

Latrille, Pierre; Lee, Juneyoung

Working Paper

Services rules in regional trade agreements: How diverse and how creative as compared to the GATS multilateral rules?

WTO Staff Working Paper, No. ERSD-2012-19

Provided in Cooperation with:

World Trade Organization (WTO), Economic Research and Statistics Division, Geneva

Suggested Citation: Latrille, Pierre; Lee, Juneyoung (2012) : Services rules in regional trade agreements: How diverse and how creative as compared to the GATS multilateral rules?, WTO Staff Working Paper, No. ERSD-2012-19, World Trade Organization (WTO), Geneva, <https://doi.org/10.30875/1c5f6e25-en>

This Version is available at:

<https://hdl.handle.net/10419/80081>

Standard-Nutzungsbedingungen:

Die Dokumente auf EconStor dürfen zu eigenen wissenschaftlichen Zwecken und zum Privatgebrauch gespeichert und kopiert werden.

Sie dürfen die Dokumente nicht für öffentliche oder kommerzielle Zwecke vervielfältigen, öffentlich ausstellen, öffentlich zugänglich machen, vertreiben oder anderweitig nutzen.

Sofern die Verfasser die Dokumente unter Open-Content-Lizenzen (insbesondere CC-Lizenzen) zur Verfügung gestellt haben sollten, gelten abweichend von diesen Nutzungsbedingungen die in der dort genannten Lizenz gewährten Nutzungsrechte.

Terms of use:

Documents in EconStor may be saved and copied for your personal and scholarly purposes.

You are not to copy documents for public or commercial purposes, to exhibit the documents publicly, to make them publicly available on the internet, or to distribute or otherwise use the documents in public.

If the documents have been made available under an Open Content Licence (especially Creative Commons Licences), you may exercise further usage rights as specified in the indicated licence.

World Trade Organization
Economic Research and Statistics Division

SERVICES RULES IN REGIONAL TRADE AGREEMENTS
HOW DIVERSE AND HOW CREATIVE
AS COMPARED TO THE GATS MULTILATERAL RULES?

by

Pierre Latrille and Juneyoung Lee
WTO

Manuscript date: October 2012

Disclaimer: This is a working paper, and hence it represents research in progress. This paper contains the opinion of the authors, and is the product of professional research. It is not meant to represent the position or opinions of the WTO or its Members, nor the official position of any staff member. Any errors are the fault of the authors. Copies of working papers can be requested from the divisional secretariat by writing to: Economic Research and Statistics Division, World Trade Organization, Rue de Lausanne 154, CH 1211 Geneva 21, Switzerland. Please request papers by number and title.

SERVICES RULES IN REGIONAL TRADE AGREEMENTS

HOW DIVERSE AND HOW CREATIVE AS COMPARED TO THE GATS MULTILATERAL RULES?

by Pierre Latrille and Juneyoung Lee¹

ABSTRACT

The study tries first to assess the extent of similarities and divergences among services rules in regional trade agreements as compared to the GATS. To do so, it uses a typology identifying variations in 48 key provisions structured under seven themes commonly found in RTAs and using the GATS as a benchmark. The analysis identifies two main “families” of agreements (GATS-inspired and NAFTA-inspired) and a residual category. The paper briefly explores the historical development that led to these families as well as their geographical spread both on an agreement by agreement basis and a country by country basis.

The paper then analyses by theme the variations found in the RTAs among services rules including their novelty as compared to the GATS. Given the lack of available information on the implementation of the agreements the paper tries to assess whenever possible the magnitude of the discrepancies and their practical impacts.

While subject to some qualifications, the results of the study are relatively straight forward: there is no "spaghetti bowl" in services rules, but just two "families" and one residual category. The details reveal that the degree of divergence between those two families does not overall seem insurmountable. This assessment concords with other studies (e.g. Marchetti, Roy) that have equated them in terms of national treatment and market access and have compared directly commitments undertaken under the three families of agreements. One may even note a certain tendency to a convergence towards the GATS model (e.g. the addition of market access clause in the second generation of NAFTA-like agreements or the use of GATS-type architecture by EU for agreements else than pre-adhesion ones).

In terms of "novelty" the results prove somewhat disappointing except in certain areas like mode 4 and transparency. Other issues in which, in view of the intensity of WTO DDA debates, one would have expected a lot of bilateral creativity, such as domestic regulation, safeguards and recognition provisions show themselves to be surprisingly embryonic.

Finally anecdotal evidence, gathered for instance during the drafting by the WTO Secretariat of Trade Policies Reviews and factual presentations on RTAs suggest that in numerous instances, provisions relating to future negotiations or even regular meetings are not implemented thereby casting doubt on the effective impact of RTA provisions (including diverging ones) on trade realities.

Keywords: Regional Trade Agreements, services, GATS, WTO.

JEL Classifications: F13, F14, F15, F53

¹ Mr Latrille is a Counsellor in the Trade Policy Review Division of the WTO and Ms Lee is Legal Affairs Officer in the Accession Division of the WTO. The authors would like to thank Antonia Carzaniga, Juan Marchetti and Martin Roy for comments on previous drafts. All views expressed are those of the authors and cannot be attributed to the WTO Secretariat or WTO Members.

Table of Contents

INTRODUCTION.....	3
I. OVERALL LANDSCAPE OF SERVICES RTAS	3
II. SCOPE, METHODOLOGY AND LIMITATIONS OF THE STUDY.....	5
A. SCOPE OF THE PAPER.....	5
B. METHODOLOGY AND DIFFICULTIES	6
III. ANALYSIS OF THE MAIN SERVICES PROVISIONS OF RTAS	7
A. OVERVIEW	7
B. ARCHITECTURE.....	7
1. Scheduling.....	7
2. Modes of delivery	9
3. The Relationship between the Investment and Services Chapters.....	10
4. Specific sectoral rules	11
C. SCOPE.....	12
1. Additions and exclusions of sectors	12
2. Excluded measures and policies	14
D. BENEFICIARIES.....	15
1. Rules of origin	15
2. Mode 4 specific provisions:	17
3. Permanent residency	17
E. CORE OBLIGATIONS	18
1. Market access	18
2. National treatment.....	19
3. Prohibition of requirements on performance, local presence and senior management and board of directors:	20
4. Status quo obligations	21
5. Ratchet obligations.....	21
F. "PERMISSIVE" PROVISIONS.....	22
1. MFN obligations:	22
2. Emergency safeguards.....	24
3. Pro-development provisions:	26
G. DOMESTIC REGULATION, TRANSPARENCY AND ADVANCE NOTIFICATION PROCEDURES AND RECOGNITION	26
1. Domestic regulation <i>stricto sensu</i>.....	27
2. Transparency and advance notification procedures:	28
3. Recognition	29
H. INSTITUTIONAL ASPECTS.....	30
1. Specialized committee and subcommittees	30
2. Procedures for the modification of schedules.....	31
3. Provisions on future negotiations	31
IV. CONCLUSION	31
ANNEX 1: TYPOLOGY	33
ANNEX 2	38
ANNEX 3	40

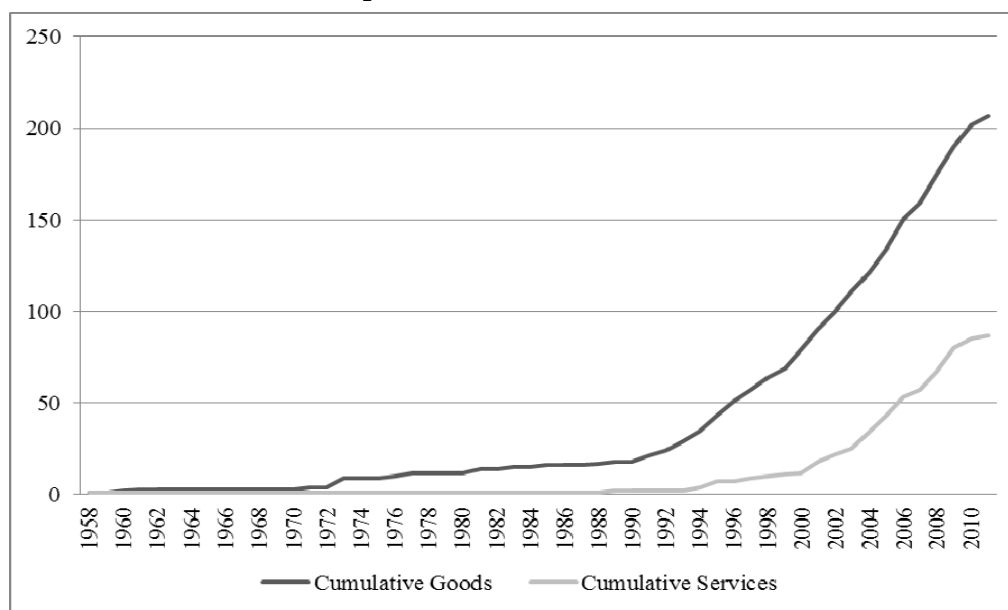
INTRODUCTION

1. Services trade represents about one-fifth of world trade as measured by the balance of payments and about one-third, based on commercial presence/establishment. Services have not escaped the recent flurry of regional trade agreements (RTAs), but as a relatively new subject in the trade negotiating arena, have been less affected by this trend than trade in goods. As of November 2010 there were 81 RTAs with a services component that had been notified to the WTO compared with 212 agreements with a goods component. The growing importance of RTAs in services raises questions about the rules on services in these agreements and this paper tries to answer two somewhat provocative questions. First, like in goods RTAs do we again have a “spaghetti bowl” of rules in services or just a handful of services regimes? If so, to what extent are those regimes different? Second, as multilateral services rules have not changed since the conclusion of the Uruguay round in 1993, do these agreements contain new elements compared to the GATS, what are the similarities and differences among these new elements or do they bear similarities with the positions of WTO members in the current WTO negotiations on services rules and domestic regulation. However, to start with we present a brief overview of RTA proliferation in services compared to that of RTAs in general and describe the evolution of RTAs in services and of their development across times and regions. It would seem that neither the level of development nor the dates of conclusion of the agreements are satisfactory explanatory factors for differences in the approach taken which may be explained better by regional and historical propensities to use certain negotiating techniques. This is followed by details of the scope, the methodology and the limitations of the study. The third section, which constitutes the core of the study, analyses in detail the provisions of the RTAs, grouped under two “families” plus a “residual one” of agreements identified. Finally the concluding section attempts to answer the two questions above.

I. OVERALL LANDSCAPE OF SERVICES RTAS

2. The landscape of services RTAs differs somewhat from the overall landscape of RTA. First this is a recent landscape. Although regional services agreements have long pre-dated the WTO notably in the European region (EC, EFTA, etc.), they were not numerous and the entry into force of WTO has “re-set” the situation by creating rules on international trade in services through the General Agreement on Trade in Services (GATS) and Article V specifically for regional services agreements. This explains why the services curve of Chart 1 below only really takes off only as of 1995.

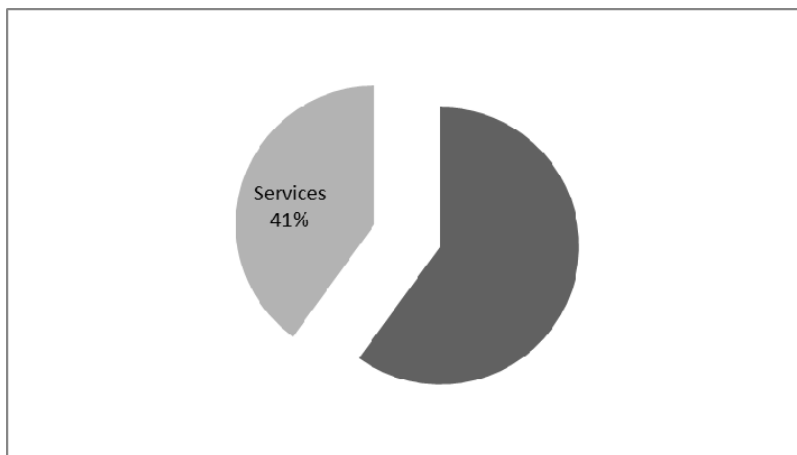
Chart 1: Comparative cumulative numbers of RTAs



Source: WTO secretariat, RTA database

3. While services RTAs are overall a recent phenomenon, they have become very quickly an integral part of the overall RTA landscape. Over 40% (84 out of 205) of physical regional trade agreements (including goods and services components) notified until November 2010 have a services component as illustrated by chart 2.

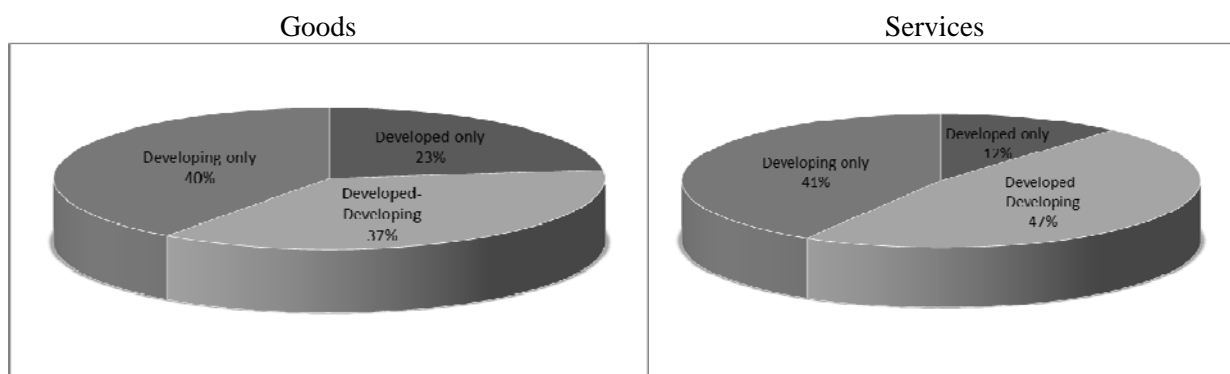
Chart 2: Proportion of RTAs with a services component



Source: WTO secretariat, RTA database

4. The membership of RTAs with a services component slightly differs from that of RTAs with a goods component as illustrated by chart 3.

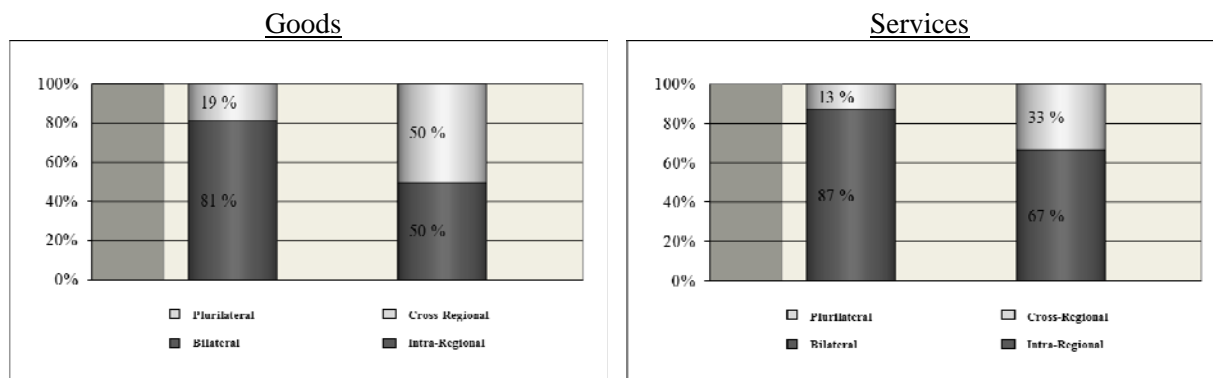
Chart 3: Membership of RTAs with goods and services components



Source: WTO secretariat, RTA database

5. While the proportion of agreements among developing countries is almost identical in both instances, agreements among developed countries are much less frequent (12 % for services, 23% for goods) and more numerous between developed and developing countries for services (47%) than for goods (37% of the agreements). These figures are extremely interesting in that they seem to show that preferential services trade (and hence more generally services trade) is not just important for developed countries only but also between developing countries and between developed and developing countries. In terms of legal vehicle used (plurilateral versus bilateral) and of the geographical distance with the partners chosen, services RTAs differs also slightly as illustrated by chart 4.

Chart 4: Bilateral, plurilateral and cross or intra-regional RTAs in goods and services



Source: WTO Secretariat, RTA database

6. The proportion of plurilateral agreement is lower (13%) for agreements with a services component than it is for agreements with a goods component (19%) but the difference is even more striking in terms of geographical distance with the partners chosen: over two third of the agreements with a services component are intra-regional (11 regions, defined narrowly²) while only 50% of the agreements with a goods component are of an intra-regional nature.

II. SCOPE, METHODOLOGY AND LIMITATIONS OF THE STUDY

A. SCOPE OF THE PAPER

7. The study covers 80 agreements notified to the WTO up until November 2010 under Article V of the GATS (see list attached in annex 2).³ It covers the services “rules” as opposed to the services commitments i.e. the equivalent *mutatis mutandis* of the GATS plus its non-sectoral annexes. This is because while RTA commitments have already been addressed by the literature and in particular in several studies by Marchetti and Roy⁴, services rules have never been addressed in a systematic manner, except to a certain extent, by Mattoo and Sauvé in their 2011 study⁵ but using a smaller sample and a less detailed typology. It is moreover a key issue because different rules entail different obligations for a commitment which may be the same across different agreements. In other words commitments cannot be read independently from the rules. In addition commitments do not come alone, they trigger certain obligations notably in terms of domestic regulation and transparency. Only services rules contained in the services chapter or, when relevant, in the investment chapter are covered. Hence if a generic provision, for example on transparency or dispute settlement, is covered by another chapter but also applicable to the services and/or investment chapters, it will not be captured by the study.

8. The study on the other hand does not include rules on government procurement, monopolies and exclusive services suppliers, and restrictive business practices. Government procurement for instance is not covered first because its essential disciplines (market access, national treatment and MFN) are carved out of the GATS and second because services chapters in RTAs generally exclude it from their ambit. Provisions on monopolies and exclusive suppliers (Article VIII of the GATS) and restrictive business practices (Article IX of the GATS) are not covered either because they have not given rise to any subsequent jurisprudence or debate and because they belong, to a large extent, to the realm of competition policy. It also does not cover sectoral services rules (such as a prudential carve

² The definition of region can be found at: http://rtais.wto.org/UserGuide/RTAIS_USER_GUIDE_EN.html

³ One Agreement between Thailand and New Zealand does not have complete services provisions and was therefore eliminated from the original list of 81 RTAs.

⁴ Notably, "Opening Markets for Trade in Services, Countries and Sectors in Bilateral and WTO Negotiations", Cambridge University Press, 2008.

⁵ Chapter 12 on "Services" in *Preferential Trade Agreement Policies for Development, a Handbook*", Edited by Jean-Pierre Chauffour and Jean-Christophe Maur, World Bank 2011.

out for financial services or interconnection disciplines for telecommunications services) or rules on mode 4 except for their "architectural aspects". Provisions and commitments to "cooperate" on services rules are also excluded because they have no equivalent in the GATS and it can be argued that in general are shallower.

9. In addition, the study only deals with the texts of the agreements except in cases where information is available on implementation e.g. through "factual presentations" of RTAs prepared by the WTO Secretariat.⁶ Finally this is an initial exploitation of the data set and underlines the main trends that can be drawn from it. The size of the data set (48 characteristics recorded by agreement among 160 possibilities multiplied by 80 agreements i.e. 3792 individual observations + more detailed observations) would clearly allow more detailed studies. Its size may also give rise to discrepancies in the coding in spite of our best efforts.

B. METHODOLOGY AND DIFFICULTIES

10. To answer the questions above, we have identified 48 significant provisions in services RTAs divided into 7 broad "themes" and further into sub-themes (see Table 1 below).⁷ Each of the provisions identified were coded to determine the extent to which the RTA provision diverged from the relevant GATS provision and whether it was narrower in scope/more restrictive, wider/laxer, different or even, in certain instances, irrelevant (for the details of the typology and the codes see Annex 1). We then used the codes to "typologize" the 80 RTAs used in the study comparing the variations and the recurrences among the various RTAs to the GATS in terms of extension, depth and novelty. We have structured this analysis around the two main families of services rules (GATS-inspired and NAFTA-inspired) which much more than geography, history or level of development appear to better explain the development of these services rules provisions over the last fifteen years.

Table 1: Categories of services provisions

Architecture	Scope	Beneficiaries	Core obligations	Permissive provisions	Domestic regulation	Institutional provisions
Scheduling of Commitments	Added sectors	Rules of origin	Market Access	MFN obligations	Domestic regulation	Specialized committees and subcommittees
Modes of delivery	Excluded sectors	Mode 4 provisions	National Treatment	Emergency safeguards	Transparency and advance notifications	Other creative transparency provisions
Investment chapter linkages to services	Added measures and/or policies	Permanent residency provisions	Prohibition on performance, local presence and nationality of members of board and senior management	Pro-development provisions	Recognition	Procedures for the modification of schedules
Specific sectoral rules	Excluded measures and/or policies		Status quo obligations Ratchet obligations			Provisions on future negotiations

⁶ General Council Decision on a Transparency Mechanism for Regional Trade Agreements, WTO document WT/L/671.

⁷ The themes are: architecture; scope; beneficiaries; core obligations; permissive provisions; domestic regulation and recognition; and institutional provisions.

11. There were several instances where it was not clear how to classify the provisions without knowing what the original intention of the negotiators were. In such cases we simply signal when a provision is difficult to classify and why. It is relatively easy to interpret RTA provisions and their relationship with the GATS when they deviate from, or have no equivalent in the GATS. In such cases the "*Lex specialis*" and "*Lex posteriori*" principles apply. However it is much more difficult to understand why Members have in certain instances chosen to reproduce *verbatim* certain provisions of the GATS and not others. Legally speaking in the absence of a new and different rule, the original GATS rule still applies between the Parties. However, it could also be that the RTA parties deliberately wished to discard the omitted provision; or because it is understood that the multilateral rule will apply in any case, there is no need to repeat it; or to avoid repeating a provision found in another chapter (e.g. exceptions, dispute settlement, definitions, etc.).

12. Sometimes the context of the provision was helpful to determine which of these may have applied. For instance when the RTA foresees a best endeavour obligation for the Parties to respect the proportionality principles of GATS Article VI.4 in the administration of their technical standards, qualification requirements and procedures and licensing requirements but does not sanction it by a nullification or impairment procedure as in Article VI.5 of the GATS, the omission seems to indicate clearly that there is no nullification or impairment procedure foreseen by the RTA. Thus, the RTA rules clearly differ from the GATS rules. But even in this clear cut case, the question of the application of the *Lex generalis* (here the nullification or impairment clause of the GATS) to the bilateral relationship remains open (so-called "GATS minus" problem). Similarly the repetition of a GATS provision but without a footnote, when other footnotes are reproduced, suggests that the omission is deliberate (e.g., Footnote 8 to Article XVI of the GATS on the underlying freedom of inward transfers in case of a commercial presence commitment). However, in several instances, during the preparation of factual presentations by the WTO Secretariat, the Parties have indicated that these omitted provisions nevertheless applied to the bilateral relationship. In many other instances, no clear rationale appears for the repetition or the omission of certain provisions and the question of the meaning of these omissions (elimination or implicit cross reference) remains open. This recurrent legal uncertainty should be born in mind when analysing the detailed results of the study.

III. ANALYSIS OF THE MAIN SERVICES PROVISIONS OF RTAS

A. OVERVIEW

13. The RTAs we have looked at can be grouped by two main "families" of agreements: those based on a positive list GATS type structure (29 agreements) and those with a negative list approach based on the NAFTA (32 agreements). In addition, there is a heterogeneous third category of 19 hybrid agreements that include elements from both these families as well as *sui generis* characteristics. This "other" family includes seven agreements inspired by the 1958 Rome treaty instituting the European Community, most of which largely pre-date 1993.⁸ A list of agreements in each of these three categories is in Annex 2.

B. ARCHITECTURE

14. Architecture includes the scheduling of commitments; modes of delivery covered; relevance of the investment chapter and its relation to services provisions; and specific sectoral rules.

1. Scheduling

15. Positive and negative listing are two different legal techniques which are used commonly across RTAs. The same commitment can be expressed indifferently through the two techniques allowing a detailed comparison, sector by sector, of commitments under both approaches⁹. However,

⁸ Although this type of formula is still used for pre-adhesion treaties of future EU Members States .

⁹ See for instance Marchetti and Roy (2008), *op cit*

in practice negative list agreements have almost always had a deeper liberalization impact due to their sweeping nature (“everything is liberalised except...”)¹⁰.

16. In our sample 30 agreements follow the positive listing approach and form part of the “GATS- inspired” family of agreement (26) or to the “other” family (4). The GATS type agreements follow closely the GATS model and have the following features: positive listing of commitments, four modes of delivery, in principle no separate investment chapter covering services, a market access clause based on the quantitative restrictions in Article XVI of the GATS, a national treatment clause with like services and like services suppliers as a benchmark, no *status quo* or ratchet obligation, transparency obligation limited to publication, no explicit provisions on performance requirements, on requirements on the composition of senior management and the board of directors and on local presence and most operative domestic regulation obligations linked to commitments.

17. GATS based agreements are found mainly between developed and developing countries (19 out of 29 agreements) and among developing countries and is not used by agreements between developed countries in our sample. The overall use of a positive list approach by developed countries moreover varies. For some, such as the U.S. (one out of 10 agreements), the EU (two out of 10 agreements) and Australia (two out of six agreements) this approach is only used in a small number of their agreements. For other developed countries the GATS approach is found in more than half of their agreements. That is the case for Japan (seven out of 10 agreements) New Zealand (three out of five) and EFTA countries (four out of seven agreements for Iceland, and four out of six each for Norway, Lichtenstein and Switzerland). The GATS model is also favoured by the ASEAN countries (all three agreements for Cambodia, Laos and Myanmar, four out of five for Brunei Darussalam, all four for Indonesia, Philippines and Vietnam, all five for Malaysia and Thailand, and nine out of 15 for Singapore).

18. A large majority of users of GATS type agreements are in the Asia-Pacific region (all developed users except the US, EU, and EFTA countries; and Mexico, Chile, Jordan and Mercosur members among developing countries). In addition, the use of the GATS model has not declined over time. NAFTA type and GATS-type approaches are used concurrently and sometimes by the same Party. The use of a particular approach appears to be related more to the level of development and even more to geography and negotiating traditions (the GATS model predominates in Asia while the NAFTA model is more commonly found in the Americas).

19. Positive listing does not mean necessarily using the GATS scheduling methods (one list of commitments covering the four modes of delivery for each Party). For instance, the EC-Cariforum agreement is assymetric. While Cariforum countries have, like in the GATS, one list each covering the four modes, the EU has four lists covering commercial presence including investment in manufacturing activities, "cross-border services" (modes 1 and 2), mode 4 covered by the third (key personal and post graduates), and the fourth (contractual services suppliers and independent professionals) lists.

20. The 39 Agreements using a negative approach belong either to the NAFTA inspired family (32 out of 39) or to the “others” family (6). In addition, one agreement (Republic of Korea-Singapore) has negative listing for all services except for financial services and mode 4 which are listed positively. NAFTA type agreements follow closely the NAFTA and the “post-NAFTA” model which includes a mandatory market access clause.¹¹ The common features of NAFTA type

¹⁰ See Juan Marchetti and Martin Roy (2008), *op.cit*, p. 89.

¹¹ The original NAFTA agreement contained a best endeavour obligation to negotiate down quantitative restrictions only in the cross border services chapter. Subsequent agreements by the United States have incorporated a market access clause which is almost identical to that in Article XVI of the GATS, and includes five out of the six limitations covered by Article XVI and with a like circumstances test which is similar to the like services and like services suppliers test in the GATS; foreign ownership limitations are not included as they are already covered by the national treatment clause. Other NAFTA like agreements

agreements include negative listing of commitments, distinction between a cross-border chapter covering *mutatis mutandis* modes 1, 2 and 4 and an investment chapter covering all investment including in services i.e. *mutatis mutandis* mode 3, a national treatment clause based on the "like circumstances" test instead of the "like services and like services suppliers" test, advance notifications, status quo and ratchet principles, explicit coverage of performance requirements, requirements for the composition of senior management and the board of directors, and local presence requirements, negotiations regarding mutual recognition of qualifications and domestic regulation disciplines untied from commitments.

21. It is striking that all 32 agreements have at least one party from the Americas (North and Latin America) and that more than half of these agreements (18 out of 32) are "intra-American". The Mercosur is an exception as it belongs to the GATS family. The level of development seems to play a less important role than geography in the choice of the NAFTA model, as among these 32 agreements, 17 are between developing countries, only one between developed countries (two if the relationship between Canada and the USA is counted individually within NAFTA) and 15 between developed and developing countries.

22. The "other" category includes seven EU related agreements and agreements that do not fit into the GATS or NAFTA categories. The EU related agreements have a longer and different history from the GATS and NAFTA models and their objective is deeper economic and political integration, while the other two types of agreements only aim to liberalize trade. The common features of EC/EU types of agreements are a "neither nor" approach to the scheduling of commitments, no modes and the use of alternative concepts such as freedom to provide services and establishment, a domestic regulation policy geared towards integration and harmonization and provisions on natural persons going much further than the GATS or the NAFTA models, notably in terms of access to employment and social security and of the status of dependents.

23. The fact that the majority of RTAs follow a negative or a "neither nor" approach indicates that RTAs tend to be overall clearly more liberal than multilateral disciplines. It also appears that developing countries are more prone to using positive listing except in the Latin American region (probably for historical reasons) while developed countries/territories tend to favour either negative or "neither nor" approaches.

2. Modes of delivery

24. There is a clear link between scheduling and modal approaches. Positive listing translates virtually in all cases into a GATS type four modes approach while negative listing translates into a "3+1" approach with the "cross border trade" chapter covering modes 1, 2 and 4 and the investment chapter covering mode 3. All NAFTA type agreements save three (Mexico's agreements with Nicaragua, Costa Rica and Colombia) follow a "3+1" approach.

25. Within the "others" category, the EU-like "neither nor" agreements have no modes. However, the "freedom to provide services" chapter largely corresponds to modes 1 and 2 while the "establishment" chapter covers mode 3 and goes much further in many respects (for instance, by covering all "economic activities" which includes manufacturing as used in the EU-Albania agreement). Mode 4 is split between those two chapters and also goes much further than GATS like or NAFTA like agreements as it extends to access to employment, coordination of social security as well as to the status of spouses and dependants.

26. Finally, some agreements do not fall within these categories like the Australia- New Zealand Closer Economic Trade relation Agreement (ANZCERTA) which pre-dates the GATS and the NAFTA but does not follow the EU model either; China's two Closer Economic Partnership Agreements (CEPA) with Hong Kong, China and Macao, China, have no "modal" structure nor a

(excluding the US) have however continued to use the best endeavour clause rather than this reinforced provision (17 out of 32 NAFTA type agreements).

distinction between cross border trade and investment; or Chile - El Salvador where there is no general cross border chapter. Iceland - Faroë Islands is difficult to categorize but seems to tend in the direction of EU-type of scheduling.

3. The Relationship between the Investment and Services Chapters

27. For NAFTA inspired agreements, the investment chapter covers the equivalent of mode 3. However even in this case, there is overlap with services provisions as in many agreements certain services provisions, typically market access, domestic regulations and transparency, apply to "measures by a party affecting the supply of a service in its territory by an investor of the other party or an investment of an investor of the other party". This means that those services provisions apply to mode 3 when it is covered by the investment chapter and not by the services chapter according to the "3+1" formula described above. This provision is typical of the "post-NAFTA" agreements and was introduced to compensate for the absence of a mandatory clause covering non discriminatory quantitative measures in the NAFTA. In all US post-NAFTA agreements as well as in some others, a GATS like market access provision was introduced which is identical to Article XVI-2 of the GATS except that it does not include limitations on foreign ownership (already captured by national treatment) and its trigger/benchmark is "like circumstances" instead of "like services or services suppliers".

28. The scope of this quasi-GATS market access clause has been systematically extended beyond the services chapter of the post-NAFTA agreements (which covered only *mutatis mutandis* modes 1, 2 and 4), via this linkage to the investment chapter so as to cover mode 3. This extension is logical because in practice non-discriminatory measures are more frequent in mode 3 than in other modes. One should note also that the depth of this market access obligation depends on the definition given to investors and investments. Although there are some variations in this regard we did not typologize them or compare them with mode 3 in the GATS sense as it would have exceeded the scope of this study.

29. In addition nearly all NAFTA type agreements (27 out of 32) give priority to the services chapter in case of conflict. Two NAFTA type agreements (US-Bahrain and Panama-Chile) do not have an investment chapter *per se* but cross-refer instead to a pre-existing bilateral investment treaty (BIT).

30. For the GATS inspired and the "others" categories, there is more variation. For 12 GATS type agreements and two "other" agreements, the investment chapter either does not exist or the agreement establishes an absolute and watertight border between the investment and services chapters. In nine GATS type agreements there is an explicit provision regulating the overlap between services and investment provisions. There are minor variations among these agreements but the basic pattern is that the investment provisions apply to both services and to investment in services except for national and MFN treatment, market access, and sometimes prohibition of performance requirements where the services chapter prevails or has exclusivity. This is a similar linkage to investment and services provisions to that used by "post-NAFTA family users. Examples include the ASEAN-Korea, China-New Zealand, Brunei-Japan, Japan-Indonesia, Pakistan-Malaysia agreements as well as EFTA- Mexico.

31. Within the "others" category, the EU inspired agreements encompass both the equivalent of mode 3 for services and investment in manufacturing, mining and agriculture in their establishment chapters. Hence there is no overlap between services and investment provisions and no need for conflict clauses.

32. In virtually all other instances the relationship between the investment and the services provisions is either not explicit or not clear. With the exception of the two NAFTA type cases mentioned above the link between services provisions and pre-existing or future Bilateral Investment Treaties is also never explicitly dealt with. The existence of such a grey area is hardly a surprise in the absence of a WTO benchmark on investment.

4. Specific sectoral rules

33. The GATS contains three sectoral annexes on air transport, telecommunications and financial services.¹² This is because they develop GATS rules further or complement them to make them effective in the sectoral context including, in financial services a detailed definition of services provided in the exercise of governmental authority¹³ in addition to the simple GATS test (neither on a competition nor on a commercial basis) for the classification and the prudential carve out. The same goes for access to the public telephone network in telecommunications services.

34. Air transport services are a special case because the annex is largely about their exclusion and not about specific rules applicable to them except for some definitions and their carve out of any dispute settlement provisions for the few services covered. Virtually all RTAs that refer to air transport deal with it through an exclusion (or sometimes a partial inclusion) in the scope provision/article rather than through a specific sectoral chapter.

35. More than 60% (48) of the agreements studied have specific financial services provisions in the form of a chapter, an annex or specific articles. For telecommunications this is the case for over 45% of the agreements (37 agreements).¹⁴

36. There are no significant differences in that respect among the various families of agreements except for EU agreements within the "others" family, where secondary legislation and the *acquis* play the role of sectoral annexes for each sector.

37. Sectoral disciplines on electronic commerce are interesting since as they were introduced post Uruguay Round, they have no equivalent in the WTO agreements and deserve hence a slightly more detailed description. Twelve agreements contain a separate chapter or annex on electronic commerce, the majority from the NAFTA family.¹⁵ The need, or not, for specific rules and disciplines for electronically traded goods and/or services was hotly but inconclusively debated in the WTO at the beginning of the millennium.¹⁶ One can find traces of these debates and disagreements in RTA e-commerce provisions.

38. For instance, the closest to the thesis developed by the US multilaterally are found in its agreements which typically repeat the WTO political moratorium on customs duties on e-commerce, impose a customs valuation method based on the value of the carrier medium and not on the value of the digital product stored and require Parties not to discriminate against digital products or between physical products and their downloadable counterparts both in terms of MFN and national treatment. They define digital products as "computer programmes, text, videos, images, sound recording and other products that are digitally encoded". But even the US agreements do not go as far as to prejudge the respective application of the disciplines on goods and services and cross-refer to the relevant

¹² Draft annexes on other sectors (maritime and road transport) were discussed in the negotiations but finally abandoned and at least one other annex (on tourism) was envisaged in the DDA negotiations. The provisions of these annexes could also have been incorporated in the GATS but as they were negotiated separately, it was felt easier to keep their unity and numbering separate during the legal drafting review process in 1992. Nevertheless, Article XXIX of the GATS establishes that they have the same value and are an integral part of the GATS.

¹³ "Activities conducted by a central bank or monetary authority or by any other public entity in pursuit of monetary or exchange rate policies, activities forming part of a statutory system of social security or public retirement plans and other activities conducted by a public entity for the account or with the guarantee or using the financial resources of the government" (GATS Annex on Financial Services, 1(b)).

¹⁴ The provisions of the sectoral annexes appear to include in most instances not only GATS-1995 types of sectoral disciplines but also disciplines agreed later on, often on an optional and/or plurilateral basis. One can indeed find elements of the financial services understanding and of the telecom references paper in these chapters. A detailed study of these provisions exceeds the scope of the current paper.

¹⁵ The 12 agreements are US-Australia, US-Chile, US-Morocco, US-Oman, US-Peru, US-Singapore, Chile-Colombia, Nicaragua-Chinese Taipei, Korea-Singapore, Thailand-Australia, India-Singapore, and EC-CARIFORUM.

¹⁶ See for instance WTO document GC/W/497, 9 May 2003.

chapters of the RTA. The Singapore-Korea and the EFTA agreements have provisions relatively similar to those of the US agreements.

39. E-commerce provisions in other non US agreements tend to focus on technical issues such as electronic signature, liabilities and consumer protection and on cooperation. In that respect these latter e-commerce annexes are very similar to "cooperation chapters" since they contain virtually no market access *-lato sensu-* obligations or regulatory disciplines but are simple declarations of intent. There are indeed numerous "cooperation provisions" spanning virtually all of the services sectors (e.g. tourism). As indicated above, these have not been included within the scope of the study.

40. The next most "popular" sector in terms of the number of annexes appears to be land transport but is essentially found in EU pre-adhesion treaties and is linked to existing bilateral agreements that are not all of Union competence. In addition, some US RTAs (with Australia, Bahrain, Chile, Morocco, Oman, and Peru) have a specific chapter, annex, or side letter on express delivery services.

C. SCOPE

41. Under scope we include: added sectors, excluded sectors, added measures/policies, and excluded measures/policies, all compared to the GATS. This includes provisions in the investment chapter when it applies to services.

42. The GATS has a very wide scope and applies to all measures affecting trade in services. Although it does not define services, it does define in Article XXVIII (c) "measures by Members affecting trade in services" as include[ing] measures in respect of (i) the purchase, payment or use of a service¹⁷; (ii) the access to and use of, in connection with the supply of a service, services which are required by those Members to be offered to the public generally; (iii) the presence, including commercial presence, of persons of a Member for the supply of a service in the territory of another Member".

1. Additions and exclusions of sectors

43. Three sectors are excluded from the GATS in general and frequently from the general services chapter of RTAs: air transport, maritime cabotage services and financial services.

(a) Air transport

44. Air traffic rights (broadly defined) are excluded from the scope of the GATS as are services directly related to traffic rights (not defined), with only three minor ancillary aviation services covered by the GATS namely aircraft repair and maintenance, selling and marketing of air transport services (by the air carrier itself) and computer reservation services. The regular reviews foreseen to extend this scope have so far failed and only served to divide Members on the interpretation of "services directly related to traffic rights".

45. The NAFTA has its own scope for air transport that has, *de facto*, inspired many agreements including beyond its own "family". This scope is larger than that of the GATS as it includes "specialty air services" relating to "aerial work" i.e. services using a plane for purposes other than transport (e.g. crop spraying, heli-logging, aerial photography, aerial advertisement etc.). However it excludes computer reservation services and selling and marketing which are covered by the GATS. A

¹⁷ Where measures by Members is defined by Article 1.3(a) as "measures taken by central, regional or local governments and authorities; and non-governmental bodies in the exercise of powers delegated by central, regional or local governments or authorities. Measures affecting trade in services have been defined through various WTO dispute settlement panels, including the banana and auto-pact panels (the latter partially invalidated by the appellate body on this point) very widely as any measure, regardless of its object and of its WTO regulatory framework (e.g. an import licensing scheme, a customs duty) that has an effect on the provision of services.

possible explanation is that the United States did not take any GATS commitments and took an MFN exemption for these services which were already liberalized in the US but were subject to reciprocity that did not sit well with the unconditional MFN coupled with GATS commitments.

46. Nearly all NAFTA type agreements subsequently replicated that scope. However, the consequence of this double exclusion of selling and marketing services and computer reservation services should not be overrated for two reasons. First, one could argue that the common law of the GATS applies also to the bilateral relationship and that the Parties' obligations are determined by their respective GATS commitments and MFN exemptions.¹⁸ Second, in practice, while largely uncommitted, these activities are generally liberalized and experience market access problems (*lato sensu*) in only a handful of countries/territories, essentially former centralized economies.

47. Finally it is worth noting that aviation is never excluded from the investment chapters of the 80 agreements of our sample. In so far as the provisions of the investment chapter apply to services (see above) all aviation is covered, including traffic rights and national ownership rules. However, in any case bilateral air services agreements and national ownership requirements are systematically covered by reservations to MFN and to national treatment thereby depriving this apparently covered sector from any substantive market access disciplines.

(b) Maritime cabotage

48. Maritime cabotage (i.e. maritime transport between two ports located within the same country) is excluded from 20 agreements¹⁹, more than a quarter of the sample and across all the families.

49. This is a typical case of a "GATS minus" provision as the GATS fully includes in its scope maritime transport including maritime cabotage. However the significance of the exclusion of cabotage by several RTAs is largely symbolic. In practice cabotage is reserved to the national flag in most countries, subject to waivers, the only real exceptions being the UK, Denmark and Norway as well as to a certain extent the European Union which has liberalized cabotage within Member States. There are very few GATS commitments on maritime cabotage. Only Iceland has referred to this transport segment explicitly. Some other WTO Members have made commitments by not excluding cabotage from their generic commitments on maritime transport.²⁰

50. The MFN provision of the GATS applies to maritime cabotage as the decision to suspend MFN in July 1996 at the end of the failed maritime sectoral negotiations concerns only international maritime transport. Cabotage is hence the subject of several MFN exemptions although numerous members seems to have "forgotten" to cover their waiver practices by an exemption. There are also virtually no commitments on cabotage in services RTAs neither through commitments in positive list agreements or subject to a reservation in negative list ones.

(c) Financial services

51. Financial services are excluded from the general services disciplines by 31 agreements, which are nearly equally split between the NAFTA and GATS families. Like for maritime and air transport, it is the specificities of the sectoral legislation that explains the exclusion rather than the choice of a negotiating technique (GATS or NAFTA) or geography or the level of economic development.

52. The effects of this exclusion should not be, again, overrated, for at least two reasons. The first is that in some cases this is simply an exclusion from the generic services disciplines of the RTA that

¹⁸ See section on methodology above.

¹⁹ China-Chile, EC-Montenegro, Pakistan-China, Japan-Vietnam, ASEAN-Korea, EC-Albania, Japan-Philippines, EC-CARIFORUM, Japan-Brunei Darussalam, Japan-Indonesia, Pakistan-Malaysia, Japan-Thailand, Chile-Japan, Japan-Malaysia, Japan-Mexico, EC-Chile, EC-Croatia, EC-Former Yugoslav Republic of Macedonia, Japan-Singapore, and EC-Mexico.

²⁰ For a detailed list of those WTO Members see S/C/W/315 , Tables 10-11.

coexist with a specific sectoral chapter for financial services which may go further than the generic services or GATS disciplines (e.g. through the integration of the optional 1993 “financial services understanding”). The second reason is that even if a given RTA excludes financial services and does not have a specific financial services chapter it could be argued that the parties' GATS obligations in financial services remain valid.

2. Excluded measures and policies

53. This is a residual category which groups all but sectoral qualifications to the scope of the GATS and of RTAs. We do not deal in that respect with the exclusion of government procurement from the key disciplines of the GATS for reasons explained above, but we cover issues such as subsidies and public services. While the GATS has virtually no exclusions in that regard, RTA drafters have been much more imaginative. We have not found any additional measures and policies compared to the GATS but only numerous cases of exclusions.

(a) Subsidies

54. Subsidies are by far the most commonly excluded measures in all the families of services RTAs (about 70% of the agreements studied).

55. In the GATS, subsidies reserved for nationals are considered to be national treatment restrictions even though there is no definition of subsidies in the Agreement. This legal uncertainty may be one of the factors that has pushed numerous members to exclude subsidies from the scope of their agreements. The consequence of such an exclusion is that on the offensive side parties deliberately renounce the treatment of subsidies reserved for nationals as national treatment restrictions and forego their legal rights to challenge them thereby allowing their partner to take such measures. On the defensive side it gives the parties an open ended right to impose such measures in their bilateral relationship without needing to schedule reservations (be they positive or negative).

56. This is a typical "GATS minus" provision where RTA obligations result in the parties involved giving up some of their GATS rights. In practice however, the gap between the GATS and RTAs on the exclusion of subsidies should not be overrated. First, one may question the effectiveness of the exclusion beyond the symbolic act especially since in virtually all other bilateral relationships the restrictive character of subsidies remains and with it, the obligation to schedule reservations. Unless the partner(s) concerned by the exclusion are major services traders, this will not increase regulatory freedom in terms of subsidies. Second, the GATS' coverage of subsidies is not absolute but preserves the freedom to reserve subsidies for nationals for sectors in which there are no commitments and also the parties' rights to schedule discriminatory subsidies as national treatment restrictions in sectors in which there are commitments. In practice subsidies are very often carved out in GATS commitments through sweeping horizontal reservations covering several modes of supply.

57. The modalities of the exclusion of subsidies in RTAs vary. The most commonly found formulation is "the trade in services chapter does not apply to subsidies or grants provided by a Party or a State enterprise, including government-supported loans, guarantees and insurance". It seems to originate from the NAFTA and has spread beyond the NAFTA inspired family. In the “others” family, the EU inspired agreements never exclude subsidies probably because the control of distorting subsidies (referred to as "State aid") is a key objective of EU competition policy and the *acquis*.

58. The GATS itself foresees in Article XV negotiations on possible future disciplines for distorting subsidies. Three points are worth noting in that respect. First there does not seem to be a correlation between the exclusion of subsidies in RTAs and positions held by Members in the GATS rules negotiations with some staunch supporters of multilateral disciplines on distorting subsidies nevertheless having carved subsidies out of their RTAs. Second, one could have expected the use of such disciplines by the demanders of multilateral subsidies disciplines in their RTAs, but that is not at all the case. We have found no attempts to define disciplines on distorting subsidies as in the SCM Agreement (e.g. definition of prohibited and actionable subsidies in the form of “boxes”, definition of

injury, criteria of causality link between the subsidy and the injury, etc.). Parties to RTAs have been more imaginative for domestic regulation and for emergency safeguards for instance. This may be because Members implicitly consider the WTO to be the relevant forum to discuss such issues in view of its *erga omnes* nature and of the implementation difficulties that would be generated by a fragmented regime. Third, a few RTAs²¹ include a rendez-vous clause to incorporate any results from the GATS subsidies negotiations. Such clauses are less numerous than for the incorporation of future domestic regulations (11) or emergency safeguards (33). However, they are best endeavour clauses and their exclusion does not prevent the Parties from either incorporating these disciplines in the RTA at a later stage or applying them on a multilateral basis.

(b) Services provided in the exercise of governmental authority

59. This exclusion is not purely sectoral, but excludes what each member considers as its own “public services policy”. This is why it is classified under “measures and policies”. These services are defined not through a list of sectors (except to a certain extent for financial services) but by a test (“neither on competition nor on a commercial basis”) whose results may be different services for different Members. For instance prison services belong, at least partially, in the United States to the realm of merchant services (as they are provided through competition and on a commercial basis), and are hence subject to the GATS. This is not the case for many other Members where prison services are provided exclusively by the public sector.

60. A certain number of agreements while excluding services provided in the exercise of governmental authority have a different definition from the GATS for these services. The GATS uses a double negative criteria: services provided in the exercise of governmental authority are “supplied neither on a commercial basis nor in competition with one or more services suppliers”. Some RTAs prefer the use of a non-exhaustive list of examples. For example, the Agreement between Honduras-El Salvador-Chinese Taipei, in Article 11.02.3.(c) stipulates that government services or functions such as law enforcement, correctional services, income security or insurance, or social security or insurance, social welfare, water supply, public education, public training, health, and child care are not applied by the trade in services chapter. Such lists can also be found in Korea-Singapore (Article 9.2.3.(d)), Korea-Chile (Article 11.2.3.(e)), Panama-Chinese Taipei (Article 11.02.3.(c)), Mexico-Honduras/Guatemala/El Salvador (Article 10-02.2.(d)), Chile-Mexico (Article 10-02.4.(b)), Mexico-Nicaragua (Article 10-02.3.(c)), Mexico-Costa Rica (Article 9-02.3.(d)), and Mexico-Colombia (Article 10-02.2.(b)). Some of these agreements use both a list along with the criteria in the GATS. A smaller number have a stand-alone list without the GATS criteria.

(c) Taxation and shell companies

61. There are only two other measures that have been excluded compared to the GATS in two agreements: taxation measures (which is wider than subsidies) by Australia-New Zealand and shell companies by India-Singapore. The issue of shell companies is addressed in other agreements through the rules of origin provisions (substantial business operation criteria in virtually all instances often complemented by anti-circumvention clauses) rather than through an outright exclusion.

D. BENEFICIARIES

62. Beneficiaries comprise rules of origin, mode 4 and permanent residency provisions.

1. Rules of origin

63. Unlike goods RTAs, services RTAs do not have a separate chapter for rules of origin for services. Rules of origin for trade in services is addressed through a provision called “denial of benefits”. A few agreements use definitions, particularly that of “juridical persons” (“companies” in

²¹ ASEAN-Australia-New Zealand (article 18), ASEAN-Korea (article 15), ASEAN-China (article 14), EFTA-Mexico (article 19) and Singapore-New Zealand (article 23)

some agreements²²). Provisions on the denial of benefits and on definitions must often be read together to capture the full extent of rules of origin. There are a surprisingly few significant variations in the rules of origin for services. Almost 80% of the agreements studied use the GATS notion (article V.6) of "substantive business operations" (SBO). A few agreements use other, but similar terminology such as "substantive business activities" or "continuous business activities".²³ Others are more specific and give a more detailed definition of "substantive business operations" (see Box 1).

Box 1: Substantive business operations in the Hong Kong, China-China CEPA

Substantive business operations are most precisely defined in China's agreements with the Hong Kong Special Administrative Region (SAR) and the Macau SAR where the definition runs into several pages in a separate annex, is asymmetric (i.e. it concerns only Hong Kong SAR's or Macau SAR's providers and not China's). For example, in China-Hong Kong, China, the following criteria are stated:

- i) a Hong Kong service supplier should be incorporated or established in Hong Kong, and have engaged in substantive business operations for three years or more (construction and related engineering services, and banking and other financial services -excluding insurance and securities- requires five years or more);
- ii) a Hong Kong services supplier should have paid profits tax in accordance with the law during the period of substantive business operations in Hong Kong; and
- iii) more than 50% of the staff employed in Hong Kong by the Hong Kong service supplier should be residents staying in Hong Kong without limit of stay, and people from the Mainland staying in Hong Kong on One Way Permit.

Source: Annex 5, definition of "service supplier" and related requirements, paragraph 3.

64. Within the "other" family, the EU-type of agreements also have their own terminology and jurisprudence which combines the notions of establishment and substantive business operations.²⁴

65. The remaining 20% of our sample, those that do not use the GATS notion of SBO comprise i) agreements silent on rules of origin, and ii) a few cases that differ from GATS Article V.6. Among the agreements that do not have a provision on the denial of benefits, *per se*, India-Singapore agreed that the Parties can prevent so-called, "shell companies" from benefiting from the scope of the Agreement.²⁵ Pakistan-Malaysia similarly specify certain types of third-party companies that may benefit from the Agreement.²⁶ Caricom and Australia-New Zealand are two examples of agreements deviating from GATS V.6. Caricom reserves the benefit of RTA concessions to companies that are substantially owned or effectively controlled by Caricom nationals. In such a case the rule of origin is found in the definition of "companies" rather than in a denial of benefits clause.²⁷ In Australia-New Zealand a Party may deny the benefits of the agreement to persons of the other Party providing a service if the first Party establishes that the service is indirectly provided by a person, not being a person of either Party (subject to prior notification and consultation).²⁸ This provision does not contain the words "substantive business operations".

²² For instance EU-Albania (Article 49(a)).

²³ Article 6.22 of Korea-India; Article 24.1 of Pakistan-China.

²⁴ Typically, "a company set up in accordance with the laws of Member States or [the partner] and having its registered office or central administration or principal place of business in the territory of the Community or of [the partner]. However, should the company set up in accordance with the laws of a Member State or of [the partner] have only its registered office in the territory of the Community or of [the partner] respectively, the company shall be considered a Community or a [the partner] company if its operations possess a real and continuous link with the economy of one of the Member States or of [the partner].

²⁵ Article 7.2.3. (b).

²⁶ Article 69 (g)

²⁷ Article 32.5

²⁸ Article 14

66. It is worth noting that very few agreements have felt it necessary to create specific rules of origin for maritime transport to take into account the multiplicity of nationalities at work in maritime transport services, as in Article XXVIII (f)(ii) of the GATS.²⁹

67. Overall the predominance of the SBO concept is striking, but logical since any difference with GATS article V.6 may be in breach of multilateral obligations.³⁰ Nevertheless, Article V.3(b) of the GATS does permit the possibility of derogating from the SBO rule for agreements among developing countries and allows them to reserve benefits for juridical persons owned or controlled by natural persons of the Parties only.³¹ It is striking that only one agreement, the CARICOM, has made use of that possibility. All other agreements among developing countries have deliberately been devised in an open manner, quasi- non preferential. They benefit companies originating in third parties provided those companies have substantial business operations in the territory covered by the agreement. This absence of real preferences for virtually all services RTAs is different from RTAs in goods. Here it seems that the controversy of whether RTAs are stumbling blocks or building blocks is less relevant.

68. In the WTO Negotiating Group on Rules, Chile has listed "substantive business operations" as an issue for analysis and clarification.³² However, the study has not found any attempt in Chile's RTAs to define or clarify SBOs.

2. Mode 4 specific provisions:

69. About 75% of the agreements in the scope of this study have specific provisions on mode 4 mostly in the form of a chapter or an annex: over 40% of the GATS type agreements (13 out of 29 agreements), and virtually all NAFTA (29 out of 32) and "other" agreements (16 out of 19 including all seven EU type agreements). NAFTA type agreements tend to have more detailed provisions than the GATS annex on the movement of natural persons notably on transparency and on procedures of admission. Within the "others" category, EU-like agreements go much further than the GATS and NAFTA type agreements, since they include access to employment, coordination of social security regimes and status of spouses and dependants.

3. Permanent residency

70. The GATS allows a Member to assimilate its permanent residents with its nationals for the purposes of the GATS provided that it notifies the WTO. Only a handful of Members (i.e. Armenia, Australia, Canada, New Zealand, and Switzerland) have done so. The provision allows a citizen of country A but permanently residing in country B to benefit from concessions granted to country B by country C (e.g a citizen of a non-WTO Member who is a permanent resident in Australia will be considered as an Australian in China under the GATS). This provision is of considerable interest for citizens of non-WTO Members. However even for citizens of WTO Members, the fact of being "assimilated" with another nationality through permanent residency can provide access to stronger or

²⁹ "Service of another Member" means a service which is supplied. For maritime transport services, it establishes that the service is supplied (i) by a vessel registered under the laws of a non-Member or of a Member to which the denying Member does not apply the WTO Agreement, and (ii) by a person which operates and/or uses the vessel in whole or in part but which is of a non-Member or of a Member to which the denying Member does not apply the WTO Agreement.

³⁰ GATS Article V.6 states that "A service supplier of any other Member that is a juridical person constituted under the laws of a party to an agreement referred to in paragraph 1 shall be entitled to treatment granted under such agreement, provided that it engages in substantive business operations in the territory of the parties to such agreement".

³¹ "Notwithstanding paragraph 6, in the case of an agreement of the type referred to in paragraph 1 [economic Integration Agreement] involving only developing countries, more favourable treatment may be granted to juridical persons owned or controlled by natural persons of the parties to such an agreement.

³² See paragraph 5 of the submission on regional trade agreements by Chile to the Negotiating Group on Rules, Document TN/RL/W/152, 26 April 2004.

more dynamic diplomatic protection than that of the country of origin, and to the preferential treatment that the host country enjoys through its RTA network and its GATS MFN exemptions.

71. In a few cases Members, who have not made such a notification to the WTO, have nevertheless assimilated their permanent residents with their nationals for the purposes of an RTA. These are often asymmetric cases concerning only one of the parties to the RTA and are found in China-ASEAN, China-Singapore, Singapore-Australia, Japan-Brunei Darussalam, Japan-Chile, and Japan-Malaysia. On the other hand, Members that have notified this assimilation to the WTO have not necessarily reproduced the provision in all their RTAs (see for example, Canada-Peru, Australia-Chile, US-Australia, EFTA-Chile, EFTA-Mexico, and Canada-Chile).

E. CORE OBLIGATIONS

72. Core obligations cover market access obligations *lato sensu* i.e. market access, national treatment, performance requirements, local presence requirements, requirement on the composition or nationality of the board members or of senior management, standstill provisions and ratchet provisions. MFN treatment is absent as it has a different meaning in the multilateral and RTA contexts.

1. Market access

73. Market access is used in this study in the sense of Article XVI of the GATS which lists six types of essentially³³ quantitative measures (see Box 2).

Box 2: Article XVI of the General Agreement on Trade in Services

In sectors where market-access commitments are undertaken, the measures which a Member shall not maintain or adopt either on the basis of a regional subdivision or on the basis of its entire territory, unless otherwise specified in its Schedule, are defined as:

- (a) limitations on the number of service suppliers whether in the form of numerical quotas, monopolies, exclusive service suppliers or the requirements of an economic needs test;
- (b) limitations on the total value of service transactions or assets in the form of numerical quotas or the requirement of an economic needs test;
- (c) limitations on the total number of service operations or on the total quantity of service output expressed in terms of designated numerical units in the form of quotas or the requirement of an economic needs test (does not cover measures taken by a Member to limit inputs for the supply of services);
- (d) limitations on the total number of natural persons that may be employed in a particular service sector or that a service supplier may employ and who are necessary for, and directly related to, the supply of a specific service in the form of numerical quotas or the requirement of an economic needs test;
- (e) measures which restrict or require specific types of legal entity or joint venture through which a service supplier may supply a service; and
- (f) limitations on the participation of foreign capital in terms of maximum percentage limit on foreign shareholding or the total value of individual or aggregate foreign investment.

74. These measures can either be discriminatory or non-discriminatory with the exception of the limitation on foreign ownership (GATS XVI.2.(f)) which is purely discriminatory.³⁴

75. Most of the GATS type agreements have incorporated Article XVI in totally identical terms with a few exceptions. For example, in Korea-Singapore, the parties have not listed the limitations on foreign ownership in their RTA market access provisions, and have not included footnote 8 of GATS

³³ The fifth restriction in Article XVI of the GATS, the prescription or prohibition of certain legal forms be they discriminatory or not, is not strictly speaking a quantitative restriction.

³⁴ The relationship between the market access and national treatment clauses in the GATS will be discussed under national treatment below.

XVI.³⁵ EC-Chile also does not include footnote 8 of GATS XVI. Among non-GATS type of agreements, a few have incorporated GATS Article XVI. These include Japan-Switzerland, India-Singapore, and Singapore-Australia. However, about 20% of the agreements surveyed exclude footnote 8 which permits the freedom of transfer for the movement of capital linked to commitments. There are no obvious explanations for this recurrent omission and its legal implications.

76. As mentioned above, the original NAFTA agreement did not contain a full-fledged market access clause but a best endeavour to notify and negotiate down quantitative restrictions³⁶, which are defined in similar terms to those of Article XVI of the GATS.³⁷ Post-NAFTA US agreements have modified that, by incorporating a binding market clause, which is identical to that of Article XVI of the GATS save for its last restriction (limitation on foreign ownership) and footnote 8 on the underlying freedom of transfers. In addition as described above, the scope of this services market access clause has been extended to the investment chapter to cover mode 3. This mandatory market access clause has literally split the NAFTA family in two with nearly half of the agreements (15) adopting the post NAFTA mandatory clause, while a small majority continue to use the initial NAFTA best endeavour approach (for example, Mexico-Honduras, Mexico-Guatemala, and Mexico-El Salvador).³⁸ In addition, Chile-Japan, and Japan-Mexico, which we have qualified as NAFTA type agreements, have no provisions on market access.

77. Within the "others" category there is no such thing as a market access clause in the GATS sense in the EU like agreements. The abolition of quantitative restrictions on services in the EU type of agreements occurs through secondary legislation, competition policy and jurisprudence of the European Court of Justice and of its First Instance Tribunal.

2. National treatment

78. In GATS like agreements national treatment is based on a test: does the measure adversely affect, or not the conditions of competition between domestic like services and like services suppliers and foreign ones. It covers also both *de jure* and *de facto* treatment and has a provision indicating that the national treatment clause should not be read as meaning to compensate for the inherent handicaps of being foreign services providers.³⁹

79. Some of the national treatment restrictions also fall into the GATS market access categories (e.g. a discriminatory limitation of the number of foreign suppliers: "only five foreign banks"). In such cases GATS Article XX-2 stipulates that the restrictions must be scheduled under the market

³⁵ Footnote 8 of GATS Article XVI: "if a Member undertakes a market access commitment in relation to the supply of a service through the mode of supply referred to in subparagraph 2(a) of Article I and if the cross-border movement of capital is an essential part of the service itself, that Member is thereby committed to allow such movement of capital. If a Member undertakes a market-access commitment in relation to the supply of a service through the model of supply referred to in subparagraph 2(c) of Article I, it is thereby committed to allow related transfers of capital into its territory".

³⁶ The relevant NAFTA provision (Article 1207, Quantitative Restrictions) is: each Party shall set out in its Schedule to Annex V any quantitative restriction that it maintains at the federal level; within one year of the date of entry into force of this agreement, each Party shall set out in its Schedule to Annex V any quantitative restriction maintained by a state or province, not including a local government; each Party shall notify the other Parties of any quantitative restriction that it adopts, other than at the local government level, after the date of entry into force of this Agreement and shall set out the restriction in its Schedule to Annex V; the Parties shall periodically, but in any event at least every two years, endeavour to negotiate the liberalization or removal of the quantitative restrictions set out in Annex V pursuant to paragraphs 1 to 3.

³⁷ A non-discriminatory measure that imposes limitations on: (a) the number of service providers, whether in the form of a quota, a monopoly or an economic needs test, or by any other quantitative means; or (b) the operations of any service provider, whether in the form of a quota or an economic needs test or by any other quantitative means."

³⁸ See Annex 2 for a list of the agreements.

³⁹ Footnote 10 of GATS Article XVII: "specific commitments assumed under this Article shall not be construed to require any Member to compensate for any inherent competitive disadvantages which result from the foreign character of the relevant services or service suppliers."

access column. There have been ample debates since 1995 on the ambiguous consequences of this rule⁴⁰: as a result it is difficult to tell if a measure in the market access column is a pure market access measure or both a market access and a national treatment restriction.⁴¹

80. The GATS formulation of national treatment can be found in most GATS like agreements as well as in a few non GATS type agreements.⁴² One may note however that a few agreements have not reproduced the GATS footnote on the non-compensation of handicaps for foreign services provider for reasons that remain unclear.

81. The second most popular formulation of the national treatment clause is that of the NAFTA which differs from that of GATS by its reference to "like circumstances" instead of "like services and like services suppliers".⁴³

82. Lastly in the EU type of agreements, national treatment obligations are based on a prohibition on restrictions based on nationality. Jurisprudence on this issue can be found in decisions by the European Court of Justice and its first instance tribunal and has become part of the *acquis* for subsequent EU agreements.

83. A small number of agreements have a provision called "standard of treatment" granting the best treatment available among national treatment and MFN.⁴⁴

3. Prohibition of requirements on performance, local presence and senior management and board of directors:

84. These are typical provisions of the investment chapter of post-NAFTA agreements applicable to mode 3/investment for services but they can also be found in about one-fifth of the GATS type agreements. Around 40% of the agreements surveyed contain provision on these requirements. Very few agreements forbid such requirements, for example Japan-Singapore regarding performance⁴⁵, Colombia-Mexico regarding local presence⁴⁶, and India-Singapore regarding senior management (although the language therein is "may").⁴⁷ None of the agreements surveyed forbid requirements for the board of directors.

85. All the other agreements having provisions in this regard allow the scheduling of reservations.

86. A few agreements⁴⁸ link the prohibition on performance requirements to the WTO TRIMs Agreement but this probably refers to the investment chapter relating to goods as the TRIMs Agreement concerns goods only. It is also worth noting that GATS-type agreements, while not spelling out these restrictions explicitly, do cover them implicitly because in legal terms they are national treatment restrictions in the sense of Article XVII of the GATS.

⁴⁰ For a summary of these discussions see WTO document S/C/W/237

⁴¹ There is a considerable body of GATT jurisprudence on the notion of conditions of competition. It has however only been interpreted once in the GATS context (Auto pact Panel) and the same goes for the notion of likeness where the GATT jurisprudence on like products is not totally transposable..

⁴² Such as Japan-Switzerland and Singapore-Australia.

⁴³ "Each Party shall accord to service providers of another Party treatment no less favourable than that it accords, in like circumstances, to its own service providers". This definition has only been interpreted once in the US-Mexico trucking Panel but the interpretation cannot be transposed *ipso facto* to other Agreements that use a similar description.

⁴⁴ Examples are Nicaragua-Chinese Taipei (Article 11.04), Chile-Mexico (Article 10.5).

⁴⁵ Article 75

⁴⁶ Article 10-06

⁴⁷ Article 6.19.1

⁴⁸ Such as Japan-Switzerland (Article 96), Japan-Brunei Darussalam (Article 61), Pakistan-Malaysia (Article 92), and India-Singapore (Article 6.23).

4. *Status quo* obligations

87. We have categorized *status quo*/standstill as a core obligation because the main consequence of negative listing agreements in terms of liberalization is that any sector becomes automatically liberalized and bound except if a reservation is made either to cover an existing or future non-conforming measure. This very far reaching obligation is found in all NAFTA type of agreements but also in about 30% of the GATS type agreements. This is unexpected as the GATS itself does not contain a *status quo*/standstill clause. Japan is the main contributor: its agreements with the Philippines (Article 75.3), Thailand (Article 77.4), Malaysia (Article 99.3) and Indonesia (Article 81.3) stipulate that "with respect to sectors and subsectors where the specific commitments are undertaken and which are indicated by "SS", any terms, limitations, conditions and qualifications shall be limited to existing non-conforming measures".

88. Pakistan-Malaysia, another GATS type agreement, has similar provisions but a different scheduling technique and a specific annex listing non-conforming measures.⁴⁹ China's Closer Economic Partnership Agreements (CEPAs) with Hong Kong, China and Macao, China also have an asymmetric *status quo* clause: "as of 1 January 2004 [Macao, China] [Hong Kong, China] will not impose any discriminatory measures on Mainland services and services suppliers in respect of services covered in this Annex".⁵⁰ Another GATS-type example is EC-Mexico whose article 7.2 stipulates that "after the entry force of this decision, neither Party shall adopt new or more discriminatory measures as regards services or services suppliers of the other party, in comparison with the treatment accorded to its own like services or services suppliers." In the EFTA-Mexico Agreement (Article 27.3) the standstill is limited to maritime transport.

89. These provisions are reminiscent of the debates of 1986 -1988 on the drafting of the GATS articles where developed countries tried, unsuccessfully, to impose a standstill obligation within the GATS framework and of similar but less vocal debates during the negotiations of the DDA services "negotiating guidelines" in 2001. It is interesting to note that some of the then staunchest opponents to a standstill provision in a WTO/GATS context have accepted since the same concept in some of their GATS type RTAs.

90. Finally among the "others" category, the EC type of agreements have numerous provisions on standstill scattered through various chapters. Among other agreements, Caricom has a provision that "the Member States shall not introduce any new restrictions on the provision of services in the Community by nationals of other Members States except as otherwise provided in this Treaty".

91. One can conclude that this concept appears to be beginning to proliferate beyond the original NAFTA type of agreements.

5. Ratchet obligations

92. Ratchet mechanisms go a step further than standstill provisions ensuring that any autonomous liberalization triggers the obligation to bind it immediately for the benefit of the partner.

93. Ratchet provisions are a structural feature of the NAFTA family of agreements both for their cross-border services trade and investment chapters.⁵¹ They appear in 32 agreements for both cross-border services trade and investment. Ratchet provisions are not found in agreements that do not have investment provisions *per se* but refers to a pre-existing bilateral investment agreement.

⁴⁹ Article 73.4 states: "with respect to sectors and sub-sectors, as outlined in Annex 5 any change or modification by a Party shall not result in the decrease of benefits in relation to the prevailing conditions applicable to the services suppliers of the other Party in the territory of the Party compared to the benefits immediately available before such a change or modification comes into effect."

⁵⁰ Paragraph 5 of Annex 4 of China-Hong Kong, China and China-Macao, China.

⁵¹ The classical formulation of the ratchet clause in the NAFTA is "Articles...[on national treatment, MFN etc.] do not apply to...an amendment to any non-conforming measure...to the extent that the amendment does not decrease the conformity of the measure, as it existed immediately before the amendment...".

94. Such provisions are virtually non-existent in the GATS and in the "others" families of agreements and when present are formulated in very weak, best endeavour terms ("shall consider"). They are found for example in Thailand-Australia⁵², Japan-Switzerland⁵³, Singapore Korea⁵⁴ and Singapore-Australia⁵⁵). The requirement to maintain the overall balance of concessions exchanged between the Parties in the latter two agreements can also be found in MFN provisions (see below).

F. "PERMISSIVE" PROVISIONS

95. Permissive provisions, often used in the context of the GATS cover MFN obligations, emergency safeguards measures and pro-development provisions. While different in substance, the three types of provisions share a common objective and to some extent the same rationale: they allow parties to the agreement to depart from some of its basic obligations and/or to provide asymmetric treatment among the Parties, provisionally or permanently. Measures allowed for problems of balance of payments, while initially coded have not been retained because they do not exhibit significant differences across the agreements analysed.

1. MFN obligations

96. MFN obligations have two main dimensions: *ratione personae* (extension of a concession to all the members of a given "club") and *ratione materiae et temporis* (extension of new concessions given to third parties to the members of this "club").

97. In view of their limited membership, it is logical that RTAs have no strong provisions regarding their extension *ratione personae*. But by contrast, in view of the depth of the integration they entail, one would also expect strong extension provisions *ratione materiae et temporis*. The results of the study partially contradict this expectation. MFN provisions in RTAs are sometimes weak and even weaker than in the multilateral GATS context where this is a quasi-absolute obligation (save MFN exemptions and built in exceptions like article V and recognition).

98. Some RTA Parties have designed numerous escape clauses that allow them not to extend new concessions granted to third parties to their older RTA partners. This constitutes a serious qualification to the argument in the literature that regional trade agreements liberalize trade. The absence of MFN provisions in half of the RTAs included in this study and the serious exception attached to it in most others deprive the liberalization phenomenon of a formidable instrument of generalization and harmonization.

99. It is very difficult to give precise figures on MFN provisions as their regimes are complex and scattered through several articles in each agreement. For instance, while the MFN clause of NAFTA type agreements appears absolute at face value, it appears to be qualified through the non-conforming measures article which allows reservations to MFN. A trickier case is that of an apparently unconditional MFN clause encompassing future measures, followed, several paragraphs later, by a

⁵² Article 812.4: "if after the entry into force a party further liberalizes any of its services sectors, subsectors or activities, it shall consider a request by the other party for the incorporation in this agreement of this unilateral liberalization".

⁵³ Article 60.2; "if after the entry into force of this agreement a party further liberalizes autonomously any of its services sectors, subsectors or activities, it shall consider any requests by the other party for the incorporation into this agreement of such autonomous liberalization.

⁵⁴ Article 9.8.2: "if a Party makes any further liberalization of the remaining restrictions scheduled in conformity with Article 9.6 or any additional commitment scheduled in conformity with Article 9.7 by an agreement with a non-party and it shall afford adequate opportunity to the other party to negotiate treatment granted therein on a mutually advantageous basis and with a view to securing an overall balance of rights and obligations.

⁵⁵ Article 20.2 states "if after this agreement enters into force, a Party further liberalizes any of its non-conforming measures in Annex IV-1 or sectors, subsectors or activities in Annex IV-2, it shall give positive consideration to a request by the other party for the incorporation herein of the unilateral liberalization. Any such incorporation should maintain the overall balance of commitments undertaken by each Party under this agreement.

clause stipulating that if as a result of an agreement with a third party a new advantage is granted to this third party, the granting Party shall afford adequate opportunities to the Party(ies) to the initial agreement to benefit from that treatment. This means that there is no automatic MFN treatment for future measures, like in the GATS and the GATT. There are even more complex cases with combined exceptions. That is why we will use in this section percentages and examples rather than actual numbers of agreements.

100. About 20% of the agreements of the sample, mostly involving at least one party from Asia, do not have a MFN clause.⁵⁶ In particular, out of eight RTAs that China is a party, and surveyed in this paper, seven do not have an MFN provision.

101. It is striking that while all NAFTA type and all EU type agreement have MFN clauses, 40% of GATS type agreements and a similar percentage of "other" agreements do not. There is no clear explanation for such a "family split". Maybe some of the users of the GATS formula found the strong MFN clause of the GATS too difficult to accommodate or to tone down, while the NAFTA users had the ready-made solution of lodging reservations for existing and future non-conforming, non MFN measures.

102. For those agreements that do have an MFN clause (around 80% of the agreements surveyed), two agreements between China and New Zealand and the EC and Cariforum are special cases in that they have assymetric "pro-development" MFN provisions (Box 3 below).

Box 3: MFN provisions in China-New Zealand and EC-Cariforum

China-New Zealand

The only RTA in which China has a MFN provision is with New Zealand. For services listed in Annex 9 of the Agreement, the Parties agree to accord to each other's services and service suppliers, treatment no less favourable than they accord to like services and service suppliers of a non-party. The sectors are: environmental services; construction and related engineering services; services incidental to agriculture and forestry; engineering services; integrated engineering services; computer and related services; and tourism and travel related services. In particular, for services incidental to agriculture and forestry, China's MFN commitment is limited to preferential treatment accorded to members of the Organization for Economic Cooperation and Development (OECD) (Article 107 and Annex 9). This would permit China under a future RTA with a non-OECD country to provide better treatment to suppliers of services incidental to agriculture and forestry from that party than it provides to providers of the same service from New Zealand thus giving China the right to accord more preferential treatment to developing rather than developed countries. This MFN treatment does not apply to RTAs or multilateral international agreements in force or signed prior to the Agreement (Article 107.2), but to any preferences arising from 'future' RTAs. The MFN treatment can be extended to other services sectors beyond those currently agreed (Article 124).

EU-Cariforum

In Article 70 the EU commits to apply to Cariforum countries any treatment resulting from an economic integration agreement signed by the EU after the entry into force of the EU-Cariforum Agreement. The Cariforum countries take the same commitment but only for economic integration agreements they would sign with "any major trading economy". A major trading economy is defined as "any developed country or any country accounting for a share of world merchandise exports above 1% in the year before the entry into of the economic integration agreement, or any group of countries acting individually, collectively or through an economic integration agreement accounting collectively for a share of world merchandise exports above 1.5%". In other words the benefits of agreements concluded with countries whose merchandise exports are lower than these thresholds do not have to be extended to the EU.

Source: China-New Zealand Agreement and the Factual Presentation (WT/REG266/1); EC-Cariforum Agreement

⁵⁶ Chile-China, Peru-China, Pakistan-China, ASEAN-Korea, China-Singapore, ASEAN-China, Jordan-Singapore, EC-Chile, China-Macao, China, China-Hong Kong, China, Chile-El Salvador, Chile-Costa Rica and New Zealand-Singapore.

103. Many agreements with MFN provisions have qualified them by clauses limiting their extension or allowing exceptions. This is the case for all of 32 NAFTA type agreements which allow MFN reservations to be listed. To assess the magnitude of this exception a detailed analysis of all reservations lodged and a precise comparison with MFN exemptions listed by the same parties under the GATS would be required, which to our knowledge has never been done. One NAFTA type agreement⁵⁷ has a "best endeavour clause" commonly found in GATS agreements for future measures thus there is no MFN provision for future measures. Some GATS type agreements allow an explicit listing of MFN exemptions (US-Jordan, Japan-Philippines, Japan-Vietnam, Brunei-Japan, Japan Indonesia, Pakistan-Malaysia, Japan-Malaysia and Singapore-Korea). One GATS type agreement, ASEAN-Australia-New Zealand, exempts past agreements from the MFN obligation. Three GATS type agreements exempt economic integration agreements notified to the WTO from the MFN obligation (Japan-Vietnam, EFTA-Korea and EFTA-Mexico).

104. Eleven GATS type agreements have a best endeavour/adequate opportunities clause and hence no "MFN forward" (ASEAN-Australia-New Zealand, Korea-India, Japan-Vietnam, Brunei-Japan, Pakistan-Malaysia, EFTA-Korea, Japan-Malaysia, India-Singapore, Thailand-Australia, EFTA-Mexico, EFTA-Chile, Chile-Korea). In four instances, this best endeavour clause is further qualified by a clause imposing an overall balance of concessions among the parties (Korea-India, EFTA-Chile, India-Singapore and EFTA-Mexico). Thus it would appear that certain agreements have a double or triple qualification to MFN treatment. This leaves only six GATS type agreements with a non-qualified MFN obligation, including Mercosur, probably due to the depth of its integration.

105. All EU type agreements have strong MFN clauses, which again is consistent with the depth of their integration and so do the ANZCERTA and the Caricom agreements, probably for similar reasons. To the extent that investment provisions apply to services, there does not seem to be very significant differences regarding the MFN clause in the two chapters

106. A less obvious consequence of the difference between the multilateral and the regional contexts is that regional MFN provisions apply quasi-exclusively to bound treatment, whereas the multilateral MFN clause applies to both bound and applied treatment. It is probably an unintended consequence but it derives from the drafting generally used to describe the "triggering factor" of MFN. "if after this agreement enters into force, a Party enters into any agreement in trade in trade in services, it shall..."(emphasis added). For the same reasons whereas multilateral MFN covers *de jure* and *de facto* treatments, the drafting of the regional MFN clauses captures essentially the treatment *de jure* but not *de facto*.

2. Emergency safeguards

107. GATS Article X directs WTO Members to negotiate on emergency safeguard measures based on the principle of non-discrimination. These multilateral negotiations are on-going in the Working Party on GATS rules. The main proponents of emergency safeguards include members of the Association of Southeast Asian Nations (ASEAN), (Brunei Darussalam, Cambodia, Indonesia, Malaysia, Myanmar, the Philippines, Thailand and Viet Nam).⁵⁸

108. Table 2 below outlines how emergency safeguard measures have been treated in 13 RTAs involving the ASEAN members. There are no emergency safeguard provisions in the Trans-Pacific Strategic Economic Partnership, Brunei Darussalam-Japan, and Philippines-Japan Agreements. The nine others have emergency safeguard provisions, but the degree of detail of these measures varies. For example, the RTA between ASEAN, Australia and New Zealand presents relatively binding procedures, using "shall" rather than "may", for the application of safeguards. Upon request by the affected Party(ies), consultations are to be held and the results to be notified. This notification

⁵⁷ Chile-Korea (Article 11.7.2) states "if a Party makes any further liberalization by an agreement with a non-Party

⁵⁸ Document S/WPGR/21, 14 April 2011, paragraph 3.

obligation is unique among the RTAs surveyed. While the RTAs that allow safeguard measures all permit them if there is a "negative impact" or "substantial adverse impact", Japan's RTAs, i.e., Vietnam-Japan, and Indonesia-Japan, tend to narrow this down to 'specific sector', rather than merely 'sector'.

109. The RTAs in the Table have various emergency safeguard procedures which differ, probably because of the negotiating position of their RTA partners. Therefore, it is not obvious whether they have been successful in securing the imposition of safeguard measures in their RTAs. Still, what this table seems to suggest is that even in RTAs, there are no clearly defined guidelines and procedures for the application of safeguards. In addition, none of these RTAs have defined the meaning of "domestic industry" in their trade in services chapters. This confirms that issue remains as controversial in RTAs as it is the GATS.

Table 2: Emergency Safeguard Provisions in RTAs involving key proponents of the measures in the GATS

	Rendez-vous clause to develop guidelines and procedures for safeguards	Temporary application permitted until the development of guidelines and procedures for application, or conclusion of current WTO negotiations		reference to GATS Article X to incorporate the results of the WTO negotiations
		When?	How?	
Thailand-Australia 01.01.2005 (Article 815)	No	No		Yes
Trans-Pacific Strategic Economic Partnership^a 28.05.2006	No	No		No
Malaysia-Japan 13.07.2006 (Article 106)	Yes (rendezvous clause; not known whether guidelines and procedures have been developed)	Not clear whether imposable If a party deems it is negatively affected. However, best endeavour clause encourages the parties to reach a mutually acceptable solution	consultations (may)	No
ASEAN-China 01.07.2007 (Article 9)	No	Yes If causing substantial adverse impact	consultations (may) mutual agreement (must)	Yes
Thailand-Japan 01.11.2007 (Article 84)	Yes	No		No
Malaysia-Pakistan 01.01.2008 (Article 81)	Yes	Not clear whether imposable If a party deems it is negatively affected. However, best endeavour clause encourages the parties to reach a mutually acceptable solution	consultations (may)	No
Indonesia-Japan 01.07.2008 (Article 89)	No	Yes if causing a substantial adverse impact in a "specific" service sector	consultations (may) silent on mutual agreement	Yes
Brunei Darussalam-Japan 13.07.2008	No provision			
Philippines-Japan 11.12.2008	No provision			
ASEAN-Korea 01.05.2009 (Article 10)	No	Yes if causing a substantial adverse impact	consultations (may) mutual agreement (must)	Yes
Viet Nam-Japan 01.10.2009 (Article 73)	No	Yes If causing a substantial adverse impact in a "specific" service sector	consultations (may) silent on mutual agreement	Yes but it is not clear whether it intends to incorporate results of negotiations
ASEAN-Australia-New Zealand 01.01.2010 (Article 19)	No	Yes if causing a substantial adverse impact	consultations (may/must) mutual agreement (must) notification (must) (specifying by whom to whom, and until when)	Yes

a The Parties to the Trans-Pacific Strategic Economic Partnership are Brunei Darussalam, Chile, New Zealand, and Singapore.

110. Two RTAs out of 80 do not allow the parties to take safeguard action against each others' services and service suppliers from the date of entry into force of the RTAs: India-Singapore⁵⁹, and Australia-Singapore⁶⁰ ("neither party shall initiate or continue any safeguard investigations in respect of services and service suppliers of the other party"). However, the India-Singapore RTA places an additional requirement in that the parties shall review the issue of safeguard measures in the context of developments in international fora of which both parties are members (Article 7.14.2). As the international fora, which could be the GATS, are not specified, the question remains open. Given that Singapore is the only ASEAN member states which is not a proponent of the emergency safeguard mechanism in the GATS, the prohibition of emergency safeguard measures in these two RTAs appears to make sense. Singapore has no provisions on emergency safeguard measures in its eight other RTAs⁶¹. Lastly, in its RTAs with China and Jordan, respectively, Singapore is committed to incorporate the results of GATS Article X negotiations in its RTAs, in this case, specifically referring to the GATS negotiations unlike in India-Singapore.

3. Pro-development provisions

111. Apart from the two asymmetric pro-development MFN provisions of the China-New Zealand and the EC-Cariforum agreements described above, there appear to be surprisingly few pro-development provisions and none which is quantifiable and operative. First, in three of ASEAN's agreements (with Korea, Australia-New Zealand and China), there is a clause foreseeing special and differential treatment for the newer members of ASEAN regarding the extent of their commitments. The clause appears to draw on both Articles IV and XIX of the GATS. A somewhat similar provision is found in Article 49 of the Caricom Agreement which states: "where in this chapter, the Member states or the Competent Organ are required to remove restrictions on the exercise of the rights mentioned in paragraph 1 of article 30, the special needs and circumstances of the Less Developed Countries shall be taken into account".

112. Two agreements, Brunei-Japan and Japan-Malaysia make a cross-reference to the pro-development provisions of Article IV of the GATS while a third, Japan-Vietnam adds a reference to Article XIX to the reference to Article IV.

113. Finally there are two somewhat similar provisions "for internal usage" of deep integration agreements, one for the Mercosur, whose Article XIX states "in the development of the program of liberalization differences in the level of commitments will be acknowledged, taking into account the specificities of the various sectors and respecting the objectives indicated in the paragraph below [right to regulate for national policies objectives]" and the other for the EU whose Article 15 states "when drawing up its proposal with a view to achieving the objectives in Article 26 the Commission shall take into account the extent of the efforts certain economies showing differences in development will have to sustain for the establishment of the internal market and it may propose appropriate provisions".

G. DOMESTIC REGULATION, TRANSPARENCY AND ADVANCE NOTIFICATION PROCEDURES AND RECOGNITION

114. While transparency and advance notification could also be categorized among the institutional provisions, WTO members tend to consider these as domestic regulation issues as part of the negotiations on domestic regulations disciplines revolve around transparency and advance notification questions.⁶² Although recognition is legally distinct from domestic regulation, it partially overlaps

⁵⁹ Article 7.14.

⁶⁰ Article 13.

⁶¹ With Peru, Korea, Panama, Trans-Pacific Strategic Economic Partnership, US, Japan, New Zealand, and EFTA, respectively.

⁶² See for instance the Chairman's progress report S/WPRD/W/45, 14 April 2011.

with it, notably through qualification requirements and procedures for the verification of competences, which is why they are dealt with together.

1. Domestic regulation *stricto sensu*

115. Domestic regulation *stricto sensu* is taken here in the sense of Article VI of the GATS and our typology follows closely the structure of this Article. In GATS Article VI.2(a), the first obligation, the existence of judicial, arbitral or administrative tribunals or procedures, is independent from the existence of commitments and applies to all services. In contrast, the following five obligations (administration of commitments in a reasonable objective and impartial manner/obligation to treat speedily applications and to inform on their status when an authorization is required/application of good governance-proportionality⁶³ criteria to the administration of commitments/nullification or impairment procedure in case of abuses use of licensing and qualification requirements and of technical standards/adequate procedures for the verification of competence of professional services provider) apply only to commitments undertaken.

116. To assess the domestic regulations provisions of RTAs and to compare them with the GATS, we have first checked the existence or the absence of or slight variations in each of these provisions, followed by whether these were linked or not to specific commitments. Finally additional elements linked to the specifics of each RTA have been added, such as further negotiations on domestic regulation in the RTA, a "rendez-vous" clause to incorporate future GATS Article VI.5 negotiating results and of other creative disciplines compared to GATS Article VI.

117. For an area so hotly debated within and outside the WTO (e.g. the "necessity test" question) we expected a lot of variations between RTAs and the GATS and domestic regulation provisions that are different from the GATS in RTAs. That has not been the case. In many instances RTA domestic regulation obligations are weaker than under the GATS because RTAs have not reproduced the nullification and impairment procedure foreseen by the GATS in cases where licensing and qualification requirements and technical standards nullify or impair such specific commitments in a manner which: (i) does not comply with the criteria outlined in subparagraphs 4(a), (b) or (c) of the GATS Article VI; and (ii) could not reasonably have been expected of that Member at the time the specific commitments in those sectors were made.

118. Around 70% of the agreements surveyed (56 out of 80) do not have a provision on nullification or impairment. This is the case for virtually all NAFTA type agreements (31 out of 32), two-thirds of the "other" agreements (including all the EU type agreements) and one-third of the GATS type agreements (10 out of 29). While the absence of these provisions can be partially explained by structural differences for NAFTA and EU type agreements, it is more puzzling for GATS type agreements. For the latter agreements it would appear difficult to argue that the GATS provision on nullification or impairment apply by default to RTAs because the non-inclusion of a nullification or impairment procedure in the RTA and its replacement by a best endeavour obligation is certainly deliberate. We have here probably a true "GATS-minus" case.

119. Finally, around 20% of the agreements surveyed do not even commit to respect the principles of Article VI.4, nor *a fortiori* a nullification or impairment procedure. Paradoxically in the latter case, it could be argued that GATS provisions on the respect of principles and sanctions for their violation through nullification or impairment, apply.

⁶³ Article VI-4 of the GATS provides "with a view to ensuring that measures relating to qualification requirements and procedures, technical standards and licensing requirements do not constitute unnecessary barriers to trade in services, the Council for Trade in Services shall, through appropriate bodies it may establish, develop any necessary disciplines. Such disciplines shall aim to ensure that such requirements are, *inter alia* (a) based on objective and transparent criteria, such as competence and the ability to supply the services, (b) not more burdensome than necessary to ensure the quality of the services, (c) in the case of licensing procedures, not in themselves a restriction on the supply of the service.

120. It is interesting to note that some Members that have opposed the development of criteria for the so-called “necessity test”⁶⁴ in the WTO have maintained this necessity test among the principles to be respected by the parties in their administration of qualification requirements and procedures, technical standards and licensing requirements. For example, in their communication on the issue of the necessity test in the disciplines on domestic regulation (S/WPDR/W/44, 22 March 2011), Brazil, Canada, and the United States expressed concerns that the necessity test may unduly undermine Members' sovereign rights to regulate. One would therefore expect that RTAs involving these three countries would not include a GATS VI.4-like necessity test. However, Canada-Peru⁶⁵, and MERCOSUR⁶⁶, maintain the necessity provision. There are also cases where RTAs extend the scope of domestic regulations as compared to the GATS. Most of the NAFTA-like agreements have taken this approach as the domestic regulation provision applies to all services and not only to those sectors in which there are commitments. A few GATS-like agreements also have such provisions although they could be best-endeavour type clauses.⁶⁷ Rendez-vous clauses appear in around 40% of the agreements surveyed.

121. Provisions on domestic regulations that are not in the GATS are not common, although not negligible either, except for mode 4 which is not covered by this study and even there they are more procedural than substantive.⁶⁸ Some provisions are “incremental” or “enhanced” in that they add marginally to GATS obligations. For instance for the speedy treatment of applications, some agreements have detailed procedures for incomplete or rejected applications.

122. It is however striking that obligations that differ from the GATS seem to bear no obvious resemblance to the draft domestic regulation disciplines being discussed in the WTO and particularly with the Chair's March 2009 text and subsequent alternative texts proposed by WTO Members and reflected in the Chairman's progress report dated 14 April 2011 (S/WPDR/W/45). The “friends of domestic regulation” (Australia, Chile, Chinese Taipei, Colombia, Hong Kong, Korea, New Zealand and Switzerland) who circulated a text “streamlining” the Chairman's text and whose proposals are reflected in the progress report do not seem to have created such disciplines in their RTAs. This may be because they believe that such issues are best discussed at the multilateral level.

2. Transparency and advance notification procedures

123. About 30% of the agreements foresee an enquiry point in their services chapter. Although this figure is relatively low it may be because the obligation to establish an enquiry point may be in another chapter of the RTA, or may be the same as in the GATS, and because the enquiry points appear to be very seldom used.⁶⁹

124. Around 20% of the agreements surveyed foresee advance notification procedures, and half of these involve the US as one of the parties. Typically those provisions are:

- (a) Each Party shall maintain or establish appropriate mechanisms for responding to inquiries from interested persons regarding its laws and regulations relating to the subject matter of this Chapter;

⁶⁴ GATS Article VI.4 (b) states “not more burdensome than necessary to ensure the quality of the service”.

⁶⁵ Article 909.2

⁶⁶ Article X.4.

⁶⁷ For example, Japan-Thailand (Article 80.6)

⁶⁸ For more details see Carzaniga, “A warmer welcome? Access for natural persons under PTAs”, in Marchetti, Roy, op. cit.

⁶⁹ For more details on transparency provisions in RTAs, see for instance the OECD document, “Multilateralizing regionalism: a progress report on the compendium of transparency provisions in RTAs” (TAD/TC/WP(2011)6).

- (b) At the time it adopts final laws and regulations relating to the subject matter of this Chapter, each Party shall, to the extent possible, including upon request, take into consideration substantive comments received from interested persons with respect to the proposed laws and regulations; and
- (c) To the extent possible, each Party shall allow a reasonable period of time between publication of final laws and regulations and their effective date.

125. In Singapore-Australia, an advance notification procedure, particularly for domestic regulation asks the parties to endeavour to provide an opportunity for comment, and give consideration to such comments, before their adoption, when introducing measures which significantly affect trade in services.⁷⁰

126. A handful of agreements contain additional transparency provisions as compared to the GATS. For example, under Japan-Malaysia, the Parties shall make public a list of all existing measures, which are inconsistent with market access and/or national treatment, whether or not these measures are included in their specific commitments. In addition, the list shall be reviewed every three years and revised as necessary.⁷¹ Other examples are found in recent agreements, such as ASEAN-Australia-New Zealand whereby the Parties to the extent possible shall make publications available on the internet⁷²; and Japan-Switzerland, where the Parties shall provide information on natural persons covered by their specific commitments including subsequent change therein, and shall endeavour to make available to the other party statistical data regarding the grant of entry into and temporary stay in the other party.⁷³

3. Recognition

127. The recognition disciplines of the GATS establish multilateral rules for the recognition of education or experience obtained, requirements met, or licenses or certifications granted by other WTO members. Article VII guarantees a certain degree of non-discrimination in the treatment of individual requests for recognition while recognizing that all diplomas may not be equal in terms of level of qualifications (emphasis added):

- (a) For the purposes of the fulfilment, in whole or in part, of its standards or criteria for the authorization, licensing or certification of services suppliers, and subject to the requirements of paragraph 3, a Member may recognize the education or experience obtained, requirements met, or licenses or certifications granted in a particular country. Such recognition, which may be achieved through harmonization or otherwise, may be based upon an agreement or arrangement with the country concerned or may be accorded autonomously.
- (b) A Member that is a party to an agreement or arrangement of the type referred to in paragraph 1, whether existing or future, shall afford adequate opportunity for other interested Members to negotiate their accession to such an agreement or arrangement or to negotiate comparable ones with it. Where a Member accords recognition autonomously, it shall afford adequate opportunity for any other Member to demonstrate that education, experience, licenses, or certifications obtained or requirements met in that other Member's territory should be recognized.
- (c) A Member shall not accord recognition in a manner which would constitute a means of discrimination between countries in the application of its standards or criteria for the authorization, licensing or certification of services suppliers, or a disguised restriction on trade in services.

⁷⁰ Article 11.8.(c)

⁷¹ Article 82.2

⁷² Article 11.3

⁷³ Article 66.4-5

128. To compare recognition provisions in RTAs and the GATS two main benchmarks were selected. The first is the existence or the absence of an obligation to "afford adequate opportunities" to negotiate a similar agreement in case of autonomous recognition or of the conclusion of a bilateral agreement. Only 13 agreements, belonging to the GATS type family, have a provision to that effect. This can be explained by the fact that some agreements have a recognition article but not an "adequate opportunity to negotiate" feature (e.g. Jordan-Singapore, Japan-Mexico, Thailand-Australia, China-Hong Kong China, China-Macao China, Singapore-Australia, and ANZCERTA). Many other agreements do not have a recognition article *per se*, with recognition questions being dealt with through licencing and certification, or an "adequate opportunities" clause. There appears to be a semantic confusion in the area of recognition and there are overlaps with licencing and certification in domestic regulation. It is therefore very difficult to compare the recognition provisions of the agreements and it would warrant a study of its own.

129. The second benchmark is the existence of additional recognition measures as compared to the GATS. We have not found any actual provisions on additional obligations. However there are numerous schedules for negotiations by designated authorities for recognition. These schedules take often the form of an annex and generally contain a calendar for negotiations; a set of principles to guide the negotiations; procedures for the non-automatic endorsement of the results of these negotiations; definition of priority sectors for negotiations (typically engineers) and priority areas for negotiations such as temporary accreditation systems.

130. The recurrence of these provisions suggests that they originated in the NAFTA provisions on recognition (Article 1210, and Annex 1210.5 on professional services) and spread beyond the NAFTA inspired family of agreements.

131. It remains to be seen however if all those programmed negotiations have effectively taken place and have translated into significant bilateral breakthroughs in terms of mutual recognition. The experience of the EU which is very integrated, and for which progress on recognition has taken several decades and is not yet complete, suggests that the subject is very difficult to tackle, even in the simpler framework of bilateral negotiations. There are similar indications in the literature⁷⁴ that some of the negotiations planned in the NAFTA framework (e.g. mutual recognition scheme for engineers) have failed so far to deliver concrete results. If it is difficult for an effectively implemented agreement such as NAFTA which groups three adjacent and closely inter-twined OECD economies, one may wonder how agreements grouping parties with different levels of development, not sharing common borders and/or common language and with relatively low bilateral services trade may succeed better in that respect.

H. INSTITUTIONAL ASPECTS

132. This group covers provisions related either to the day to day management and operation of the agreement or its development through future negotiations. It covers specialized committees and subcommittees, procedures for the modification of schedules and future negotiations.

1. Specialized committee and subcommittees

133. Around 45%, of the 80 agreements foresee a special services commission or committee. In addition, 24 agreements require regular meetings, although many detail only the first meeting. Some agreements also have established specialized subcommittees mostly for mode 4, mutual recognition, or financial services. Anecdotal evidence suggests that these committees and subcommittees do not meet as regularly as planned.

⁷⁴ See Mattoo and Sauv e, page 148, box 12.2 "Harmonization and Mutual Recognition in Services: promise and pitfalls", *op. cit.*

2. Procedures for the modification of schedules

134. Paradoxically, the existence of procedures for the modification of schedules (in the sense of less liberal modifications compensated or not by more liberal concessions in one or several other sectors) is a priori the sign of an effective implementation of the agreement: one does not need to modify commitments if they are not implemented in the first place. However one can argue the reverse: properly negotiated and implemented commitments do not need frequent or any modifications of their schedules. In fact since 1995 renegotiations under GATT Article XXVIII have become a relatively rare occurrence.

135. Second neither the NAFTA and its followers nor the EU like agreements have such procedures in their services chapters. They could of course be present in another chapter of the agreement. However this is very unlikely due to the specificities of services as compared to goods (absence of objective benchmarks to assess injury and to determine the nature and the level of compensation called for services specific rules).

136. With regard to the GATS type family, 13 agreements have no procedures while 16 others have. Out of 18 agreements that have procedures on the modifications of schedules, 15 foresee in addition an obligation for the modifying party to provide compensation and 10 foresee explicitly recourse to arbitration similar to that of Article XXI of the GATS or to the general dispute settlement procedures if bilateral negotiations fail within a given period (ASEAN-Australia-New Zealand, Japan-Switzerland, China-New Zealand, Pakistan-Malaysia, China-ASEAN, India-Singapore, Thailand-Australia, Singapore-Australia, Singapore-New Zealand, Singapore-Korea). Neither the dates of the agreements, nor their geography, nor the level of development of the parties involved appear as satisfactory explanatory factors for these variations.

137. Finally even the agreements comprising a full-fledged modification procedure with compensatory adjustment and arbitration have not added new provisions as compared to the GATS Article XXI procedures despite ample scope for doing so (e.g. guidelines for the arbitrator to select the sectors in which compensatory adjustment to be made and the levels of the adjustments notably in case of multiple and diverging requests).

3. Provisions on future negotiations

138. About 70% of the agreements surveyed have provisions for future services negotiations, and more than half have established periodicity in such future negotiations. Some are generic, dedicated to the negotiation of new commitments, others are centred around specific themes: recognition, mode 4, quantitative restrictions, or removal of permanent residency requirements. In some of Mexico's agreements, such as with Honduras, Guatemala, El Salvador, and Nicaragua, the parties have committed to future negotiations on land transport.

139. No systematic data has been collected on the effective implementation of those clauses or on the results of future negotiations if and when they have taken place. Such gaps in our knowledge of the implementation of RTAs and information on further changes to agreements in that regard could be narrowed if WTO Members actively fulfil their subsequent notification obligations under the Transparency Mechanism for RTAs.⁷⁵

IV. CONCLUSION

140. From the detailed analysis of the provision of services rules of RTA notified to the WTO a small number of conclusions emerge. The answer to the two main questions of this paper how divergent? how creative? is that it is "neither the tower of babel, nor realized utopias". There are indeed divergences between the agreements in their architecture (positive versus negative listing, four modes versus 3+1 or establishment + freedom to provide services, relationship with the

⁷⁵ Transparency Mechanism for RTAs, WT/L/671, paragraph 14.

investment/establishment chapter). But the divergences do not have a significant impact on the depth and the strength of the obligations they entail.

141. National treatment is the cornerstone of all the agreements which contain, in most instances, disciplines on market access/non-discriminatory quantitative measures. There are a few so-called "GATS minus" cases notably in terms of coverage of the agreement (subsidies, financial services, maritime cabotage, some ancillary air transport services) but any potential conflict with the GATS remains to be tested. In many other instances RTAs: enlarge the scope of the GATS, although marginally as the GATS is already very encompassing; increase preferential commitments, especially through negative listing for half of them; often "unlock" the link between domestic regulations disciplines and commitments, by applying domestic regulation disciplines to all services covered by the agreements regardless of commitments; and appear, at least at face value, much more ambitious than the GATS in terms of recognition.

142. RTAs have not been used to experiment or try to prejudge disciplines that are under discussion in the WTO (such as domestic regulation, safeguards, and subsidies). This finding is counter-intuitive as agreement on these disciplines should be much easier among like-minded countries than in a multilateral context. A possible explanation may be that RTA Parties still consider that these questions should be discussed in the multilateral forum.

143. MFN/multilateral mechanisms are often absent; when they are present they appear to be rather weak and full of exceptions. This limits the extent and the generalization of the liberalization envisaged by otherwise liberal provisions. This is a paradox because such liberalization could be in practice extended on an MFN basis with little or no political and economic costs due to the quasi-absence of multiple/preferential applied regimes in services (except for services restricted through licences or concessions where the prime mover advantage is of essence). It is as if unconsciously Members had felt that multilateralization/generalization of liberalization could only be dealt through the multilateral forum rather than through full non-party unrestricted MFN clauses in RTAs.

144. Whether this is a Freudian "acte manqué" or not, the fact remains that there is no "babel tower effect": the services rules are not sufficiently divergent to technically prevent their hypothetical multilateralization. As long as this remains the case services RTA will remain a "tangible second best". "Tangible" because they bring effective liberalization within a relatively short period of negotiations, with relatively low political costs. "Second best" because liberalization in RTAs is devoid in most instances of the support of a real dispute settlement system; through the lack of strong MFN provisions this liberalization is bound to remain limited, to the detriment of least-developed countries and low income developing countries, that do not have the administrative resources and capacities to negotiate and implement these agreements on a large scale.

ANNEX 1: TYPOLOGY

I. ARCHITECTURE⁷⁶

A) Services Commitments Approach

0 positive, 1 negative, 2 hybrid (specify), 3 neither nor (specify), 4 "can't tell" (specify), 5 other (specify)

B) All Modes in Services Chapter?

0 yes, 1 no, 2 others (specify – e.g., not relevant, "can't tell". etc.)

C) Investment Commitments Approach

0 positive, 1 negative, 2 hybrid (specify), 3 neither or nor (specify), 4 "can't tell" (specify), 5 no investment chapter, or services excluded from the investment chapter (specify) 9 other (specify)

D) Relationship between Services and Investment Chapters

0 irrelevant (i.e., no investment chapter, or services excluded from the investment chapter), 1 "can't tell"(no explicit provision describing the relationship), 2 services chapter priority, 3 investment chapter priority, 4 no priority, 5 investment chapter exclusivity for mode 3, 6 others (specify)

E) Specific Sectoral Chapters

0 no, 1 yes (specify)

F) Mode 4 Chapter

0 no, 1 yes

G) Status quo/Stand-still for Services Chapter

0 no, 1 yes (specify), 2 others (specify)

H) Status quo/Stand-still for Investment Chapter

0 no, 1 yes (specify), 2 others (specify), 3 irrelevant

I) Ratchet (indicate that the extent of the ratchet depends on the respective extension of commitments among parties) for Services Chapter

0 no, 1 yes (specify), 2 others (specify)

J) Ratchet (indicate that the extent of the ratchet depends on the respective extension of commitments among parties) for Investment Chapter

0 no, 1 yes (specify), 2 others (specify), 3 irrelevant

K) Cross reference to GATS Article V.1

0 no, 1 partial reference (specify), 2 full reference, 3 irrelevant

L) Institutional framework

1) Enquiry points

0 no, 1 yes

2) Committees/sub-committees

0 no, 1 ad hoc, 2 systematic, 3 yes, but periodicity unknown

⁷⁶ The structure of the typology was defined and used (in 81 instances) long before the final drafting of the paper which explains that the order and the groupings of the various features in the typology differs in certain instances from the order and the groupings finally retained in the paper.

II. "SCOPE" *LATO SENSU* AND DEFINITIONS

1. Services Chapter

A) Added measures/policies

0 no added measures, 1 added measures (specify), 2 can't tell

B) Excluded measures/policies

0 no excluded measures/policies, 1 excluded measures/policies (specify), 2 can't tell

C) Added sectors

0 no added sectors, 1 added sectors (specify), 2 can't tell

D) Excluded sectors

0 no excluded sectors, 1 excluded sectors (specify), 2 can't tell

2. Investment Chapter, if relevant

A) Added measures/policies

0 no added measures, 1 added measures (specify), 2 irrelevant

B) Excluded measures/policies

0 no excluded measures/policies, 1 excluded measures/policies (specify), 2 irrelevant

C) Added sectors

0 no added sectors, 1 added sectors (specify), 2 irrelevant

D) Excluded sectors

0 no excluded sectors, 1 excluded sectors (specify), 2 irrelevant

3. Definitions

A) Permanent Residency beyond GATS Natural Persons Notifications (i.e. Switzerland, Armenia, New Zealand, Australia, Canada)

0 identical to GATS, 1 beyond GATS (specify), 2 other (i.e. Switzerland, Armenia, New Zealand, Australia, Canada)

B) National treatment for Services Chapter

0 identical to GATS XVII, 1 different (specify), 2 no provision

C) Market access for Services Chapter

0 identical to GATS XVI, 1 different (specify), 2 can't tell, 3 irrelevant, 4 no provision

D) National treatment for Investment Chapter

0 identical to GATS XVII wording, 1 benchmark, 2 different (specify), 3 irrelevant

E) Market access for Investment Chapter

0 identical to GATS XVI wording, 1 different (specify), 2, irrelevant, 3 no provision

III. TRANSPARENCY

A) **Publication:** 0 no, 1 yes (specify in the "observations" column if linked to commitments or not and if best endeavor or compulsory)

B) **Notification:** 0 no, 1 yes

C) Advance notification: 0 no, 1 yes

D) Others (specify in the "observations" column) 0 no, 1 yes

IV. RULES OF ORIGIN

0 if substantive business operations (specify variations of the terminology and criteria if there is, e.g., create categories if variation in definitions for 'substantive business operations'), 1 others (specify), 2 no provision

Specify if specific rules for other modes

V. MFN

A) Services Chapter

0 no MFN, 1 MFN limited to the parties of the agreement itself, 2 non-party MFN (specify exceptions be them sectoral, pre/post agreements, or specific types of partners etc. in the "observations" column, then draw from that, if enough material, a new typology)

B) Investment Chapter

0 no MFN, 1 MFN limited to the parties of the agreement itself, 2 non-party MFN, 3 irrelevant (specify exceptions be them sectoral, pre/post agreements, or specific types of partners etc. in the "observations" column, then draw from that, if enough material, a new typology), 4 others

VI. SAFEGUARDS

A) BOP safeguards

0 narrower than GATS/GATS minus, 1 identical to GATS, 2 wider than GATS/GATS+, 3 others, 4 no provisions (specify exclusions and additions in a "observations" column)

B) Emergency safeguards

0 incorporating results of GATS X negotiations, 1 enforceable disciplines (e.g., consultation procedures, specify in the "observations" column), 2 no provisions, 3 others (e.g., combination between incorporating results of GATS and enforceable disciplines in the meantime), 4 total prohibition of emergency safeguard measures

VII. PROHIBITION OF REQUIREMENTS ON PERFORMANCE, LOCAL PRESENCE, SENIOR MANAGEMENT AND BOARD

A) Performance requirement

0 no provision, 1 provisions with no possibility for reservations (i.e. prohibition of performance requirement), 2 provisions with possibility for reservations (specify), 3 irrelevant

B) Senior management and board of directors

0 no provision, 1 provisions with no possibility for reservations (i.e. prohibition of requirements on senior management and board of directors), 2 provisions with possibility for reservations (specify), 3 irrelevant,

C) Local presence requirement

0 no provision, 1 provisions with no possibility for reservations (i.e prohibition of local presence requirement), 2 provisions with possibility for reservations (specify), 3 irrelevant

VIII. DOMESTIC REGULATION

A) General provisions

- **Judicial review and procedures (benchmark GATS VI.2)**

0 narrower than GATS/GATS minus, 1 identical to GATS, 2 wider than GATS/GATS+, 3 others, 4 no provisions

B) Provisions linked to the existence of commitments

- **Administration of commitments in a reasonable, objective and impartial manner (benchmark GATS VI.1)**

0 narrower than GATS/GATS minus, 1 identical to GATS, 2 wider than GATS/GATS+, 3 others, 4 no provisions

- **Obligation to treat speedily applications and to inform on their status when an authorization is required (benchmark GATS VI.3)**

0 narrower than GATS/GATS minus, 1 identical to GATS, 2 wider than GATS/GATS+, 3 others, 4 no provisions (if minor or plus specify)

- **Application of the criteria listed in GATS Article VI-4 to the administration of commitments**

0 narrower than GATS/GATS minus, 1 identical to GATS, 2 wider than GATS/GATS+, 3 others, 4 no provisions (if minor or plus specify)

- **Existence of a nullification or impairment procedure where commitments are nullified or impaired by licencing and qualification requirements and technical standards (with cross reference to the criteria of VI.4 and to legitimate expectations) benchmark GATS VI.5**

0 narrower than GATS/GATS minus, 1 identical to GATS, 2 wider than GATS/GATS+, 3 others, 4 no provisions (if minor or plus specify)

- **Adequate procedures for the verification of competences of professional services providers (benchmark GATS VI.6)**

0 narrower than GATS/GATS minus, 1 identical to GATS, 2 wider than GATS/GATS+, 3 others, 4 no provisions (if minor or plus specify)

- **Further negotiations on domestic regulation in an RTA context (*mutatis mutandis* GATS V-5)**

0 No, 1 Yes, 2 Others

- **Rendez-vous clause to incorporate VI-5 future negotiating results**

0 no rendez-vous clause, 1 rendez-vous clause

- **"Other Creative" disciplines as compared to the GATS**

0 no, 1 yes (specify define typology afterwards in function of recurrences and variations identified)

IX. RECOGNITION

0 narrower than GATS/GATS minus, 1 identical to GATS, 2 wider than GATS/GATS+, 3 others, 4 no provisions (if minor or plus specify)

X. PARAMETERS OF NEGOTIATIONS AND MANAGEMENT OF THEIR RESULTS

- **Successive round of negotiations foreseen in the Services Chapter (*mutatis mutandis* GATS XIX.1)**

0 no provision, 1 as the parties see fit (e.g., endeavor clause), 2 established periodicity (specify)

- Procedure for modification of schedules (benchmark GATS XXI)

0 no provision, 1 with compensatory adjustment, 2 without compensatory adjustment,

- Operative pro-development provisions (benchmark GATS XXI)

0 no provision, 1 yes (specify, e.g. commit less sectors? More time for liberalization? Something that can be said in number)

XI. ANY OTHER DIFFERENT PROVISIONS

Specify

ANNEX 2

”FAMILIES” OF SERVICES RTA (Agreements by date of signature)

I GATS type agreements: 29 agreements

Southern Common market (Mercosur) (December 1997)
EC Mexico (December 1997)
US - Jordan (October 2000)
EFTA - Mexico (November 2000)
New Zealand - Singapore (November 2000)
Japan - Singapore (January 2002)
EFTA- Singapore (June 2002)
EC - Chile (November 2002)
EFTA - Chile (June 2003)
Jordan - Singapore (May 2004)
Thailand - Australia (July 2004)
Korea (Republic of) - Singapore (August 2005)
EFTA - Korea (Republic of) (December 2005)
Japan - Malaysia (December 2005)
Japan - Philippines (September 2006)
ASEAN - China (January 2007)
Japan - Thailand (April 2007)
Brunei Darussalam - Japan (June 2007)
Japan - Indonesia (August 2007)
Pakistan - Malaysia (November 2007)
China - New Zealand (April 2008)
Chile - China (April 2008)
China - Singapore (October 2008)
ASEAN - Korea (Republic of) (November 2008)
Japan - Vietnam (December 2008)
ASEAN - Australia - New Zealand (February 2009)
Pakistan - China (February 2009)
Peru - China (April 2009)
Korea (Republic of) - India (August 2009)

II NAFTA-type agreements: 32 agreements

A) NAFTA I type (without a mandatory market access clause): 17 agreements

NAFTA (December 1992)
Costa Rica - Mexico (April 1994)
Colombia - Mexico (June 1994)
Canada - Chile (December 1996)
Mexico - Nicaragua (December 1997)
Chile - Mexico (April 1998)
Mexico - Honduras (Northern triangle) (June 2000)
Mexico - Guatemala (Northern triangle) (June 2000)
Mexico - El Salvador (Northern triangle) (June 2000)
Panama - El Salvador (Panama - Central America) (March 2002)
Chile - Korea (February 2003)
Panama - the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu (August 2003)
Japan - Mexico (September 2004)
Panama - Chile (June 2006)
Chile - Japan (March 2007)
Panama - Honduras (Panama - Central America) (June 2007)
Panama - Costa Rica (Panama - Central America) (August 2007)

B) "NAFTA II" /post - Nafta type (with a mandatory market access clause): 15 agreements

US - Singapore (May 2003)
US - Chile (June 2003)
US - Australia (May 2004)
US - Morocco (June 2004)
Dominican Republic - Central America - US (CAFTA DR) (August 2004)
US - Bahrain (September 2005)
US - Oman (January 2006)
Panama - Singapore (March 2006)
US - Peru (April 2006)
Chile - Colombia (November 2006)
Honduras - El Salvador - the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu (May 2007)
Peru - Singapore (May 2008)
Nicaragua - the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu (June 2006)
Canada - Peru (May 2008)
Australia - Chile (July 2008)

III "Other" agreements: 19

A) EU inspired agreements:

EC (March 1957)
EEA (May 1992)
EC - FYROM (April 2001)
EFTA (June 2001)
EC - Croatia (October 2001)
EC - Albania (June 2006)
EC - Montenegro (October 2007)

B) Other agreements

Australia - New Zealand (ANZCERTA) (August 1988)
Chile - El Salvador (October 1999)
Chile - Costa Rica (October 1999)
Caricom (July 2001)
Singapore - Australia (February 2003)
China - Hong Kong, China (June 2003)
China - Macao, China (October 2003)
India - Singapore (June 2005)
Transpacific Strategic Economic Partnership (July 2005)
Iceland - Faroe Islands (August 2005)
EC - Cariforum (October 2008)
Japan - Switzerland (February 2009)

ANNEX 3
TYPES OF SERVICES RTA BY INDIVIDUAL COUNTRY /TERRITORY “USER”
(Number of agreements)

Member or agreement	GATS type agreements	NAFTA I or II type agreements	Other types of agreements	
			EU type agreements	"other" agreements
Albania (1)			EU-Albania (1)	
Antigua and Barbuda (2)				Caricom, EU-Cariforum (2)
ASEAN (3)	ASEAN-Australia-New Zealand, ASEAN-Korea ASEAN-China (3)			
Argentina (1)	Mercosur (1)			
Australia (6)	ASEAN-Australia-New Zealand, Thailand-Australia (2)	Australia-Chile, US-Australia (2)		Singapore-Australia, Australia-New Zealand (ANZCERTA) (2)
Bahamas (2)				Caricom, EU-Cariforum (2)
Barbados (2)				Caricom, EU-Cariforum (2)
Belize (2)				Caricom, EU-Cariforum (2)
Brazil (1)	Mercosur (1)			
Bahrain (1)		US-Bahrain (1)		
Brunei Darussalam (5)	Brunei Darussalam-Japan ASEAN-Australia-New Zealand, ASEAN Korea, ASEAN-China (4)			Transpacific Strategic Economic Partnership (1)
Cambodia (3)	ASEAN-Australia-New Zealand, ASEAN-Korea, ASEAN-China (3)			
Canada (3)		Canada-Chile, NAFTA, Canada-Peru (3)		
Chile (14)	Chile-China, EU-Chile, EFTA-Chile (3)	Australia-Chile, Panama-Chile, Chile-Japan, Chile-Korea, US-Chile, Chile-Mexico, Canada-Chile, Chile-Colombia (8)		Chile-El Salvador, Chile-Costa Rica, Transpacific Strategic Economic Partnership (3)
China (10)	Chile-China, Peru-China, Pakistan-China, China-Singapore, China-New Zealand, ASEAN-China (8)			China-Macao, China, China-Hong Kong, China (2)
Hong Kong, China (1)				China-Hong Kong, China (1)
Macao, China (1)				China-Macao, China (1)
Colombia (2)		Colombia-Mexico, Chile-Colombia (2)		
Costa Rica (4)		Panama-Costa Rica, CAFTA-DR, Costa Rica-Mexico (3)		Chile-Costa Rica (1)
Croatia (1)			EU-Croatia (1)	
Dominica (2)				Caricom EU-Cariforum (2)

Dominican Republic (2)		CAFTA-DR (1)		EU-Cariforum (1)
EU (10)	EC-Chile, EC -Mexico (2)		EU-Montenegro, EU-Albania, EU-Croatia, EU-FYROM, EFTA, EEA, EC (7)	EU-Cariforum (1)
EFTA (4)	EFTA-Korea, EFTA-Chile, EFTA - Singapore, EFTA-Mexico (4)			
El Salvador (5)		Honduras-El Salvador-Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu, CAFTA-DR, Panama-El Salvador, Mexico-El Salvador (4)		Chile-El Salvador (1)
Faroe Islands (1)				Iceland-Faroe Islands (1)
FYROM (1)			EU-FYROM (1)	
Honduras (4)		Panama-Honduras, Honduras-El Salvador-Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu, CAFTA-DR, Mexico-Honduras (4)		
Grenada (2)				Caricom, EU-Cariforum (2)
Guatemala (2)		CAFTA-DR, Mexico-Guatemala (2)		
Guyana (2)				Caricom, EU-Cariforum (2)
Haiti (1)				Caricom (2)
Iceland (7)	EFTA-Korea, EFTA-Chile, EFTA-Singapore, EFTA-Mexico (4)		EEA, EFTA (2)	Iceland-Faroe Islands (1)
India (2)	Korea-India (1)			India-Singapore (1)
Indonesia (4)	Japan-Indonesia, ASEAN-Australia-New Zealand, ASEAN-Korea, ASEAN-China (4)			
Jamaica (2)				Caricom, EU-Cariforum (2)
Japan (10)	Japan-Vietnam, Japan-Philippines, Brunei Darussalam-Japan, Japan-Indonesia, Japan-Thailand, Japan-Malaysia, Japan-Singapore (7)	Chile-Japan, Japan-Mexico (2)		Japan-Switzerland (1)
Jordan (2)	Jordan-Singapore, USA-Jordan (2)			
Rep. of Korea (5)	Korea-India, ASEAN-Korea, EFTA-Korea, Korea-Singapore (4)	Chile-Korea (1)		
Lao PDR (3)	ASEAN-Australia-New Zealand, ASEAN-Korea, ASEAN-China (3)			
Liechtenstein (6)	EFTA-Korea, EFTA-Chile, EFTA-Singapore, EFTA Mexico (4)		EEA, EFTA (2)	

Malaysia (5)	Pakistan-Malaysia, Japan-Malaysia, ASEAN-Australia-New Zealand, ASEAN-Korea, ASEAN-China (5)			
Mexico (11)	EFTA-Mexico, EU-Mexico (2)	Japan-Mexico, Mexico-Honduras, Mexico-Guatemala, Chile-Mexico, Mexico-Nicaragua, Costa Rica-Mexico, Colombia-Mexico, NAFTA, Mexico-El Salvador (9)		
Montenegro (1)			EU-Montenegro (1)	
Montserrat (1)				Caricom (1)
Morocco (1)		US-Morocco (1)		
Myanmar (3)	ASEAN-Australia-New Zealand, ASEAN-Korea, ASEAN-China (3)			
New Zealand (5)	ASEAN-Australia-New Zealand, China-New Zealand, New Zealand-Singapore (3)			Australia-New Zealand (ANZCERTA), Transpacific Strategic Economic Partnership (2)
Nicaragua (3)		Nicaragua-Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu, CAFTA-DR, Mexico-Nicaragua (3)		
Norway (6)	EFTA-Korea, EFTA-Chile EFTA-Singapore, EFTA-Mexico (4)		EEA, EFTA (2)	
Oman (1)		US-Oman (1)		
Pakistan (2)	Pakistan-China, Pakistan-Malaysia (2)			
Panama (6)		Panama-Honduras, Panama-Costa Rica, Panama-Chile, Panama-Singapore, Panama-Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu, Panama-El Salvador (6)		
Paraguay (1)	Mercosur (1)			
Peru (4)	Peru-China (1)	Peru-Singapore, US-Peru, Canada-Peru (3)		
Philippines (4)	Japan-Philippines, ASEAN-Australia-New Zealand, ASEAN-Korea, ASEAN-China (4)			
Saint Kitts and Nevis (2)				Caricom, EU-Cariforum (2)
Saint Lucia (2)				Caricom, EU-Cariforum (2)
Saint Vincent and the Grenadines (2)				Caricom, EU-Cariforum (2)

Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu (3)		Honduras-El Salvador-Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu, Nicaragua-Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu, Panama-Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu (3)		
Singapore (15)	China-Singapore, Korea-Singapore, Jordan-Singapore, EFTA-Singapore, Japan-Singapore, New Zealand - Singapore, ASEAN-Australia-New Zealand, ASEAN-Korea, ASEAN-China (9)	Peru-Singapore, Panama-Singapore, US-Singapore (3)		India-Singapore, Singapore-Australia, Transpacific Strategic Economic Partnership (3)
Suriname (2)				Caricom, EU-Cariforum (2)
Switzerland (6)	EFTA-Korea, EFTA-Chile, EFTA-Singapore, EFTA-Mexico (4)		EFTA (1)	Japan-Switzerland (1)
Thailand (5)	Japan-Thailand, Thailand-Australia, ASEAN-Australia-New Zealand, ASEAN-Korea, ASEAN-China (5)			
Trinidad and Tobago (2)				Caricom, EU-Cariforum (2)
Uruguay (1)	Mercosur (1)			
United States (10)	US-Jordan (1)	US-Peru, US Oman, US-Bahrain, CAFTA-DR, US-Morocco, US-Australia, US-Singapore, US-Chile, NAFTA (9)		
Vietnam (4)	Japan-Vietnam, ASEAN-Australia-New Zealand, ASEAN-Korea, ASEAN-China (4)			

Note: Plurilateral agreements that conclude agreements with third parties have been used rather than their individual member states. Individual EU Member States do not appear in the Table.