XVI of the General Agreement on Trade in Services.*"[27] This limitation appears to nullify all market access concessions that the US offered to Singapore and that go beyond the US GATS commitment.[28] Moreover, fully understanding how open US service markets are for Singaporean service providers requires a careful reading of the US GATS commitment. Given that the latter follows a hybrid list approach, the presumed transparency value of the negative list seems seriously undermined.

- In the Japan-Mexico EPA, Mexico scheduled a future measure under which it "*[…] reserves the right to adopt or maintain any measure relating to the supply of services in any mode of supply in which those services were not technically feasible at the time of entry of force of this Agreement.*" This reservation effectively denies the application of the agreement to future service activities—one of the supposed benefits of negative listings.

In Section 4, we will compare the liberalization content of FTAs with different scheduling approaches in quantitative terms. But from our analysis so far, we can already make two observations. First, benefits associated with greater transparency, enhanced credibility and stronger incentives for committing to liberal trade policies may emerge from rules that require countries to bind status quo policies and that allow for an upward ratcheting of policy bindings once trade-restrictive measures are unilaterally liberalized. These rules exist in all East Asian negative list FTAs. However, the Japan-Malaysia EPA illustrates that they can also be incorporated into positive list FTAs. Second, positive list FTAs may provide breathing room to governments that do not have the capacity to compile an inventory of all non-conforming measures or where governments want to retain the flexibility to introduce trade-restrictive measures at a future point in time—as is illustrated by the treatment of financial services in East Asian FTAs.

These two findings suggest that causality not only runs from the scheduling approach to the transparency, credibility and liberalization outcome, but also the other way around. Trading partners which have limited administrative capacity to take stock of all their existing measures and which are cautious in committing to market opening in services may be more likely to adopt a positive list approach and shun rules requiring status quo bindings and upward ratcheting. By contrast, countries that have a good understanding of all measures affecting trade in services and that are prepared to open up are more likely to adopt negative list agreements and accept status quo binding and ratcheting rules. From this view, it is not surprising that countries such as Japan, Korea, and Singapore that have negotiated at least one negative list FTA, will seek the adoption of negative lists in subsequent FTAs, as they already went through the exercise of identifying all their non-conforming measures.

As a final consideration, the transparency, credibility and liberalization value of any FTA commitment depends crucially on the nature of trade-restrictive measures scheduled—as illustrated by the examples of non-conforming and future measures described above. Indeed,

[27] See Annex 8A of the Singapore-US FTA.

[28] The transparency of the US commitment in the Singapore-US FTA is reduced by another provision of this agreement. Schedules of non-conforming measures contain both a description of the relevant measures and a reference to the relevant laws and regulations. Article 2(g) of Annex 8 of the Singapore-US FTA provides that "*description, for Singapore, sets out the non-conforming aspects of the measure for which the entry is made; and description, for the United States, provides a general, non-binding, description of the measures*".

it can be argued that the scope and nature of scheduled limitations is in the end more significant than the scheduling approach as such.

B. Main disciplines

Trade agreements establish rules that constrain governments from maintaining policies that adversely affect foreign participation in the domestic economy. In the area of trade in services, these rules take the form of disciplines on national treatment, market access, MFN treatment, domestic regulation, dispute settlement, and other matters. In what follows, we briefly review the main disciplines that determine the liberalization content of FTAs—national treatment, market access, and MFN treatment. Other disciplines will be discussed later in this section. For ease of reference, Appendix 1 offers a comprehensive overview of the most relevant disciplines found in the 20 East Asian FTAs analyzed in this paper.

National treatment

National treatment is one the main disciplines that ensures the contestability of services markets by foreign suppliers. It mandates that imported services do not face more restrictive policy measures than domestically supplied services. As discussed in Section 3.A, the Lao PDR-US BTA incorporates a general national treatment obligation, applying to all service activities. All other agreements allow parties to not immediately provide for non-discriminatory treatment of foreign supplied and domestically supplied services. Depending on the scheduling approach of FTAs, departures from national treatment are inscribed in schedules of specific commitments or in lists of non-conforming and future measures. Two agreements—the Mainland-Hong Kong and Mainland-Macao CEPAs—do not expressly establish a national treatment discipline, though China's market opening schedules under these agreements implicitly allow for departures from national treatment.

Table 5: National treatment provision

Agreements	Standard of likeness
ASEAN Framework Agreement on Services, Australia-Singapore FTA, Australia-Thailand FTA, EFTA-Singapore FTA, India-Singapore ECA, Japan-Malaysia EPA, Japan-Singapore EPA, EFTA-Korea FTA, Lao PDR-US BTA, Jordan-Singapore FTA, New Zealand-Singapore FTA, Vietnam-US BTA	Like services and service suppliers
Panama-Singapore FTA, Singapore-US FTA	In like circumstances, referring to service suppliers
Chile-Korea FTA, Japan-Mexico EPA, Korea-Singapore FTA, Trans-Pacific EPA	In like circumstances, referring to services and service suppliers
Mainland-Hong Kong CEPA, Mainland-Macao CEPA	No explicit national treatment discipline

Note: The standard of likeness indicated here refers to the national treatment provision of FTAs' services chapter. Different standards may prevail in the investment chapter of FTAs. Appendix 1 offers more details.

The reach of the national treatment obligation depends crucially on whether foreign and domestic services are considered alike. If likeness were defined narrowly such that only few imported services would be considered like domestically supplied services, the reach of

national treatment would be limited. In this context, it is interesting to observe that the standard of likeness in services agreements is not uniform. Table 5 offers an overview of the different standards found in East Asian FTAs.

The hybrid list agreements, the Lao-PDR US BTA, and the Australia-Singapore FTA have adopted the language of GATS Article XVII, which mandates no less favorable treatment to "like services and service suppliers." By contrast, national treatment in all negative list agreements except the Australia-Singapore FTA applies in "like circumstances". Within this latter group, a further distinction is made in that the national treatment provision of two agreements—the Panama-Singapore FTA and the Singapore-US FTA—only applies to service suppliers, whereas the other four negative list agreements refer to services and service suppliers.

These seemingly small semantic differences can have non-trivial implications for the level of openness established by trade agreements. Which standard of likeness is narrower or broader raises complex legal issues and will depend on the factual situation in question. For example, where national treatment refers to both services and service suppliers, is likeness met if only services are like but service suppliers are unlike? Or do both services and service suppliers have to be like? Consider a car manufacturer that provides consumer loans to promote the purchase of its automobiles. Would the car manufacturer's lending service be like a lending service supplied by a bank? Would the car manufacturer and the bank be like service suppliers or acting in like circumstances, if the former is not subject to the same prudential regulations? Finally, does likeness extend across different modes of supply? Are online gambling services supplied from foreign territories like online gambling services supplied domestically? So far, there has been no jurisprudence that could give guidance in answering these types of questions.[29]

Market access

Market access is the second main discipline that determines the liberalization content of FTAs. The measures covered by the market access discipline fall under an exhaustive catalogue of explicit trade barriers. Under the GATS, the market access provision encompasses four types of quantitative restrictions, limitations on the form of legal establishment, and restrictions on foreign equity participation.[30] Measures covered may be discriminatory or non-discriminatory in nature.[31]

All but four East Asian FTAs contain disciplines on market access. As discussed in Section 3.A, market access is subject to the scheduling of specific commitments or non-conforming and future measures, depending on the agreement's scheduling approach. The catalogue of measures covered by these agreements mirrors the one adopted by the GATS, with one exception. Four negative list agreements—the Korea-Singapore FTA, the Singapore-Panama FTA, the Singapore-US FTA, and the Trans-Pacific EPA—do not cover restrictions on

[29] Johnson (2001) discusses the concepts of "like circumstances" and "like service and service suppliers" in the context of NAFTA disciplines on investment. See also Mattoo (1997).

[30] See GATS Article XVI.2. The four types of quantitative restrictions are limitations on the number of service suppliers, on the total value of service transactions or assets, on the total number of service operations or on the total quantity of service output, and on the total number of natural persons.

[31] See WTO document S/CSC/W/19. The overlap between market access and national treatment measures is addressed in GATS Article XX, which specifies that measures inconsistent with both market access and national treatment are to be scheduled under market access and would then be considered as a limitation on national treatment as well.

foreign equity participation under market access. In the case of the Korea-Singapore FTA, market access does not apply to investment in services and the question of foreign equity participation thus does not arise. In the other three cases, foreign equity limitations would likely be covered under the agreements' national treatment obligation, because they are discriminatory in nature. In other words, the absence of foreign equity restrictions in the catalogue of market access measures does not appear to fundamentally alter the scope of measures covered by liberalization undertakings.

As discussed in Section 3.A, China's two CEPAs with Hong Kong and Macao do not establish an explicit market access obligation, though market access-type measures are implicitly covered in China's schedule of specific commitments. The Japan-Mexico EPA and the Chile-Korea FTA also do not establish a market access discipline. In these two FTAs, non-discriminatory market access-type measures are truly excluded from the agreements' liberalization undertakings. The Chile-Korea FTA features a provision that requires parties to set out all quantitative restrictions they maintain. But this provision does not bind governments to the notified measures, as new quantitative restrictions can be listed at any time. The treatment of quantitative restrictions in the Chile-Korea-FTA replicates the original NAFTA model, which also did not establish a binding market access discipline.

Most favored nation treatment

The MFN principle is one of the cornerstones of the multilateral trading system. It obliges WTO members to not discriminate between trading partners. Under the GATS, MFN is a general discipline, applying to all service sectors even if no specific commitments are undertaken.[32] However, it is subject to two exceptions: the conclusion of regional trade agreements and certain reservations scheduled by WTO members on a negative list basis.[33] The former will be discussed in greater detail in Section 5. The latter were negotiated as part of the original GATS agreement and were supposed to be temporary, though they have so far not been eliminated.[34]

What is the role of the MFN principle in bilateral and regional free trade agreements? One can distinguish between two such roles. First, regional trade agreements involving more than two countries may wish to establish an MFN obligation to establish non-discriminatory treatment between service providers from countries within the region. In East Asia, this is the case for the ASEAN Framework Agreement on Services (AFAS), which calls for preferential treatment to be accorded on an MFN basis. Interestingly, a 2003 amendment to the AFAS allows for departure from MFN if two or more members agree to liberalize trade in services faster than the remaining ASEAN members. The rationale for this so-called ASEAN-X formula was to advance negotiations among member countries that are ready and willing to commit to more open service markets. The adoption of this formula is a textbook illustration of the bargaining handicap associated with MFN-based negotiations, as discussed in Section 2.

The second type of MFN provision found in FTAs focuses on the treatment of parties versus non-parties. A number of East Asian services agreements require that trade preferences

[32] However, the MFN obligation does not apply to service activities that are carved out from the scope of the GATS, such as core air transport services (see Section 3.A).

[33] A third exception pertains to the conclusion of recognition agreements, as discussed in Section 3.D.

[34] GATS Annex II, Art. 6, provides that "*[i]n principle, such exemptions should not exceed a period of 10 years*". However, that period elapsed on January 1st, 2005 without achieving the elimination of GATS MFN reservations. For a detailed discussion of the MFN principle in the GATS, see Mattoo (1999).

accorded to non-parties are extended to FTA parties. As in the GATS, this extra-regional MFN clause is subject to a negative list of reservations. Several other East Asian services agreements establish a non-binding extra-regional MFN provision, merely requiring countries to favorably consider requests from other parties to extend benefits granted to a non-party.

The bargaining incentives created by an extra-regional MFN obligation are somewhat different from the well-known free-riding handicap discussed in Section 2. For any given FTA, each country has an incentive to ask its trading partner for MFN treatment, as it ensures that domestic service providers benefit from current and future trade preferences extended to non-parties. But a country bound by many extra-territorial MFN obligations becomes a less attractive negotiating partner for future FTAs. Potential new FTA partners know that any negotiated preference will be extended automatically to others. As a consequence, the bargaining advantage offered by FTAs with a small number of players is undermined and incentives to negotiate at the multilateral level are strengthened.

Table 6: MFN provisions

Agreement(s)	Type of MFN provision
ASEAN Framework Agreement on Services	Intra-regional MFN obligation subject to ASEAN-X formula
Japan-Malaysia EPA, Japan-Mexico EPA, EFTA-Korea FTA, EFTA-Singapore FTA, Panama-Singapore FTA, Singapore-US FTA, Trans-Pacific EPA, Vietnam-US BTA	Extra-regional MFN obligation subject to a negative list of reservations
Australia-Thailand FTA, India-Singapore ECA, Japan-Singapore EPA	Non-binding extra-regional MFN provision
Australia-Singapore FTA, Chile-Korea FTA, Korea-Singapore FTA, Lao PDR-US BTA, Mainland-Hong Kong CEPA, Mainland-Macao CEPA, Jordan-Singapore FTA, New Zealand-Singapore FTA	No MFN disciplines

Notes: The type of MFN provision indicated here refers to FTAs' services chapter. Different types may prevail in the investment chapter of FTAs. Appendix 1 offers more details. The MFN obligation of the EFTA-Korea and EFTA-Singapore FTAs does not apply to agreements concluded by one of the parties and notified under GATS Article V.

Table 6 offers an overview of the different type of MFN provisions found in the 20 East Asian FTAs analyzed here. No clear pattern can be discerned: there are almost as many FTAs without an MFN clause as there are with an extra-territorial MFN obligation. In addition, the approach to MFN treatment cannot be associated with the basic structure of the agreement: one finds negative list agreements with and without MFN disciplines, as one finds positive list agreements with and without MFN disciplines. Having said this, one distinguishing feature of MFN clauses can be associated with the basic FTA structure. As in the case of national treatment, negative list agreements provide for MFN in 'like circumstances' whereas the hybrid list agreements have adopted the 'like services and service suppliers' language found in the GATS.[35] The interpretive questions raised above on the different standards of likeness thus apply equally to the MFN discipline.

[35] In particular, those FTAs that provide for MFN treatment adopt the language on likeness found in the agreements' respective national treatment articles, as shown in Table 4.

C. Investment in services

For historical reasons, many FTAs establish two different sets of disciplines for investment in services. On the one hand, investment is considered a mode of supply in the services chapters of numerous agreements. Given that many services require the physical proximity of suppliers and consumers, the concept of trade in services has typically been defined more broadly than trade in goods to also include services supplied through commercial presence abroad. Under the GATS, commercial presence is one of four modes of supply and FTAs that have adopted the GATS model have followed this approach.

On the other hand, countries have for long time concluded bilateral investment treaties (BITs) that establish horizontal disciplines for investment in goods and services. No such horizontal investment disciplines have so far been established under the WTO.[36] But most FTAs negotiated in recent years have included separate investment chapters that are largely based on the BIT model. Indeed, a number of agreements—notably those that strictly follow the NAFTA model—cover investment in services exclusively through horizontal investment disciplines. However, the majority of East Asian FTAs feature both services disciplines covering commercial presence and horizontal investment disciplines.

The dual coverage of investment in services raises several questions about the transparency and depth of liberalization undertakings. In what follows, we first compare the definition of investment and the key obligations established by the two different sets of disciplines. We then describe how FTAs have sought to address possible inconsistencies between services and investment chapters, evaluating the advantages and drawbacks of the different approaches encountered.[37]

Definition of investment and key obligations

Table 7 provides an overview of the treatment of investment in the 20 East Asian FTAs analyzed in this paper. Sixteen agreements have incorporated horizontal investment disciplines. The definition of investment in most of these sixteen agreements is broad, covering foreign direct investment, portfolio investments, and various forms of tangible and intangible property.[38] Only two agreements depart from this broad definition. The Framework Agreement on the ASEAN Investment Area (AIA) and the Australia-Thailand FTA limit the scope of horizontal investment disciplines to foreign direct investment (FDI). The former does not further define FDI, whereas the latter refers to the International

[36] WTO members considered the establishment of a multilateral investment agreement in the initial stages of the Doha Development Agenda. But no consensus on launching negotiations in this area could be formed and the topic was removed from the DDA's work programme as part of the July 2004 General Council Decision.

[37] See Roy (2003) for a general discussion of the treatment of investment in services under services and investment disciplines.

[38] For example, under the Singapore-US FTA "*investment means every asset owned or controlled, directly or indirectly, by an investor, that has the characteristics of an investment. Forms that an investment may take include: (a) an enterprise; (b) shares, stock, and other forms of equity participation in an enterprise; (c) bonds, debentures, other debt instruments, and loans; (d) futures, options, and other derivatives; (e) turnkey, construction, management, production, concession, revenue-sharing, and other similar contracts; (f) intellectual property rights; (g) licenses, authorizations, permits, and similar rights conferred pursuant to applicable domestic law; and (h) other tangible or intangible, movable or immovable property, and related property rights, such as leases, mortgages, liens, and pledges*" (Article 15.1, para. 13, footnotes omitted).

Monetary Fund's definition of FDI which uses a 10 percent ownership threshold to distinguish FDI from portfolio investment.[39]

The definition of commercial presence in FTAs' services chapters is substantially narrower. Most FTAs that incorporate commercial presence as a mode of supply subject to services disciplines follow the GATS definition of commercial presence. This definition covers only foreign investments in services where the foreign investor holds more than 50 percent of the equity interest or exercises control over the foreign invested enterprise.[40] Foreign investments with a minority equity stake and no exercise of control are not covered by the scope of services disciplines, though they would typically be covered by horizontal investment disciplines (either as FDI or portfolio investment).[41]

Appendix 1 offers an overview of the most relevant disciplines found in the services and investment chapters of FTAs. The key obligations established by the two sets of disciplines are similar in one respect. Where services or horizontal investment disciplines exist, they always establish a national treatment obligation. At the same time, services chapters provide for a market access discipline, which is not always incorporated into investment chapters. In addition, services chapters often establish service-specific rules on domestic regulation not found in horizontal investment disciplines. By contrast, several obligations are, in principle, unique to investment chapters: prohibitions of performance requirements, bans on residency requirements for senior managers and boards of directors, regulations against direct and indirect expropriation, and guarantees on the free transfer of funds. Having said this, to the extent that measures covered by these obligations are discriminatory, they may also be subject to the national treatment obligation of services chapters. Finally, all horizontal investment disciplines provide for investor-state dispute settlement, which is not available under any of the services chapters (see Section 3.G).

Relationship between services and investment disciplines

In principle, the dual coverage of investment in services can be complementary or overlapping. Complementary coverage occurs whenever an investment transaction is covered by one set of disciplines, but not the other. It can emanate either from the different definitions of investment or from the different obligations established by the two sets of disciplines, as described in the previous section. Governments may specifically seek this type of complementary coverage. A horizontal investment chapter promotes equal treatment of investors in manufacturing and services and may thus promote a more transparent investment regime for multinational enterprises that are engaged in both manufacturing and the provision of services. At the same time, a parallel services chapter allows governments to

[39] The IMF's Balance of Payments Manual defines a direct investment enterprise "*as an incorporated or unincorporated enterprise in which a direct investor, who is resident in another economy, owns 10 percent or more of the ordinary shares or voting power (for an incorporated enterprise) or the equivalent (for an unincorporated enterprise)*" (International Monetary Fund, 1993).

[40] Three East Asian FTAs—the Trans-Pacific EPA, the Lao PDR-US BTA, and the New Zealand-Singapore FTA—do not provide for a definition of what constitutes a 'juridical person of the other party', along the lines of GATS Article XXVIII(m). There is thus no link between the concept of commercial presence and ownership or control. The range of investments in services covered by these three agreements remains unclear. Since the structure of these FTAs' services chapter follows in many ways the GATS, can one assume that the GATS criteria of majority ownership or control apply? Or does the absence of a definition imply that any level of foreign participation in a juridical person would be covered?

[41] The GATS definition of commercial presence extends to "*the creation or maintenance of a branch or a representative office*" (Article XXVIII). These forms of foreign presence appear to be covered also under the definition of investment adopted by horizontal investment chapters.

establish disciplines specific to the service sector, such as market access and domestic regulation.

Table 7: The treatment of investment in services

Agreement(s)	Definition of commercial presence in services chapter	Definition of investment in horizontal investment disciplines	Relationship between services and horizontal investment disciplines
Mainland-Hong Kong CEPA, Mainland-Macao CEPA	--	--	No substantial disciplines on either services or investment
Lao PDR-US BTA, Trans-Pacific EPA	GATS definition of commercial presence	--	No investment disciplines, only services disciplines apply
Chile-Korea FTA, Japan-Mexico EPA, Korea-Singapore FTA, Panama-Singapore FTA, Singapore-US FTA	--	FDI, portfolio investment and various forms of tangible and intangible property	No services disciplines, only investment disciplines apply
ASEAN Framework Agreement on Services/ASEAN Investment Area (AIA)	Not explicitly defined, but implicitly follows GATS	Foreign direct investment (not further defined)	AIA does not apply to investment in services
Australia-Thailand FTA	GATS definition of commercial presence	Foreign direct investment, as defined by IMF	One single schedule of commitments for services and investment
Australia-Singapore FTA	GATS definition of commercial presence	FDI, portfolio investment and various forms of tangible and intangible property	One single schedule of commitments for services and investment
US-Vietnam BTA, India-Singapore ECA, Japan-Malaysia EPA, Jordan-Singapore FTA	GATS definition of commercial presence	FDI, portfolio investment and various forms of tangible and intangible property	Services chapter prevails in case of inconsistencies
EFTA-Singapore FTA, New Zealand-Singapore FTA, EFTA-Korea FTA	GATS definition of commercial presence	FDI, portfolio investment and various forms of tangible and intangible property	The investment chapter's national treatment and MFN obligations do not apply to commercial presence as governed by services chapter
Japan-Singapore FTA	GATS definition of commercial presence	FDI, portfolio investment and various forms of tangible and intangible property	Relationship not expressly defined. Singapore has scheduled a reservation giving precedence to the services disciplines in case of inconsistencies with the investment chapter's obligations on national treatment and performance requirements.

Overlapping coverage occurs whenever measures affecting foreign investment in services are covered by both sets of disciplines. In principle, such overlaps would not pose a problem if the disciplines and levels of openness under the services and investment chapters were identical. However, suppose that a measure is allowed in one chapter, but prohibited in the other chapter. Which chapter would prevail? Inconsistencies of this type would undermine the transparency of the investment regime and may even give rise to legal conflicts. To remedy such inconsistencies, most East Asian FTAs that provide for dual coverage of investment in services have established rules that define the relationship between the services chapter and the horizontal investment chapter. These rules are described in the last column of Table 7.

The Framework Agreement on the AIA has taken the most drastic approach in simply removing investment in services from the scope of investment disciplines.[42] This approach avoids any type of inconsistency, but does not provide the benefit of truly horizontal investment disciplines. Four agreements—the India-Singapore ECA, the Japan-Malaysia EPA, the Jordan-Singapore FTA, and the US-Vietnam BTA—have established a rule that gives precedence to the services chapter in case of inconsistencies.[43] Investment disciplines still apply insofar they affect matters not covered by the services chapter. This rule again avoids inconsistencies between the two chapters and, at the same time, preserves some of the benefits of horizontal investment disciplines. However, the transparency of the investment regime is reduced, as an understanding of what type of investments are (not) allowed requires joint reading of the two chapters and possible interpretation of what might be considered an inconsistency. [44]

Three agreements—the EFTA-Singapore FTA, the New Zealand-Singapore FTA, and the EFTA-Korea FTA—have adopted a different approach. They provide that the national treatment and MFN obligations of the investment chapter do not apply to measures affecting commercial presence as governed by the services chapter. Since national treatment and MFN are the only two overlapping obligations in these FTAs, direct inconsistencies between the two chapters are avoided. This approach provides for somewhat greater transparency, as the liberalization content related to commercial presence is solely determined by the services chapter and no judgment is necessary about what might be considered an inconsistency. However, a full understanding of the investment regime for services still requires joint reading of the services and investment chapters, as the investment chapter's national

[42] A 2001 amendment to the Framework Agreement on the AIA increases the scope of the AIA to include services incidental to manufacturing, agriculture, fishery, forestry, and mining and quarrying. The relationship between ASEAN Framework Agreement on Services and the AIA for these service activities is not further defined.

[43] In the case of the Japan-Malaysia EPA, the precedence of services discipline only applies to inconsistencies with the investment chapter's obligations on national treatment, MFN, and performance requirements. The investment chapter takes precedence in the case of inconsistencies with all other investment disciplines. In the case of the US-Vietnam BTA, precedence of services disciplines only applies to inconsistencies between "*provisions set forth*" in parties' schedule of specific services commitments and the BTA's investment disciplines (see Article VII.6).

[44] For example, suppose that a sector is not subject to specific service commitments but no investment reservations are listed in that sector. Would this situation be considered an inconsistency, as one could argue that the right to restrict investment is afforded by one set of disciplines and denied by another? A side letter to the Jordan-Singapore BIT on this question makes clear that such a case would indeed be considered an inconsistency. The same conclusion may be drawn for the US-Vietnam BTA, which stipulates that the investment disciplines "*shall not be construed or applied in a manner that would deprive a Party of rights*" provided for in the schedule of specific services commitments (see Article VII.6). The other two agreements do not explicitly address this question.

treatment and MFN obligations still apply to those forms of investments not covered by the services chapter—notably investments with a minority equity stake and no effective foreign control.[45]

The Australia-Thailand FTA and the Australia-Singapore FTA have adopted yet another approach to avoiding inconsistencies. Liberalization undertakings in these two agreements are inscribed in one single schedule of commitments, which also covers investment in goods. This approach offers the benefit of consulting only one schedule of commitments to determine the level of openness of the investment regime. Among all the agreements with dual coverage of investment in services, it appears to offer the most transparent solution to avoiding potential inconsistencies between services and investment disciplines.[46]

Finally, the Japan-Singapore FTA does not establish any rule defining the relationship between services and investment disciplines. In addition, while services commitments are scheduled on a hybrid list basis, investment reservations are scheduled on a negative list basis and the two commitment schedules do not provide for identical sectoral coverage. In principle, this approach seems to offer the least transparent treatment of investment in services and may even open the door to inconsistencies between services and investment disciplines. Having said this, Singapore has scheduled a reservation which stipulates that (i) the investment chapter's obligations on national treatment and performance requirements do not apply to sectors for which no specific services commitments are undertaken; and (ii) services disciplines take precedence over investment disciplines where sectors are subject to specific services commitments.[47] This reservation eliminates potential inconsistencies and improves on transparency along the lines discussed above. Interestingly, no such reservation is found in the case of Japan.

D. Movement of natural persons

As in the case of investment, the inclusion of labor movements in trade agreements on services stems from the fact that the provision of many services requires the physical proximity of suppliers and consumers. At the same time, trade agreements typically seek the freeing of only certain labor flows—those directly linked to the provision of services, as distinct from permanent migration.

The supply of services through the movement of natural persons is recognized as the fourth mode of delivery by the GATS. However, many observers have pointed out that WTO members have so far made only limited commitments in this area.[48] A natural question therefore is whether FTAs have been able to make any progress. In Section 4, we will seek to assess this question empirically. In what follows, we will focus on two issues that escape our empirical analysis.

[45] However, the EFTA-Singapore FTA extends the non-application of national treatment and MFN to all investments in services.

[46] Theoretically, the EFTA-Singapore FTA, the New Zealand-Singapore FTA, the EFTA-Korea FTA, the Australia-Thailand FTA and the Australia-Singapore FTA leave the door open to potential inconsistencies between obligations not subject to liberalization undertakings.

[47] See Annex V.B of the Japan-Singapore FTA.

[48] See, for example, Mattoo and Carzaniga (2003).

First, we will review the different architectural approaches adopted by the East Asian FTAs towards the movement of natural persons. Even though an evaluation of the depth of liberalization undertakings on mode 4 invariably requires careful reading of all relevant commitments, certain architectural choices influence the transparency and depth of commitments. Second, we will discuss the contribution of East Asian FTAs with respect to the recognition of professional qualifications. For many professional services, trade may only be commercially attractive if trading partners recognize the credentials of foreign professionals. As discussed in Section 2, FTAs may offer a fertile forum for this type of regulatory cooperation and we will evaluate to what extent East Asian FTAs have lived up to this promise.

Architectural considerations

In considering the different architectural approaches towards labor mobility encountered in East Asian FTAs, a natural starting point is the treatment of the movement of natural persons at the multilateral level. The GATS defines mode 4 as the supply of a service "*by a service supplier of one Member, through presence of natural persons of a Member in the territory of any other Member.*" Additional guidance is provided in the Annex on the Movement of Natural Persons, which suggests that 'service suppliers' include independent service providers, the self-employed and individuals employed by foreign companies established in the territory of a WTO member. It remains unclear, however, whether individuals employed by domestic companies are covered by mode 4.[49]

Two types of measures are expressly carved out from the scope of the GATS. First, the GATS does not apply to measures affecting access to the employment market of a Member nor to measures regarding citizenship, residence or employment on a permanent basis. Second, it does not prevent WTO members from regulating the entry of natural persons provided that regulations are not applied in such a manner as to nullify or impair the benefits accruing from specific commitments made by WTO members. In this context, the sole fact of requiring a visa for certain members and not for others is not regarded as nullifying or impairing benefits under a specific commitment.[50]

Table 8 summarizes the architectural approaches adopted by the 20 East Asian FTAs. As can be seen, most of the positive list agreements have adopted the GATS definition of mode 4. The only two exceptions are China's two CEPAs with Hong Kong and Macao, which do not offer any definition of modes of supply. The Lao PDR-US BTA replicates the GATS definition of mode 4, but then limits its scope to services sales persons and intra-corporate transferees. Most positive list FTAs also provide for similar carve-outs with respect to covered measures as the ones established in the GATS. Exceptions again are China's two CEPAs with Hong Kong and Macao and the Lao PDR-US BTA, for which no comparable carve-outs are found. In addition, the services chapter of the Japan-Singapore EPA does not expressly carve out regulations affecting the entry of natural persons.

[49] See, for example, WTO Document S/C/W/75 and Nielson (2003).

[50] In this regard, it could be argued that a consistent practice of denying visas to service providers of a certain WTO Member, or plainly denying the possibility to apply for visas, may entail a nullification of GATS commitments on mode 4.

Table 8: Key architectural choices

Agreement(s)	Definition of mode 4	Separate chapter or agreement related to the movement of natural persons
Positive list agreements Jordan-Singapore FTA, New Zealand-Singapore FTA, US-Vietnam BTA	GATS	--
Lao PDR-US BTA	GATS, but limited to services sales persons and intra-corporate transferees	--
ASEAN (AFAS)	GATS	AESAN Framework Agreement on Visa Exemption
Australia-Thailand FTA	GATS	Chapter on movement of natural persons, providing for additional rights and obligations to those set out in the services and investment chapters
EFTA-Korea FTA, EFTA-Singapore FTA, Japan-Malaysia EPA	GATS	Provision on key personnel in investment chapter (or BIT)
India-Singapore ECA	GATS	Chapter on movement of natural persons, commitments subject to reservations scheduled under services chapter
Japan-Singapore EPA	GATS (weaker exception)	Chapter on movement of natural persons, commitments apply only to sectors included in a party's services schedule
Mainland-Hong Kong CEPA, Mainland-Macao CEPA	No definition	--
Negative list agreements Australia-Singapore FTA, Panama-Singapore FTA	GATS	Chapter (or annex) on movement of natural persons, commitments subject to reservations scheduled under services and investment chapters
Chile-Korea FTA, Korea-Singapore FTA, Singapore-US FTA	NAFTA	Chapter on movement of natural persons, prevailing over services chapter as far as 'immigration measures' are concerned
Japan-Mexico EPA	NAFTA	Chapter on movement of natural persons, relationship to services chapter not further defined
Trans-Pacific EPA	NAFTA	'Soft-law' chapter on movement of natural persons

Note: The precise title and substantive provisions of chapters on movements on natural persons varies from agreement to agreement.

Two of the seven negative list FTAs—the Australia-Singapore FTA and the Panama-Singapore FTA—have also followed the GATS definition of the movement of natural persons, along with the two familiar carve outs. The other five negative list FTAs—the Chile-Korea FTA, the Japan-Mexico EPA, the Korea-Singapore FTA, the Singapore-US FTA, and the Trans-Pacific EPA—have adopted a definition of the movement of natural persons that can be traced back to the NAFTA. Thus, disciplines on cross-border trade in

services apply to services supplied "*by a national of a Party in the territory of the other Party*" (whereby 'national' is essentially equivalent to a natural person). No further guidance is offered on what type of service suppliers are included under this definition. The concept of supply of a service *by* a national—rather than *through presence of* natural persons as in the GATS—may imply a different scope.[51]

The five 'NAFTA-style' negative list FTAs also provide for a carve-out with respect to measures affecting access to the employment market of a party. In addition, one of the five agreements—the Trans-Pacific EPA—has expressly incorporated the second GATS-style carve-out relating to regulations affecting the entry of natural persons. The Chile-Korea FTA, the Korea-Singapore FTA, and the Singapore-US FTA generally exempt immigration measures from the scope of services disciplines, thus offering a similar carve-out. Therefore, the only negative list agreement not providing for a similar exemption for regulations affecting the entry of natural persons is the Japan-Mexico EPA.

In addition to the disciplines established in the services chapters of trade agreements, a number of East Asian FTAs feature separate rules affecting the movement of natural persons (MNPs). Like for horizontal disciplines on investment, these additional rules mostly take the form of self-standing FTA chapters which establish disciplines for the entry of business persons active in goods and services sectors. The substantive disciplines and depth of commitments established in these MNP chapters varies from agreement to agreement. They typically define categories of business persons eligible for preferential treatment, including business visitors, sales persons, traders and investors, professionals, and intra-corporate transferees. The main benefit then consists of commitments on the temporary entry of natural persons in the various categories, setting out the length of stay, eligibility conditions, applicable numerical quotas, and certain safeguards that parties can invoke. All MNP chapters feature the GATS-style carve-outs regarding access to the employment market of members and the regulation of entry of natural persons.[52]

Historically, the inclusion of a horizontal chapter on the movement of natural persons can be traced back to the NAFTA. It is thus not surprising that all of the East Asian negative list FTAs contain such a chapter.[53] At the same time, the establishment of horizontal rules in this area is not inherently linked to the structure of negative list agreements. Indeed, three positive list agreements—the Australia-Thailand FTA, the India-Singapore ECA, and the Japan-Singapore EPA—have also incorporated a horizontal MNP chapter.

Regardless of the scheduling approach, the dual coverage of this mode of service supply raises the question of how the two sets of disciplines are related. Just as seen in the case of investments, dual coverage can be complementary or overlapping. Complementary exists in both ways. Services disciplines apply to market access and national treatment barriers encountered 'beyond the border', whereas MNP chapters focus more narrowly on matters

[51] On the one hand, one may argue that the NAFTA definition does not extend to foreign employees of companies, because services are eventually supplied by a juridical person. On the other hand, the involvement of foreign employees in the production, distribution, and delivery of a service by juridical persons may in itself be considered a supply of a service, so that employees would be covered.

[52] One exception is the Chile-Korea FTA, which does not feature the second carve-out. However, the commitments on temporary entry make clear that a party may require a business person to obtain a visa in accordance with domestic immigration laws.

[53] However, the Chapter on Temporary Entry of the Trans-Pacific EPA is of a 'soft-law' nature. It merely commits parties to review the rules and conditions applicable to the movement of natural persons two years after the entry into force of the agreement.

related to the entry of foreign individuals. Conversely, the latter establish certain transparency obligations not available in services chapters and offer horizontal treatment for individuals engaged in trade in goods, trade in services and investment.

The possibility of overlapping coverage emanates from the fact that services disciplines, in principle, also apply to entry measures—to the extent that they fall under the definition of market access, national treatment, or MFN. Unless commitments in the two chapters are identical, overlapping coverage may give rise to inconsistencies. Which chapter would prevail if a measure is allowed by one chapter, but prohibited by the other chapter? Just as we saw in the case of investment, most East Asian FTAs that provide for dual coverage of the movement of natural persons feature rules that define the relationship between the two sets of disciplines (see Table 8).

As pointed out above, the Chile-Korea FTA, the Korea-Singapore FTA, and the Singapore-US FTA make clear that 'immigration measures' are exclusively dealt with by the MNP chapter. This rule effectively carves out measures affecting the entry of foreign individuals from the scope of the services chapter, thus providing for a clear delineation of the two sets of disciplines.

The Australia-Singapore FTA, the India-Singapore ECA, and the Panama-Singapore specify that commitments in the chapter on the movement of natural persons are subject to the limitations scheduled under the agreement's services chapter. In addition, the services schedules of these three FTAs include a horizontal reservation according to which parties are free to adopt any MNP-related measure subject to the provisions of the MNP chapter. Effectively, this rule implies that commitments on the movement of natural persons emanate exclusively from the MNP chapter. However, any commitment in this chapter applies only to sectors covered by services commitments and, even then, may be qualified by limitations for specific service sectors as detailed in the services schedule.

A similar approach is followed by the Japan-Singapore EPA. Commitments under the agreement's MNP chapter are effectively incorporated into the horizontal section of the two parties' services schedules. Given the hybrid list scheduling approach of this agreement, these commitments apply only to listed sectors and are further subject to limitations scheduled for specific service sectors.[54] The Australia-Thailand FTA and Mexico-Japan FTA do not offer a clear rule setting out the relationship between the agreements' services and MNP chapters.[55] The absence of such a rule may give rise to inconsistencies between the two chapters, but in any case reduces the transparency of the commitments made.[56]

Finally, four FTAs offer additional benefits for foreign natural persons other than through dedicated chapters on the movement of natural persons. In the case of the EFTA-Korea FTA,

[54] The MNP chapter of the Japan-Singapore EPA specifies that horizontal MNP commitments apply only where specific services commitments are undertaken. At the same time, for certain service sectors, schedules of specific commitments indicate an 'unbound' entry for mode 4. Such situations could well give rise to inconsistencies between the two sets of disciplines.

[55] The MNP chapter of the Australia-Thailand FTA indicates as an objective the provision of rights and obligations additional to those set out in the services and investment chapters. But this language does not seem to offer any guidance on which chapter would take precedence if a measure was allowed by one chapter, but not the other.

[56] The Trans-Pacific EPA also does not feature a rule on the relationship between services and MNP disciplines. However, since the MNP chapter of this agreement does not feature any 'hard' commitments on the movement of natural persons, the absence of such a rule does not give rise to legal inconsistencies.

the EFTA-Singapore FTA, and the Japan-Malaysia EPA, provisions granting temporary entry for investors and certain key personnel are found in the agreements' investment chapters. These undertakings are subject to immigration laws and regulations relating to entry, stay, and work of natural persons.[57] ASEAN members, in 2006, concluded a Framework Agreement on Visa Exemption, which establishes guidelines for advancing bilateral arrangements for exempting ASEAN nationals from visa requirements.[58]

Recognition of professional qualifications

For professional services, the absence of explicit trade barriers is only a necessary but not sufficient condition for the entry of foreign service providers. To effectively compete, foreign professionals must either obtain the mandated local qualifications or have their foreign qualifications recognized. For certain professions, the former may require significant educational investments over several years, which may pose a *de facto* barrier to market entry. The recognition of foreign qualifications is an option for those professions with a high degree of generic skills content—for example, doctors, architects, or engineers. Even then, a government would be only willing to consider recognition if it has confidence in the foreign educational system and professional standards applied abroad are comparable to domestic requirements. Thus, recognition is more likely to be feasible where professional standards are harmonized or, for historical reasons, share a common foundation. In such cases, governments often grant recognition on a reciprocal basis, leading to so-called mutual recognition agreements (MRAs).

What is the role of FTAs with respect to the recognition of professional qualifications? One can distinguish two contributions. First, like the GATS, many FTAs exempt recognition agreements from MFN treatment, but attach certain conditions to the conclusion of such agreements. Second, several FTAs facilitate the recognition of professional qualifications and some feature explicit commitments on recognition. We will discuss these contributions in turn.

In principle, an agreement to recognize the professional qualifications of individuals from one particular country may depart from an FTA's MFN obligation. The GATS expressly allows for such a departure provided that the WTO member in question affords adequate opportunity to other interested members to negotiate a comparable arrangement. Most East Asian FTAs that have established a binding MFN obligation (see Section 3.B) feature a similar carve-out. The only exception is the US-Vietnam BTA, for which no such carve-out is found. Under this agreement, a party's recognition agreement with a third country may therefore need to be extended to the other party of the BTA. The Japan-Mexico EPA, while exempting recognition agreements from the MFN principle, does not impose the condition of giving interested parties the opportunity to negotiate a comparable agreement. At the same time, this latter requirement is found in three FTAs that do not feature a binding MFN obligation, namely the India-Singapore ECA, the Japan-Singapore EPA, and the Korea-Singapore FTA.

As discussed in Section 2, FTAs may offer a fertile forum for directly facilitating the recognition of professional qualifications, given the small number of players involved and

[57] In the case of the EFTA-Korea FTA and EFTA-Singapore FTA, the relationship of the relevant provisions to the agreements' services disciplines is not addressed. In the case of the Japan-Malaysia EPA, the relevant provision takes precedence over services disciplines.

[58] In addition, the 1998 Framework Agreement on the ASEAN Investment Area commits ASEAN members to promote the freer flow of skilled labor and professionals.

possible similarities in qualification systems. Indeed, the majority of East Asian FTAs contain 'soft-law' provisions which encourage parties—or their competent regulatory bodies—to enter into negotiations towards the recognition of professional qualifications.[59] Some agreements identify specific professions for which such negotiations should take place on a priority basis. In some cases, FTAs have established a negotiating timeframe of 1-3 years after entry into force of the FTA or simply call 'for an early outcome'.

In the FTAs under review, only five agreements feature binding commitments to recognize foreign qualifications.[60] ASEAN members concluded in 2005 a mutual recognition agreement for professional engineers, along with a set of minimum qualification requirements that eligible professionals need to meet.[61] Under the Korea-Singapore FTA, again for engineering services, the two parties committed to recognize the professional qualifications obtained from 20 Korean universities (for Singapore) and 2 Singaporean universities (for Korea). The universities were to be selected by each party "*based on mutual trust and common benchmarks*".[62] Under the Singapore-US FTA, Singapore committed to recognize the degrees of four U.S. law schools for the purposes of admission into the Singapore Bar. However, recognition is limited to individuals who are Singapore citizens or Singapore Permanent Residents and additional qualifications in Singapore law are necessary for those individuals to be eligible for recognition. The four universities were to be selected through consultations between the two parties.

Finally, a different form of recognition is established by China's commitments in its two CEPAs with Hong Kong and Macao. For professionals in the fields of law and healthcare, permanent residents from Hong Kong and Macao who meet certain qualification standards in those two territories are allowed to 'sit' the Mainland's qualifying exams. These commitments fall short of full recognition.[63] But they still serve to facilitate the mobility of professionals, because they grant permanent residents from Hong Kong and Macao the right to have their qualifications tested in the Mainland without undergoing additional training in the Mainland.

E. Rules of origin

FTAs extend trade benefits to signatory parties, thereby discriminating against trade with non-parties. But what exactly constitutes trade between signatory parties that is eligible for preferential treatment? FTAs resolve this question through so-called rules of origin. In the case of goods trade, rules of origin determine to what extent products with imported intermediate inputs from non-parties qualify for trade preferences. In the case of trade in services, rules of origin are broader, reflecting the fact that services agreements apply to both

[59] Six FTAs did not feature such provisions, namely the EFTA-Korea FTA, the Japan-Malaysia EPA, the Japan-Mexico EPA, the Lao PDR-US BTA, the Panama-Singapore FTA, and the US-Vietnam BTA.

[60] Our research was confined to undertakings on recognition that are published alongside trade agreements. It is possible that negotiations between regulatory bodies subsequent to the conclusion of an FTA have led to additional recognition agreements.

[61] See http://www.aseansec.org/18009.htm. Negotiations among ASEAN members towards an MRA for nursing professionals are at an advanced stage (see Thanh and Bartlett, 2006).

[62] See Annex 9D of the Korea-Singapore FTA.

[63] In the case of medical and dental services, the Mainland fully recognizes the qualifications of Hong Kong and Macao permanent residents for the purpose of "*short-term practice in the Mainland*".

services and service suppliers. Suppose countries A and B take part in an FTA to which country C is not a member. In principle, questions of origin arise in three different contexts:

- *Origin of services*. Would a service imported by country A from country B qualify for trade preferences, if the provision of the service relied on intermediate service imports from country C?

- *Origin of service suppliers in the form of juridical persons*. Suppose that a service provider from country C has established a commercial presence in country B. Under which circumstances, if any, would this service provider be allowed to export services to country A—through modes 1, 2, or 3?

- *Origin of service suppliers in the form of natural persons*. Suppose that an individual from country C has certain ties with country B. What kind of ties would allow this individual to export services to country A via mode 4?

As discussed in Section 2, rules of origin determine the degree of trade preferences created by FTAs. From the point of view of economic efficiency, liberal rules of origin minimize trade diversion effects and promote entry of the most efficient service providers. At the same time, they undermine the bargaining advantage that FTAs offer relative to multilateral negotiations.

In what follows, we discuss the rules of origin established by East Asian FTAs. The discussion is divided into three parts, corresponding to the three different contexts outlined above. Notwithstanding certain exceptions and interpretive uncertainties, we conclude that most agreements feature 'fairly' liberal rules of origin.

Rules of origin for services

The origin question for services resembles most closely the classical origin question in the case of goods trade. In the latter case, rules of origin define the level of transformation imported goods need to undergo in order for the transformed product to be exported to the FTA partner at a preferential tariff. In the case of services trade, the concepts of imported service inputs and domestic transformation are conceptually and statistically not well-developed. Indeed, it is not clear whether a transformation rule could be meaningfully applied in this area.

Implicitly, most FTAs establish a rule of origin for services through the definition of what constitutes a 'service of another party'. Thus, services disciplines apply to services that are supplied "*from or in the territory of another party*"—corresponding to modes 1 and 2.[64] Four agreements—the India-Singapore ECA, the Japan-Singapore EPA, the Jordan-Singapore FTA and the US-Vietnam BTA—expressly allow a party to deny the benefits of the services chapter, if it establishes that the service is supplied from or in the territory of a non-party.[65] In other words, as long as a service originates within the territory of the exporting party, it would seem to be eligible for preferential treatment.

[64] The definition of a 'service of another party' found in FTAs mirrors the one established by GATS Article XXVIII(f). Several agreements do not provide for a definition of a 'service of another party', but the territoriality concept is embedded in the definition of modes 1 and 2. The only two agreements that offer neither a definition of a 'service of another party' nor definitions of modes of supply are China's two CEPAs with Hong Kong and Macao.

[65] This denial of benefit provisions mirrors GATS Article XXVII(a), which applies in relation to non-members of the WTO.

This rule of origin raises non-obvious interpretive questions. Suppose a firm in country A 'imports' call center services from its FTA partner country B. Suppose further that the service supplier in country B subcontracts the answering of telephone calls to a company in country C, but channels the calls between countries A and C through country B and fully manages the business from country B. Would such a service qualify for preferential treatment under the FTA between A and B? Admittedly, such a question may appear theoretical. Cross-border trade in services has so far been largely unrestricted and technological advances may make it increasingly difficult to put in force trade restrictions. However, in view of the rapid growth of cross-border trade in services and associated adjustment pressures, trade protection may not be inconceivable in future and questions about the origin of services may well arise.[66]

Ten East Asian FTAs feature a special rule of origin for maritime transport services.[67] Thus, maritime transport services are eligible for preferential treatment only if they are supplied by a vessel registered under the law of another party or by a person of that other party which operates and/or uses the vessel with which services are supplied. The four FTAs mentioned above again expressly allow a party to deny the benefits of the services chapter, if similar conditions are not met.[68] The intent of this special rule of origin is to exclude from preferential treatment maritime transport services which are supplied by transiting vessels which do not have any association with the exporting FTA partner.

Neither the GATS nor the East Asian FTAs establish rules of origin for services supplied through commercial presence or the presence of natural persons. For those modes of supply, services agreements define a 'service of another member' as a service supplied *by a service supplier* of that other member. Service suppliers, in turn, are subject to separate rules of origin which we discuss in the remainder of this section.

Rules of origin for juridical persons

FTAs feature provisions that determine to what extent a non-party service supplier established in the territory of an FTA party in the form of a juridical person can benefit from preferential treatment. Such provisions affect services exported by a juridical person on a cross-border basis, via consumption abroad, or through the establishment of a commercial presence in another FTA territory.

Table 9 summarizes the rules of origin for juridical persons established by the 20 East Asian FTAs. These rules are embedded in the definition of a juridical person, denial of benefit clauses, and extension of benefit clauses of FTA services chapters. For FTAs that subject investment in services to separate investment disciplines, additional rules are found in the definition of 'investors of the other party' and investor denial of benefit clauses.

[66] Mattoo and Wunsch (2004) describe that the imposition of trade restrictions on international business process outsourcing has been considered by several US states.

[67] This special rule of origin is based on GATS Articles XXVII and XXVIII(f). It is not found in the Australia-Thailand FTA, the Chile-Korea FTA, the Japan-Mexico EPA, the Korea-Singapore FTA, the Lao PDR-US BTA, the Mainland-Hong Kong CEPA, the Mainland-Macao CEPA, the Panama-Singapore FTA, the Singapore-US FTA, and the Trans-Pacific EPA.

[68] The denial of benefit provisions are modelled after GATS Article XXVII(b). However, they apply in respect of non-parties to the FTA.

Most East Asian FTAs have created 'fairly' liberal rules of origin, extending FTA benefits to juridical persons that are constituted or otherwise organized under the laws of a party and that have substantial business operations in the territory of that party—regardless of who owns of controls the juridical persons. In other words, service suppliers from non-parties can take advantage of the market opening negotiated under an FTA, as long as they establish a juridical person in one of the FTA member countries and are commercially active in that country. The latter requirement arguably serves to exclude 'mailbox' companies that merely seek to exploit an FTA's trade preferences and that do not have any commercial interest in the country of establishment.

Table 9: Rules of origin for juridical persons

Agreement(s)	Benefits of FTA …		Other provisions
	… limited to domestically owned or controlled service suppliers	… extended to juridical persons constituted under domestic laws and having substantial business operations in the domestic territory	
Australia-Singapore FTA, Korea-Singapore FTA, Panama-Singapore FTA,	no	yes	--
Mainland-Hong Kong CEPA, Mainland-Macao CEPA	no	yes	Offers in-depth definition of substantial business operations
ASEAN (AFAS), EFTA-Singapore FTA, Japan-Singapore EPA, Jordan-Singapore FTA, Trans-Pacific EPA	no	yes	Benefits also extended to juridical persons with substantial business operations in the territory of any party (services chapter only)
New Zealand-Singapore FTA	no	yes	Benefits also extended to juridical persons with substantial business operations in the territory of any party (services chapter only) No substantial business operations test in investment chapter
EFTA-Korea FTA	no	yes	Benefits also extended to juridical persons with substantial business operations in the territory of any WTO member, if service supplier is owned or controlled by person of a party (services chapter only)
US-Vietnam BTA, Lao PDR-US BTA	no	yes	Parties can deny FTA benefits to investors from third country if the denying party does not maintain normal economic relations with the third party (investment chapter only)
Chile-Korea FTA	no	yes	Parties can deny FTA benefits to service providers from non-parties

			with which a party does not maintain diplomatic relations or where certain trade sanctions apply (investment chapter only)
Japan-Malaysia EPA, Japan-Mexico EPA, Singapore-US FTA	no	yes	Parties can deny FTA benefits to service providers from non-parties with which a party does not maintain diplomatic relations or where certain trade sanctions apply The investment chapter of the Japan-Malaysia EPA does not extend benefits to branches of enterprises of third states
Australia-Thailand FTA	yes (for services and main investment disciplines)	yes (for chapter on promotion and protection of investments)	--
India-Singapore ECA	yes (for services supplied through commercial presence and investment disciplines)	yes (for services supplied cross border and through consumption abroad)	Benefits can be denied if juridical person is owned or controlled by persons of the denying party In the case of financial services, several Singaporean banks are expressly listed as beneficiaries

Notwithstanding this liberal picture, there are important exceptions and qualifications. First, two FTAs—the Australia-Thailand FTA and the India-Singapore ECA—have adopted a significantly more restrictive rule of origin, limiting the benefits of FTAs to domestically owned or controlled firms. In countries with substantial 'non-party' foreign participation in the service sector, such a requirement can narrow markedly the set of service suppliers eligible for preferences. In the case of the Australia-Thailand FTA, the domestic ownership or control requirement does not apply to the agreement's chapter on the promotion and protection of investments. In the case of the India-Singapore ECA, this requirement only applies to services supplied through commercial presence and to the agreement's investment disciplines. It does not apply to services supplied cross-border or through consumption abroad.

Both FTAs define domestic ownership as domestic persons holding a majority equity share in the service supplier and domestic control as domestic persons having the power to name the majority of directors or otherwise directing the service supplier's actions. Interestingly, the India-Singapore ECA adds a special rule for the supply of audiovisual, education, financial and telecommunications services. For these activities, eligible service suppliers also include juridical persons which are owned or controlled by "*the other Party*"—presumably, referring to state-owned enterprises. In the case of financial services, the agreement explicitly lists several Singaporean financial institutions that are to qualify for preferences and specifies the types and numbers of legal entities through which these institutions can supply financial services in India.

Finally, the India-Singapore ECA has a special clause that allows a party to deny FTA benefits if a juridical person is owned or controlled by persons from the denying party. Since

FTA benefits for services supplied through commercial presence are already limited to domestically owned or controlled juridical persons, this clause applies only to services supplied through modes 1 and 2.

Second, several agreements provide for a more liberal application of the substantial business operations requirement. In particular, the services chapters of the AFAS, the EFTA-Korea FTA, the EFTA-Singapore FTA, the Japan-Singapore EPA, the Jordan-Singapore FTA, the New Zealand-Singapore, and the Trans-Pacific EPA extend FTA benefits to duly constituted juridical persons with substantial business operations in the territory of *any* FTA party—not just the territory of the party in which the juridical person is constituted. The services chapter of the EFTA-Korea FTA goes further in only requiring substantial business operations in the territory of any WTO member, if the service supplier is owned or controlled by a person of a party. Finally, the investment chapter of the New Zealand-Singapore FTA eliminates the substantial business operations test altogether—requiring only establishment or registration under a party's applicable laws.

Third, a number of agreements have incorporated foreign policy-related exceptions to otherwise liberal rule of origins. In particular, the Chile-Korea FTA (investment chapter only), the Japan-Malaysia EPA, the Japan-Mexico EPA, and the Singapore-US FTA allow a party to deny FTA benefits to a juridical person from a non-party if (i) the denying party does not have diplomatic relations with the non-party, or (ii) the denying party prohibits transactions with the enterprise in question. The Lao PDR-US BTA and the US-Vietnam BTA have incorporated a similar exception that allows the denial of benefits if the denying party does not maintain normal economic relations with the third party.

Fourth, as pointed above, most FTAs require juridical persons to be constituted or otherwise organized under the laws of a party to be eligible for FTA benefits. The concept of 'constitution or other organization' arguably encompasses non-incorporated legal entities such as branches and representative offices.[69] The only exception is the investment chapter of the Japan-Malaysia EPA, which expressly excludes branches of enterprises of third states from the definition of 'investor of the other party'.

Fifth, most FTAs do not offer a definition of substantial business operations. The only exceptions are China's two CEPAs with Hong Kong and Macao, which closely circumscribes this concept for service suppliers from Hong Kong and Macao. To qualify for trade preferences, service suppliers must have had substantive business operations for 3-5 years in Hong Kong or Macao for the services they intend to provide in the Mainland; they must have paid profit tax in Hong Kong or Macao; they must own or rent premises for business operations in Hong Kong or Macao; and more than 50 percent of employees must be Hong Kong or Macao residents (or Chinese people staying in Hong Kong or Macao on a one way permit). Additional rules exist for law firms, which require the sole proprietor and all partners of a firm to be registered as practicing lawyers.

The two CEPAs also establish a registration procedure which verifies that interested service suppliers meet the above requirements. In the case of Hong Kong, 1054 service suppliers

[69] Several negative list FTAs and investment chapters expressly refer to branches in the definition of a juridical person or the definition of an enterprise.

have submitted applications for certificates to be eligible under CEPA, of which 1014 have been approved.[70]

Rules of origin for natural persons

The origin question for natural persons is relatively straightforward. An individual's economic ties with a particular country are closely linked to that individual's nationality or residency. Table 10 summarizes the rules of origin for natural persons found in the 20 East Asian FTAs. All agreements extend trade benefits to the nationals—or 'citizens'—of the signatory parties.[71] In addition, a number of agreements extend benefits to individuals that have the right to permanent residency in an FTA member. In certain cases, permanent residents only qualify for trade preferences, if the importing party accords substantially the same treatment to permanent residents as to nationals in respect of measures affecting services trade.

Provided the nationality or right to permanent residency conditions are met, agreements generally extend FTA benefits regardless of whether individuals actually reside in the territory of an FTA party. The only exception is the US-Vietnam BTA, which requires natural persons to reside in the territory of the 'exporting' FTA party. For example, a US citizen residing in Hong Kong would appear to be ineligible for the trade preferences of this bilateral agreement.

Table 10: Rules of origin for natural persons

Agreement(s)	Benefits of FTA …		Other provisions
	… extended to domestic nationals (or 'citizens')	… extended to permanent residents	
Australia-Singapore FTA, India-Singapore ECA, Jordan-Singapore FTA, Korea-Singapore FTA, Panama-Singapore FTA, Trans-Pacific EPA	yes	yes	--
Australia-Thailand FTA, Japan-Mexico EPA, Singapore-US FTA,	yes	no	--
Chile-Korea FTA	yes	yes	Benefits of chapter on temporary entry for business persons limited to citizens
AFAS, EFTA-Korea FTA, EFTA-Singapore FTA, New Zealand-Singapore FTA, US-Vietnam BTA	yes	not automatically	Benefits extended to permanent residents only if a party accords substantially the same treatment to permanent residents as to nationals in respect of services measures For US-Vietnam BTA: natural person must reside in the territory

[70] As of November 30, 2006 (see http://www.tid.gov.hk/english/cepa/statistics/hkss_statistics.html).

[71] The only two exceptions are the Mainland-Hong Kong and Mainland-Macao CEPAs, as these agreements are between separate customs territories within the same nation.

			of 'exporting' party
Japan-Malaysia EPA	yes	no (for Japan) yes (for Malaysia)	--
Japan-Singapore EPA	Yes	no (for Japan) yes (for Singapore)	--
Lao PDR-US BTA	Yes	no	Definition of natural person applies to market access obligation only
Mainland-Hong Kong CEPA	Yes (for Mainland)	no (for Mainland) yes (for Hong Kong)	--
Mainland-Macao CEPA	Yes (for Mainland)	no (for Mainland) yes (for Macao)	--

F. Trade rules

Trade rules in services are generally understood as a set of disciplines designed to complement the core obligations that shape the liberalization content of trade agreements—the latter consisting mainly of national treatment, market access, and MFN. While there is no unique definition of trade rules, most attention usually focuses on four areas: domestic regulation, subsidies, government procurement, and emergency safeguards.[72] This focus is largely explained by the fact that disciplines in these areas are only incompletely developed under the GATS. No final consensus on such disciplines could be reached during the Uruguay Round, leading the GATS to call for further negotiations to resolve rule-making in these areas. A natural question therefore is whether FTAs have been able to make any rule-making advances.

In principle, the smaller number of countries involved in FTA negotiations may offer a more fertile environment for rule-making innovations. At the same time, bilateral and regional negotiations share many of the technical challenges and regulatory sensitivities that have posed obstacles to progress at the multilateral level.

We divide the discussion of trade rules into two parts. The first part will be exclusively devoted to domestic regulation. As will be seen, this area has seen some innovation in East Asian FTAs. The second part will discuss subsidies, government procurement, and emergency safeguards, where virtually no progress has been made at bilateral and regional levels. For ease of reference, Appendix 1 offers an overview of the disciplines established by East Asian FTAs in all four areas.

Domestic regulation

Most services agreements establish disciplines on domestic regulation. These disciplines are intended to cover measures that are non-discriminatory and qualitative in nature, presumably falling outside the scope of agreements' MFN, national treatment, and market access

[72] Other areas of trade rules include general exceptions, the treatment of monopolies and exclusive service suppliers, and restrictions to safeguard the balance of payments.

obligations.[73] Services agreements often refer to qualification requirements and procedures, technical standards and licensing requirements, though other measures may be covered as well. Governments adopt these types of measures for legitimate regulatory purposes—such as protecting consumers, remedying market failures, and ensuring the quality of services. At the same time, domestic regulatory measures may impose restrictions to trade in services much beyond what is warranted to attain certain policy goals.

Thus, disciplines on domestic regulation seek to ensure that internal government measures do not unnecessarily undermine the market opening offered by the core obligations on national treatment, MFN, and market access. In doing so, these disciplines serve to enhance the credibility of domestic service policies, because foreign service providers are offered some assurance that a government will not seek recourse to domestic regulatory measures to protect domestic service suppliers.

Rules on domestic regulation typically concern three different regulatory aspects:

- the administration of domestic laws, administrative decisions and other rulings;
- the necessity of domestic regulatory measures, to the extent that they impose restrictions on trade in services; and
- the establishment of sectoral regulatory disciplines.

The GATS has provisions in relation to all three aspects. Most East Asian FTAs—except the Lao PDR-US BTA, the Mainland-Hong Kong CEPA, and the Mainland-Macao-CEPA—have established rules covering at least one of them. Some FTAs have even established stronger obligations than what is found in the GATS. In what follows, we describe the key disciplines of the GATS and explore to what extent East Asian FTAs have gone beyond these disciplines.

Administration of regulatory measures

The GATS calls for regulatory measures to be "*administered in a reasonable, objective and impartial manner*."[74] However, this requirement is limited to sectors in which WTO members have undertaken specific commitments. East Asian FTAs that have adopted a hybrid listing approach have replicated this requirement either by reproducing the relevant GATS provision in the text of the FTA or by express reference to the GATS. The only exception is the Japan-Malaysia EPA, which does not have any discipline on the administration of regulatory measures.

Negative list FTAs have followed two different routes. The Chile-Korea FTA, the Japan-Mexico EPA, and the Singapore-US FTA do not provide for a requirement to administer regulatory measures reasonably, objectively and impartially—following the original NAFTA model.[75] The Australia-Singapore FTA, the Korea-Singapore FTA, the Panama-Singapore FTA, and the Trans-Pacific EPA have adopted a requirement mirroring the one found in the GATS. However, the reach of this requirement is different in three respects. First, given the

[73] Services agreements typically do not define measures falling under domestic regulation and measures falling under one of the core market opening obligations in a mutually exclusive way. In principle, it is possible for a measure to fall under the scope of both domestic regulation and, say, market access. See Pauwelyn (2005).

[74] See GATS Article VI.1.

[75] Interestingly, the Singapore-US FTA has incorporated this requirement only in its financial services chapter.

negative list structure, it applies to all service sectors, rather than only to the sectors in which specific commitments are undertaken. Second, three agreements—the Australia-Singapore FTA, the Korea-Singapore FTA, the Panama-Singapore FTA—exempt all scheduled non-conforming and future measures from any discipline on domestic regulation.[76] Third, in the case of the Korea-Singapore FTA and the Panama-Singapore FTA the requirement does not apply to commercial presence, as the services chapter of these two agreement does not extend to this mode of supply (see Section 3.A).

Necessity test

The GATS features what may be called a 'weak' necessity test for certain regulatory measures. WTO members are required to ensure that licensing and qualification requirements and technical standards are based on objective and transparent criteria and not more burdensome than necessary to ensure the quality of a service. In addition, licensing procedures should not in themselves pose a restriction on the supply of a service. However, these requirements are subject to two important caveats. They can only be invoked if the relevant regulatory measures nullify or impair specific commitments and could not reasonably have been expected when specific commitments were made.[77]

Again, East Asian hybrid list FTAs—with the exception of the Japan-Malaysia EPA—have effectively replicated the weak necessity test of the GATS. Three negative list FTAs—the Australian-Singapore FTA, the Korea-Singapore FTA and the Panama-Singapore FTA—also follow this approach, although the necessity test's reach is different along the lines described above. The Chile-Korea FTA, the Japan-Malaysia EPA, the Japan-Mexico EPA, and the Singapore-US FTA adopt language similar to the GATS, but the necessity test applies only on a best endeavor basis.[78] In other words, these agreements provide for an even weaker regulatory discipline than the GATS.

The only East Asian FTA featuring a strong necessity test is the Trans-Pacific EPA. It lists all the requirements found in the GATS, but does not limit regulatory scrutiny to situations where specific commitments have been nullified or impaired and regulatory measures could not reasonably have been expected. The necessity test of the Trans-Pacific EPA is potentially far-reaching. In principle, it applies to all sectors, all four modes of supply, and all measures—even those for which reservations have been listed by the parties.

Sectoral disciplines

In addition to horizontal rules on domestic regulation, trade agreements may also establish regulatory disciplines for specific service sectors. Like horizontal regulatory rules, sectoral disciplines seek to ensure that legitimate regulatory interventions do not lead to unwarranted barriers to trade in services. However, sectoral disciplines can better account for the regulatory environment in which specific services are provided and thereby strengthen the reach of regulatory rules. Ultimately, greater regulatory scrutiny serves to enhance the credibility of market opening commitments in relevant service sectors.

[76] In contrast to the GATS, these three FTAs thus clearly delineate national treatment, market access, and MFN measures from domestic regulatory measures.

[77] The GATS also calls for the development of additional disciplines to ensure that qualification requirements and procedures, technical standards and licensing requirements do not constitute unnecessary barriers to trade in services. See GATS Article VI:4.

[78] The best-endeavor necessity test has its origins in the NAFTA.

The GATS has established regulatory rules in two service sectors—accountancy services and telecommunications services. In the case of accountancy services, WTO members agreed on a set of disciplines that, among other things, establishes a 'strong' necessity test for measures relating to licensing requirements and procedures, technical standards and qualification requirements. In the area of telecommunications, post-Uruguay Round negotiations led to a liberalization package that included a Reference Paper on regulatory principles. Among other things, this reference paper sets rules on network interconnection, universal service, the independence of regulatory agencies, and the allocation of the radio spectrum.[79]

Several East Asian FTAs have introduced new sectoral disciplines, focusing mainly on telecommunications services and electronic commerce-related services (see Table 11).[80] In the case of the former, dedicated chapters on telecommunications have deepened the obligations of the GATS Reference Paper. In the case of the latter, FTAs have established rules on the electronic supply of services, online consumer protection, data protection, electronic signatures, and other matters. In addition to these two main areas, the Panama-Singapore FTA features certain regulatory disciplines in the maritime transport sector, such as non-discriminatory access to a list of essential port services.

Table 11: New Sectoral disciplines found in FTAs

Agreement(s)	Sector(s) covered
Australia-Singapore FTA, Korea-Singapore FTA, Singapore-US FTA	Electronic commerce and telecommunications
Australia-Thailand FTA, India-Singapore ECA, Jordan-Singapore FTA	Electronic commerce only
Chile-Korea FTA, EFTA-Korea FTA, EFTA-Singapore FTA, Japan-Singapore EPA	Telecommunications only
Panama-Singapore FTA	Electronic commerce, telecommunications, and maritime transport
AFAS, Lao PDR-US BTA, Mainland-Hong Kong CEPA, Mainland-Macao CEPA, New Zealand-Singapore FTA, Trans-Pacific EPA, US-Vietnam BTA	No sectoral disciplines

The scope of regulatory disciplines in these areas varies significantly from agreement to agreement. In addition, some of the regulatory provisions create binding obligations on the matters covered, whereas others establish only 'soft-law' or best-endeavor principles. A detailed comparative review of regulatory rules in East Asian FTAs and their valued added relative to the GATS would go beyond the scope of this paper.[81]

[79] See Gamberale and Mattoo (2002) for a detailed review of GATS regulatory rules in these two sectors.

[80] The Panama-Singapore FTA and the Singapore-US FTA have also established certain regulatory rules for financial services. For example, these FTAs require non-discriminatory access to payment and clearing systems operated by public entities.

[81] See Wunsch-Vincent (2006) for a discussion of provisions on electronic commerce in US FTAs.

Government procurement, subsidies and safeguards

Government procurement of services is largely carved out from the GATS. Specifically, the GATS provides that obligations on national treatment, MFN, and market access do not apply to measures "*governing the procurement by governmental agencies of services purchased for governmental purposes*".[82] Most East Asian FTAs have followed the same approach or, even more far-reaching, have carved out government procurement from the scope of services disciplines altogether.[83] The services chapters of the Lao PDR-US BTA and the US-Vietnam BTA do not feature a special provision on government procurement. Thus, government purchases of services—like any measure affecting trade in services—are subject to the core market opening obligations of these agreements, especially national treatment.[84]

In the area of subsidies, the GATS does not establish any special discipline. It merely provides for a negotiating mandate to develop necessary disciplines to avoid "trade-distortive" effects of subsidies. In the absence of special rules, subsidies in services are subject to all obligations under the GATS—most importantly, national treatment. In other words, in sectors were specific commitments are undertaken and unless national treatment limitations with respect to subsidies are inscribed, government aid offered to domestic service suppliers has to be extended on a non-discriminatory basis to foreign service suppliers. Like the GATS, East Asian FTAs have not established any dedicated disciplines for subsidies. To the contrary, rules on subsidies in ten East Asian FTAs fall short of multilateral rules as they carve out subsidies from the scope of services disciplines.[85]

Finally, the GATS does not provide for a mechanism by which WTO members can temporarily depart from their commitments in response to an unanticipated surge in services imports with harmful effects on domestic service suppliers. The establishment of such emergency safeguard measures (ESMs)—similar to those provided for in the WTO Agreement on Safeguards for goods trade—was considered during the Uruguay Round, but no consensus could be achieved. The GATS merely calls for negotiations "*on the question of emergency safeguard measures based on the principle of non-discrimination*."[86]

East Asian FTAs have not established ESMs in services either. Only one agreement—the Japan-Malaysia EPA—foresees the development of guidelines and procedures for the application of ESMs within five years of the entry into force of the agreement. Interestingly, the India-Singapore ECA expressly forbids the initiation of safeguards investigations and the imposition of safeguards measures.

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[82] See GATS Article XIII. At the same time, purchases of services are covered by the disciplines of the WTO Agreement on Government Procurement. However, this agreement is a plurilateral agreement, extending only to 37 WTO members (see http://www.wto.org/english/tratop_e/gproc_e/gp_gpa_e.htm).

[83] At the same time, the majority of these FTAs feature self-standing chapters with disciplines on government procurement. Like the WTO Agreement on Government Procurement, these chapters encompass government purchases of services.

[84] The services chapters of China's two CEPAs with Hong Kong and Macao also do not feature any provision on government procurement. But these two agreements do not establish a national treatment obligation in the first place (see Section 3.B).

[85] As shown in Appendix 1, these ten agreements are the Australia-Singapore FTA, the Australia-Thailand FTA, the Chile-Korea FTA, the Japan-Malaysia EPA, the Japan-Mexico EPA, the Korea-Singapore FTA, the New Zealand-Singapore FTA, the Panama-Singapore FTA, the Singapore-US FTA, and the Trans-Pacific EPA.

[86] See GATS Article X.

Two additional observations in relation to emergency safeguard measures are in order. First, the group of ASEAN countries has been one of the main advocates for the establishment of ESMs at the WTO.[87] At the same time, ASEAN's own regional trade agreement in services—the AFAS—does not feature an emergency safeguard mechanism.[88] Second, the lack of ESMs in bilateral and regional agreements may constrain the application of multilateral emergency safeguard measures, if WTO members were ever to agree on such measures. Unless ESMs are also incorporated into FTAs, countries departing from their GATS commitments may run afoul of their FTA liberalization undertakings and may be liable to dispute settlement under these agreements.

G. Dispute Settlement

Rules, rights, obligations, and commitments established in trade agreements are of limited value if they are not supported by an instrument capable of determining when they are being infringed and to compel parties to abide by them. Thus, most East Asian FTAs provide for dispute settlement mechanisms (DSMs) to resolve differences between parties on the interpretation and implementation of the agreements' disciplines.

Effective dispute settlement is central for harnessing the credibility benefit offered by trade agreements. The existence of a sound mechanism for remedying non-compliance with legal obligations assures traders and investors that trade policy will not become more restrictive at the discretion of the 'importing' party. In addition, when trade controversies arise, dispute resolution based on shared principles minimizes the risk of a protectionist backlash. Resort to unilateral retaliatory measures—as observed in extreme forms during the Great Depression of the 1930s—can provoke a vicious cycle of trade protection with adverse economic consequences.

Most East Asian FTAs follow the standard practice in modern FTAs of establishing two distinct dispute settlement procedures: first, a state-to-state DSM that usually applies to all chapters of an agreement—including trade in goods, trade in services, investment and intellectual property; and second, an investor-to-state DSM that applies only to disputes between a private party and a host country government on an agreement's investment disciplines.

The substantive and procedural elements of DSMs embedded in East Asian FTAs vary in important ways. In general, the effectiveness of a DSM can be seen to depend on three factors: the ability of a party to prevent the establishment of arbitral panels; the power of instruments to enforce arbitral rulings; and the mechanism's institutional underpinnings. In what follows, we will review the state-to-state and investor-to-state DSMs found in East Asia and evaluate their effectiveness along these three dimensions.

State-to-state dispute settlement

Table 12 offers an overview of the state-to-state DSMs adopted by East Asian FTAs. Except for China's CEPAs with Hong Kong and Macao and the US-Vietnam BTA, all agreements feature rules governing the resolution of disputes between parties. State-to-state DSMs

[87] In 2000, ASEAN submitted a concept paper on possible elements of an emergency safeguard mechanism (see WTO Document S/WPGR/W/30).

[88] ASEAN countries have adopted rules on emergency safeguard measures in the context of the ASEAN Investment Area (AIA). However, the AIA does not apply to investment in services (see Section 3.C).

typically apply to all FTA disciplines covering trade and investment in services. The only exception is the Japan-Mexico EPA, which removes disciplines on financial services from the reach of the agreements' dispute settlement system.

Table 12: State-to-state dispute settlement mechanisms

Agreement(s)	Type of DSM	Can parties block panels?	Remarks
Mainland-Hong Kong CEPA, Mainland-Macao CEPA, US-Vietnam BTA	None	--	--
Lao PDR-US BTA	Unilateral retaliation	--	--
Australia-Singapore FTA, Australia-Thailand FTA, Japan-Malaysia EPA, Korea-Singapore FTA	Ad-hoc arbitration	Yes	Possibility of blocking a panel by failing to appoint arbitrator or chairman.
Singapore-US FTA, Chile-Korea FTA	Ad-hoc arbitration	Yes	If not appointed by a party, panelist drawn by lot from a roster. Possibility of blocking a panel by failing to designate candidates for the roster.
Japan-Singapore EPA	Ad-hoc arbitration	Yes	If not appointed by a party, panelist shall be the Party's legal expert of the Consultative Committee. Possibility of blocking a panel by not designating legal expert to the Consultative Committee.
AFAS	Ad-hoc arbitration	No	Appointment of panelists by ASEAN Secretary-General if parties fail to do so.
New Zealand-Singapore FTA, EFTA-Singapore FTA, Panama-Singapore FTA, Trans-Pacific EPA	Ad-hoc arbitration	No	Appointment of panelist by WTO Director-General if one party fails to do so.
EFTA-Korea FTA	Ad-hoc arbitration	No	Appointment of panelist by WTO Director-General if one party fails to do so, or ultimately drawn by lot from a list submitted by one party only.
Jordan-Singapore FTA	Ad-hoc arbitration	No	Appointment of panelist by WTO Director-General if one party fails to do so.
Japan-Mexico EPA	Ad-hoc arbitration	No	Panelist drawn by lot from a list submitted by one party only. Financial services excluded from DSM.
India-Singapore ECA	Ad-hoc arbitration	No	Panel composed of one single panelist if one party fails to make its appointment. If both parties appoint panelists, chairman can be drawn by lot from a list submitted by one party only.

In many ways, state-to-state DSMs found in FTAs share many of the procedural elements of the WTO Dispute Settlement Understanding (DSU). In particular, they typically foresee three procedural stages: consultations, decision, and implementation. The consultations phase offers a diplomatic forum for discussion, ideally leading to a mutually satisfactory

solution to the dispute between the parties. Even if consultations fail to produce such a solution, they can serve the parties to better understand their respective positions and the measures at issue, providing the basis for well-informed arbitration.

If consultations do not lead to a resolution of the dispute, most FTAs foresee the establishment of an arbitral panel that decides on the consistency of the measures in question with the obligations established in an FTA. It is at this second stage where significant differences between DSMs exist. WTO dispute settlement rules do not require the party complained against—the 'defending' party—to consent to the establishment of an arbitral panel. In fact, this feature of the WTO DSU was brought about by the Uruguay Round and has been hailed as one of the most important improvements in multilateral dispute settlement.[89]

Nine East Asian FTAs have followed the WTO DSU in providing for a 'right to a panel' (see Table 12). Typically, parties are required to appoint the panelists charged with ruling on the dispute. In case a party fails to do so—or fails to put forward candidates for a list from which panelists are selected—the relevant DSMs have established mechanisms to overcome a possible procedural deadlock. Several agreements have directly followed the WTO DSU in allowing the complaining party to ask the Director-General of the WTO to perform the necessary appointments if the defending party fails to make its appointment(s). Other agreements provide for a missing panelist to be drawn by lot from a list submitted only by the complaining party. The India-Singapore ECA has a unique provision according to which a panel can be composed of a single panelist appointed by the complaining party.

By contrast, the DSMs of seven East Asian FTAs ultimately allow parties to block the establishment of panels. Even though those agreements also require parties to appoint panelists, they do not feature any mechanism to resolve a procedural deadlock if a party fails to make its appointment(s) or fails to put forward candidates for the list from which panelists are to be selected. Experience with dispute settlement under NAFTA has shown that 'defending' parties make use of this procedural loophole to prevent the establishment of arbitral panels.[90]

The possibility of blocking the establishment of arbitral panels limits the effectiveness of dispute settlement. Moral suasion and the fact that trade disputes are 'repeated games' with reversing roles may still induce the defending parties to agree to the establishment of arbitral panels. But from the point of view of private traders and investors, the absence of an automatic right to a panel introduces uncertainty that ultimately reduces the credibility of FTA liberalization undertakings.

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[89] See, for example, Hoekman and Mavroidis (2000).

[90] The issue of establishment of a panel under NAFTA Chapter 20 disciplines arose in the context of the Mexico – Soft Drinks dispute at the WTO. In that case, Mexico argued that a complaint against the United States under NAFTA "*stalled at the stage of constituting the arbitral panel because of the United States' refusal to appoint panelists and to agree on the appointment of a chairperson*" (response by Mexico to Question 7 from the Panel). On the same matter, the United States expressed that "*[u]nlike the DSU, which permits a party to request that the Director-General appoint panelists 20 days after the panel's establishment if the parties are unable to agree, there is no parallel provision in the NAFTA. As Mexico concedes: 'NAFTA's Chapter Twenty lacks the automaticity of the DSU.' In this regard, the NAFTA Secretariat did not appoint panelists in the NAFTA sugar dispute pursuant to Mexico's request, because under NAFTA dispute settlement rules the NAFTA Secretariat does not have the authority to appoint panelists*" (response by the US to Question 76 of the Panel). See Panel Report on *Mexico – Soft Drinks*, WTO Document WT/DS308/R, Annex C, pages C-5 and C-87, respectively.

The decision of an arbitral panel determines the consistency of the disputed measures with FTA obligations and, in certain cases, may also provide recommendations to parties on how to best put inconsistent measures into conformity with FTA rules. Most East Asian FTAs follow the WTO's dispute settlement system in allowing the defending party a 'reasonable' period of time to implement the panel's decision. If the complaining party feels that the implementation period proposed by the defending party is excessive, it can seek a further arbitral decision on what timeframe can be considered reasonable. The Chile-Korea FTA has sought to expedite the implementation process by requiring panel decisions to immediately spell out a timeframe for compliance. The ASEAN DSM goes even further in setting a uniform 60-day implementation period from the adoption of the panel decision, unless the parties to the dispute agree otherwise.

If the defending party has not complied with the panel's decision at the end of the implementation period, the complaining party has the right to retaliate. Like under the WTO DSU, retaliation in FTAs takes the form of suspending trade benefits equivalent in value to the damages caused by the defending party's inconsistent measures. The economic drawbacks of this form of 'shoot yourself in the foot' enforcement are well-known.[91] Nonetheless, parties to most FTAs see the suspension of trade benefits as the only effective political economy instrument to induce implementation of panel decisions. One noteworthy innovation is introduced by the DSM of the Singapore-US FTA. Under this agreement, the defending party can avoid the suspension of trade benefits by offering the complaining party the payment of an annual monetary compensation. Unless the parties agree otherwise, the amount of the compensation is equivalent to 50 percent of the level of damages suffered by the complaining party.[92]

The Lao PDR-US BTA stands out with a unique dispute settlement system. While parties are encouraged to hold consultations on matters relating to the interpretation and implementation of the agreement, the BTA does not provide for arbitral panels if consultations cannot resolve parties' differences. Instead, a party can make a unilateral determination that the other party has failed to implement one or more obligations and request compensation for the damages suffered. If the requested party fails to provide such compensation, the agreement allows the requesting party to unilaterally determine and impose retaliatory measures equivalent in value to the damages suffered. Arguably, the lack of independent arbitration under the Lao PDR-US BTA transforms disputes resolution into a power-driven—rather than law-based—system. As pointed out above, unilateral retaliatory measures can exacerbate trade controversies rather than solve them, especially when non-compliance with BTA obligations is not obvious. In addition, differences in the size of the two parties' economies suggest that the agreement's retaliation mechanism may be effectively used by one party only.

Finally, the credibility of a DSM does not depend only on its procedural rules, but also on the broader institutional framework in which it is embedded. At the multilateral level, the WTO Secretariat provides legal assistance for arbitral panels, drawing on a pool of experienced trade lawyers. In addition, parties have the right to appeal panel decisions in front of a permanent seven-member Appellate Body. Since the establishment of the WTO in 1995, there have been more than 100 panel decisions and more than 70 rulings by the WTO's Appellate Body—forming a substantial body of accumulated case law. The record of WTO

[91] See, for example, Hoekman and Mavroidis (2000) and Pauwelyn (2000).

[92] In principle, the WTO DSU also allows for "mutually acceptable compensation" if rulings are not implemented within a reasonable period of time (Article 22.2 of the DSU). However, the term "compensation" is generally understood to take the form of trade concessions. In any case, no WTO dispute has so far made use of this option.

members in implementing arbitral decisions is generally considered good, notwithstanding implementation deficiencies in certain cases.[93]

No comparable institutional underpinnings exist in FTAs. Most agreements establish ad-hoc administrative committees composed of government officials from the parties, but no self-standing secretariats with the mandate and capacity to provide legal support to arbitral panels. In addition, they do not provide for the possibility of appealing the findings of arbitral panels. The only exception is the ASEAN dispute settlement mechanism. It has both an independent secretariat equipped to provide legal support and a permanent Appellate Body, closely following the WTO model. However, to our knowledge, no disputes have led to the adoption of panel or Appellate Body reports under ASEAN, so far. This may, in part, reflect the fact that the 'enhanced' ASEAN DSM was only created in 2004.[94]

To the extent that the weaker institutional underpinnings of FTA DSMs lower the real or perceived quality of dispute settlement, parties may be more reluctant to implement adverse panel decisions—thereby reducing the credibility of FTA commitments.

Investor-to-state dispute settlement

As suggested by their name, investor-to-state DSMs afford private investors the ability to invoke an FTA's (or separate) investment disciplines directly against a government before an international arbitration court. This form of dispute resolution offers certain advantages to foreign investors. They do not need to convince their home governments to challenge non-compliant measures of the host country. In addition, if arbitral tribunals confirm the inconsistency of host country measures with investment disciplines, foreign investors can request monetary compensation for the damages suffered. A government's acceptance of such scrutiny, in turn, can strengthen the credibility of its investment regime. At the same time, economists disagree about the extent to which the credibility afforded by this form of arbitration is associated with greater foreign investment flows, with some studies suggesting only a small, if any, effect.[95]

It is also worth noting that foreign investors invoke this form of arbitration mostly when a government's action leads them to exit a market—especially, in the case of asset expropriation. The pursuit of international arbitration implies a rupture in an investor's relations with the host government, which may be difficult to reconcile with continued business operations. In addition, investor-to-state arbitration decisions do not require governments to bring non-compliant measures into conformity with an agreement's investment disciplines, thus offering no forward-looking relief for foreign investors. From an investor's viewpoint, state-to-state and investor-to-state arbitration should therefore be seen as complements, rather than substitutes.[96] From the viewpoint of defending governments, in turn, some arbitral decisions have been criticized for their 'expansive' interpretation of treaty

[93] See Hoekman and Mavroidis (2000).

[94] The original ASEAN DSM was created in 1996, but was perceived as ineffective due to a lack of independent decision-making. See Greenwald (2006).

[95] Hallward-Driemeier (2003) and Rose-Ackerman and Tobin (2005) find no or only a weak empirical relationship between the existence of a bilateral investment treaty and inflows of foreign investment. However, using a different estimation sample, Neumayer and Spess (2005) find a strong positive relationship.

[96] For a more detailed discussion of the benefits and drawbacks of state-to-state versus investor-to-state arbitration, see Molinuevo (2006).

provisions, creating more burdensome obligations than those originally intended by the signatory parties.[97]

All of the sixteen East Asian FTAs that have an investment chapter or a separate investment treaty provide for investor-to-state dispute settlement. For agreements with dual coverage of investment in services, the reach of an investor-to-state DSM depends critically on the rules that define the relationship between trade in services and horizontal investment chapters (see Section 3.C). For example, private investors in services may not be able to challenge national treatment violations through investor-to-state arbitration, if an agreement gives precedence to services disciplines in the legal effect of the national treatment obligation.

The ability of a foreign investor to initiate an arbitration claim depends on whether that investor is covered under the rule of origin established by an FTA or investment treaty. In other words, access to investor-to-state arbitration is itself a trade preference. As discussed in Section 3.E, most East Asian FTAs feature liberal rules of origin which include all service providers constituted under the laws of a party and engaging in substantive business operations, regardless of who owns or controls them.

In addition to being a covered investor, the initiation of investor-to-state arbitration proceedings may be subject to the consent of the affected government. Most East Asian FTAs and investment treaties provide for automatic consent to arbitration by the parties. Exceptions are the EFTA-Singapore FTA and the New Zealand-Singapore FTA, which allow parties to block the initiation of arbitration claims. In the case of the EFTA-Korea FTA, a party's consent to arbitration depends on the nature of the dispute. Automatic consent only applies to disputes initiated by foreign investors that already have an investment position in a host country and not to those involving investors that merely seek to make an investment. As in the case of state-to-state dispute settlement, the absence of a right to arbitration may weaken the effectiveness of an investor-to-state DSM and, ultimately, the credibility of the investment regime.

Most East Asian investor-to-state DSMs follow standard international practice in allowing for two types of arbitration procedures. Foreign investors can submit their arbitration claims either to the International Centre for the Settlement of Investment Disputes (ICSID) or to ad-hoc arbitral tribunals established under the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL). Exceptions are the Australia-Thailand FTA, which provides only for the former, and the EFTA-Singapore FTA, Jordan-Singapore FTA, and New Zealand-Singapore FTA, which provide only for the latter.

Finally, some agreements feature special provisions for investor-to-state disputes in the area of financial services. As pointed out in Section 3.A, the provision of financial services raises special regulatory sensitivities, which have led several governments to shun the exposure of measures in this sector to the full scrutiny of an investor-to-state DSM.[98] Thus, the EFTA-Korea FTA, the Korea-Singapore FTA, and the Singapore-US FTA require authorization

[97] According to some legal commentators, certain arbitral decisions have interpreted the concept of 'investment' to include transactions that parties did not intend to be covered. Similarly, certain interpretations of obligations relating to 'fair and equitable treatment' and measures 'tantamount to expropriation' have been considered to go beyond parties' original intentions. In response to some of these arbitral decisions, the United States and Canada have included interpretative notes in their BITs and FTA investment chapters, clarifying the scope of the fair and equitable treatment and expropriation provisions. See Sornarajah (2004).

[98] The Chile-Korea FTA and the Japan-Mexico EPA fully carve out financial services from the scope of the agreements' investment chapter. By design, investor-to-state dispute settlement therefore does not extend to financial services in these cases.

from a joint FTA committee to proceed with investor-to-state arbitration, if the defending government invokes one of the exceptions to financial services disciplines. These exceptions relate to prudential measures, monetary and exchange rate policies, and matters affecting the soundness and integrity of the financial system (see Section 3.F). If the joint FTA committee does not reach a conclusion, the EFTA-Korea FTA allows the investor to proceed with its arbitration claim. The Korea-Singapore FTA and the Singapore-US FTA instead allow the defending party in this case to request the establishment of a state-to-state arbitration panel that makes a binding ruling on the legality of the exceptions defense.

Yet another special provision on investor-to-state arbitration in financial services is found in the Panama-Singapore FTA. The agreement allows arbitration claims based on the breach of certain obligations only—namely, expropriation and compensation, transfer of funds, and denial of benefit. Thus, even though the Panama-Singapore FTA provides for national treatment, MFN and market access in financial services, private investors cannot bring arbitration claims against governments pertaining to breaches of these core market opening obligations.[99]

4. Where and how far have East Asian FTAs gone beyond the GATS?

In this section, we evaluate to what degree the 20 East Asian FTAs with a substantial services component have led to wider and deeper trade commitments relative to the state of play in the GATS. For this purpose, we created a database that identifies the 'value added' of FTAs for each of the 154 sub-sectors and four modes of supply identified under the GATS. In particular, we classified the resulting 616 entries per FTA schedule into four categories:

(i) Sub-sectors and modes for which only a GATS commitment exists or an FTA does not offer any improvement (*GATS only*);

(ii) Sub-sectors and modes for which a partial GATS commitment exists and an FTA eliminates one or more remaining trade-restrictive measures (*FTA improvements*);

(iii) Sub-sectors and modes for which no GATS commitment is available, but an FTA commitment is made (*FTA new sectors*); and

(iv) Sub-sectors and modes for which neither a GATS nor an FTA commitment exists (*Unbound*).

In addition, for categories (i), (ii), and (iii), we further distinguished between partial and full commitments, with the latter defined as not listing any remaining trade-restrictive measures.

Our detailed methodology for classifying commitments into the four categories is described in Appendix 2. Several important methodological elements are worth pointing out here. First, we define trade-restrictive measures as all measures that are inconsistent with GATS-style market access and national treatment disciplines. As further explained in Appendix 2, these two disciplines implicitly capture the additional obligations on local presence, senior managers and boards of directors, and performance requirements found in negative list agreements. In recording trade-restrictive measures, we did not separately identify market

[99] The purpose of extending application of the investor-to-state DSM to the denial of benefit provision is not clear. One motivation may be to prevent governments from circumventing the expropriation and transfer of funds disciplines by simply denying investors the benefits of the investment chapter. At the same time, the question arises whether investors could challenge violations of national treatment, market access, or MFN as a denial of benefit.

access and national treatment measures. Thus, a partial commitment corresponds to a commitment that maintains at least one trade-restrictive measure in either the market access or national treatment category; a full commitment corresponds to a commitment that does not list any trade-restrictive measure in either of these two categories.

Second, we treated horizontal commitments in 'hybrid' GATS-style schedules as if they were inscribed in each scheduled sub-sector. While this approach follows GATS scheduling guidelines, it departs from similar quantification exercises performed in the previous literature.[100] In comparison to those studies, we thus obtain a smaller number of full commitments—especially for Mode 3 where most countries have scheduled horizontal limitations. Third, commitments without any trade-restrictive measures that did not cover the full sub-sector (as defined under the GATS) were classified as partial commitments.

Quantifying services commitments in the way described above allows for meaningful comparisons. At the same time, our approach has a limitation that is inherent to any analysis of services trade policy. Even though we may record that an FTA improves in a certain sub-sector relative to the GATS, we do not measure the depth of the underlying improvement. For example, a country may raise in one FTA the foreign equity ceiling in the banking sector from 40 to 45 percent and in another FTA eliminate a prohibition on branch banking; we would classify both commitments as partial improvements even though the latter is arguably more far-reaching than the former.

Ideally, we would like to measure the tariff-equivalent of services trade liberalization: trade barriers fall from x to y percent of the import value. But trade protection in services is exercised through a variety of non-tariff measures and empirically assessing their *de facto* restrictiveness remains a fundamental challenge.[101] To partially remedy this deficiency, Appendix 3 offers descriptive summaries of the key liberalization measures offered by the East Asian FTAs examined. While selective, these summaries are intended to complementing our quantitative findings presented in this section.

A second caveat is that we do not evaluate whether trade commitments imply actual market opening or merely bind services policies at or above the existing status quo. For example, domestic services policy in ASEAN countries is usually more liberal—on an MFN basis—than the commitments negotiated under the ASEAN Framework Agreement on Services.[102] By contrast, the bulk of China's commitments under the Mainland-Hong Kong and Mainland-Macao Closer Economic Partnership Agreements imply new market opening. For the most part, China's bilateral liberalization undertakings grant Hong Kong and Macao-based service providers preferential access to the Chinese market, in advance of the liberalization schedule to which China committed when it acceded to the WTO in 2001. Some of the bilateral preferences will be eroded by 2008 once China's GATS commitments are fully phased in; others will be long-lasting (see Fink, 2005). Carefully evaluating to what extent the East Asian FTAs provide for *de novo* liberalization was beyond the scope of this study.

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[100] For example, in quantifying the results of Uruguay Round services commitments, Hoekman (1996) treats horizontal commitments as a separate sub-sector. Marko (1998) ignores horizontal commitments in quantifying the results of the WTO Agreement on Basic Telecommunications Services.

[101] Some studies have attempted to refine measurement of trade policy in certain service sectors. See Findlay and Warren (2001) for a review. However, the results of these studies have been mixed and they typically cover only a subset of service sectors.

[102] See Fink (2006) and Stephenson and Nikomborirak (2002).

In what follows, we use our database to analyze the liberalization content of the 20 East Asian FTAs. We first focus on the set of 20 agreements as a whole and then assess their contribution at the level of individual countries.

Aggregate assessment

Thirteen East Asian countries participated in at least one of the 20 FTAs that form the basis of our analysis, for a total of 32 schedules of commitments.[103] Drawing on our database, Annex A depicts the liberalization content of FTAs relative to the GATS for each of these 32 schedules (in alphabetical order of the scheduling country). The first graph for each schedule presents this information by the 12 main service sectors identified under the GATS. The bars for the four liberalization categories are relative to the total number of sub-sectors and modes in a given sector. (The number of sub-sectors ranges from 4 for environmental services, health-related and social services, and tourism and travel-related services to 46 for business services).[104] The second graph for each schedule breaks the information down by the four modes of supply and depicts an aggregate total (again, all bars are in relative terms).

As can be seen from the figures in Annex A, the ambition of liberalization undertakings varies considerably. At one end of the spectrum, most schedules under the ASEAN Framework Agreement on Services (AFAS) show few improvements over GATS commitments and only a small number of new sub-sectors are listed.[105] Similarly, Malaysia's commitment under the Japan-Malaysia Economic Partnership Agreement and Thailand's commitment under the Australia-Thailand FTA offer limited value added relative to the GATS. At the other end of the spectrum, Laos' commitment under the Lao PDR-US BTA can be considered the most ambitious of all East Asian agreements. As described in Section 3.A, Laos subscribed to full national treatment across all sectors and to full market access in a large number of sectors—including professional, telecommunications, construction, distribution, financial, health and education services.[106] Since Laos is not yet a member of the WTO, its bilateral commitment breaks new ground in binding services policies under international law.

There are other agreements that offer substantial value added vis-à-vis the GATS, notably the commitments made by Japan, Korea, and Singapore in their FTAs.[107] In fact, the GATS commitments of these three high income countries are already among the most liberal in the East Asia region.[108] This point is illustrated in Figure 3, which plots for each FTA schedule the total share of sub-sectors and modes covered by a country's GATS commitment against the equivalent share for the FTA commitment. As can be seen, greater willingness to commit at the FTA level seems to be positively associated with the level of multilateral openness. This finding is not obvious. In principle, the scope for widening and deepening trade commitments in FTAs should be greater for countries with fewer commitments under the

[103] Hong Kong and Macao did not make specific commitments under their Closer Economic Partnership Agreements with China.

[104] By definition, the residual sector 'Other services not included elsewhere' is not further broken down into sub-sectors.

[105] Thanh and Bartlett (2006) offer a comprehensive analysis of the achievements of AFAS.

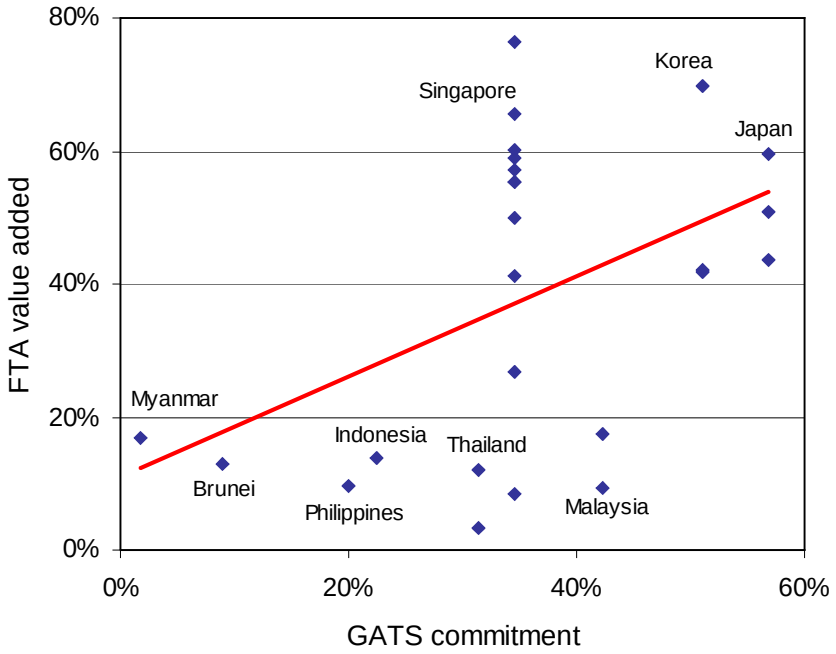
[106] However, the definition of Mode 4 under the Lao PDR-US Bilateral Trade Agreement is limited to services sales persons and intra-corporate transferees.

[107] Having said this, Singapore's commitment under the ASEAN Framework Agreement on Services has limited ambition, mirroring the commitments made by fellow ASEAN members.

[108] We use the World Bank's definition of high income countries here. See World Bank (2005b).

GATS. But it turns out that most of the low and middle income East Asian WTO members have so far used FTAs only in a limited way to widen and deepen their already less ambitious GATS commitments.

Figure 3: Ambition of GATS versus FTA value added



Notes: The dataset used for this figure excludes the commitments of Laos and Vietnam, which are not yet members of the WTO. It also excludes the commitments of Cambodia and China, which acceded to the WTO after the conclusion of the Uruguay Round. Given the non-reciprocal nature of accession negotiations, GATS commitments resulting from accession processes are substantially wider and deeper than those negotiated during the Uruguay Round. The share of GATS commitments is based on all sub-sectors and modes with a partial or full commitment (regardless of subsequent FTA commitments). The share of FTA commitments is based on all sub-sectors and modes for which improved or new partial/full commitments relative to the GATS were made.

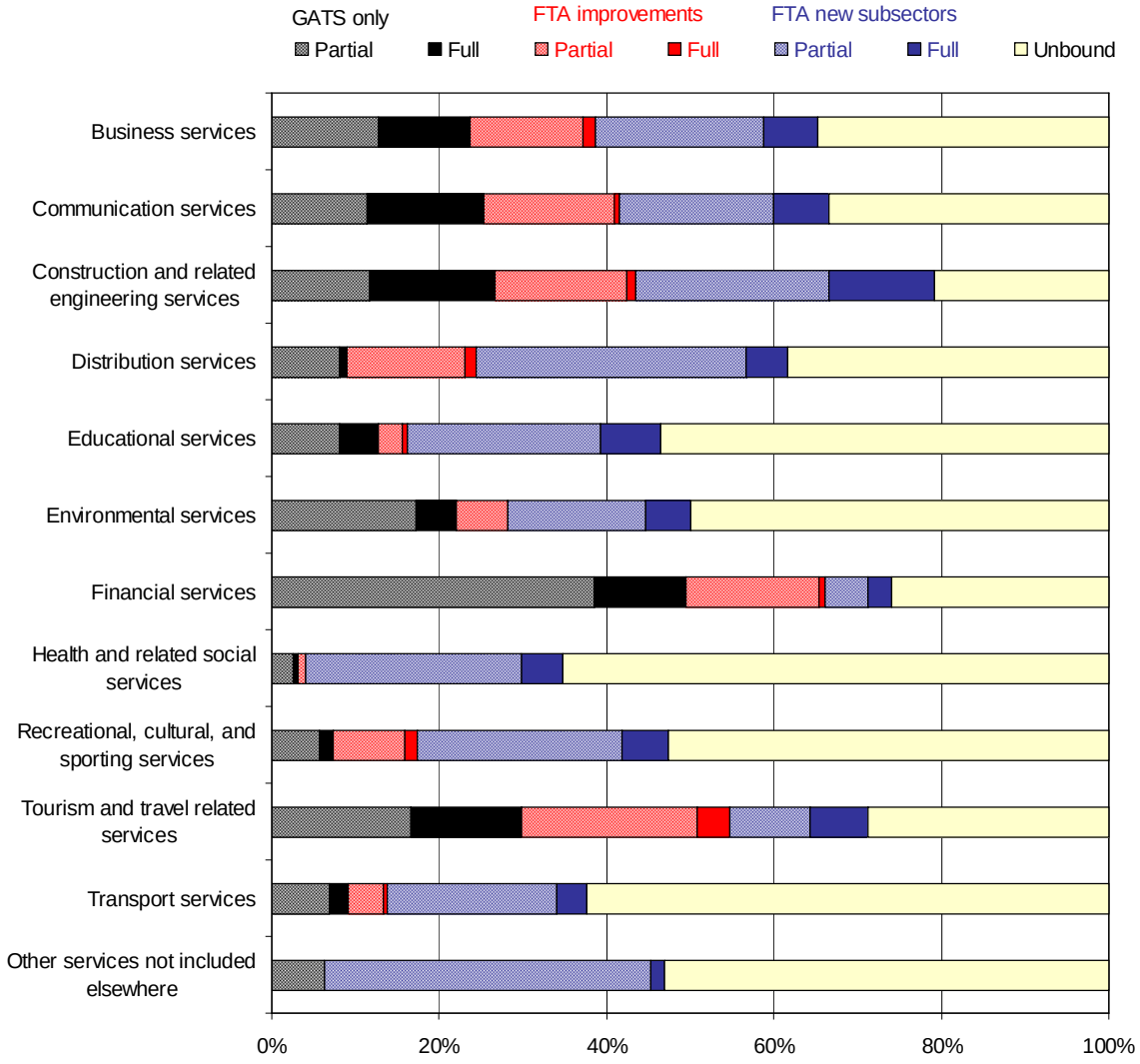
Are the contributions of FTAs evenly spread across sectors and modes of supply or are there specific areas in which FTAs seem more likely to make progress? To answer this question, we computed the aggregate (unweighted) liberalization content of all the 32 schedules in our database. Figure 4 depicts the results of this exercise broken down by the 12 main service sectors. As in the agreement-specific figures, the bars for the four liberalization categories are relative to the total number of sub-sectors and modes in a given sector. Several patterns can be observed. First, the contributions of East Asian FTAs are not limited to particular sectors. FTAs offer improved and new commitments in all of the 12 main service sectors.

Second, construction and distribution services have received the most attention in FTAs, with more than 50 percent of sub-sectors and modes showing improved or new FTA commitments. This is followed by tourism, business, communications, and recreational, cultural, and sporting services, with approximately 40 percent of sub-sectors and modes showing an FTA value added. The smallest contributions have been made in education, environmental, health, transport, and financial services, with only 25 to 31 percent of sub-sectors and modes showing improved or new FTA commitments. This result confirms the

well-known sensitivities towards liberalization in these sectors, even though FTAs were still able to make some inroads towards greater openness. In the case of financial services, the comparatively modest contribution of FTAs may also be due to the already wide coverage of GATS commitments—an outcome of the post-Uruguay Round financial services negotiations in 1997.

Third, the overwhelming share of FTA commitments are still of a partial nature. While this may to some extent reflect our strict criterion for classifying a commitment as 'full' (see above), it is apparent that FTAs do not provide for immediate free trade across the board, but only offer a step in that direction.

Figure 4: Aggregate liberalization content by sector

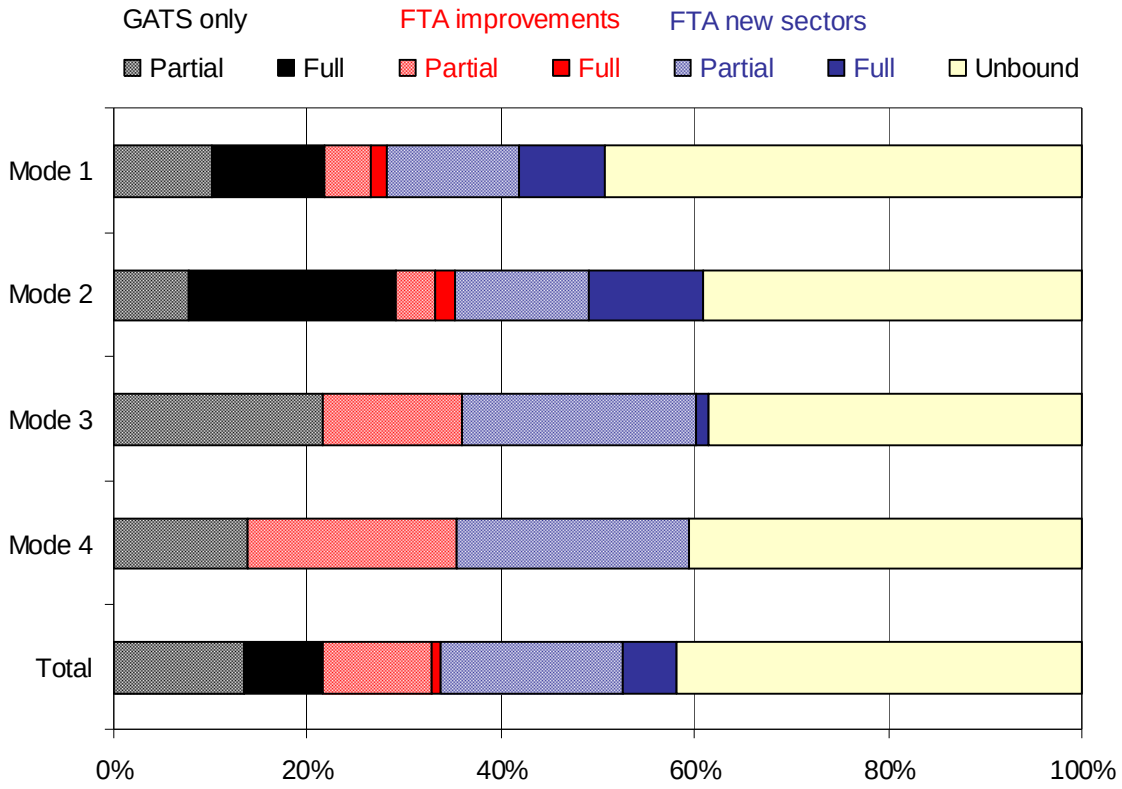


Notes: The commitments shown here are the unweighted aggregate total of the 32 schedules shown in Annex A.

Figure 5 shows the same aggregate liberalization content but this time broken down by the four modes of supply. Again, two patterns bear brief discussion. First, mode 4 has seen the greatest share of improved or new FTA commitments (46 percent), followed by mode 3 (40 percent), mode 2 (32 percent), and mode 1 (29 percent). However, in most cases the value

added offered by FTAs in the area of temporary labor movement is small, consisting mostly of minor expansions in the type of labor flows and measures covered by the agreement. Few of the FTAs provide for expanded quotas for individual service providers or the elimination of economic needs tests. Second, the share of full FTA commitments is substantial for mode 1 (10 percent) and mode 2 (14 percent). As in the GATS, this pattern reflects the absence of horizontal limitations for cross-border supply and consumption abroad in most FTAs and the fact that trade restrictions for these two modes are less pervasive—and, indeed, often not feasible. The share of full commitments for mode 3 is around 2 percent and solely attributable to the commitments made by Laos under the Lao PDR-US BTA.

Figure 5: Aggregate liberalization content by modes of supply

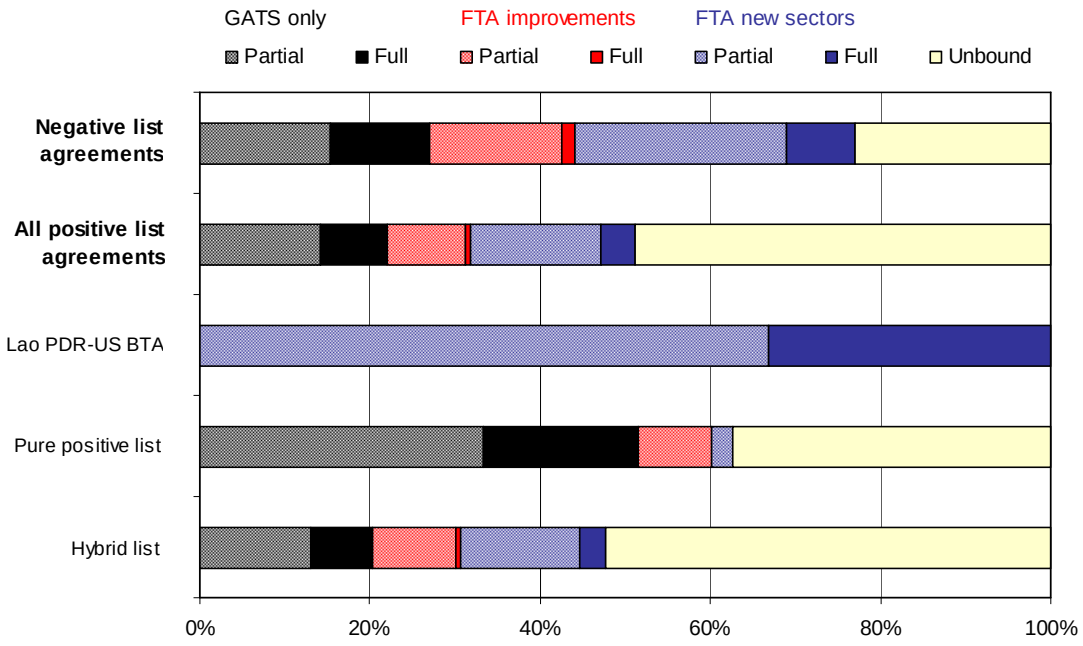


Notes: See Figure 4.

Finally, we can also use our database to investigate whether FTA commitments differ according to the scheduling approach chosen. In Section 3.A, we distinguished between three types of positive list agreements—the Lao PDR-US BTA, pure positive list, and hybrid list—and negative list agreements. As discussed in that section, some observers have argued that a negative list approach offers incentives for the scheduling of more liberal commitments. Is this presumption borne out for East Asian FTAs? At first glance, the answer appears to be 'yes'. Figure 6 depicts the aggregate liberalization content for all positive list agreements, the three different types of positive list agreements, and negative list agreements. As can be seen, the group of positive list agreements has unleashed a smaller share of improved or new commitments (29 percent) than negative list agreements (50 percent).[109]

[109] Within the group of positive list agreements, pure positive list FTAs appear to have unleashed the smallest shares of improved or new commitments (11 percent in total). However, this category is made up of only two

Figure 6: Aggregate liberalization content by scheduling approach



Notes: See Figure 4. For a list of agreements in the various categories shown, see Figure 2. As discussed in Section 3.A, two of the negative list agreements have adopted a hybrid list for cross-border trade in financial services (Modes 1, 2, and 4) and one negative list agreements has adopted a hybrid list for all trade in financial services (Modes 1, 2, 3, and 4). The relevant commitments for these cases were allocated to the hybrid list category.

At the same time, the relationship between the scheduling approach and the ambition of liberalization undertakings is not straightforward. The case of the Lao PDR-US BTA illustrates that far-reaching liberalization can also be achieved through a positive list of sectors. Even comparing FTAs negotiated by the same country, negative list agreements do not always provide wider and deeper coverage. For example, Singapore's schedule under the positive list Japan-Singapore EPA shows more improved and new commitments than Singapore's schedule under the negative list Australia-Singapore FTA (see Figures A19a/b and A22a/b in Annex A).[110]

In addition, the empirical patterns depicted in Figure 6 do not permit the conclusion that a negative list approach *causes* the scheduling of more liberal commitments. As discussed in Section 3.A, causality may well run in the opposite direction. Countries that are prepared to offer or demand greater openness in services may be more likely to seek a negative list to scheduling commitments.

In Box 1, we describe an econometric investigation that controls for countries' propensity to commit to open service markets using FTA partners' level of economic development. We still find a positive effect of negative list agreements on the FTA liberalization content, but this effect is solely explained by the scheduling of new sub-sectors and modes. FTA

agreements: China's CEPAs with Hong Kong and Macao. As discussed in the text, these two agreements imply substantial actual liberalization, even though the number of sub-sectors covered by them appears modest.

[110] Both agreements were concluded around the same time: the Japan-Singapore EPA in 2002 and the Australia-Singapore FTA in 2004.

improvements over existing GATS commitments were not affected by the scheduling approach. However, given the limitations of our database and the fact that other factors are likely to determine countries' 'natural' propensity to liberalize, these findings should be considered as tentative.

Box 1: An econometric evaluation of the contribution of negative list agreements

Our database on East Asian trade commitments allows us to explore the contribution of negative list agreements in an econometric setting. In particular, we investigate what determines the share of commitments with an FTA value added for the 12 main service sectors and 4 modes of supply across the schedules in our database. Our corresponding dependent variables distinguish between three types of FTA value added: (i) improvements relative to existing GATS commitments; (ii) the scheduling of new sub-sectors and modes not listed in the GATS; and (iii) the total contribution of FTAs, defined as the sum of (i) and (ii). In constructing the three dependent variables, we did not make any distinction between partial and full commitments.

The first set of regressions explains the FTA value added by a dummy variable that is 1 if the commitment was scheduled under a negative list and 0 otherwise, and fixed effects for the 12 service sectors and 4 modes of supply. The results are shown in the first three columns of Table 13. Coefficients were estimated by ordinary least squares.[111] The dummy variable for negative list commitments is always positive and statistically significant at the 1 percent level. This result is not surprising and merely confirms what can be seen in Figure 6: negative list FTAs are associated with deeper and wider commitments.

As explain in the text, this finding does not account for the possibility that trading partners with a greater propensity to commit to open service markets may be more likely to adopt a negative list. To address this possibility, we included two additional variables in our regressions: the GDP per capita of the scheduling country and the GDP per capita of the FTA partner(s).[112] Our underlying premise is that countries' 'natural' propensity to commit to liberal trade policies is determined by levels of economic development. The results of the second set of regressions are shown in columns four to six. As before, the dummy variable for negative list commitments is positive and statistically significant at the 1 percent level for new FTA commitments and the total FTA contribution. The value of the estimated coefficients is somewhat smaller than before, suggesting that the GDP per capita variables indeed work to reduce the effect of negative listing. In addition, the negative list dummy variable is not any more statistically significant for improved FTA commitments.

At their face value, our results suggest that negative listings do not hold any advantage in deepening GATS commitments, but that they induce the scheduling of new sub-sectors and modes of supply. This finding accords with intuition. Most positive list agreements included in our analysis are hybrid list agreements, for which the level of openness is to a large extent determined by measures inscribed on a negative basis (see Section 3.A). In other words, the distinguishing characteristic of negative list agreements is the way in which sectors are listed and this seems to have an effect on the negotiating outcome.

As expected, GDP per capita of the scheduling country has a positive effect on improved FTA commitments and the total contribution of FTAs. Interestingly, this variable is found not to be statistically significant for new FTA commitments. GDP per capita of the partner country (or partner countries) was statistically not significant for any of the three dependent variables. This latter result seems surprising. One would expect richer countries to exert stronger pressure on FTA partners to make wider and deeper commitments. But such pressure—if it exists—does not appear to be reflected in the negotiating outcome.

[111] Since our dependent variable is truncated at values below zero and above one, we also tested a Tobit maximum likelihood estimation technique (with a lower bound of 0 and an upper bound of 1). The results showed higher coefficient estimates, but did not change any of the conclusions described in the text.

[112] Where there was more than one FTA partner, we used the population-weighted GDP per capita of all partner countries. Brunei and Myanmar (for ASEAN) and Liechtenstein (for EFTA) were excluded in the calculation of population weighted GDP per capita, because no GDP data were available for these countries.

As a final note, we caution against over-interpreting our econometric findings. As described in the text, our database does not capture the true depth of FTA commitments, but merely records commitments that show some value-added relative to the GATS. In addition, countries' 'natural' propensity to commit to open service markets is likely to be only imperfectly captured by the GDP per capita variables. To the extent that other factors play a role in this respect, our econometric approach over-estimates the contribution of the scheduling approach as such.

Table 13: Results of econometric investigation

	Improved FTA commitment	New FTA commitment	Total FTA contribution	Improved FTA commitment	New FTA commitment	Total FTA contribution
Negative list commitment	0.073* (5.82)	0.294* (15.63)	0.367* (17.91)	0.014 (1.03)	0.279* (13.07)	0.293* (12.82)
GDP per capita of scheduling country				0.036* (9.94)	0.006 (0.99)	0.042* (6.89)
GDP per capita of partner country (or countries)				-0.005 (-1.24)	0.009 (1.36)	0.004 (0.52)
Number of observations	1,440	1,440	1,440	1,440	1,440	1,440
Adjusted R-squared	0.352	0.516	0.626	0.393	0.516	0.639

Notes: Ordinary least squares estimates; t-statistics are in parenthesis; * indicates statistical significance at the 1 percent level. Data on GDP per capita are for 2002, were taken from the World Bank's World Development Indicators, and were converted to natural log values. Brunei and Myanmar were dropped from the analysis, because no GDP per capita data were available. That leaves 30 schedules of commitments with observations for 12 sectors and 4 modes of supply, explaining the total of 1,440 observations.

Country level assessment

Most East Asian countries have concluded more than one FTA. The aggregate liberalization content shown in Figures 3-6 use individual commitment schedules as the unit of analysis. Since countries may make the same or similar commitments to more than one trading partner, it is also interesting to aggregate agreements at the country level. In particular, we identified the most liberal commitment a country has made across all of its FTAs for each of the 154 sub-sectors and 4 modes described above. Of course, this is a hypothetical experiment. By definition, FTAs are preferential agreements, excluding service providers from non-parties (though the degree of exclusion depends on the rule of origin adopted, as discussed in Section 3.E). Even if FTA commitments were implemented on a most-favored nations (MFN) basis, only parties would benefit from the rules and access to dispute settlement provided for in an agreement. Still, our experiment is useful in asking how far a country has been willing to go across all of its FTAs.

The figures presented in Annex B depict the 'maximal' liberalization content for countries with more than one FTA, again broken down by sectors and modes of supply. Table 14 summarizes the information contained in these figures, indicating for each country the number of FTAs and the total 'maximal' liberalization content in the four liberalization categories. Unsurprisingly, Laos remains the country for which FTA commitments have gone farthest. In addition, the figures presented for Korea, Japan, and Singapore reveal that these three high income countries have made extensive use of FTAs to subscribe to greater openness in services. Singapore stands out in this group, with 86 percent of sub-sectors and modes showing improved or new commitments across its 11 FTAs. For Korea and Japan, this share stands at 76 and 71 percent, respectively. They are followed by Vietnam, for

which the share of sub-sectors and modes covered by an FTA commitment is 42 percent. Similar to Laos, Vietnam is not yet a member of the WTO, but has concluded an ambitious—though less far-reaching—BTA with the United States. For the remaining 8 countries that have concluded at least one FTA, the share of sub-sectors and modes with an improved or new commitment lies somewhere between 10 and 20 percent.

Table 14: 'Maximal' liberalization content by country

Country	Number of FTAs	GATS only		FTA improvements		FTA new sectors		Unbound	Variation coefficient (V)
		Partial	Full	Partial	Full	Partial	Full		
Brunei Darussalam	1	38	13	2	2	55	21	485	--
Cambodia	1	187	111	44	0	15	4	255	--
China	2	205	112	53	0	16	0	230	0.986
Indonesia	1	72	12	31	23	22	10	446	--
Japan	3	68	85	160	37	131	112	23	0.642
Korea	3	11	70	206	28	202	34	65	0.579
Lao PDR	2	--	--	--	--	410	206	0	0.161
Malaysia	2	142	45	72	1	25	9	322	0.308
Myanmar	1	5	4	2	0	89	12	504	--
Philippines	1	95	25	3	0	39	18	436	--
Singapore	11	12	56	117	28	243	139	21	0.579
Thailand	2	130	25	37	1	32	4	387	0.280
Vietnam	2	--	--	--	--	183	73	360	0.453

Notes: Commitment counts are based on the maximum of commitments across all FTAs concluded by a country. In other words, if an improved commitment or new sub-sector relative to a country's GATS schedule is found in *at least* one FTA, the relevant sub-sector is classified as 'improved' or 'new' in the table's FTA columns. The FTA variation coefficient is calculated as explained in the text.

Finally, it is interesting to ask whether the commitments offered by one country to two or more FTA partners are alike or dissimilar. We investigate this question by calculating a variation coefficient, V, which we define as follows:

$$V = \frac{\sum_{ij} A_{ij}}{\text{Number of subsectors and modes with an improved or new commitment in at least one FTA}},$$

where

$$A_{ij} = \begin{cases} A_{ij} = 0 & \text{if only one FTA shows an improved or new commitment for subsector i and mode j} \\ A_{ij} = \dfrac{\text{Number of FTAs that show an improved or new commitment for subsector i and mode j}}{\text{Total number of FTAs}} & \text{otherwise.} \end{cases}$$

Intuitively, our variation coefficient measures the number of matching FTA commitments as a share of all improved or new FTA commitments. It ranges from 0 to 1, with 0 indicating perfect incongruence among a country's FTAs and 1 suggesting perfectly matching FTAs. In calculating V, we make no distinction between partial and full commitments. We also do not directly compare FTA commitments. Thus, even though two FTAs may show improved or

new commitments for the same sub-sector and mode, the respective commitments may still differ.

The calculated values of our variation coefficient are shown in the last column of Table 1. V is close to one in the case of China, as schedules of commitments under the two CEPAs with Hong Kong and Macao are almost identical. In other words, China's liberalization undertakings seem less the outcome of Hong Kong's or Macao's negotiating demands, but rather by what China was prepared to offer to its two Special Administrative Regions.[113] The lowest value for V is found for Laos, reflecting the low level of ambition in Laos' AFAS commitment relative to the high level of ambition in Laos' commitment under the Lao PDR-US BTA. It is interesting to look at the values of V for Japan, Korea, and Singapore—the countries that have negotiated at least three FTAs and which have used these FTAs to make substantial market opening commitments. We find that the value ranges from 0.579 to 0.642, which could be interpreted as follows: while these countries seem to have a common set of commitments that they are prepared to offer to all negotiating partners, they reserve some commitments for certain trading partners—possibly responding to trading partners' market opening requests.

5. Are East Asian FTAs compatible with WTO rules on economic integration?

The analysis presented so far has shown how much bilateral and regional agreements in services have led to market opening in services beyond existent multilateral commitments. The 20 East Asian FTAs examined feature different degrees of ambition—ranging from agreements with broad sectoral coverage and deep liberalization undertakings to agreements that add only limited value to existing GATS commitments.

These findings are not only of academic interest. The WTO has rules on the conclusion of economic integration agreements (EIAs). Preferential agreements in services entail an exception to the general principle of non-discrimination between WTO Members, enshrined in the MFN obligation of the GATS. Like its goods *alter ego*—GATT Article XXIV—GATS Article V prescribes a series of conditions that treaties on economic integration in services must fulfill in order to constitute a lawful deviation from the MFN principle.

Observance of WTO rules on economic integration is not only a matter of respect for the multilateral trading system. Compliance of an FTA with GATS Article V falls under the jurisdictional capacity of the WTO's dispute settlement system. Thus, should a preferential agreement involving WTO members be found to not comply with the requirements of the GATS, trade preferences under such an agreement would have to be 'multilateralized' to the entire WTO membership.[114]

The requirements of GATS Article V involve a substantive element and a procedural element. The substantive element establishes obligations on the sectoral coverage and depth of FTAs as well as on the treatment of non-parties. In particular, WTO-consistent EIAs are required to:

[113] The Mainland-Hong Kong and Mainland-Macao CEPAs have to be understood in the context of the 'one country, two systems' formula. For a further discussion, see Fink (2005).

[114] For a review of WTO jurisprudence on economic integration—in particular, Article XXIV of the GATT—see Marceau and Reiman (2001).

- have substantial sectoral coverage, in terms of number of sectors, volume of trade affected and modes of supply (understood as not providing for the *a priori* exclusion of any mode of supply);

- provide for the absence or elimination of substantially all discrimination that affects service suppliers from a party to an EIA;

- not raise the overall level of barriers to trade in services for WTO members that are not party to an EIA;

- and provide for a rule or origin that extends trade preference to service suppliers from non-parties that are constituted under the laws of a party and are engaged in substantive business operations in the territory of the parties.

The first and second substantive requirements need to be met either at the entry into force of an EIA or on the basis of a reasonable time-frame.[115]

The main procedural element is the prompt notification of an EIA—as well as any subsequent enlargement or significant modification—to the WTO Council for Trade in Services (CTS). In addition, where agreements are implemented on the basis of a time-frame, the parties need to report periodically to the CTS on the state of implementation. The CTS may establish a working party to examine the consistency of a notified agreement with the substantive requirements of Article V and issue recommendations to the parties.

Do East Asian FTAs live up to these standards? An authoritative answer can only emerge from WTO dispute settlement. So far, there has been no jurisprudence on GATS Article V. In addition, the CTS has not provided any further clarification on Article V conditions. The precise interpretation of WTO rules in this area remains therefore uncertain. Nonetheless, the analysis presented in the last two sections can shed light on the criteria that might be relevant in assessing compliance with Article V requirements. In what follows, we first document which agreements have been notified to the CTS. We then confront the substantive requirements outlined above with the observed practices in East Asian FTAs.

Notification

Fourteen of the twenty East Asian FTAs have so far been notified to the WTO (see Table 15). Typically, notification occurs within a few weeks or months after entry into force of the FTA, sometimes even shortly before that date. The longest time lag between entry into force and notification has been eleven months (for the Jordan-Singapore FTA). If the "prompt" notification requirement applies from the date of entry into force of an FTA, it appears that notifications have for the most part been made according to GATS Article V obligations.[116]

Eight of the notified FTAs have undergone a factual examination process. However, the CTS has so far not issued any recommendations to any WTO member on the compliance of FTAs with GATS Article V.

[115] Article V bis establishes additional rules for labour market integration agreements. But these rules are of little relevance for our purposes, as none of the East Asian FTAs provides for this form of integration.

[116] However, in discussion in the WTO Committee on Regional Trade Agreements, it has also been suggested that a "prompt" notification should occur at least 90 days before an agreement takes effect (see WTO Document WT/REG/W/37).

Table 15: East Asian FTAs notified to the WTO

Agreement	Date of entry into force	Date of notification	Examination process
ASEAN Framework Agreement on Services	December 30, 1998	*Not notified*	--
New Zealand-Singapore FTA	January 1, 2001	September 19, 2001	Factual examination concluded
US-Vietnam BTA	December 10, 2001	*Not notified*	--
Japan-Singapore EPA	November 30, 2002	November 14, 2002	Factual examination concluded
EFTA-Singapore FTA	January 1, 2003	January 24, 2003	Factual examination concluded
Australia-Singapore FTA	July 28, 2003	October 1, 2003	Factual examination concluded
Chile-Korea FTA	April 1, 2004	April 19, 2004	Factual examination concluded
Mainland-Hong Kong CEPA	January 1, 2004	January 12, 2004	Factual examination concluded
Mainland-Macao CEPA	January 1, 2004	January 12, 2004	Factual examination concluded
Singapore-US FTA	January 1, 2004	December 19, 2003	Factual examination concluded
Laos PDR-US BTA	February 4, 2005	*Not notified*	--
Japan-Mexico EPA	April 1, 2005	April 22, 2005	Factual examination not started
Jordan-Singapore FTA	August 22, 2005	July 12, 2006	Examination not requested
Australia-Thailand FTA	January 1, 2005	January 5, 2005	Factual examination not started
EFTA-Korea FTA	September 1, 2006	August 28, 2006	Examination not requested
Korea-Singapore FTA	March 2, 2006	February 24, 2006	Factual examination not started
Japan-Malaysia EPA	July 13, 2006	July 13, 2006	Examination not requested
Trans-Pacific EPA	*Not yet in force*	*Not notified*	--
India-Singapore ECA	*Not yet in force*	*Not notified*	--
Panama-Singapore FTA	*Not yet in force*	*Not notified*	--

Source: WTO (http://www.wto.org/english/tratop_e/region_e/region_e.htm, as of October, 2006).

To date, six East Asian FTAs have not been notified to the WTO. In the case of three agreements—the India-Singapore ECA, the Panama-Singapore FTA, and the Trans-Pacific EPA—non-notification is most likely due to their recent vintage. The US BTAs with Laos and Vietnam have not been notified, probably because they are unlikely to pose any conflict with the MFN principle of the GATS. Laos and Vietnam are not yet Members of the WTO. The United States, in turn, does not extend any trade preference to its BTA partners beyond its current GATS commitment.

Thus, the only FTA where notification has not occurred for an apparent reason is the ASEAN Framework Agreement on Services—the oldest services agreement in the East Asia region.

Substantial sectoral coverage

The first of the four substantive requirements relates to substantial sectoral coverage. GATS Article V spells out that this concept is to be understood in terms of number of sectors, volume of trade affected and modes of supply. However, the precise application of these criteria remains unclear. Several questions immediately arise. What precisely is meant by the 'volume' of services trade (as opposed to the 'value' of such trade)? At what level of disaggregation should the count of sectors be made? Can entire sectors be excluded from the

agreement? If so, at which point would an exclusion of a sector reduce the volume of trade to a non-substantial level?[117] The lack of precise and sufficiently disaggregated data on trade in services further complicates the task of determining whether or not an FTA meets a certain threshold value above which sectoral coverage could be considered substantial.

The analysis presented in the previous section has shown that no East Asian FTA provides for universal sectoral coverage.[118] Having said this, the lack of universal coverage does not immediately imply non-substantial coverage. Looking at the number of sub-sectors, we note that some East Asian FTAs, such as the Japan-Singapore FTA or the Chile-Korea FTA, provide for wide sectoral coverage, averaging commitments in well over 70 percent of all services sub-sectors. By contrast, a great number of East Asian FTAs—including the AFAS, the Australia-Thailand FTA, the Mainland-Hong Kong and Mainland-Macao CEPAs, and the Jordan-Singapore FTA—feature commitments in less than half of all 154 sub-sectors.[119] Without implying any judgment on the definition of sectors to be counted, it seems fair to conclude that current commitments under FTAs do not manifestly provide for substantial sectoral coverage.

It is beyond the scope of this paper to attempt any quantification of the volume of trade covered by East Asian FTAs. As already pointed out, such an exercise would be severely constrained by the availability of data on trade in services. But it is worth pointing out that certain agreements carve out service activities that are known to be associated with substantial trade flows—air and maritime transport services and financial services (see Table 2).[120] Again, it is not obvious to what extent the exclusion of such sectors reduces the volume of trade covered to non-substantial levels.

As far as modes of supply are concerned, GATS Article V makes clear that there should be non *a priori* exclusion of any mode of supply. Thus, an agreement that features commitments in all service sectors, but excludes one or more modes of supply would still fail the substantial sectoral coverage test. None of the 20 East Asian FTAs formally excludes any mode of supply from its coverage.[121] As discussed in Section 3.A, most negative list agreements exclude mode 3 from the scope of the services chapter. But commercial presence

[117] In discussions in the WTO Committee on Regional Trade Agreements, one WTO member has suggested that excluded sectors should not be of an essential nature—alluding specifically to transport services, but presumably also encompassing services such as finance and telecommunications that form the 'backbone' of an economy (See WTO Document WT/REG/M/22). However, an essentiality test is not expressly mentioned in GATS Article V. In addition, such a criterion would seem difficult to apply in practice, as most services—except maybe services such tourism or entertainment—can be argued to be essential in some way.

[118] The commitment of Laos under the Lao PDR-US BTA can be considered universal in scope. But the same does not hold for the US commitment under that agreement.

[119] See Annex A for a graphical description of the sectoral coverage of FTA commitments.

[120] Another open question is whether FTAs need to expand coverage to air transport, which has been carved out from the scope of the GATS.

[121] Some WTO Members have argued that certain mode 4 aspects exempted from the GATS through the Annex on the Movement of Natural Persons should be included in EIAs (see WTO documents WT/REG/W7 and WT/REG/M/22). Thus, even FTAs that fully replicate the GATS modes of supply would not meet the substantive sectoral coverage test. However, it is uncertain whether such an expansionist view would be upheld in WTO dispute settlement proceedings.

is covered by the investment chapters of these agreements.[122] Indeed, all agreements analyzed offer some commitments in each of the four modes of supply (see Annex A).[123]

Finally, FTAs that do not provide for substantial sectoral coverage when they enter into force can still be consistent with Article V, if further negotiations lead to the achievement of substantial sectoral coverage within a reasonable timeframe. Most East Asian FTAs incorporate provisions that call for further liberalization through successive negotiations. In the case of AFAS and China's two CEPAs with Hong Kong and Macao, several rounds of negotiations have taken place. But as pointed out above, commitments under these agreements cover still less than half of the 154 sub-sectors identified under the GATS. While at current trends these agreements would eventually reach universal coverage, it is an open question whether the pace of liberalization is sufficient for substantial coverage to be achieved within a timeframe that can be deemed 'reasonable'.[124]

Elimination of substantially all discrimination

The second of the four substantive conditions of GATS Article V calls for the elimination of substantially all discrimination, with explicit reference to the national treatment article of the GATS. In other words, EIAs are allowed to maintain all non-discriminatory measures that fall exclusively under the market access discipline, but they are supposed to substantially do away with measures inconsistent with national treatment.[125]

Like above, the requirement to eliminate substantially all discrimination raises a number of interpretative questions. Does this requirement extend to all sub-sectors and modes for which FTA commitments are made? Which measures could still be maintained so that the level of remaining discrimination can be considered non-substantial? Would the volume of trade in a particular sub-sector play a role in this assessment? As discussed in Section 4, quantifying the restrictiveness of trade barriers in services—for example, in the form of tariff-equivalents—is a challenging task. For methodological and data reasons, a rigorous empirical assessment of the depth of FTA liberalization undertakings appears elusive.

Our database of the value added of FTA liberalization undertakings discussed in Section 4 did not separately record market access and national treatment commitments. Still, a few observations are possible based on the qualitative summaries of FTA commitments presented in Appendix 3. First, except Laos' commitment under the Lao PDR-US BTA, none of the East Asian FTAs provide for full national treatment across all sectors and modes. Second, where sub-sectors have been scheduled, modes 1 and 2 are for the most part subject to few explicit discriminatory measures. Having said this, in several FTAs, parties require the establishment of a commercial presence or the registration with local professional bodies as a

[122] Similarly, several negative list agreements adopt a definition of mode 4 different from the one found in the GATS. It is uncertain, however, whether this definition is necessarily narrower. In addition, the relevant agreements complement services commitments with dedicated MNP chapters. See Section 3.D.

[123] The US undertakings under the Lao PDR-US BTA and US-Vietnam BTA do not offer any market opening beyond the US GATS commitment. As pointed out above, however, these commitments are most likely not subject to the disciplines of Article V.

[124] In discussions in the WTO Committee on Regional Trade Agreements, suggestions about what can be considered a "reasonable" period of time for substantial liberalization of services trade to occur have ranged, for the most part, from 5 to 10 years (see WTO Document WT/REG/W/37).

[125] Article V offers vaguely formulated flexibility in evaluating whether substantially all discrimination has been eliminated. Thus, "*consideration may be given to the relationship of the agreement to a wider process of economic integration or trade liberalization among the countries concerned*."

prerequisite for supplying services. Even if such restrictions are *de jure* non-discriminatory and are inscribed as market access limitations, they may be considered *de facto* discriminatory and thus be taken into account in an assessment of whether substantially all discrimination is eliminated.

Third, most agreements feature horizontal limitations for mode 3. In several cases, these limitations are relatively far-reaching. For example, in the Korea-Singapore FTA, Korea maintains all discriminatory measures of local governments and reserves the right to maintain or introduce discriminatory measures pertaining to the acquisition and usage of land, capital transactions by non-residents, and performance requirements with respect to employment. Brunei's AFAS commitment exempts all measures concerning foreign equity participation (again, a market access measure that may be considered *de facto* discrimination). In all its FTAs, Singapore maintains horizontal limitations on the nationality of managers and directors of foreign service suppliers.

As described in Section 4, even though there are a significant number of FTA liberalization undertakings that offer wider and deeper commitments under mode 4, the value added of these commitments relative to the GATS is typically minor. Most FTAs commitments, like the GATS, are limited to high-skilled professionals and intra-corporate transferees. Measures affecting low-skilled workers and independent service providers are usually not covered in commitment schedules.

As in the case of substantial sectoral coverage, provisions in East Asian FTAs calling for further liberalization through successive negotiating rounds can help ensure compliance even if remaining discriminatory measures at the entry into force of an FTA are non-substantial.

Overall level of trade barriers

The first two substantive requirements concern the 'internal' breadth and depth of an EIA. The final two conditions focus on the treatment of non-parties. In particular, the third condition calls for an EIA to not raise the overall level of trade "barriers" as faced by WTO members outside the agreement. Once more, a number of interpretative questions emerge. What is meant by "barriers"—national treatment measures, market access measures, or both?[126] Does the concept of *overall* level of trade barriers allow for higher barriers in certain sectors, as long as some weighted or unweighted average of sectoral barriers is not raised? Even if these questions were answered, it would appear difficult to translate this requirement into practice. Given the quantification challenges outlined previously, it does not seem feasible to calculate the overall level of barriers in effect prior to the formation of an EIA and compare that level to the post-EIA counterfactual.[127]

At the same time, the requirement to not raise the level of protection faced by outsiders applies only to trade policy changes that directly emanate from obligations under an EIA. In analyzing the 20 East Asian FTAs, we did not find any provision that implies the creation of new trade barriers vis-à-vis third parties. From this view, it would appear that all FTAs are compliant with this substantive requirement of GATS Article V.

[126] The GATS Agreement does not provide for a definition of the term "barrier".

[127] See also Stephenson (2000) for a discussion of the practical difficulties in applying this requirement.

Rule of origin

The fourth substantive condition also concerns the treatment of non-parties. It requires the establishment of a liberal rule of origin for juridical persons. In particular, trade preferences negotiated under an EIA need to be extended to juridical persons of any other WTO member that are constituted under the laws of a party and are engaged in substantive business operations in the territory of the parties.[128]

Compared to the other three substantive requirements, the rule of origin condition poses the least interpretative difficulties. Still, several uncertainties remain. Does the concept of constitution under the laws of a party encompass non-incorporated entities such as branches or representative offices? What threshold needs to be surpassed for business operations to qualify as substantive?

Notwithstanding these uncertainties, several observations can be made in relation to the East Asian FTAs. As discussed in Section 3.E, most agreements feature a rule of origin that, indeed, entitles non-party service suppliers that are constituted or otherwise organized under the laws of a party and that engage in substantive business operations to the benefits of FTAs. The Mainland-Hong Kong and Mainland-Macao CEPAs are the only agreements that define 'substantive business operations' in concrete terms. In all other FTAs, the implementation of this concept is left to domestic laws and regulations.

While most rules of origin thus appear compliant with GATS Article V, several agreements allow parties the denial of trade benefits to at least some service suppliers from other WTO member countries that are legally constituted and engaged in substantive business operations in the territory of the parties (see Table 9):

- the Australia-Thailand FTA allows the denial of benefits when a party "*establishes that the service supplier is owned or controlled by persons of a non-Party*";

- the Chile-Korea FTA (investment chapter only), the Japan-Malaysia FTA, the Japan-Mexico EPA, and the Singapore-US FTA allow the denial of benefits to service providers from non-parties with which a party does not maintain diplomatic relations or where certain trade sanctions apply.[129]

It is not immediately obvious how the denial of benefit provisions of these agreements comply with GATS Article V.[130]

Special and differential treatment for developing countries

WTO rules on economic integration offer special and differential treatment (SDT) for agreements involving developing countries. In the area of goods trade, SDT takes the form

[128] GATS Article V does not establish any discipline on the rule of origin for services or natural persons.

[129] The majority of East Asian FTAs limit FTA benefits to juridical persons with substantial business operations in the territory of the party in which the juridical person is legally constituted (see Table 9). To the extent that the language "*territory of the parties*" in GATS Article V.6 is equivalent to 'territory of either party', the rule of origin of these FTAs would appear to be inconsistent with GATS rules as well.

[130] In case an FTA's rule of origin provision is found to be inconsistent with GATS Article V, WTO members may be able to invoke the general exceptions (Article XIV) and security exceptions (Article XIVbis) provisions of the GATS. Security motivations may apply especially to the denial of benefits clauses of the Chile-Korea FTA, the Japan-Malaysia FTA, the Japan-Mexico EPA, and the Singapore-US FTA.

of the so-called 'Enabling Clause' of 1979, which allows for the conclusion of EIAs that provide for less than full liberalization. In the area of services trade, GATS Article V offers two distinct SDT provisions.

First, where developing countries are parties to an EIA, GATS Article V calls for "flexibility" in the application of the two substantive 'internal' conditions—substantial sectoral coverage and elimination of substantially all discrimination. Second, agreements involving developing countries *only* may adopt a more restrictive rule of origin which limits trade preferences to service suppliers that are owned or controlled by natural persons of the parties.

The significance of the first provision depends critically on the interpretation of the concept of "flexibility." GATS Article V does not offer any guidance on how this concept could be applied in practice. As such, it is difficult to evaluate to what extent this provision might bring East Asian FTAs that fall short of the two substantive 'internal' requirements closer to compliance.

A second source of uncertainty—relevant for both SDT provisions—stems from the classification of developing countries. The WTO only has an official list of least-developed country (LDC) members, based on United Nations criteria. In principle, non-LDC WTO members can decide for themselves whether they are to be considered 'developed' or 'developing' countries. However, this decision may be challenged by other members. The question of developing country status is particularly delicate for the 'emerging' East Asian economies that have experienced fast growth over the past 10-20 years and are today classified as 'high income' countries by the World Bank—notably Hong Kong, Korea, and Singapore. So far, there has been no jurisprudence that could give guidance on what criteria would be used to resolve a disagreement on this question.

Finally, only two agreements have established a rule of origin with an ownership and control criterion—the Australia-Thailand FTA and the India-Singapore ECA. Since Australia is unlikely to be considered a developing country in the WTO, it is not obvious how the rule of origin of the former agreement complies with Article V—as pointed out above. Compatibility of the rule of origin of the latter agreement with GATS requirements seems to depend on whether Singapore would be considered a developing country under WTO law.

6. Conclusion

FTAs involving East Asian countries are proliferating at a mind-boggling pace. In light of their large and fast-growing markets, many countries in the region are seen as attractive partners for an FTA. Most recently, the European Union, which has so far not entered into an FTA with an East Asian country, identified agreements with ASEAN and Korea as priorities in its new trade policy strategy.[131] If current trends continue, the bulk of international commerce in the East Asia region will be governed by the rules and commitments of such agreements. Indeed, many future commercial transactions may be governed by more than one FTA. New Zealand and Singapore, for example, have already entered into two FTAs—a bilateral agreement and a regional agreement involving Brunei and Chile. A third common FTA is under negotiation as part of the ASEAN-New Zealand partnership.

[131] See the Communication from the European Commission "Global Europe: Competing in the World," Document No. COM(2006) 567, October 4, 2006.

What are the implications of this growing 'spaghetti bowl' of overlapping FTAs for the governance of world trade? Most interestingly, will the East Asian FTAs act as 'building blocks' or 'stumbling blocks' to further multilateral liberalization? This question has been heavily debated by economists.[132] Even though most of this debate has focused on trade in goods, a number of arguments apply directly to the services context. In particular, proponents of the 'building blocks' view advance the following arguments:

- FTAs offer inroads towards more open markets, even if liberalization occurs only with respect to certain trading partners. As such, countries may be more willing to liberalize, for two reasons. First, there may be less resistance form vested interests that already face some foreign competition. Second, if the outcome of preferential liberalization proves successful, the support for multilateral market opening may be strengthened.

- FTAs may spur a process of competitive liberalization. Businesses in countries left out by FTAs may feel that they are harmed by not having preferential access to a foreign market. They may thus lobby their own government to enter the FTA game. The rapid increase in the number of FTAs suggests that this force may be at work in the East Asia region.[133] Once a country has concluded FTAs with all of its major trading partner, it might as well 'multilateralize' its level of openness.

Followers of the 'stumbling blocks' view respond with the following arguments:

- FTAs are discriminatory in nature, leading to the diversion of trade. As such, there may be businesses that would see their preferences eroded from MFN-based liberalization. Those businesses can become a powerful voice against further multilateral integration. Indeed, concerns about preference erosion have been a source of contention in the DDA's negotiations on non-agricultural market access.

- FTAs divert scarce negotiating resources. Many countries in East Asia are negotiating five or more FTAs at the same (see Table 2). While there are substantial spillovers from negotiating in different trade fora, each individual agreement requires its own share of preparation, consultation, coordination, and travel. There is therefore the risk that devotion of negotiating resources towards FTAs comes at the expense of reduced engagement at the WTO.

Is there anything special about the services component of East Asian FTAs that would strengthen either the 'building block' or 'stumbling block' forces? Three arguments can be made in support of the 'building block' camp. First, as discussed in Section 3.E, most East Asian FTAs have adopted liberal rules of origin, reducing the discriminatory nature of trade preferences in services. Service providers from non-parties that have substantial business operations in the territory of a party typically benefit from the greater levels of openness available under FTAs. While this treatment still falls short of MFN treatment, it arguably generates less resistance to further multilateral liberalization from vested interests worried about preference erosion as in the goods case. From this view, one might argue that the

[132] See Baldwin (2006a) for a recent review of the rich literature on this topic.

[133] Baldwin (2006b) argues that China's broaching of the idea of an FTA between China and ASEAN in November 2000 triggered a domino effect responsible for the negotiation of many East Asian FTAs, especially by Japan and Korea.

obligation under GATS Article V to provide for liberal treatment of non-party service providers has laid the foundations for 'WTO-friendly' FTAs.

Second, a number of East Asian FTAs provide for extra-territorial MFN obligations. As explained in Section 3.B, countries bound by many such MFN obligations become less attractive partners for future FTAs, because potential negotiating parties know that any negotiated preference will be extended automatically to others. As a consequence, the bargaining advantage offered by FTAs with a small number of players is undermined and incentives to negotiate at the multilateral level are strengthened.

Third, positive spillover effects from FTA to WTO negotiations may be more important in services than in goods. Services negotiations are more information-intensive, requiring a resource-intensive stock-take of domestic laws and regulations that might be considered measures affecting services trade. Governments that have carried out a comprehensive stock-take in the course of FTA negotiations may be better prepared for services negotiations at the WTO. In other words, the East Asian services FTAs may play a useful role in overcoming 'informational' obstacles to further multilateral integration.

At the same time, there is one important consideration that may lead East Asian FTAs in services to become a stumbling block towards progress at the WTO. The United States, the European Union, Japan, and several other WTO members consider greater engagement in the WTO's services negotiations as a quid pro quo for committing to trade reforms in agriculture—currently the key sticking point for unlocking the DDA negotiations. As discussed in Section 2, one of the key trade policy measures in agriculture—domestic subsidies—by nature cannot be reduced on a preferential basis. Many East Asian countries would stand to gain from agricultural trade reforms at the WTO and, at the same time, are the targets of liberalization requests in services. If the 'demandeurs' in services are able to advance their offensive interests through FTAs, important bargaining chips may be removed from the multilateral negotiating table. By the same token, private sector interests may have less of an incentive to lobby for a successful conclusion of the DDA, if their market opening demands can be fulfilled in FTAs.

As a final point, it is worth emphasizing that East Asian countries arguably have much to gain from engagement in the DDA's services negotiations. First, important commercial relations are not covered by FTAs—for example, Japan-Korea, China-Japan, or Japan-United States. The negotiation of FTAs between these trading partners cannot be ruled out, but does not appear likely in the foreseeable future. Improved GATS commitments offer the only realistic vehicle for wider and deeper policy bindings in these cases. Second, the WTO offers the most credible mechanism for settling trade disputes between governments. As discussed in Section 3.G, the state-to-state DSMs found in East Asian FTAs do not share the institutional underpinnings and accumulated experience of multilateral dispute settlement.

Finally, from an economic perspective, non-discriminatory liberalization ensures access to the world's most efficient service providers. Since performance in the service sector has emerged as a critical determinant of a country's export competitiveness and attractiveness to foreign investment, preferential arrangements may prove costly in the long term. Equally, a non-discriminatory trading system offers the greatest transparency and lowest transaction costs for modern service suppliers that are active in many countries, operate international networks and frequently move staff from one location to another.

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Appendix 1

Overview of key disciplines found in East Asian FTAs

	Services disciplines							Investment disciplines									
	MFN	NT	MA	Domestic regulation	Government procurement	Subsidies	ESM	MFN	NT	F&ET	MA	Domestic regulation	Performance requirements	Board of Directors	ESM	Transfer of funds	Expropriation	Investor-State arbitration
ASEAN (AFAS)	yes [1]	yes [3]	yes [1]	yes [4]	no [2]	--	--	yes [1]	yes [1]	yes	--	--	--	--	yes	yes [1]	yes	yes
Australia-Singapore FTA	--	yes [1]	yes [1]	yes [1]	no [2]	no [2]	--	soft	yes [2]	--	--	--	--	--	--	yes [1]	yes	yes
Australia-Thailand FTA	soft	yes [1]	yes [1]	yes [1]	no [1]	no [2]	--	yes	yes [2]	yes	--	--	--	--	--	yes [1]	yes	yes
Chile-Korea FTA	--	yes [2]	soft [3]	soft [5]	no [1]	no [2]	--	yes	yes [2]	yes	--	--	yes [2]	yes	--	yes [1]	yes	yes
EFTA-Korea FTA	yes	yes [1]	yes [1]	yes [4]	no [1]	--	--	yes	yes [4]	yes	--	--	--	yes	--	yes [1]	yes	yes [2]
EFTA-Singapore FTA	yes	yes [1]	yes [1]	yes [1]	no [1]	soft [1]	--	yes	yes [3]	yes	--	--	--	yes		yes [1]	yes	yes [1]
India-Singapore ECA	soft	yes [1]	yes [1]	yes [1]	no [2]	soft [1]	no [2]	soft	yes [2]	--	--	--	yes [1]	yes	--	yes [1]	yes	yes
Japan-Malaysia EPA	yes	yes [1]	yes [1]	soft [5]	no [2]	no [2]	no [1]	yes	yes [2]	yes	--	--	yes [1]	--	--	yes 1	yes	yes
Japan-Mexico EPA	yes	yes [2]	--	soft [5]	no [1]	no [2]	--	yes	yes [2]	yes	--	--	yes [2]	yes	--	yes [1]	yes	yes
Japan-Singapore EPA	soft	yes [1]	yes [1]	yes [1]	no [1]	--	--	soft	yes [2]	yes	--	--	yes [2]	--	--	yes [1]	yes	yes
Jordan-Singapore FTA	--	yes [1]	yes [1]	yes [1]	no [2]	--	--	soft	yes [2]	yes	--	--	yes [1]	yes	--	yes [1]	yes	yes
Korea-Singapore FTA	--	yes [2]	yes [2]	yes [1]	no [1]	no [2]	--	soft	yes [2]	yes	--	--	yes [2]	yes	--	yes [1]	yes	yes
Lao PDR-US BTA	--	yes [1]	yes [1]	--	--	--	--	no investment disciplines										
Mainland-Hong Kong CEPA	--	--	--	--	--	--	--	no investment disciplines										
Mainland-Macao CEPA	--	--	--	--	--	--	--	no investment disciplines										
New Zealand-Singapore FTA	--	yes [1]	yes [1]	yes [2]	no [1]	no [2]	--	yes	yes [2]	--	--	--	--	--	--	yes [1]	--	yes [1]
Panama-Singapore FTA	yes	yes [2]	yes [2]	yes [1]	no [1]	no [2]	--	yes	yes [2]	yes	yes [1]	--	yes [2]	yes	--	yes [1]	yes	yes
Singapore-US FTA	yes	yes [2]	yes [2]	soft [5]	no [1]	no [2]	--	yes	yes [2]	yes	yes [1]	--	yes [2]	yes	--	yes [1]	yes	yes
Trans-Pacific EPA	yes [2]	yes [2]	yes [2]	yes [3]	no [1]	no [2]	--	no investment disciplines										
US-Vietnam BTA	yes	yes [1]	yes [1]	yes [1]	--	--	--	yes	yes [3]	yes	--	--	yes [1]	yes	--	--	yes	yes

Notes:

"**yes**": FTA features mandatory disciplines
"**soft**": FTA features 'best-endeavor' or similar soft-law disciplines
"**no**": FTA features a provision on the matter which does not impose any obligation on the parties
"**--**": FTA does not feature any provision

Services

MFN – Most-favoured-nation treatment
1 intra-regional
2 extra-regional

NT – National treatment
1 refers to "like services and service suppliers"
2 refers to "like circumstances"
3 refers to "discriminatory measures"

MA – Market access
1 substantially reproduces GATS Art. XVII
2 substantially reproduces GATS Art. XVII, excluding paragraph e)
3 substantially reproduces NAFTA Art. 1207

Domestic regulation
1 substantially reproduces GATS Art. VI:1,2,3,5
2 substantially reproduces GATS Art. VI:1,5
3 substantially reproduces GATS Art. VI:1,3 and features an effective necessity test
4 fully reproduces GATS Art. VI
5 provides for a 'best-endeavor' necessity test

Government procurement
1 carved-out from the scope of the services disciplines
2 excluded from the scope of national treatment, MFN, market access obligations

Subsidies
1 consultations between parties foreseen in case of adverse effects of subsidies
2 expressly carved-out from services disciplines

ESM – Emergency Safeguard Measures
1 features a built-in agenda for negotiations on an ESM
2 expressly prohibits safeguards measures

Investment

MFN – Most-favoured-nation treatment
1 intra-regional

F&ET – Fair and equitable treatment

MA – Market access
1 by reference to services chapter reproduces GATS Art. XVII, excluding paragraph e)

NT – National treatment
1 refers to "like investors"
2 refers to "like circumstances"
3 refers to "like situations"
4 refers to "treatment that is not less favourable than that it accords to its own investors"

Performance requirements
1 substantially reproduces TRIMs obligations
2 substantially expands on TRIMs obligations

Transfer of funds
1 allows for current and capital transactions

ESM – Emergency Safeguard Measures

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

Appendix 2

Methodology for quantifying services commitments

This appendix describes the methodology for compiling the database of services commitments that forms the basis of the analysis in Section 4.

Our database identifies the 'value added' of FTAs for each of the 154 sub-sectors and four modes of supply identified under the GATS. In particular, we classified the resulting 616 entries per FTA schedule into four categories:

(v) Sub-sectors and modes for which only a GATS commitment exists or an FTA does not offer any improvement (*GATS only*);

(vi) Sub-sectors and modes for which a partial GATS commitment exists and an FTA eliminates one or more remaining trade-restrictive measures (*FTA improvements*);

(vii) Sub-sectors and modes for which no GATS commitment is available, but an FTA commitment is made (*FTA new sectors*); and

(viii) Sub-sectors and modes for which neither a GATS nor an FTA commitment exists (*Unbound*).

For categories (i), (ii), and (iii), we further distinguished between partial and full commitments, with the latter defined as not listing any remaining trade-restrictive measures.

Trade-restrictive measures

We defined trade-restrictive measures as all measures that are inconsistent with GATS-style market access and national treatment disciplines. The additional classes of measures found in negative list agreements—local presence, performance requirements, and senior managers and boards of directors—are implicitly captured by these two disciplines. Local presence requirements are limitations on the provision of services through Mode 1 of the GATS (non-conforming and future measures in negative list agreements do not distinguish between different modes of cross-border trade in services). Performance requirements and limitations on the nationality or residency of senior managers and boards of directors are discriminatory measures that would otherwise be covered by the national treatment discipline.

In recording trade-restrictive measures, we did not separately identify market access and national treatment measures. Thus, a partial commitment corresponds to a commitment that maintains at least one trade-restrictive measure in either the market access or national treatment category; a full commitment corresponds to a commitment that does not list any trade-restrictive measure in either of these two categories. In adopting this approach, we avoided classifying measures into the national treatment or market accesses domains—an issue for which FTAs establish different rules and which has been subject to conflicting legal interpretations (see Mattoo, 1997).[134]

[134] Exceptions to MFN treatment were not considered in our quantification exercise.

Horizontal commitments

We treated horizontal commitments in GATS-style schedules as if they were inscribed in each scheduled sub-sector. In doing so, we adopted the following rules, following GATS scheduling guidelines:[135]

- If a sectoral commitment indicates 'unbound', the relevant sector is fully excluded from a country's schedule and the horizontal commitment does not apply.

- If there is a partial sectoral commitment which can be read harmoniously with the horizontal commitment, both commitments apply.

- If there is a partial sectoral commitment which is mutually contradictory with the horizontal commitment, the former overrides the latter.

- If the sectoral commitment indicates 'none', horizontal limitations still apply unless expressly mentioned otherwise.

Definition of sectors

Our definition of sectors corresponds to the GATS Services Sectoral Classification List—also known as the W120 list.[136] In allocating commitments to the 154 sub-sectors, we adopted the following conventions:

- Commitments without any trade-restrictive measures that did not cover the full sub-sector (as defined under the GATS) were classified as partial commitments. In line with this approach, all commitments applying to residual categories—"other services" within a particular sector or the overall "other services not included elsewhere" category—were recorded as partial commitments, unless a whole residual category was expressly scheduled.

- Where a commitment covered two or more sectors, it was separately recorded in the relevant W120 categories.

- Where two or more commitments applied to the same W120 sector, we read the commitments jointly. A partial commitment was recorded whenever at least one of the relevant commitments listed remaining trade-restrictive measures.

- In selected cases, the description of service activities did not correspond to the W120 sector identified in the commitment. In those cases, we allocated the commitment to the W120 sector that we saw as most appropriately matching the description of activities.

These conventions apply equally to positive and negative list agreements. However, for negative list agreements, we started by assuming full commitments across all 154 sub-sectors and then reduced or eliminated commitments in line with the non-conforming and future measures listed.

[135] See WTO document S/CSC/W/19.

[136] See WTO document MTN.GNS/W/120.

Recording of commitments

In determining whether to record commitments as partial or full commitments, we ignored superfluous entries in commitments that did not constitute a limitation on market access or national treatment. These include, for example, references to non-discriminatory licensing requirements or non-discriminatory prudential measures, often found in the horizontal section of GATS-style commitment schedules.

As described above, we only counted an FTA commitment as an improvement over an existing GATS commitment if at least one trade-restrictive measure was relaxed or eliminated. In a number of cases, an entry in an FTA schedule was identical to—or effectively the same as—the corresponding GATS entry. In principle, the replicated FTA commitment still offers value added—for example, by making a policy binding subject to the FTA's dispute settlement understanding. But since the focus of our analysis was on the liberalization content of FTAs, we allocated the relevant sub-sectors and modes to the 'GATS only' category.

Finally, in selected cases, we felt that there was legal ambiguity on the sectoral allocation or the level of openness. We resolved those cases by adopting the most liberal interpretation of the description of service activities or the trade-restrictive measures. For example, consider Japan's GATS commitment for certain legal services under mode 1. In the market access column, Japan's entry includes the limitation "*Commercial presence is required*". At the same time, Japan has a "none" entry under national treatment. Since the cross-border supply of legal services, by definition, cannot take the form of commercial presence in Japan, one may interpret Japan's commitment as a full prohibition of the supply of legal services under mode 1. In this case, Japan's national treatment commitment would seem irrelevant. However, we still recorded a partial commitment in this case. Even if Japan's commitment were to amount to a de facto prohibition, the actual policy regime in Japan could be—or could become—more liberal. If some cross-border supply of legal services was allowed, the guarantee of full national treatment would be of value to foreign service providers.

Fortunately, the number of cases with legal ambiguity was small and a more restrictive interpretation would not alter any of the conclusions drawn in Section 4.

Appendix 3

Summary of country-specific liberalization undertakings

This appendix offers a brief summary of the liberalization undertakings of the East Asian countries considered in this paper. It is intended to complement the quantitative analysis of GATS and FTA commitments presented in Section IV. The comments provided for each country are based on our subjective impressions of the value added of FTAs, trying to identify the nature and depth of liberalization undertakings as well as the commonalities among different agreements negotiated by one country. While these comments offer a first guide to the achievements of FTAs, they may hide important details—such as deep commitments in selected services sub-sectors or liberalization undertakings that go beyond status quo policies.

Country	**FTA(s)**	**Summary comments**
Brunei	ASEAN Framework Agreement on Services (AFAS)	For the most part, Brunei's AFAS commitment replicates the country's GATS schedules. The value added relative to the GATS consists primarily of commitments in selected sub-sectors not listed under the GATS. Overall, Brunei's liberalization undertakings are limited in depth, particularly with respect to Mode 3. Horizontal limitations under both AFAS and GATS remove measures affecting foreign equity participation from Brunei's schedules of specific commitments. Under AFAS, Brunei has made commitments on foreign equity participation in certain sub-sectors, but allows foreign majority equity participation (up to 55 percent) only in the case of construction services.
Cambodia	ASEAN Framework Agreement on Services (AFAS)	Cambodia's AFAS commitment provides only limited value added compared to the country's GATS commitment. This is largely explained by Cambodia's ambitious GATS offer (with the exception of financial services), which reflects the unique circumstances of WTO accession negotiations. In the area of Mode 3, Cambodia's AFAS commitment is even 'GATS-minus,' as they feature a 49 percent foreign equity limitation for joint venture enterprises that is not found in Cambodia's GATS schedule. This outcome is most likely due to the AFAS commitment having been finalized before the conclusion of the WTO accession negotiations. Key GATS-plus commitments found in Cambodia's AFAS schedule include the absence of a national treatment limitation for subsidies and a permission to provide deposit services extending to all foreign banks.

Country	FTA(s)	Summary comments
China	Mainland-Hong CEPA, Mainland-Macao CEPA	The Mainland-Hong Kong and Mainland-Macao CEPAs offer the two Special Administrative Regions a number of specific preferences. Some of these preferences are time-bound and will expire once China's WTO accession commitments are fully phased in at the beginning of 2008. Other preferences will last beyond 2008. Many of China's CEPA commitments facilitate access of professional service providers to the Chinese market, including lawyers and medical practitioners from certain Macao and Hong Kong universities. The Mainland explicitly recognizes qualifications for certain professional services (e.g., short term medical practice in the Mainland) and waives residency requirements for Macao and Hong Kong technical and managerial staff. In respect of Mode 3, the agreements reduce total asset requirements for setting up bank branches in the Mainland. The Mainland-Hong Kong and Mainland-Macao CEPA are almost identical, except that the former allows the establishment of representative offices of Hong Kong securities companies.
Indonesia	ASEAN Framework Agreement on Services (AFAS)	Indonesia's AFAS commitment offers only limited value added relative to the GATS. A number of new sub-sectors are scheduled, especially in the area of business services. GATS commitments are deepened in three ways. First, certain foreign equity restrictions are relaxed, especially for maritime transport and telecommunications services. Second, Indonesia has undertaken full AFAS commitments for modes 1 and 2 in sub-sectors where these modes are 'unbound' under the GATS. Third, Indonesia's AFAS commitment increases the number of service suppliers allowed for travel agency and tour operator services.
Japan	Japan-Malaysia EPA, Japan-Mexico EPA, Japan-Singapore EPA	Japan's FTAs offer value added relative to the GATS in a large number of sub-sectors and modes. Having said this, the depth of FTA liberalization undertakings is sometimes modest. This partly reflects the already liberal commitment by Japan under the GATS. New FTA commitments cover, in particular, certain professional service categories. In the area of telecommunications, Japan's FTAs offer greater foreign equity ownership (though this liberalization measure was already anticipated under the GATS). Japan's FTA schedules also provide for full liberalization in a number of sub-sectors and modes that were categorized as "unbound due to lack of technical feasibility" under the GATS.
Korea	Chile-Korea FTA, EFTA-Korea	Korea's FTAs significantly improve on GATS commitments by eliminating a broad horizontal

Country	FTA(s)	Summary comments
	FTA, Korea-Singapore FTA	restriction on ownership and control of Korean companies. In addition, Korea has made FTA commitments for modes 1 and 2 in a significant number of sub-sectors which remain "unbound" under the GATS (though certain limitations still apply). Having said this, FTA commitments in key service sectors—including financial and telecommunications services—offer only modest value added relative to the GATS. The Korea-Chile FTA carves out financial services altogether; the two other FTAs feature only few new liberalization undertakings. In the area of telecommunications, all Korean FTAs maintain important restrictions.
Lao PDR	ASEAN Framework Agreement on Services (AFAS), Lao PDR-US BTA	Laos' FTAs have the particularity of featuring one of the least ambitious agreements (AFAS) and one of the most ambitious agreements (Lao PDR-US BTA) in services. The former offers only few commitments in selected sectors, mainly construction services, tourism and maritime transport. In these sectors, Laos has undertaken liberal market access commitments—for example, allowing full foreign ownership—but less liberal national treatment commitments. By contrast, the Lao PDR-US BTA is probably the world's most liberal trade agreement in services (for Laos at least, as the United States is only bound by its GATS commitment). Laos has committed to full national treatment across all sectors and full market in a large number of sectors (including telecommunications, financial services, distribution, professional services, audiovisual, construction, health, tourism). Only Mode 4 commitments are narrow in scope, as they are limited to services sales persons and intra-corporate transferees.
Malaysia	ASEAN Framework Agreement on Services (AFAS), Japan-Malaysia EPA	Malaysia's commitments in its two FTAs offer only modest value added over the country's GATS commitment. While some FTA commitments raise foreign equity limitations (e.g., from 30 to 35 percent), they do not allow for majority foreign ownership. Only the Japan-Malaysia EPA includes commitments for new sub-sectors and modes of supply, but the ambition of those commitments is modest. Malaysia's AFAS commitment offers minor improvements in the area of mode 4, consisting mostly of a small quota increases—usually between one and three—for certain types of foreign natural persons.
Myanmar	ASEAN Framework Agreement on Services (AFAS)	Myanmar's commitments under AFAS are significantly wider than those under the GATS, but the overall level of ambition of its FTA commitment is still low. Myanmar has not scheduled any horizontal limitations under the GATS or under AFAS. In several sectors, Myanmar's

Country	FTA(s)	Summary comments
		AFAS undertaking offers full foreign ownership under mode 3.
Philippines	ASEAN Framework Agreement on Services (AFAS)	The Philippine's commitment under AFAS offers only limited value added relative to the country's GATS commitment. New sectors scheduled under AFAS include construction services, telecommunications, tourism, and selected professional services. Modes 1 and 2 in these sectors are fully liberalized (except where trade is not considered feasible under these modes). Commitments on Mode 3 are substantial for certain high-end hotel services, for which full foreign ownership is allowed. In all other sectors, important restrictions remain, including foreign ownership limitations of less than 50 percent. AFAS commitments do not cover financial services. In telecommunications, they are limited to basic telecommunications services with foreign ownership limited to 40 percent and managers and directors required to be Philippine citizens. In the area of mode 4, AFAS expands coverage to certain professional services (e.g., engineering and architectural services), although economic needs tests and reciprocity requirements still apply.
Singapore	ASEAN Framework Agreement on Services (AFAS), Australia-Singapore FTA, Brunei-Chile-New Zealand-Singapore (Trans-Pacific) EPA, EFTA-Singapore FTA, India-Singapore ECA, Japan-Singapore EPA, Jordan-Singapore FTA, Korea-Singapore FTA, New Zealand-Singapore FTA, Panama-Singapore FTA, Singapore-United States FTA	Singapore's FTA commitments vary markedly from agreement to agreement. Commitments under AFAS and the Jordan-Singapore FTA offer only limited value added relative to Singapore's GATS schedule. Both agreements mostly replicate GATS entries, with only few sub-sectors added. GATS horizontal measures—including a nationality requirement for managers and directors under mode 3—are maintained, limiting deeper liberalization undertakings. Other agreements are more ambitious. They offer wider coverage, extending to a large number of services sub-sectors that have not been included in Singapore's GATS schedules, with few restrictions maintained. Relative to the GATS, a number of restrictions on modes 1 and 2 are lifted under these FTAs. Otherwise, there are few improvements over GATS commitments. This outcome partly reflects the maintenance under FTAs of horizontal limitations inscribed found in the GATS. Commitments in financial services are marginal for all of Singapore's FTAs, except for the Singapore-US FTA. The latter inscribes a phase-out commitment under which Singapore would open its market to US banks within 18 months from the entry into force of the agreement. The Singapore-US FTA also offers deeper market

Country	FTA(s)	Summary comments
		opening in the area of telecommunications. In summary, the main value added of Singapore's FTAs is the widening of GATS commitments to additional sub-sectors. With the exception of the Singapore-US FTA, there are few improvements relative to existing GATS entries. At the same time, Singapore's GATS commitment is already relatively liberal—the only major restriction being a nationality requirement for managers and directors of foreign invested enterprises. Finally, FTA commitments in the area of Mode 4 are limited in scope. The only improvement relative to Singapore's GATS schedule consists of extended periods of stay for business visitors and intra-corporate transferees.
Thailand	ASEAN Framework Agreement on Services (AFAS), Australia-Thailand FTA	Thailand's FTA commitments do not substantially expand on sectoral coverage relative to the country's GATS commitment. In addition, AFAS offers hardly any improvement over the GATS. All sectors listed face a horizontal foreign equity limitation of 49 percent. By contrast, the Australia-Thailand FTA offers certain improvements in distribution and construction services (for which full foreign ownership is allowed) as well has hotel and restaurant services (for which majority ownership is allowed). In the area of Mode 4, Thailand extends residency and work permits to Australians to up to 5 years, compared to six months under the GATS.
Vietnam	ASEAN Framework Agreement on Services (AFAS), US-Vietnam BTA	Vietnam's two FTAs feature different degrees of ambition. While Vietnam's AFAS commitment has limited sectoral scope, the US-Vietnam BTA covers the vast majority of service sectors (except transport services). Where commitments exist, they are subject to deep liberalization undertakings in both agreements. In the area of Mode 3, Vietnam's AFAS commitment does not impose any foreign equity limitations but inscribes certain licensing requirements. Under the US-Vietnam BTA, Vietnam maintains certain foreign equity restrictions, but these are phased out over time (within 3 to 10 years after entry into force of the BTA).