Does architecture matter?
The treatment of trade and investment in financial services in selected preferential trade agreements

Pierre Sauvé and Martin Molinuevo*

ABSTRACT
How are financial services best treated in preferential trade agreements? Do they warrant a special chapter that takes account of their specific characteristics, or should they be incorporated into broader general disciplines on services and investment? Is the choice of architecture important for shielding financial sector regulation from key provisions of investment chapters, notably those dealing with indirect expropriation and investor-state arbitration? This paper reviews a number of preferential trade agreements (PTAs) in East Asia and the Americas and analyzes differing rule-making architectures to deal with the regulation of trade and investment in financial services. The paper devotes special attention to the interface between services and investment chapters in the sample of trade agreements under review, and where relevant, their relationship to particular provisions in regard to financial services.

KEY WORDS
Trade in services, investment regulation, General Agreement on Trade in Services, preferential trade agreements, financial services.

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I. Introduction

How are financial services best treated in preferential trade agreements? Do they warrant a special chapter that takes account of their specific characteristics, or can they/should they rather be incorporated into broader general disciplines on services and investment? General disciplines on trade in services often follow the GATS approach of considering investment in services (commercial presence) as a mode of supplying services alongside cross-border trade in services or the movement of service suppliers or consumers. Should investment in financial institutions be subject to disciplines on services trade or to general disciplines on investment – which typically cover investment in both in good and services? What specific provisions in regard to financial services are commonly featured in PTAs? Are these different architectural options reflected in the liberalization outcome of financial services? Is the choice of architecture important for shielding financial sector regulation (and provide some measure of dispute settlement immunity) from key provisions of investment chapters, notably those dealing with indirect expropriation and investor-state arbitration?

This note addresses some of the above questions by reviewing a number of preferential trade agreements (PTAs) in East Asia and the Americas, and analyzes how such agreements deal with the regulation of trade and investment in financial services. The note devotes special attention to the interface between services and investment chapters in the sample of trade agreements under review, and where relevant, their relationship to particular provisions in regard to financial services.

II. Are all sectors covered?

A first item to explore is the sectoral scope of PTAs. No trade agreement signed to date has established immediate free trade in all service sectors. The East Asian and American agreements reviewed are no exception in this regard. For a variety of reasons, governments wish to exempt certain activities from the coverage of trade and investment disciplines and/or maintain certain trade- and investment-restrictive measures in covered sectors. A key question is how specific agreements tackle such sectoral exemptions from the main disciplines of the agreements in question.
One way to limit the sectoral coverage of an agreement consists of entirely excluding a given sector or sub-sector from such an agreement’s scope of coverage.

Table 1 summarizes the sectoral carve-outs found in the services chapters of the agreements under review. The table reveals that five agreements list financial services amongst the sectors excluded from their scope. With the exception of the Trans-Pacific EPA, all agreements that carve out financial services are negative-list agreements that otherwise follow the NAFTA model (see Table 3 below). The exclusion of financial services from international disciplines can be explained by a number of reasons, among which countries’ preparedness or willingness to negotiate in the light of the business or regulatory sensitivities arising in the financial sector and the complexities that negotiating trade commitments for such a heavily regulated industry may give rise to. Paradoxically, however, all agreements that have carved-out financial services entirely from their scope involve countries that have agreed to liberalising disciplines on financial services in other bilateral or regional agreements as well as in the WTO. Seen in this light, it would appear that the exclusion of financial services in certain agreements stems from the inability of trading partners to agree on a common approach or liberalization outcome.

Table 1. Sectoral carve-outs in services in selected PTAs

<table>
<thead>
<tr>
<th>Agreement(s)</th>
<th>Carve-out(s)</th>
</tr>
</thead>
<tbody>
<tr>
<td>AFAS, Australia-Singapore FTA, Australia-Thailand FTA, ASEAN-China TIS Agreement, India-Singapore ECA, EFTA-Korea FTA, EFTA-Singapore FTA, Jordan-Singapore FTA, Korea-Singapore FTA, Nicaragua-Chinese Taipei FTA, Panama-Singapore FTA, Panama-Chinese Taipei FTA, Singapore-US FTA, US-Chile FTA, CAFTA, China – New Zealand FTA, CAN</td>
<td>Core air transport services</td>
</tr>
<tr>
<td>Japan-Malaysia EPA, Japan-Philippines EPA, Japan-Singapore EPA, Japan-Mexico EPA</td>
<td>Core air transport services and cabotage in maritime transport</td>
</tr>
<tr>
<td>EC – Chile AA, EC – CARIFORUM EPA</td>
<td>Core air transport services, cabotage in maritime transport, and audiovisual services</td>
</tr>
<tr>
<td>Chile-Korea FTA, Guatemala-Chinese Taipei FTA, Trans-Pacific EPA, Canada – Chile FTA</td>
<td>Core air transport services and financial services</td>
</tr>
<tr>
<td>Lao PDR-US BTA, Mainland-Hong Kong CEPA, Mainland-Macao CEPA, New Zealand-Singapore FTA, Vietnam-US BTA, MERCOSUR</td>
<td>None</td>
</tr>
</tbody>
</table>

Note: The Chile-Korea FTA, Canada-Chile FTA and the Trans-Pacific EPA foresee the possibility of future negotiations on trade in financial services.

Sectoral carve-outs are the most radical form of exclusion from international disciplines. They entail that no provision of the agreement (unless otherwise explicitly provided for) applies to
the excluded sector. As such, the countries concerned retain full freedom to introduce or maintain any kind of restrictive measures in regard to operators from their trading partners. A less radical form of carve-out is found in the Japan-Mexico FTA where, despite the presence of a chapter dedicated to financial services (Chapter 9), the Parties agreed to be merely bound by their respective commitments under the OECD Codes of Liberalisation and Capital Movements and the GATS.¹

The lack of a carve-out for any industry, such as financial services, does not necessarily entail that all disciplines of the agreement will apply to that activity. Trade agreements allow countries to maintain or introduce certain trade- and investment-restrictive measures where they expressly decide to so in their commitments or reservations.

III. How are financial services covered in PTAs?

International disciplines on services trade may follow the GATS in covering investment in services under general disciplines on trade in services. Alternatively, investment in services can be governed entirely by disciplines on foreign investment that apply across the board to all economic sectors – primary (including agriculture), manufacturing and services. Particular regulatory sensitivities emerging in financial markets raise the question of whether cross-border trade and investment in financial services should be addressed under the common disciplines for investment in services, or whether it warrants a special, dedicated, chapter on financial services.

International practice shows a variety of approaches to the treatment of financial services in PTAs. Table 2 summarizes the architectural choices regarding the main liberalization disciplines on cross-border trade and investment in financial services for the sample of 29 agreements under review.

III.1 No general disciplines

¹ Moreover, Articles 109 and 111 of the Chapter on Financial Services state, respectively, that “the dispute settlement procedure provided for in Chapter 15 shall not apply to this Chapter” (Article 109) and that “the provisions of Chapters 7 (Cross-Border Trade in Services) and 8 (Investment) shall not apply to measures referred to in paragraph 1 of Article 107 (Scope and Coverage).
China’s Closer Economic Partnership Agreements (CEPAs) with the Special Administrative Regions (SARs) of Hong Kong and Macao feature a unique approach in the landscape of international trade agreements covering services. The text of these two agreements does not contain core provisions such as most favoured nation or national treatment, nor does it feature services-specific obligations such as that on “market access” as found in Article XVI of the GATS. Indeed, both of the above agreements lack the general disciplines depicted in Annex 1. The obligations of the Parties relating to either cross-border trade or investment in any services sector – including financial services - stem from the list of specific commitments adopted by China. This approach affords parties the freedom to undertake commitments solely in those areas where governments feel capable of doing so, rather than introducing disciplines that may be deemed burdensome on the regulatory capacity of the countries. While the lack of general disciplines and of a rules-based dispute settlement mechanism raise clear-cut enforceability issues, such agreements are not devoid of actual trade and investment preferences. Indeed, China has committed to significant liberalization undertakings in favour of services suppliers from its two SARs, effectively giving the latter (including financial service providers) a lead start in its internal market ahead of the full implementation of China’s WTO accession commitments.²

Nonetheless, the lack of general disciplines and the need to refer at all times to the schedules of commitments to assess the precise scope of what the package of market opening elements precisely consists of may not make this approach particularly attractive to countries that wish to provide for broad commitments in a greater number of sectors, and signal such undertakings to foreign investors and services suppliers.

As for financial services, the lack of generally binding disciplines, such as market access or national treatment, make unnecessary the introduction of a prudential carve-out, or other regulatory provisions. Rather, China’s CEPAs allow the parties to undertake commitments at the desired level of openness and to include in such schedules any financial services-specific regulatory consideration that they may deem convenient. It is debatable whether such a high degree of regulatory discretion would prove attractive to other WTO members, particularly developed country partners.

² Less than 18 months after the entry into force of the China’s CEPA with Hong Kong (January 1st 2004), almost 800 Hong Kong service suppliers had been awarded certificates to benefit from the preferences of the agreement. However, despite Hong Kong’s highly developed financial sector, only 9 of those certificates were awarded to financial service suppliers. See Fink (2005) p. 165-166. See also, Gao (2004).
### Table 2. Substantive obligations on trade in financial services in selected PTAs

<table>
<thead>
<tr>
<th>Agreement</th>
<th>Cross-border trade in financial services</th>
<th>Investment in financial services</th>
</tr>
</thead>
<tbody>
<tr>
<td>Trans-Pacific EPA</td>
<td>Carved out from general trade in services chapter</td>
<td></td>
</tr>
<tr>
<td>Chile-Korea FTA, Guatemala-Chinese Taipei FTA, Canada – Chile FTA, Japan-Mexico EPA</td>
<td>Carved-out from cross-border trade in services chapter</td>
<td>Carved-out from investment chapter</td>
</tr>
<tr>
<td>Mainland-Hong Kong CEPA, Mainland-Macao CEPA</td>
<td>No general disciplines – subject to specific commitments</td>
<td></td>
</tr>
<tr>
<td>US – Laos BTA, AFAS, ASEAN – China TIS, China – New Zealand FTA</td>
<td>Covered by general trade in services chapter</td>
<td></td>
</tr>
<tr>
<td>EC – CARIFORUM EPA</td>
<td>Covered by cross-border trade in services chapter</td>
<td>Covered by commercial presence chapter</td>
</tr>
<tr>
<td>Korea-Singapore FTA, Panama-Singapore FTA, Panama-Chinese Taipei FTA, Singapore-US FTA, Nicaragua-Chinese Taipei FTA, NAFTA, CAFTA, US – Chile FTA, EC – Chile AA</td>
<td>Covered by dedicated chapter on financial services.</td>
<td></td>
</tr>
<tr>
<td>Korea – EFTA FTA</td>
<td>Covered by dedicated chapter on financial services.</td>
<td>Investor-State DS procedures for investors in financial services provided by Korea – EFTA BIT</td>
</tr>
</tbody>
</table>

## III.2 Financial services covered by services chapters

Four agreements under review – the US–Laos BTA, ASEAN’s AFAS, the ASEAN–China TIS, and the China–New Zealand FTA - provide for coverage of financial services under a general chapter on trade in services. Like the GATS, these disciplines cover the supply of services not only through cross-border means (including consumption abroad), but also through the presence of natural persons and via commercial presence. As such, foreign investment is covered by these agreements only insofar as it relates to service industries. The coverage of investment in financial services is primarily focused on foreign direct investment (FDI) aimed at establishing a financial institution in the host market. Foreign participation
that does not involve beneficial ownership or control over covered financial institutions hence falls outside of the agreements’ scope.

ASEAN countries have additionally developed the ASEAN Investment Agreement (AIA), which applies to investment in goods (non-services) industries. Similarly, the China–New Zealand FTA features an investment chapter that covers investment in agricultural and manufacturing industries.

The substantive obligations governing services trade in the above agreements follow GATS Articles XVI and XVII in providing for market access and national treatment commitments. The ASEAN–China TIS and AFAS also feature disciplines on domestic regulation in line with GATS Article VI (see Annex 1 below). The latter agreement further resembles GATS in providing for a general MFN obligation, subject to country-specific exemptions. Financial services are covered by the general provisions that apply to all services. The above agreements further follow the GATS by incorporating a GATS-like Annex on Financial Services or by reproducing a carve-out for prudential measures on financial regulation modelled after the GATS disciplines.

The approach described above offers the advantage of incorporating financial services into a familiar and well-accepted framework of international rules. However, general trade in services disciplines offer only limited investment protection features, such as disciplines on expropriation, fair and equitable treatment and investor-state arbitration, commonly found in investment chapters.

One of these agreements, the China–New Zealand FTA, has attempted to overcome this lack of investment protection disciplines in services by extending the key protection disciplines featured in the investment-in-goods chapter (including fair and equitable treatment, guarantees against expropriation and access to investor-state arbitration) to those sectors where commitments have been scheduled with regard to commercial presence under the agreement’s chapter on trade in services.

Furthermore, it could be argued that general services disciplines do not perfectly capture the specificities and concomitant policy sensitivities arising in the financial services sector. The incorporation of provisions drawing on the GATS Annex on Financial Services (FSA) or
provisions modelled on the FSA’s prudential carve-out aim to partially remedy such a shortcoming. From this perspective, the treatment of financial services in the PTAs under review does not differ markedly from that found at the multilateral level. In principle, nothing prevents Parties to the above agreements from expanding the financial services-specific disciplines of the GATS by adopting common regulatory principles and other provisions on financial services while leaving the issue of liberalization commitments in financial services subject to the general NT and MA obligations of the services chapter. The four PTAs under review, however, have not made use of such a possibility.

III.3 Dual coverage of investment in services

A majority of the PTAs under review provide for the dual coverage of investment in services. Financial services are covered by general GATS-like chapters on trade in services, encompassing all modes of supply, including commercial presence. Furthermore, investment in services – including in financial services - is additionally covered by the general disciplines on investment. In principle, such dual coverage of investment in services can be complementary or lead to potentially conflicting overlaps.

A horizontal investment chapter promotes equal treatment of investors regardless of the sector concerned (i.e. primary activities, manufacturing and services) and may thus promote a seamless investment regime, particularly for those for the many firms engaged in both manufacturing and services-related activities. Meanwhile, a parallel services chapter may allow Parties to establish disciplines specific to individual service sectors.

Overlapping coverage may arise when measures affecting foreign investment in services are subject to both sets of disciplines. Such overlaps might prove benign if the disciplines and levels of openness deriving from the services and investment chapters were identical. Conflict may however arise if a measure is allowed under one chapter but prohibited or not covered under the other (for instance recourse to investor-state dispute settlement). Inconsistencies of this type could undermine the transparency of the investment regime and potentially give give

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3 This section draws on Fink and Molinuevo (2007).
4 Complementary coverage occurs whenever an investment transaction is covered by one set of disciplines, but not the other. It can emanate either from the different definitions of investment or from the different obligations established by the two sets of disciplines.
rise to legal conflicts. To remedy such problems, most PTAs that provide for dual coverage of investment in services have established rules that define the relationship between the services chapter and the horizontal investment chapter. Drawing on recent work by Fink and Molinuevo (2007), Box 1 offers an analysis of the different rules regarding the relationship between services and investments disciplines in agreements that provide for dual coverage on financial services, attempting to highlight the pros and cons that each approach entails.

Many of the agreements described in Table 2 above tackle the specificities of financial sector regulations by including an extra chapter or annex specifically devoted to the sector. Countries in the Andean Community are seeking to develop such disciplines, for which several negotiation rounds have been held. Since the liberalization obligations – national treatment or market access - are enshrined in the general chapters on services and investment, the specific chapter or annex on financial services focuses on additional disciplines aimed at complementing the liberalization obligations.⁵ Such additional provisions on financial services include a prudential carve-out as well as language on recognition of regulatory measures by international bodies or third states in line with the GATS Annex on Financial Services.

Some agreements introduce further financial services-specific disciplines, such as those dealing with access to payment and clearing services for locally-established foreign financial institutions (Singapore–EFTA FTA), commitments on new financial services (Japan–Philippines EPA), or cooperation in the development of capital markets (Japan–Singapore EPA). The above agreements seek to reap the benefits of having financial services subject to GATS-like disciplines, under a common framework for commitments on all services activities, while also addressing the particularities of financial services by introducing specific provisions in this regard.

⁵ In the case of the Andean Community, however, the introduction of a financial services chapter is likely to enshrine, in addition to regulatory disciplines, liberalization obligations. As such, once the financial services agreement enter into force, such disciplines are likely to prevail over the current general obligations enshrined in Decision 439 in what relates to financial services.
Box 1. Linkages between services and investment chapters

A cursory review to the relationship between services and investment chapter in agreements that provide for dual coverage helps to understand how investment in financial services is covered.

Four agreements—the India-Singapore ECA, the Japan-Malaysia EPA, the Jordan-Singapore FTA, and the US-Vietnam BTA—have established a rule that gives precedence to the services chapter in case of inconsistencies. Investment disciplines still apply insofar they affect matters not covered by the services chapter. This rule again avoids inconsistencies between the two chapters and, at the same time, preserves some of the benefits of horizontal investment disciplines. However, a full understanding of the agreement would require joint reading of the two chapters and possible interpretation of what might be considered an inconsistency—a question not always straightforward.

The New Zealand-Singapore FTA and the EFTA-Korea FTA both provide that the national treatment and MFN obligations of their respective investment chapters do not apply to measures affecting commercial presence as governed by the services chapter. Since national treatment and MFN are the only two overlapping obligations in these FTAs, direct inconsistencies between the two chapters are avoided. This approach provides for somewhat greater transparency, as the liberalization content related to commercial presence is solely determined by the services chapter. However, a full understanding of the investment regime for services still requires joint reading of the services and investment chapters, as the investment chapter’s national treatment and MFN obligations still apply to those forms of investments not covered by the services chapter—notably investments with a minority equity stake and no effective foreign control.

The EFTA-Singapore FTA and the Japan-Philippines FTA feature a variation of the latter approach. These agreements entirely remove investment in services from the scope of the investment chapter’s core liberalizing obligations. This rule offers a cleaner distinction of the roles of the services and investment chapters, but implies a loss of discipline for minority investments in services. Curiously, in the case of the Japan-Philippines EPA, this rule applies only to measures adopted or maintained by the Philippines. For Japan, the relationship between services and investment disciplines remains undefined. This approach seems to offer the least transparent treatment of investment in services and may open the door to inconsistencies between services and investment disciplines.

A similar situation is encountered in the Japan-Singapore FTA. The agreement does not establish any rule defining the relationship between services and investment disciplines. However, Singapore has scheduled a reservation that stipulates that (i) the investment chapter’s obligations on national treatment and performance requirements do not apply to sectors for which no specific commitments are undertaken and (ii) where sectors are subject to specific commitments, these are effectively incorporated into the investment chapter. This aims to eliminate potential inconsistencies regarding Singapore’s disciplines and commitments in services and investment. No such reservation is found in the case of Japan, leaving the door open for potential inconsistencies.

The Australia-Thailand FTA and the Australia-Singapore FTA offer what appears to be the most transparent solution to avoiding inconsistencies. Liberalization undertakings in these two agreements are inscribed in one single schedule of commitments, which also covers investment in goods. This approach offers the benefit of consulting only one schedule of commitments to determine the level of openness of the investment regime, while taking full advantage of the complementary coverage of investment in services by two different sets of disciplines.

Source: Fink and Molinuevo (2007)

Finally, dual coverage ensures that the treatment foreign investors in financial institutions does not fall short of that afforded to foreign investors in other sectors. In particular,

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6 In the case of the Japan-Malaysia EPA, the precedence of services discipline only applies to inconsistencies with the investment chapter’s obligations on national treatment, MFN, and performance requirements. The investment chapter takes precedence in the case of inconsistencies with all other investment disciplines. In the case of the US-Vietnam BTA, precedence of services disciplines only applies to inconsistencies between “provisions set forth” in parties’ schedule of specific services commitments and the BTA’s investment disciplines (see Article VII.6).
investors in services benefit from the investment protection provisions featured in the general investment chapters, such as fair and equitable treatment, guarantees against direct and indirect expropriation, and access to investor-state arbitration. However, governments pursuing such an approach need to ensure that the relationship between services and investment disciplines is clearly defined, avoiding potential inconsistencies that may give rise to legal conflicts.

III.4 Financial services covered separately by services and investment chapters

Only two agreements under review ‘split’ disciplines on financial services into two separate chapters, one on cross-border trade in services, and one on foreign investment. Except for the Australia–Singapore FTA and the EC–CARIFORUM EPA, all agreements that feature a chapter on cross-border trade in services (which does not cover commercial presence), and a separate one on foreign investment (that applies to both goods and services), have carved out financial services from their scope and confined the sector to a special, dedicated, chapter – as is explained below.

The main liberalization obligations, including national treatment and market access (this latter only in the case of the EC–CARIFORUM EPA), are enshrined in the respective chapters on cross-border trade in services and investment. While the investment chapter in the Australia–Singapore FTA adopts a broad definition of investment and features standard investment protection disciplines (expropriation, investor-state arbitration), the EC–CARIFORUM EPA focuses exclusively on admission (establishment) and foreign direct investment. In so doing, the latter agreement can be seen as extending GATS-like disciplines to investment in goods sectors without however incorporating traditional investment protection disciplines. These rules, including guarantees against expropriation and access to investor-state arbitration, are left to bilateral investment treaties between the individual CARIFORUM and EC countries.

In addition to the general disciplines on services and investment, both of the above agreements feature a chapter on financial services that does not contain liberalization obligations. Instead, this chapter, like those found in agreements that provide for dual coverage, features only additional provisions specific to financial services, such as language on the prudential carve-out and on new financial services.
As in the case of dual coverage agreements, the above approach provides common liberalization disciplines for all services or investment transactions, regardless of the sector, without however, leading to interpretational conflicts that may arise from overlapping disciplines. In contrast to agreements with a financial services-specific chapter, keeping the liberalization undertakings under the general services and investment disciplines adds an element of transparency to the agreement, as it avoids unnecessary reiterations and possible discrepancies in the scope of the provisions and in their application. Furthermore, the additional regulatory disciplines on financial services found in the financial services chapters serve to complement the liberalization undertakings, allowing the Parties to tackle the regulatory specificities of the sector.

III.5 Financial services covered by a dedicated chapter

A number of agreements have opted for carving-out financial services from the general disciplines on services and investment. Such agreements dedicate an individual chapter to the core liberalization obligations and other provisions on financial services. In other terms, all rules on cross-border trade and investment in financial services are to be found in one single chapter specifically devoted to the financial sector.

Such an approach was pioneered by the NAFTA and, not surprisingly, the majority of agreements that follow the NAFTA model in regard to services and investment have also followed its example in the approach towards financial services – with the notable exception of four agreements that have excluded financial services outright from their scope. Additionally, three other agreements not directly following the NAFTA approach have also confined rules on financial services to one single chapter of the agreement –namely the EFTA-Korea FTA, the EC–Chile Association Agreement and the Korea-Singapore FTA.

The specific content of the financial services chapters found in the above agreements varies greatly. On the one hand, all three agreements present a number of common features, largely based on the GATS structure. On the other hand, agreements that follow more closely the NAFTA model can also be grouped into one single category, as their architectural approach features only slight deviations. This group consists of the Panama-Chinese Taipei FTA, the Nicaragua-Chinese Taipei FTA, the Singapore-US FTA, the Panama-Singapore FTA, the US–Chile FTA and the CAFTA.
The EFTA-Korea FTA, the EC–Chile AA and Korea-Singapore FTA all feature disciplines on national treatment and market access, in line with GATS Articles XVI (Market Access) and XVII (National Treatment), as well as a carve-out for regulatory measures taken for prudential reasons. They further provide some financial sector-specific disciplines, such as on transparency and on data processing in financial services. In essence, the content of the dedicated chapter on financial services found in these agreements does not differ much from the disciplines found under other models explored so far, namely agreements providing for dual coverage with an additional chapter or annex on financial services. General disciplines on national treatment, market access and domestic regulation, which are common to both types of agreements, are closely aligned, as are a number of financial services-specific provisions.

The structure of the financial services chapter of agreements based on the NAFTA model features two particular characteristics. Firstly, the main liberalization disciplines do not apply equally to cross-border trade in financial services and to investment in financial services. Rather such disciplines flow from the interplay of different provisions on cross-border trade and/or investment in financial services. Only the MFN obligation in these agreements cover evenly both means of financial services supply. The market access obligation (similar to GATS Art. XVI) applies instead only in regard to established services suppliers, while cross-border trade and investment in financial services are subject to two separate national treatment provisions.

Secondly, although reservations under the NAFTA are scheduled via a negative list approach (including for financial services), the financial services chapters of the US–Chile FTA, the Singapore-US FTA and the CAFTA deviate from this model by featuring a combination of a positive list of sectors and a negative list of trade-restrictive measures when it comes to reservations on cross-border trade in services (see Table 3 below). The parties provide a list of financial services allowed to be supplied on a cross-border basis; no obligations are undertaken with regard to cross-border financial operations not expressly included in that list. The parties may further list restrictive measures on the cross-border provision of those services on a negative list basis – partially reverting to the original NAFTA approach. Furthermore, the Nicaragua-Chinese Taipei FTA and the Singapore-Panama FTA rely entirely on a GATS-like positive list for the scheduling of commitments on financial services, leaving
Table 3. Scheduling approaches in selected PTAs

<table>
<thead>
<tr>
<th>Agreement</th>
<th>Chapter on Services</th>
<th>Chapter on Investment</th>
<th>Chapter of Financial Services</th>
</tr>
</thead>
<tbody>
<tr>
<td>Lao PDR-US BTA, Mainland-Hong Kong CEPA, Mainland-Macao CEPA, ASEAN-China TIS Agreement</td>
<td>Positive</td>
<td>No investment chapter</td>
<td>No financial services chapter</td>
</tr>
<tr>
<td>Australia-Thailand FTA</td>
<td>Positive</td>
<td></td>
<td></td>
</tr>
<tr>
<td>CAN</td>
<td>Negative</td>
<td>No reservation lists</td>
<td></td>
</tr>
<tr>
<td>India-Singapore ECA</td>
<td>Positive</td>
<td>Positive (for India)</td>
<td>Commitments on FS undertaken under services and investment chapters. No liberalization disciplines in FS chapter</td>
</tr>
<tr>
<td>Positive (for Singapore)</td>
<td>Negative</td>
<td>Negative</td>
<td>Commitments on FS undertaken under services and investment chapters. No liberalization disciplines in FS chapter</td>
</tr>
<tr>
<td>AFAS / AIA, New Zealand-Singapore FTA, Japan-Malaysia EPA, EFTA-Singapore FTA, Japan-Philippines EPA, Vietnam-US BTA, Jordan-Singapore FTA, MERCOSUR</td>
<td>Positive</td>
<td>Negative</td>
<td>Commitments on FS undertaken under services and investment chapters. No liberalization disciplines in FS chapter</td>
</tr>
<tr>
<td>Japan-Singapore EPA</td>
<td>Positive</td>
<td>Negative</td>
<td>Commitments on FS undertaken under services and investment chapters. No liberalization disciplines in FS chapter</td>
</tr>
<tr>
<td>EC – CARIFORUM EPA</td>
<td>Positive</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Australia-Singapore FTA</td>
<td>Negative</td>
<td></td>
<td>Commitments on FS undertaken under services and investment chapters. No liberalization disciplines in FS chapter</td>
</tr>
<tr>
<td>EC – Chile AA</td>
<td>Positive</td>
<td>Positive</td>
<td>Positive</td>
</tr>
<tr>
<td>EFTA-Korea FTA</td>
<td>Positive</td>
<td>Negative</td>
<td>Positive</td>
</tr>
<tr>
<td>Korea-Singapore FTA, Nicaragua-Chinese Taipei FTA, Singapore-Panama FTA</td>
<td>Negative</td>
<td>Negative</td>
<td>Positive</td>
</tr>
<tr>
<td>US – Chile FTA, CAFTA, Singapore-US FTA</td>
<td>Negative</td>
<td>Negative</td>
<td>Negative (positive list of sectors allowed for cross-border financial services)</td>
</tr>
<tr>
<td>Panama-Chinese Taipei FTA</td>
<td>Negative</td>
<td>Negative</td>
<td>Negative</td>
</tr>
</tbody>
</table>

The Panama-Chinese Taipei FTA is the only agreement in this note’s sample that provides for only negative listing in regard to financial services as under the original NAFTA approach.

The NAFTA-like model on financial services is tailored to the particularities and regulatory sensitivities of financial services. As such, it allows the parties to provide for liberalization disciplines and specific provisions on financial services that would not necessarily suit other
services sectors. Nonetheless, the reiteration of the main obligations, such as national
treatment, among chapters and within the financial services one, and the fact that certain
disciplines (market access) do not apply equally to all means of services supply adds an
element of complexity to these agreements. Furthermore, the fact that most agreements have
deviated from the NAFTA negative list for financial services suggests that the all-
encompassing nature of negative listing may not be entirely suitable for a services sector
subject to important regulatory concerns, nor for countries that have otherwise had recourse to
the negative listing of commitments in all other sectors of their economy. Indeed, one could
argue that the four modes of supply featured in agreements following the GATS model
provide a simpler and more transparent solution, while the GATS-style positive listing
ensures the parties the needed degree of comfort to undertake commitments in a regulatory
sensitive sector like financial services.

One characteristic is common to all agreements that have confined financial services to one
dedicated chapter. In addition to providing for several financial services-specific provisions
(transparency, data processing in financial services, access to payments and clearing services
– like many other financial services chapters), disciplines regarding investment in financial
services in these agreements fall short of those provided for investment in general.7 In
particular, financial services chapters typically do not feature a fair and equitable treatment
obligation and may limit access to investor-state arbitration.

Regarding the latter issue, access to investor-state arbitration for investors in financial
services is substantially limited only to measures falling under clauses on expropriation and
transfer of funds. In other terms, investors in financial services may not resort to core
obligations like national treatment and market access in the financial services chapter, or fair
and equitable treatment in the investment chapter, for the protection of their investments in an
arbitration claim. While this may reduce guarantees against investment in financial services, it
grants host countries greater regulatory space in the case of a financial crisis and affords them
the right to introduce measures to safeguard only certain banks (likely, national banks), rather
than all banks established in their territory.8

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featured in financial services chapters in PTAs..
8 The recent ICSID award in the case “Fireman's Fund Insurance Company v. United Mexican States (ICSID
Case No. ARB(AF)/02/1)” took account of the different disciplines applying on investment in financial services
and the general obligations on investment to conclude that Mexico’s measures taken during its financial crisis in
Furthermore, such agreements limit access to arbitration claims to the review of a joint committee on financial services, which may decide whether the prudential carve-out applies for the measures at issue. In sum, while investors in financial services are better protected under agreements that provide for dual coverage, the financial chapters of these agreements seem to better acknowledge the regulatory sensitivities of financial markets. However, nothing prevents countries engaged in dual coverage agreements to include such limitations on investor-state arbitration in their financial services chapters if they deem them desirable on policy grounds.

IV. Concluding remarks

The architectural approach towards liberalization and regulatory disciplines in financial services is closely linked to the overall architecture found in particular preferential trade agreements and, in particular, their services and investment chapters. Countries that have followed the GATS approach for their general trade in services chapters may thus find it natural – and more familiar - to adopt such an approach towards financial services or to introduce a special chapter expanding on the GATS Annex on Financial Services. Similarly, countries that have previously relied on a NAFTA-like approach may feel more at ease with a financial services chapter modelled after the latter agreement’s separate (i.e. stand-alone) disciplines on financial services. The fact that some countries have experimented with differing architectures across various agreements can be seen both as a manifestation of the “learning by doing” properties of services negotiations and as a result of the fact that some trading partners might need to adopt a differing approach when negotiating with some partners, particularly large OECD countries with a tradition of more comprehensive investment disciplines and more marked offensive interests in services trade and investment, including in financial services.

It should be noted that all competing architectural approaches can ultimately generate the same level of market opening (even as they do not afford the same degree of regulatory transparency or level of treatment (protection) to investors. Equally, the ability of parties to

the mid-nineties did not entail the expropriation of an American investments in financial services. The tribunal noted that the measures might have been discriminatory, and hence run against other provisions such as national treatment or fair and equitable treatment, but those obligations could not form the basis for an arbitration claim. The final arbitral award is available at [http://www.worldbank.org/icsid/cases/pdf/FFIC_Award_English_Final_Redacted_Version.pdf](http://www.worldbank.org/icsid/cases/pdf/FFIC_Award_English_Final_Redacted_Version.pdf)
maintain or introduce restrictive measures on financial services on regulatory grounds can be preserved under any approach by introducing specific provisions – such as a prudential carve-out, limitations on market access, national treatment or by qualifying recourse to investor-state dispute settlement - in a financial services chapter.

However, this note’s depiction of differing approaches to the treatment of trade and investment in financial services in preferential trade agreements yields a number of policy observations. These can be summarized as follows:

- Not all agreements cover financial services. However, all countries that are Parties to the agreements under review have entered into at least one preferential agreement that provides for the liberalization of financial services.

- Some countries have chosen to entirely reproduce GATS disciplines and its Annex on Financial services in their preferential agreements. This offers the advantage of negotiating commitments on financial services under a familiar set of international rules, while further specific provisions can be established in dedicated chapters or in an annex on financial services.

- A number of agreements have complemented the GATS approach with investment chapters. While this approach establishes a level playing field for all foreign investors, regardless of the sector in which investment occurs, clear rules are needed to avoid overlaps between services and investment disciplines that may give rise to legal conflicts. Furthermore, the fact that a number of countries have restricted access to investor-state arbitration by financial investors suggests that international arbitration is not always seen as desirable in sensitive sectors such as financial services.

- While liberalization disciplines under the latter agreements are left to the concerned services and investment chapters, a number of financial services-specific provisions have been added in dedicated chapters or annexes which take account of the specificities of the financial sector. Such an option provides Parties with the ability to address regulatory concerns of common concern in financial services and agree on relevant disciplines. The latter option also frees the Parties from having to negotiate the drafting of core liberalization obligations specifically for the financial services sector.
The coverage of financial services by a single dedicated chapter seems to capture the common interests of the Parties in providing for substantial liberalization disciplines, and allows them to tailor such disciplines to the particularities of financial services. However, approaches to such dedicated financial services chapters vary. NAFTA-like agreements tend to resort to complex provisions to take account of the different means of supplying financial services (via cross-border trade or local establishment) and the regulatory sensitivities that such different modes can entail.

Dedicated chapters on financial services are also used for purposes of circumscribing the extent to which investors and investments in financial services are subject to various investment provisions. This is most notably the case of investment protection disciplines, particularly as regards provisions on indirect expropriation and investor-state arbitration.

The scheduling of commitments on financial services often shies away from pure negative listing. Most agreements have followed GATS-style hybrid lists in scheduling commitments on financial services, or have introduced a positive listing of sectors for cross-border services, even as they resort to negative lists under services and/or investment chapters. Only one agreement under review has relied exclusively on negative lists for financial services, in line with the original NAFTA approach.

Finally, this brief review of architectural approaches to the treatment of trade and investment in financial services in selected PTAs suggests that bilateral PTAs, particularly North-South FTAs, are more likely to result in departures from the GATS architecture than are South-South agreements or regional groupings (with the notable exception of the NAFTA). As well, architectural advances that deviate from WTO practice or address new issues in trade and investment rule-making and market opening appear more frequent under FTAs than under customs unions. The latter findings echo those found in Pereira Gonclaves and Stephanou (2007).
References


## Annex 1. Main substantive obligations in selected PTAs

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### Notes:
- **FET:** Forced Entry Taxation
- **Expropriation:** Nationalization
- **ISDS:** Investor-State Dispute Settlement
- **MFN:** Most Favored Nation
- **NT:** National Treatment
- **MA:** National treatment for nationals
- **PR:** Provisional treatment

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*Liberalization disciplines on FS governed by services and investment chapters. No liberalization disciplines in FS chapter.*
Abbreviations used: NT: national treatment; MFN: most favoured nation treatment; MA: market access; FET: fair and equitable treatment; PR: performance requirements; ISDS: investor-State dispute settlement; FS: financial services.

(*) A network of bilateral investment treaties between the Andean countries complements the non-binging national treatment disciplines enshrined in CAN Decision Nº 439.