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Comparing EU free trade agreements

Investment

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The aim of this *InBrief* series is to provide a synthesis of various chapters of the ten free trade agreements (FTAs) recently concluded by the European Union with developing countries, as well as other relevant trade agreements when appropriate. Each *InBrief* offers a detailed and schematic overview of a specific set of trade and trade-related provisions in these agreements.

International investment flows are a vital part of the global economy. In developed and developing countries alike, foreign direct investment (FDI) can be a key element for economic growth by stimulating employment, wage levels and the transfer of knowledge. There is a growing consensus that there is a close link between international trade and FDI. Though they can be substitutes for each other, trade and FDI are often complementary means by which businesses can service foreign markets. It is therefore not surprising that investment issues are gaining in importance within international trade negotiations. More broadly, private investment decisions are affected by a broad range of institutional factors, some of which may be addressed in investment agreements.

Broadly, provisions on investment in international (trade) agreements can be divided into four categories:

(1) Investment promotion: the parties to an investment agreement try to stimulate reciprocal investment flows by means of information exchange, regulatory coordination, investment promotion machineries or technical assistance.

(2) Investment protection. Such provisions include: a) the liberalisation of current payments and capital movements, enabling foreign investors to liquidate and/or repatriate their assets from abroad; b) guarantees of investors' property rights, for instance through compensation provisions that can be invoked should an investment be expropriated by the host state; and c) provisions on the settlement of investment disputes.

(3) Market access for foreign investors and the restrictions that are potentially encountered when entering a market (known as 'pre-admission provisions'). These provisions define foreign investors' rights with respect to entry and establishment in certain economic sectors in the host country.

(4) 'Post-admission provisions' on the regulatory treatment of foreign investors once they are established in the host country. The principle that foreign investors are not discriminated against vis-à-vis domestic counterparts (the national treatment principle) lies at the heart of these provisions.

The debate on investment

With the exception of investment promotion, all the above categories have generated a great deal of controversy over the question of whether a multilateral framework for investment should be negotiated under the aegis of the World Trade Organization (WTO). Whereas some developed countries, led by the European Union (EU), argue that international rules on investment benefit all parties, most developing countries are either lukewarm or

Box 1 Investment in the WTO

To date, WTO members have been unable to agree on the merits of covering international investment by a single, all-encompassing multilateral agreement. So far, the issue has been partially dealt with (and in a fragmented manner) by GATT/WTO rules. The WTO General Agreement on Trade in Services (GATS) includes the concept of a 'commercial presence' (through FDI) in its definition of trade in services. As regards trade in goods, the Agreement on Trade Related Investment Measures (TRIMS) deals only with local performance requirements for investors.

At the Fifth WTO Ministerial Conference in Cancún (September 2003), members could not arrive at the 'explicit consensus' required by the Doha Declaration to start negotiations on investment. Hence, the investment issue was later dropped from the Doha agenda of negotiations.

Members' submissions on investment can be found at **http://docsonline.wto.org/** under WT/WGTI/W.

ecdpm
European Centre for Development Policy Management
Centre européen de gestion des politiques de développement

Box 2
Where to find articles on investment in EU FTAs and NAFTA's Chapter 11

MED agreements: e.g. Articles 33-35 and 50 (EU-Morocco) and Articles 48-52, 67 and Annex V and VI (EU-Jordan),
http://europa.eu.int/comm/external_relations/euromed/med_ass_agreemnts.htm

TDCA (South Africa): Articles 33-34 and 52,
http://europa.eu.int/eur-lex/en/archive/1999/l_31119991204en.html

Global Agreement (Mexico): EC/Mexico Joint Council Decision no. 2/2001 of February 2001: Titles II-III,
http://trade-info.cec.eu.int/doclib/docs/2003/april/tradoc_111829.pdf

Association Agreement (Chile): Article 21, Title III, V, Annexes VII, VIII, X and XIV,
http://europa.eu.int/comm/trade/issues/bilateral/countries/chile/euchlagr_en.htm

NAFTA's Chapter 11,
www.sice.oas.org/trade/nafta/chap-111.asp

For other agreements, see the Trade Agreements Database and Archive by the Dartmouth Tuck School of Business:
http://mba.tuck.dartmouth.edu/cib/research/trade_agreements.html

opposed to committing themselves, fearing as they do that such rules may undermine their sovereign right to pursue their own domestic (development) policies. Experts also disagree on the potential merits of a WTO agreement on investment. The debate is complicated by the fact that there is as yet no evidence linking the conclusion of (bilateral) investment agreements with increases in FDI inflows.[1]

The split between developed and developing countries on investment issues was again demonstrated during the failed Ministerial Meeting in Cancún in September 2003. It subsequently became clear that no consensus could be reached to begin negotiations on investment, which was therefore dropped from the Doha Round agenda (see Box 1).

In the absence of such a multilateral framework, bilateral investment treaties (BITs) have mushroomed over the past decade: the number of BITs rose from 385 in 1989 to 2,181 in 2002.[2] Though BITs vary widely in scope and content, the majority include provisions on investment promotion, capital flows and direct payment liberalisation, as well as post-admission issues such as non-discrimination and bans on certain performance requirements. Some BITs go further, including pre-admission issues (i.e. establishment and acquisition) across the board of economic activities, and more explicit protection provisions in the form of expropriation and compensation clauses. The most renowned and controversial agreement that has been concluded in this respect is Chapter 11 of the North American Free Trade Agreement (NAFTA). Because NAFTA's investment provisions figure prominently in the discussions on investment rules (either as an example to follow or a counter-example of what not to do), Chapter 11 will be presented separately towards the end of this *InBrief*.

Investment in EU Free Trade Agreements

The investment-related provisions of free trade agreements (FTAs) concluded by the European Union (EU) are generally not as comprehensive as those of traditional BITs. One reason for this is that EU Member States have so far resisted to hand competency in negotiating some of the most substantial BIT provisions entirely to the European Commission. Member States' own BITs thus remain important and some of their provisions go beyond those of EU FTAs. In fact, the EU agreements refer directly to bilateral relations with Member States where certain investment provisions are concerned.

Except for some loose provisions concerning capital market liberalisation, the agreements with the Mediterranean (MED) countries and South Africa merely emphasise the parties' commitments in international agreements, as well as assistance and cooperation in investment issues. And though the more detailed agreements with Mexico and Chile include restrictions on performance requirements, the principle of national treatment, and even some pre-admission provisions (i.e. market access in services), they stop short of including any clauses on expropriation and compensation, or a separate dispute settlement mechanism for investment issues.

The Euro-Mediterranean Association Agreements and the TDCA

The Trade, Development and Cooperation Agreement (TDCA) concluded with South Africa in 1999, and the Association (or MED) Agreements concluded with Israel (1995), Tunisia (1995), Morocco (1996), Jordan (1997), the Palestinian Authority (1997), Algeria (2001) and Lebanon (2002) contain mostly similar and relatively shallow provisions on investment issues. Most of the agreements emphasise coordination and cooperation, and contain only loose wording on issues such as the objective of progressive capital account liberalisation.

On investment promotion, means to stimulate reciprocal investment flows include harmonising and simplifying procedures, examining the creation of joint ventures, establishing co-investment machineries, and providing technical assistance (e.g. Art. 54 of EU-Algeria). A few agreements (i.e. those with Algeria, Lebanon, and South Africa) specify particular industries (e.g. tourism and mining) which are to be targeted by such promotion measures, though no detailed commitments are made. Most of the MED agreements and the TDCA also mention investment protection in the articles dealing with investment promotion. However, this is not covered in any substance, as they refer to the *possibility* of including protection provisions in BITs with EU Member States.

Current payments and capital flows

The only MED and TDCA provisions that effectively cover investment protection are those dealing with current payments and FDI-related capital flows. All eight agreements state that current payments and transactions shall be free of restrictions (e.g. Art. 32 of EU-Lebanon) or allowed in a freely convertible currency (e.g. Art. 38 of EU-Algeria). This basically reiterates the parties' international (IMF) commitments. Exceptions are made for serious balance-of-payments difficulties (see the agreements with Algeria, Lebanon, Morocco, the Palestinian Authority, South Africa and Tunisia), in the case of serious problems with the operation of monetary or exchange rate policies (Israel), or both (Jordan).

The provisions on the free movement of capital relating to direct investments contain initially quite strong language. The agreements with Algeria, Morocco, South Africa and Tunisia state that the parties 'shall ensure' both the free movement of capital relating to direct investment and the liquidation/repatriation of investments (or the resulting profits) from the host country (e.g. Art. 33.1 of the TDCA). However, the wording subsequently becomes looser: the TDCA states that the parties 'shall consult each other with a view to facilitating and *eventually* achieving full liberalisation of the movement of capital' (i.e. including capital not relating to FDI) between the parties (Art. 33.2, emphasis added). The agreements with Tunisia and Morocco mention full liberalisation 'when the time is right' (Art. 34), and the agreement with Jordan refers to the prospect of full liberalisation 'as soon as conditions are met' (Art. 49). None of the agreements, however, defines a time-frame or a specific set of conditions under which full liberalisation is to be achieved. Hence, these provisions are unlikely to carry much weight

Table 1 Investment promotion in EU FTAs

	Technical assistance / investment promotion instruments	Harmonisation & simplification	Co-investment machinery	Reference to bilateral investment treaties
MED 5 / TDCA	✓	✓	✓	✓
Palestinian Auth.	✓	✓	✓	-
Israel	-	-	-	-
Mexico	-	✓	✓	✓
Chile	✓	✓	-	✓

if one party fails to engage in any substantive liberalisation, and are at best indicative of the parties' intentions. The agreements with Israel, Jordan and Lebanon are even less forceful, as they merely boil down to a standstill in restrictions. Though it is stated that 'there shall be no restrictions' on the movement of capital (e.g. Art. 31 EU-Israel), the parties are free to maintain any restriction that existed *before* the agreement came into force, involving direct investment, establishment, the provision of financial services or access to capital markets (Art. 33 for Israel and Lebanon, and Art. 50 for Jordan).

As for post-admission issues, the TDCA and most MED agreements do not include provisions of this kind. Hence, the national treatment principle, under which foreign businesses have to be afforded the same treatment as domestic businesses, are not included. Instead, the agreements only refer to the parties' obligations in the General Agreement on Trade in Services (GATS) without binding themselves to any additional commitments. An exception is the EU-Jordan Agreement, which entails a commitment to national treatment in the services sector. Title III (on Rights of Establishment and Services) states that the EU and Jordan must treat each other's companies at least as favourably as their domestic companies or companies from 'third countries' (Art. 30), albeit with a long list of sectoral exemptions (see Box 3).

Box 3 Reservations to the national treatment principle

The EU-Jordan Association Agreement is the only MED agreement that incorporates the principle of national treatment (in services), albeit with the necessary reservations on both sides.

On the Jordanian side, Annex V explicitly constrains EU ownership of public companies, construction, trade, trade services and mining companies, and sets a minimum amount for non-Jordanian investment in any project. On the EU side, Annex VI excludes agriculture, mining, fisheries, transport, telecommunications, news agency services and audiovisual services from the principle of national treatment.

The MED agreements and the TDCA contain relatively lightweight provisions on investment. The provision on the liberalisation of capital movements is an expression of intent rather than a genuine commitment. Three agreements explicitly mention the possible maintenance of restrictions. Furthermore, only the agreement with Jordan contains a clause on national treatment. All agreements mention investment promotion by means of harmonisation, information and assistance as a means of creating a favourable investment climate.

The EU-Mexico Global Agreement

The Economic Partnership, Political Coordination and Cooperation Agreement, also called the Global Agreement, between the EU and Mexico was signed in December 1997 and came into force in October 2000. The provisions on investment can be found in the Joint Council Decision no. 2 of February 2001.

The investment promotion clause (Art. 33 of Joint Council Decision no. 2/2001) in the Global Agreement reflects the generic provisions in the TDCA and the MED agreements: information mechanisms on legislation and investment opportunities, progress towards uniform and simplified procedures, and investment promotion targeting small and medium-sized enterprises are cited as instruments for stimulating reciprocal investment. Again, the option of concluding separate investment protection agreements is left to individual Member States and Mexico (Art. 33(b)).

Like the MED agreements and the TDCA, the Global Agreement seeks to liberalise investment-related payments and capital movements. However, this agreement is the only EU FTA reviewed here that explicitly defines these payments and capital movements as being related to 'direct investment, investment in real estate and the purchase and sale of any kind of securities, as defined in the OECD Codes of Liberalisation' (Art. 28.1). Article 29 states that restrictions on payments shall be progressively eliminated and introduces a standstill on any new restrictions. Exemptions are still made for situations where serious difficulties exist with exchange-rate or monetary policies (Art. 30) or with the balance of payments (Art. 31). In such cases, the party concerned is required to inform the other party forthwith, and the measures taken should be equitable, in accordance with international obligations and of a limited duration. Article 32 excludes direct investments by Mexican or EU residents from Article 30 restrictions on liquidation or transfer abroad. Finally, the parties recall their international investment commitments, in particular the OECD Codes of Liberalisation, in Article 34. This provision, however, is among the few articles that are excluded from the agreement's dispute settlement mechanism (Art. 37.2).

A GATS approach to...

The most substantive investment-related provisions are found in the chapters on (financial) services, and are predominantly based on the parties' commitments in GATS. Though a decision on a positive list for services liberalisation was postponed (to be taken by the Joint Council 'no later than three years' after the entry into force of the Agreement; see Arts. 7.3 and 17.3),[3] the Global Agreement already makes provision for three important general principles i.e. on market access, most-favoured nation (MFN) treatment and national treatment.

...market access...

On market access: investments by foreign service suppliers that seek market access in the other party's territory should not be constrained by pre-admission requirements. Articles 4 (on services) and 12 (on financial services) state that no party may impose quantitative limits on the number of (foreign) (financial) service suppliers in a country. They are also not allowed to limit the number of transactions or operations performed by these service suppliers, or the size of their workforces. Similarly, measures that seek to cap the amount of foreign capital invested in domestic firms, or to limit individual or aggregate foreign investment, are forbidden. Moreover, (foreign) firms cannot be required to engage in specific legal entities such as joint ventures, except in the financial services sector. All these requirements reflect the parties' specific commitments at the multilateral level, as agreed in GATS Article XVI.2.

...MFN...

Once an investment is made and a foreign service supplier is established, the MFN

Table 2 Current payments and capital movements in EU FTAs

	Standstill on new restrictions to payments or capital movements	(Progressive) liberalisation of current payments and capital movements	Exemptions for		Repatriation/liquidation of investments or the profits derived thereof	
			Serious balance-of-payment difficulties	Serious exchange-rate or monetary policy difficulties	Guaranteed	Exemption for specific investment laws
MED 4/ TDCA	✓	✓	✓	-	✓	-
Israel	✓	-	✓	-	✓	-
Jordan	✓	-	✓	✓	✓	-
Lebanon	✓	-	✓	-	✓	-
Mexico	✓	✓	✓	✓	✓	-
Chile	✓	✓	✓	✓	✓	✓

principle (similar to GATS Article II) commits both parties to treating each other's (financial) service suppliers in a manner that is 'no less favourable than that accorded to like service suppliers of any third country' (Arts. 5.1 for services and 15.1 for financial services). However, Article 5.2 (15.2) makes a reservation for treatment to third parties with whom a separate agreement has been made (which is notified under GATS Article V). Hence, this provision for instance prevents EU service suppliers from compulsorily receiving a regulatory treatment in Mexico that is identical to that granted to other NAFTA members (i.e. Canada and the US). The Global Agreement does, however, contain an option for such an MFN treatment to be negotiated in the case of future agreements with third parties (Arts. 5.3 and 15.3).

...and national treatment

Finally, the principle of national treatment for services other than financial services is also derived directly from GATS obligations (Art. XVII). Hence, service suppliers from the other party shall, during their operations, receive treatment 'no less favourable' than is accorded to domestic services suppliers (Art. 6.1). Treatment is considered to be less favourable if 'it modifies the conditions of competition in favour of services or service suppliers of the Party compared to like services or service suppliers of the other Party.' (Art. 6.3) The provisions on maritime transport (Art. 10.3) and public procurement (Art. 26 of a different Council Decision – No. 2, March 2000) reiterate this principle. For financial services, the national treatment provisions are more elaborate than those for other services as they include not only the operations of an investor once established (post-admission), but also the entry of the investment itself (pre-admission) (see Box 4).

Apart from the specific chapters on services or financial services that are mainly based on GATS commitments, the Global Agreement does not contain more general pre-admission or post-admission investment commitments. Both parties merely agree to 'recall their international commitments with regard to investment', a reference to the OECD Domestic Treatment Instrument (Article 34). Article 35 commits both parties to review, within three years, the legal framework for investment, the investment climate and the flows of investment between them, so as to ensure that these are consistent with their commitments under international investment agreements.

There is no special dispute settlement procedure for investment-related disputes. However, where disputes concern financial services, Article 25 states that panel arbitrators shall have the necessary expertise relevant to the specific financial service that is in dispute.[4]

The Global Agreement with Mexico goes somewhat further than the MED agreements and the TDCA in terms of investment provisions, as it explicitly incorporates the GATS principles of market access, MFN and national treatment in the chapters on services. There are, however, no investment provisions 'across the board' of economic activity, and investment protection provisions other than those concerning payments and capital flows are left to bilateral agreements between Mexico and EU Member States.

The EU-Chile Association Agreement

To date, the most recent FTA concluded by the EU to date is the one with Chile, signed in November 2002 and provisionally in effect since 1 February 2003. Besides covering political dialogue and cooperation issues, it is the trade chapter in the Association Agreement that stands out as the most far-reaching in EU regional agreements so far. The provisions on investment are no exceptions in this respect, even though, as in the Global Agreement, they are spread throughout the main agreement and the annexes.

Within the main agreement, investment-related provisions can be found in the Titles on Economic Cooperation (Part III, Title I), Services and Establishment (Part IV, Title III) and Current Payments and Capital Movements (Part IV, Title V). The part on Economic Cooperation does not differ much from the other agreements. The parties agree (Art. 21) that investment will be promoted by:

(a) mechanisms that provide information on investment rules and opportunities;
(b) a favourable legal framework - where appropriate, to be pursued through bilateral agreements with Member States

Box 4 Explicit language: a NAFTA-inspired national treatment definition for financial services

Though the market access (Art. 12) and MFN clauses (Art. 15) in the Financial Services chapter of the EU-Mexico Global Agreement are worded almost identically to the Services chapter (both reiterating obligations in GATS), national treatment is more explicitly defined in the former. Article 14 describes it as:

> 'treatment no less favourable than that [is accorded] to [domestic] like financial service suppliers with respect to the establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of commercial operations of financial service suppliers in its territory.'

The wording of Article 14 is identical to that of NAFTA's Chapter 11 (Art. 1102-1104), and stresses that foreign investors in the financial services sector should be given national treatment from the start (*establishment* and *acquisition*) and throughout their further operations.

concerning issues such as promotion, protection and dual taxation;
(c) technical assistance; and
(d) developing uniform and simplified procedures.

It is clear from (b) that the Association Agreement also stops short of covering all sorts of investment protection provisions. Here too, competency issues between the European Commission and the EU Member States seem to have precluded any substantial provisions in this area. Article 134 states that the legal framework (as well as the investment environment and the flow of investments) will be reviewed within three years, to ascertain whether they are consistent with both parties' commitments under international agreements. Hence, as in the Global Agreement, a further deepening of investment provisions is made dependent on either bilateral or multilateral developments.

As for the Current Payments and Capital Movements Title, the provisions on the liberalisation of payments (Art. 164) and the free movement of capital (Art. 165) are at first sight broadly similar to those of the other agreements:

- capital (or profits derived from it) relating to direct investment can be freely liquidated or repatriated;
- payments can be made in freely convertible currency;
- exceptional circumstances under which restrictions are allowed concern difficulties in the operation of monetary or exchange-rate policy (Art. 166) and the existence or threat of serious balance-of-payments and external financial difficulties (Art. 195).

Reservations to the movement of capital

What sets the EU-Chile Association Agreement apart from the other EU FTAs in this domain are the investment-related provisions in Annex XIV. Here, Chile reserves the right for its central bank to function independently, and for the government to maintain or introduce investment legislation that may restrict capital movements (see Box 5).

Most of the provisions on market access and national treatment for investors can be found in the chapters on Services and Financial Services. These apply directly to the parties' schedules for liberalisation in these sectors (Art. 97.1 and Annexes VII and VIII). Unless otherwise specified, market access commitments for a wide range of (financial) services in both Chile and the EU are taken in these schedules.[5]

The provisions of the (financial) services chapters on market access principles are virtually identical to those of the Global Agreement, and thus reflect GATS commitments. According to Articles 97.2 and 118.2, no party may impose quantitative limits on the number of foreign service suppliers, transactions, operations or employees. Measures that seek to limit the amount of foreign capital invested in domestic firms to a maximum percentage are also banned. A difference is that the Association Agreement also bans all measures which restrict or require a foreign financial service supplier to engage in specific legal entities or joint ventures. The Global Agreement does not include such a provision for financial services. However, in their respective schedules for (financial) services liberalisation, both Chile and the EU make substantial derogations from these general principles (see Box 6).

Box 5 Chilean reservations to capital market liberalisation

Annex XIV of the EU-Chile Agreement solely concerns Chile's reservations to the liberalisation of payments and free movement of capital to which both parties are committed under Articles 164 and 165. Article 1 of this annex authorises Chile to forbid EU investors who have invested under voluntary investment programmes (see Box 6) to liquidate or repatriate (the proceeds of) an investment before a certain period has elapsed since the initial investment. Depending on the legal context, this period of restriction on capital flows can range from one to five years. Article 2 also confirms Chile's right to adopt new voluntary investment programmes in the future (capping the restriction on repatriation or liquidation to five years, however). It should be noted that investors can choose the regulatory regime that best suits them: if they forego the (fiscal) benefits of investing under voluntary investment programmes, investors need not comply with any of the capital constraints.

However, Article 3 of Annex XIV also authorises Chile's Central Bank to:

> '...maintain or adopt measures [...] in order to ensure currency stability and the normal operation of domestic and foreign payments. [...] The Central Bank of Chile is empowered as well to issue regulations governing monetary, credit, financial, and foreign exchange matters. Such measures include, inter alia, the establishment of restrictions or limitations on current payments and transfers (capital movements) to or from Chile, as well as transactions related to them, such as requiring that deposits, investments or credits from or to a foreign country, be subject to a reserve requirement ("encaje")' (Annex XIV, Art. 3).

Since the functioning and independence of Chile's Central Bank is grounded in the Chilean constitution, this reservation constituted a key condition for Chile. In return, Article 4 of this annex states that, in applying any reserve requirements, Chile will not discriminate between the EU and third countries.

Table 3 National Treatment for establishment in non-service sectors in EU-Chile FTA
Main limitations on national treatment by party

	Chile	EU
Horizontal commitments	- foreign investment laws - ownership of land near border or coast - assets in state-owned entities - rights granted to indigenous peoples	various for individual member states
Sectoral commitments		
Agriculture	none	various for individual member states
Fishing	various	various for individual member states
Mining and quarrying	various	various for individual member states
Manufacturing	none	none
Electricity, gas and water supply	exception for nuclear energy	various for individual member states

Box 6 Reservations to market access principles in services

Though Articles 97 and 118 of the Chile-EU Association Agreement lay out the main principles for market access in the (financial) services sectors, both Chile and the EU stipulate various exemptions in their respective schedules ('limitations to market access' in Annexes VII and VIII).

In the EU, France Italy, Portugal and Spain retain their rights to reject Chilean participation in certain domestic firms, such as newly privatised companies, the utility sectors and the defence industry, if this participation exceeds a certain percentage. France requires investors to be specifically authorised to establish certain commercial, industrial or artisanal activities, and Italy retains the right to grant exclusive rights to newly privatised companies.

Chile, on the other hand, has ensured that its two main laws on foreign investment, including its voluntary investment programmes, cannot be undermined by the agreement. Part B of Annex VII states that:

> '[t]he obligations and commitments contained in the services Chapter and in this Annex do not apply to Decree Law 600, Foreign Investment Statute, Law 18.657 Foreign Capital Investment Fund Law, to the continuation or prompt renewal of such laws, to amendments to those laws or to any special and/or voluntary investment regime that may be adopted in the future by Chile' (Annex VII, Part B, ii).

In practice, this means that the Foreign Investment Committee of Chile retains the right to regulate the investment laws and approve or reject applications from firms that wish to invest under voluntary investment programmes.

As for the national treatment principle, the wording of the EU-Chile agreement appears at first sight to be similar to that of the Global Agreement. The principle of national treatment and the conditions under which this principle is violated for the services and financial services chapters (Art. 98 and 119) are both formulated in accordance with GATS Article XVII. However, as compared with the detailed definition of *financial services* in the Global Agreement (see Box 4), the EU-Chile agreement is less explicit. Articles 108, 113 and 139 reiterate the national treatment principle for the marine transport, telecommunication and government procurement sectors.

National treatment for non-service sectors

Yet there is one unique feature of the EU-Chile Agreement that far surpasses the Global Agreement in the scope of the national treatment principle. In a separate chapter on Establishment (Title III, Chapter 3), this principle is adopted for all non-service sectors (Art. 130-132), ranging from agriculture to manufacturing and utilities. The exceptions to the general national treatment commitment are subsequently outlined in Annex X (see Table 3).

'Establishment' is defined as 'the constitution, acquisition or maintenance of a legal person' or 'the creation or maintenance of a branch or a representative office' in the territory of one of the parties. Without any reservations, Chile grants full national treatment with respect to establishment to EU investors in both the agricultural and manufacturing sectors. Similar commitments are also made in other sectors, albeit with various reservations. A separate protocol was added (Appendix 1) for fisheries – a sector with clear strategic value for some EU Member States – to provide for clear reciprocal commitments between the parties on issues such as fishing permits, the registration of vessels, and ownership and control over fishing enterprises.

As for investment-related dispute settlement, the Association Agreement does not contain a separate procedure. It does require that the arbitrators involved are experts in financial services law and that they should be appointed before a dispute can arise (i.e. within six months after the agreement's entry into force).

Concerning investment, the Association Agreement with Chile is the most far-reaching of all EU FTAs. In addition to more detailed provisions on current payments, capital movement liberalisation and rights for foreign investors (including detailed reservations on the Chilean side), the agreement is the first EU FTA to extend the principle of national treatment to all non-service sectors. Besides its broad scope, the agreement allows for clear Chilean reservations in the pre-admission and investment protection provisions.

NAFTA's Chapter 11

In the discussion on international investment rules, the provisions of NAFTA's Chapter 11 are often referred to, either as a model or as an anti-model for bilateral or multilateral frameworks on investment. Certainly, Chapter 11 contains some of the most detailed and comprehensive rules on foreign investment to date. In the past, it has also served as a working model for OECD discussions on the controversial Multilateral Agreement on Investment (MAI).[6]

However, to date there remain wide differences between the approach adopted and the scope of the investment provisions in EU FTAs as compared with NAFTA. Broadly speaking, NAFTA's investment provisions go beyond all EU FTAs in four respects: their scope of application, the degree of liberalisation, the extent of protection, and the mechanism for dispute settlement.[7]

Table 4 Post-admission provisions and protection in EU FTAs

	National Treatment (non-discrimination)		Performance requirements commitments *not to maintain or introduce:*			Horizontal Reservation	Protection against expropriation
	For services	For other economic activities	Quantitative constraints on suppliers, transactions, operations or personnel	Legal entity requirements (e.g. for joint ventures) for inward investment	Limits on the proportion of foreign ownership	Specific reservation to retain limits on the proportion of foreign ownership	
MED6/ TDCA	-	-	-	-	-	-	-
Jordan	✓	✓	-	-	-	✓	-
Mexico	✓	-	✓	✓	✓	-	-
Chile	✓	✓	✓	✓	✓	-*	-

*Limits may still be imposed on individual sectors.

First, NAFTA's investment provisions are not scattered over the agreement such as in EU FTAs (in particular in the services chapters), but are brought together in Chapter 11. Here, the terms 'investment' and 'investor' are given very broad legal definitions that go beyond mere FDI to include issues such as equity security, debt security, debt finance and real estate (Art. 1139). Hence, the potential regulatory impact of Chapter 11 is much greater than that of most EU BITs or FTAs, which solely address investments, capital flows and payments in an FDI context.

Second, Chapter 11 pursues liberalisation beyond the predominantly post-admission issues of EU FTAs. The national treatment and MFN principles clearly go beyond the definitions in GATS and concern the 'establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments' (Art. 1102) across the board of economic activity (services and non-services) and for all investments. Hence, as the terms 'establishment' and 'acquisition' underline, NAFTA parties are not only obliged to treat foreign investors that are already established in the same way as domestic investors; they need to treat potential foreign investors on an equal footing as well. The Association Agreement with Chile is the only EU FTA that comes close to this wide coverage in its Services and Establishment chapters. However, the list of prohibited performance requirements in Chapter 11 is both longer and much more widely applicable as compared with EU FTAs, where the relevant provisions are modelled on GATS. Besides foreign investments, Article 1106, which regulates this prohibition, also applies to all other investments in the territory of the parties (Art. 1101.1(c)). Hence, in terms of the ban on performance requirements, Chapter 11 has a regulatory impact even when foreign investors are not involved.

Measures 'tantamount' to nationalisation

Third, NAFTA includes very strong investment protection clauses, some of which are entirely absent from EU FTAs. Article 1110.1 states that:

> 'No Party may directly or indirectly nationalise or expropriate an investment of an investor of another Party in its territory or take a measure tantamount to nationalisation or expropriation of such an investment ("expropriation"), except: (a) for a public purpose; (b) on a non-discriminatory basis; (c) in accordance with due process of law and Article 1105(1); and (d) on payment of compensation in accordance with paragraphs 2 through 6'.

The compensation method mentioned in item (d) is subsequently defined as 'immediate and equal to the market value at the expropriation date' (Art. 1110.2). In particular, the words 'tantamount to nationalisation' and the reference to indirect expropriation provide leeway for wide interpretation. A foreign investor who is adversely affected by seemingly normal host state actions (or regulations) could claim to be the victim of an indirect expropriation. The serious legal consequences of such a relatively open definition have been demonstrated by the rising number of arbitration procedures that have been initiated under Article 1110, which have given rise to heated debates on the legitimacy of Chapter 11.[8]

Fourth, and closely related to the issue of investment protection, an entire section in Chapter 11 is devoted to very detailed procedures for the settlement of investment-related disputes (Arts. 1115-1138). This is in sharp contrast with EU FTAs, which include only generic dispute settlement mechanisms. The specificity of Chapter 11 allows investor-to-state dispute settlement, giving investors an opportunity to directly submit claims to arbitration, either under the Convention of the International Centre for the Settlement of Investment Disputes (ICSID) or under the arbitration rules of the United Nations Commission on International Trade Law (UNCITRAL). Under EU FTAs, only the contracting parties can have recourse to the dispute settlement procedures.

Unlike current EU FTAs, Chapter 11 places investment issues in a wider framework. It contains a very broad definition of investment, as well as stronger provisions on liberalisation and protection in particular. Finally, the dispute settlement mechanism, to which investors themselves have access, stands in sharp contrast to the provisions in EU FTAs.

Towards more substantial across-the-board commitments?

Disagreement between EU Member States and the European Commission over their respective competences has so far prevented the latter from negotiating FTAs that cover all issues recurring in bilateral agreements. There is, however, a clear difference between the MED and the TDCA agreements on the one hand and the agreements with Mexico and Chile on the other. Whereas the former only contain loose wording on international payments and capital transfers, the latter include more substantial issues, such as market access to and national treatment for investors in foreign services sectors. The Association Agreement with Chile goes even further by extending the national treatment principle to non-service sectors.

In their scope and substance in terms of investment liberalisation, however, none of the EU agreements are as far-reaching as NAFTA's Chapter 11, an agreement often criticized for its excessive scope and implications. All EU FTAs stop short of including protection provisions such as expropriation and compensation clauses. These issues are still left to bilateral agreements concluded by trading parties with individual Member States. Another important difference is that none of the agreements provide for a separate investor-to-state dispute settlement procedure for conflicts about investment issues. Hence, any dispute that might arise under the FTAs discussed has to be resolved by consultation or by applying the generic dispute settlement provisions.

Acronyms

ACP	African, Caribbean and Pacific
BIT	Bilateral Investment Treaty
EU	European Union
FDI	Foreign Direct Investment
FTA	Free Trade Agreement
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
ICSID	International Centre for the Settlement of Investment Disputes
IMF	International Monetary Fund
MAI	Multilateral Agreement on Investment
MED	Mediterranean countries
MFN	Most Favoured Nation
NAFTA	North American Free Trade Agreement
OECD	Organisation for Economic Cooperation and Development
TDCA	Trade, Development and Cooperation Agreement
TRIMS	Agreement on Trade Related Investment Measures
UNCITRAL	United Nations Commission on International Trade Law
WTO	World Trade Organization

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Notes

1 See, for example, Hallward-Driemeier (2003).
2 UNCTAD (2003).
3 See also the *ECDPM FTA InBrief* on services.
4 For more information, see the *ECDPM FTA InBrief* on dispute settlement.
5 See the *ECDPM FTA InBrief* on services.
6 The MAI proposal never left the drawing board because its first drafts stirred up huge controversy amongst Northern and Southern groups, after which some OECD members openly distanced themselves from the idea.
7 See Kurtz (2002) for a detailed discussion.
8 See Kurtz (2002).

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UNCTAD International Investment Agreements portal:
www.unctad.org/Templates/StartPage.asp?intItemID=2310&lang=1

SICE portal on investment: www.sice.oas.org/investment/main_e.asp

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