Services and investment in the EU-South Korea free-trade area: implications of a new approach for GATS V agreements and for bilateral investment treaties

Mathis, J.H.; Laurenza, E.

Published in:
The Journal of World Investment & Trade

DOI:
10.1163/221190012X627601

MARTINUS NIJHOFF PUBLISHERS

The Journal of World Investment & Trade 13 (2012) 157–185

The Journal of World Investment & Trade
Law • Economics • Politics
brill.nl/jwit

Services and Investment in the EU - South Korea Free-Trade Area: Implications of a New Approach for GATS V Agreements and for Bilateral Investment Treaties

James Mathis[a] **and Eugenia Laurenza**[b]

[a)]Associate Professor, Faculty of Law, University of Amsterdam,
Amsterdam Center for International Law
j.h.mathis@uva.nl

[b)]LLM, Amsterdam Law School, Associate Lawyer,
FratiniVergano – European Lawyers, Brussels
e.laurenza@fratinivergano.eu

Abstract

This paper focuses on the services and investment features of the recently concluded free trade agreement between the European Union and its Member States, of the one part, and the Republic of Korea, of the other part. This agreement is an early example of a new scheduling approach adopted by the European Union in its regional trade agreements. Rather than isolating services and investment into different sections for attention, the provisions for these factors are merged into a single and integrated approach for establishment and national treatment. After outlining the primary features of the agreement, we analyze the approach taken by the parties to services and investment liberalization. Finally, the implications of this approach are considered in light of the WTO General Agreement on Trade in Services rules for economic integration agreements, and existing bilateral investment treaties operating between the parties.

Keywords

Regional Trade Agreements; services and investment; WTO GATS V; economic integration agreements; bilateral investment treaties; BITS

Introduction

The European Union has negotiated its services and investment commitments in recent free-trade agreements[1] (FTAs) according to a new approach.

[1)] The EU-CARICOM Economic Partnership Agreement (signed 15 October 2008); the Free Trade Agreement between the European Union and its Member States, of the one part, and the Republic of Korea, of the other part (signed October 6, 2010); and the Trade Agreement between

DOI 10.1163/221190012X627601

This envisages a different structure for the modes of supply[2] and the means by which the EU inscribes its own market access commitments.[3] This new template is on display in the 'Trade in Services, Establishment and Electronic Commerce' chapter of the Free Trade Agreement between the European Union and its Member States, of the one part, and the Republic of Korea, of the other part (hereinafter, the EU – South Korea FTA, or the Agreement).

Here, a first recognizable change is that the modes of supply designated by the General Agreement on Trade in Services (GATS) have been reduced from four modes to three. The GATS mode two (consumption abroad) has been merged with the GATS mode one for 'cross border' supply of services. This new single mode essentially covers all delivery of services that do not entail investment in any form.

For the other two modes, commercial presence (GATS mode three) and presence of natural persons (GATS mode four), the approach contemplates the scheduling of commitments, as in keeping with the structure of scheduling in the GATS, but with the distinguishing feature that the defined scope of the modes here are not limited to trade in services – the limiting scope of the GATS Agreement.[4] In the EU approach, it is 'investment' that is being scheduled – and for that purpose, investment is defined as extending to 'all economic activities'.[5] In short, services are a part of what is being scheduled as an aspect of cross-border investment, but are no longer defining the scope of what is being committed.

This approach may be advancing the relationship between services and investment in a regional trade agreement and in its relationship to existing bilateral investment agreements between the parties. One could position the agreement as a hybrid somewhere between a services liberalization agreement (a trade agreement, as in the GATS Article V) and a bilateral investment

---

the European Union and Colombia and Peru (initialed on 24 March 2011). The agreements are available online, at http://trade.ec.europa.eu/doclib/docs/2008/february/tradoc_137971.pdf (EU - CARICOM); http://trade.ec.europa.eu/doclib/press/index.cfm?id=443&serie=273&langId=en (EU – South Korea); and http://trade.ec.europa.eu/doclib/press/index.cfm?id=691 (Trade Agreement between the European Union and Colombia and Peru). The relevant chapter of the EU – South Korea Agreement is Chapter 7 for 'Trade in Services, Establishment and Electronic Commerce'.

2) WTO, General Agreement on Trade in Services (GATS), Article I, *Scope and Definition*. The GATS is organized for market access commitments for trade in services according to four designated modes of supply, characterized as a) cross border, b) consumption abroad, c) commercial presence, d) temporary movement of persons.

3) As according to GATS Article XVI, *Market Access*.

4) GATS Article I(1) provides that '[t]his Agreement applies to measures by Members affecting trade in services'.

5) EU – South Korea FTA, Article 7.9(c), 'economic activity' includes any activities of an economic nature except activities carried out in the exercise of governmental authority, *i.e.* activities carried out neither on a commercial basis nor in competition with one or more economic operators. This is subject to some listed exemptions, treated here later.

agreement (a bilateral investment treaty, as in a BIT). The trade agreement aspect of scheduling market access is here, but not through the exclusive lens of 'services and service providers' modes of supply. Rather, the subject of liberalization is that of economic activity delivered in the form of investment which encompasses the range of services deliverable under the mode of commercial presence. On the other hand, while a traditional (European) bilateral investment agreement does not schedule for market access of investment, it does provide for norms of investor and investment protection in the form of fair and equitable treatment and compensation for expropriation. This is a characteristic that the EU – South Korea Agreement is currently lacking. In this sense, and in contrast with the approach found in the North America Free Trade Agreement (NAFTA), we cannot say that the EU – South Korea Agreement contains a 'BIT within a trade agreement'.

The three categories of agreements in play (GATS, FTAs and BITS) have provisions common to each to provide for non-discriminatory treatment in the forms of most-favoured nation (MFN) and national treatment. It is the relationship of these provisions across the different treaties that form the focus of this paper in two areas. First, we examine the EU – South Korea integrated scheduling approach according to the operation of the WTO GATS provisions governing the formation of economic integration agreements. This considers the scope of GATS MFN status and the exception provided by economic integration agreements. Second, we consider the relationship between the non discrimination provisions of the agreement and the existing bilateral investment treaties, which additionally accord international norms of protection for established investment and investors.

The paper begins with an overview of how the scheduling mechanism works in the EU – South Korea FTA, and then goes on to discuss some of these implications, first addressing this approach to services in respect of the GATS regime and the regional exception provided by GATS Article V. It then considers the EU - Korea approach to traditional bilateral investment treaties, using EU Member State BITS with Korea as examples. Here a comparative approach is used to consider the scope for national treatment clauses, in particular as they appear in the different agreements among the same parties, and in some instances relate to the same subject matter. For investment protection provisions, such as standards for expropriation or fair and equitable treatment, we know that the EU – South Korea FTA does not include these traditional investment protection obligations at this time and no comparison on these types of rules can be made accordingly.[6]

---

[6] See Article 17.16 of the EU – South Korea FTA, which (i) calls for a mandatory review of the investment legal framework within three years from the entry into force of the agreement and (ii) requires Parties to undertake negotiations to address the obstacles to investment

I. EU - South Korea FTA – General Aspects

The Agreement's formal title is: 'Free Trade Agreement between the EU and its Member States, of the one part, and the Republic of Korea, of the other part'. This clearly envisions a GATT Article XXIV notification which would require the elimination of duties and other restrictive regulations of commerce on substantially all of the trade (in goods) originating in the parties. The objectives of the Agreement are broader than Article XXIV alone however, as Chapter 1 of the text refers to establishing a 'free trade area on goods, services, establishment and associated rules in accordance with this agreement.' Thus, para 2(b) of Article 1.1 (Objectives) makes explicit reference to liberalizing trade in services and investment in conformity with Article V of the GATS. Besides this services liberalization objective, paras 2(f) and 2(h) make additional explicit reference to 'investment', first, 'to an environment conducive to increased investment flows' and second, 'to promote foreign direct investment without lowering or reducing environmental, labor or occupational health and safety standards in the laws of the parties.

We also briefly survey the supportive institutional provisions for the realization of these listed objectives. Article 15 of the Agreement establishes a 'Trade Committee' composed of the representatives of both parties. The Trade Committee is the decision-making body for the functioning of the Agreement.[7] It shall 'ensure that this Agreement operates properly,' and shall supervise the work of specialized committees.[8] The 'Committee on Trade in Services, Establishment and Electronic Commerce' is one of six specialized committees authorized by the Agreement (in accordance with Article 7.3, its tasks and remit as set out in Chapter 7). In principle the specialized committees are to meet once a year. The Trade Committee can change or undertake a task assigned to a specialized committee and also dissolve a specialized committee.[9]

Dispute settlement procedures for the EU – South Korea FTA entail the use of party consultations and then recourse to proceedings before a three-person (non-standing) arbitration panel.[10] That panel is charged with issuing an interim and then a final report. There is an additional recourse to the panel to determine the reasonable time for compliance with the panel report and for a review of any measure taken to comply with the panel's rulings.[11] If there has

---

encountered, with a view to deepening the provisions on investment, including with respect to general principles of investment protection.

7) EU – South Korea FTA, Article 15.4.

8) *Id.*, Article 15.1.3 (a) and (c).

9) *Id.*, Article 15.2 (3) and (5).

10) *Id.*, Article 14.5.

11) *Id.*, Articles 14.9 and 14.10.

been a failure to undertake an adequate remedial measure then the party complained against can be requested to make an offer of compensation and, failing that, the aggrieved party can suspend its concessions under the Agreement to the level of compensation.[12] A final return to the panel is contemplated for a review of any measures taken to comply with the panel ruling following the suspension of concessions. The rulings of a panel are stated to be binding on the parties and not understood to create any rights or obligations for natural or legal persons.[13]

The relationship to WTO dispute settlement is also provided by the Agreement. A claim that could be raised under both agreements ('regarding the same measure') can be brought in either forum, but can only be brought in one of them at a time. A complaint can then only be raised in the other forum when the first forum selected fails, for 'procedural or jurisdictional reasons,' to make findings on the claim.[14] It is not clear whether the Agreement completely forecloses a complainant from commencing in the other forum after losing on the merits in the first selected forum. While the provision says, 'a Party shall not seek redress of an obligation which is identical under this Agreement and under the WTO Agreement in the two forums,' this may be read to be limited to concurrent rather than consecutive actions. We assume that the possibility of a second forum cannot be foreclosed after exhausting the first one on the merits, especially if the second forum is under the WTO Dispute Settlement Understanding.[15]

II. Services and Investment in the EU – South Korea FTA

II.1 WTO Context

GATS Article V (Economic Integration) provides that the GATS Agreement shall not prevent any of its Members from entering an agreement liberalizing trade in services, provided that the agreement has 'substantial sectoral coverage,' and provides for the elimination of substantially all discrimination (in the sense of GATS National Treatment, Article XVII) among the parties. GATS V does not treat 'investment' explicitly, but 'substantial sectoral coverage' is a reference to the four modes of supply identified by the GATS Agreement, one of which, 'mode three', delivers a service by the use of investment in the form

12) *Id.*, Article 14.11.
13) *Id.*, Articles 14.12 and 14.17 respectively.
14) *Id.*, Article 14.19.2.
15) See, WT/DSDS308/AB/R, *Mexico — Tax Measures on Soft Drinks and Other Beverages*, Report of the Appellate Body, 6 March 2006, paras 40-57.

of a commercial presence. This is to say that the scope of liberalization contemplated in the GATS is limited to services and service providers, and investment is a means of delivering a service. Investment *per se* is not a subject of the GATS Agreement.

II.2 Chapter Seven on Trade in Services, Establishment and E-Commerce

II.2.1 General Overview

The EU – South Korea Agreement includes the most ambitious services and investment commitments concluded to date by the EU.[16] Chapter Seven on 'Trade in Services, Establishment and E-Commerce' is structured according to a new template that departs substantially from that used under the GATS. In addition, in this agreement investment liberalization formally makes its appearance in EU FTAs through the scheduling of commitments in establishment and movement of natural persons in non-services sectors.

The EU's former services scheduling practice was consistent with the standard GATS format. First, services commitments were listed according to a positive list (or bottom-up) approach (*i.e.*, only the listed service activities were committed). Second, services commitments were listed under four columns: sector or sub-sector, market access, national treatment, and additional commitments. Third, services commitments were listed, under each column, according to their modes of supply, namely, cross-border trade (mode one), consumption abroad (mode two), commercial presence (mode three), and movement of natural persons (mode four).

The new template envisages: (i) a new structure for the modes of supply and the inscription of commitments; (ii) investment liberalization through the undertaking of market access and national treatment commitments on establishment and movement of natural persons in services and non-services sectors; and (iii) regulatory convergence through obligations affecting regulatory frameworks.

In particular, Chapter Seven includes a set of provisions regulating trade in services and establishment, and a set of annexes. The set of provisions is divided into sections on cross-border supply of services (Section B), which includes the cross-border and the consumption abroad modes in GATS terms; establishment (Section C); and temporary presence of natural persons for business (Section D). Other sections include definitions and general

---

[16] The EU has negotiated and concluded commitments on investment also with CARIFORUM Countries, in the context of the EU – CARIFORUM Economic Partnership Agreement. At the time of writing, the EU has also initialed an agreement with Colombia and Peru, also dealing with investment through establishment. The depth and coverage of establishment commitments under this latter agreement have not been considered.

provisions (Section A), regulatory frameworks (Section E), provisions on electronic commerce (Section F) and exceptions to services trade and establishment (Section G). The set of annexes contain the following: a list of the EU's and South Korea's commitments on cross-border supply of services, establishment and temporary presence of natural persons (Annex 7-A); provisions for the MFN treatment exemption (Annex 7-B); the list of exemptions to the MFN obligation (Annex 7-C); and an annex on the additional commitments on financial services (Annex 7-D). Subsidies are expressly excluded from Chapter Seven. In addition, Chapter Seven provides that, consistent with the provisions therein, Parties retain the right to regulate and introduce new regulations to meet legitimate policy objectives.

Services and investment liberalization are advanced through commitments on market access and national treatment on cross-border supply of services, establishment and temporary presence of natural persons, subject to the reservations scheduled by the Parties. The new approach features separate Schedules of Commitments for cross-border supply of services, establishment (services and non-services sectors), and the movement of natural persons for business purposes.

'Cross-border supply of services' is defined as the supply of a service (i) from the territory of a Party into the territory of the other Party and (ii) in the territory of a Party to the consumer of the other Party, thus encompassing modes of supply one (cross-border supply *strictu sensu*) and two (consumption abroad) under the GATS. The obligations and commitments relating to cross-border supply of services cover Parties' measures affecting the cross-border supply of all services, with some sectoral carve-outs.[17] The Agreement further specifies that measures affecting the cross-border supply of services include: (a) the production, distribution, marketing, sale and delivery of a service; (b) the purchase, payment or use of a service; the access to and use of, in connection with the supply of a service, networks or services which are required by the Parties to be offered to the public; and (d) the presence, in a Party's territory, of a service supplier of the other Party.

'Establishment' is defined as the constitution, acquisition or maintenance of a juridical person, or the creation or maintenance of a branch or representative office within the territory of one Party for the purpose of performing an economic activity. The concept of 'economic activity' includes all activities of an economic nature except those carried out in the exercise of governmental

[17] These are: audio-visual services; national marine cabotage; and domestic and international air transport services, whether scheduled or not, and services directly related to the exercise of traffic rights, other than aircraft repair and maintenance services; the selling and marketing of air transport services; computer reservation systems services and other services auxiliary to air transport services (see EU – South Korea FTA, Article 7.4).

authority (*i.e.*, those carried out neither on a commercial basis nor in competition with one or more economic operators).[18] The provisions of the section on establishment cover all economic activities, again with some carve-outs.[19]

Obligations and commitments relating to the temporary presence of natural persons for business cover measures concerning the entry into, and the temporary stay in, parties' territories of key personnel,[20] graduate trainees,[21] business services sellers,[22] contractual services suppliers,[23] and independent professionals.[24]

Separate market access, national treatment and MFN treatment clauses are spelled out for the cross-border supply of services and for establishment, in terms which are similar to the correspondent provisions of the GATS. In particular, Parties agreed to accord to services and services suppliers and establishments and investors treatment no less favorable than that provided for under the terms, limitations and conditions agreed and specified in the list of commitments included in Annex 7-A.[25] The types of limitations that can be scheduled for the cross-border supply of services correspond to those that are relevant for modes one and two of supply in indents (a), (b) and (c) of Article XVI of the GATS. The limitations that Parties may schedule on establishment reflect, *mutatis mutandis*, those listed under Article XVI of the GATS.

---

18) EU – South Korea FTA, Article 7.9(c).

19) *Id* Article 7.10. See also section II.2.2 below.

20) 'Key personnel' is defined as 'natural persons employed within a juridical person of a Party other than a non-profit organization and who are responsible for the setting up or the proper control, administration and operation of an establishment'. The concept of 'key personnel' comprises business visitors responsible for setting up an establishment and intra-corporate transferees. These categories are further defined by Article 17.7.

21) 'Graduate trainees' are 'natural persons who have been employed by a juridical person of a Party for at least one year, who possess a university degree and who are temporarily transferred to an establishment in the territory of the other Party for career development purposes or to obtain training in business techniques or methods' (see Article 17.7).

22) 'Business services sellers' are 'natural persons who are representatives of a service supplier of a Party seeking temporary entry into the territory of the other Party for the purpose of negotiating the sale of services or entering into agreements to sell services for that service supplier'. Business services sellers do not engage in making direct sales to the general public and do not receive remuneration from a source located within the host Party (see Article 17.7).

23) 'Contractual service suppliers relates to 'natural persons employed by a juridical person of a Party which has no establishment in the territory of the other Party and which has concluded a *bona fide* contract to supply services with a final consumer in the latter Party requiring the presence on a temporary basis of its employees in that Party in order to fulfill the contract to provide services' (see Article 17.7).

24) 'Independent professionals' means 'natural persons engaged in the supply of a service and established as self-employed in the territory of a Party who have no establishment in the territory of the other Party and who have concluded a *bona fide* contract to supply services with a final consumer in the latter Party requiring their presence on a temporary basis in that Party in order to fulfil the contract to provide services' (see Article 17.7).

25) EU – South Korea FTA, Articles 7.5 (cross-border supply) and 7.11 (establishment) respectively.

In sectors where commitments have been undertaken, and subject to conditions and qualifications set out in the list of commitments, Parties must accord to services and services suppliers and establishments and investments treatment no less favorable than that accorded to their own service suppliers, establishments and investors.[26] The national treatment obligations are crafted on the basis of Article XVII of the GATS.

The MFN treatment obligations cover all measures affecting the cross-border supply of services and establishment (not just in the committed sectors), and require Parties to treat services and services providers and investors as favorably as any other third country with which an economic integration agreement has been signed following the entry into force of the EU – South Korea FTA.[27] However, to qualify for the exemption from the MFN obligations under the Agreement, the treatment arising from a regional economic integration agreement granted by either Party to services and services suppliers, establishments and investors of a third party must provide for a significantly higher level of obligations than those taken in the context of Chapter Seven.[28] In addition, the MFN obligations do not apply, *inter alia*, to measures covered by the Parties' list of MFN exemptions.[29]

Temporary entry and stay for key personnel and graduate trainees is granted by the Parties, according to the conditions specified in Article 7.18 of the Agreement and the reservations included under the list of commitments, for every sector liberalized under 'establishment.' The reservations that parties may maintain, where indicated in the list of commitments, are those affecting the total number of natural persons that an investor may transfer in the form of numerical quotas or a requirement of an economic needs test and as discriminatory limitations. Commitments on the temporary entry of business services sellers are granted by the parties, according to the conditions

---

[26] EU – South Korea FTA, Articles 7.6 (cross-border supply) and 7.12 (establishment) respectively.

[27] *Id.*, FTA Articles 7.8 (cross-border supply) and 7.14 (establishment).

[28] In particular, Articles 7.8 and 7.14 of the EU – South Korea FTA provide that the treatment arising from a regional economic integration agreement granted by either party to services and service suppliers of a third party shall be excluded from the MFN obligation only if this treatment is granted under sectoral or horizontal commitments for which the regional economic integration agreement stipulates a significantly higher level of obligations than those undertaken in the context of Chapter Seven, as set out in Annex 7-B. This Annex, which covers the MFN treatment exemption, clarifies that to be of a significantly higher level, obligations stipulated in a regional economic integration agreement shall either create an internal market on services and establishment or encompass both the right of establishment and the approximation of legislation. The evaluation of the level of the obligations must be conducted on the basis of sectoral or horizontal commitments. The annex clarifies the concepts of 'right of establishment' and 'approximation of legislation' and requires Parties to notify of any regional economic integration agreement which fulfils such conditions.

[29] These are included in Annex 7-C of the EU – South Korea FTA.

specified in Article 7.19 and the reservations included under the list of commitments, for every sector liberalized under both 'cross-border supply of services' and 'establishment.' Parties have made no commitments on temporary presence of contractual services suppliers and independent professionals, as the Agreement requires that liberalization for those categories will be undertaken by the parties within two years from the conclusion of the WTO Doha Development Agenda negotiations.[30] The Agreement also specifies that obligations and commitments undertaken on establishment and the temporary presence of natural persons are without prejudice to the rights of investors of the parties to benefit from any more favorable treatment provided for in any existing or future international agreement to which either party is a signatory.[31]

The list of commitments and reservations scheduled for the cross-border supply of services, establishment and the temporary presence of natural persons is included in Annex 7-A. The parties' list of commitments maintain the GATS positive listing (or 'bottom-up') approach, according to which only those sectors expressly listed are subject to commitments. However, the EU's commitments depart substantially from the GATS Schedules. First, they are inscribed in three different lists of commitments: one for cross-border supply of services, one for establishment, and one for temporary presence of natural persons. In addition, the three separate lists include two columns (instead of the four columns of the GATS Schedules) which refer, respectively, to: (i) to the services and non-service sectors or sub-sectors liberalized; and (ii) reservations.[32] The reservations combine market access and national treatment limitations, eliminating the GATS distinction between the two.[33]

---

30) EU – South Korea FTA, Article 7.20.

31) *Id.*, Article 7.15.

32) Note that the GATS distinction between mode one and mode two re-surfaces in the EU's list of commitments on cross-border supply of services, where the reservations are spelled-out for the two different modes of supply.

33) The text of Article XX:2 of the GATS states that '[m]easures inconsistent with both Articles XVI and XVII shall be inscribed in the column relating to Article XVI. In this case the inscription will be considered to provide a condition or qualification to Article XVII as well'. In light of this wording, it was subsequently questioned whether, if the Schedule of Commitments for a certain service sector was listed as 'unbound' (*i.e.*, leaving a WTO Member free to introduce or maintain laws or regulations that limit access) under the market access column, yet as 'none' (*i.e.*, committing to full liberalization) under the national treatment column, any commitment could in fact be deemed to exist regarding national treatment. The EU's solution to this dilemma has been to simplify its approach to scheduling services commitments by eliminating the separate listing of market access and national treatment in EU – third country FTAs. The EU's Schedules of Commitments for services in EU – third country FTAs have thus been reduced to two columns: sector or sub-sector, and a general description of reservations.

On the other hand, South Korea's commitments are compiled into one single schedule divided in two sections, (one for commitments on services and one for establishment) which follows the structure of the Schedules under the GATS.

II.2.2 *A closer look at the investment provisions in the EU – South Korea FTA*

The objective of the provisions on investment in the EU – South Korea FTA is to improve the '…investment environment, and in particular the conditions of establishment between the Parties.' The scope of the provisions on establishment applies to all measures (*i.e.*, any measure taken by a party, whether in the form of law, regulation, rule, procedure, decision, administrative action or any other form) affecting establishment. As seen above, 'establishment' is defined as the constitution, acquisition or maintenance of a juridical person, or the creation or maintenance of a branch or representative office within the territory of one Party for the purpose of performing an economic activity. 'Constitution' and 'acquisition' must be understood as including capital participation in a juridical person with a view to establishing or maintaining lasting economic links.[34] The established juridical person must be owned or controlled by natural or juridical persons of the other party. Ownership of a juridical person requires an equity interest of more than 50 per cent. The concept of control is linked to the power to name a majority of the directors of the controlled company or the ability to legally direct its actions. Therefore, under the Agreement, investment is covered to the extent that it is conducted through establishment, according to the definitions provided above. The EU – South Korea FTA's coverage of establishment (just like the GATS commercial presence) applies to the extent that the locally established juridical person is owned or controlled by the other Party's companies or nationals[35] and according to the thresholds specified above. In addition, the scope of investment under the Agreement covers foreign direct investment through establishment and not portfolio or other short-term investments.

The focus of the investment provisions in the EU – South Korea FTA is on ensuring non-discriminatory access for either Party's establishments and investors into the other Party's market for services and non-services economic activities. The link between investment in the form of establishment

---

The new approach has been described as a 'hybrid' system, given that it contains a positive listing of sectors, and a negative listing of general limitations.

[34] EU – South Korea FTA, Article 7.9(a)(i), footnote 9.

[35] R. Adlung and M. Molinuevo, *Bilateralism in Services Trade: Is there Fire Behind the (BIT-) Smoke?*, Journal of International Economic Law 11(2), 2008, p. 374, in relation to the GATS.

and services liberalization originates from the GATS 'mode three' of supply of services through commercial presence, which is recognized as a form of foreign direct investment. The EU and South Korea sought investment liberalization through the expansion to non-services economic activities of the sectors subject to commitments on establishment (and temporary presence of natural persons).

The Agreement covers the conditions of admission and establishment of investments, securing access to EU and South Korean establishments and investors through binding market access and national treatment commitments on the economic activities included in the list of commitments and subject to the reservations indicated thereof. Parties also agreed to grant to each others' establishments and investors MFN treatment, which is a standard that compares to the treatment granted to foreign investors originating from third countries with which the EU and South Korea negotiate an agreement following the entry into force of the EU – South Korea FTA. The MFN treatment applies to all measures affecting establishment, whether or not commitments have been undertaken and without prejudice to the MFN exemptions scheduled.

The sectoral coverage of the commitments on establishment extends to agriculture and fisheries, industrial and services sectors. However, the EU – South Korea FTA provides for two types of carve-out: (a) exclusions which apply to the entire Chapter Seven (*e.g.*, subsidies); and (b) sectoral exclusions which apply to establishment (*i.e.*, mining, manufacturing and processing of nuclear materials, production of – or trade in – arms, audio-visual services, national maritime cabotage and domestic and air traffic rights). In addition, access and national treatment to foreign investment only applies to activities for which specific commitments have been undertaken. This template allows parties to remove entire sectors from being subject to foreign investment under non-discriminatory terms.

The Agreement does not include 'traditional' investment protection clauses. Footnote 11 to Chapter Seven provides that, '[i]nvestment protection, other than the treatment deriving from Article 7.12 [national treatment], including investor-state dispute settlement procedures, is not covered by this Chapter'. This clarification is complemented by Article 7.16, which, *inter alia*, requires Parties to review the investment legal framework no later than three years after the entry into force of the Agreement, to assess obstacles to investment with a view to deepening the provisions of Chapter Seven, including on investment protection. Enforcement of the commitments is so far secured only through the state-to-state dispute settlement mechanism provided for under the Agreement.

II.2.3 *The EU – Korea FTA and EU Member States' BITs*

The breadth and scope of the obligations on investment of the EU – South Korea FTA varies substantially from those of EU Member States BITs[36] and, in particular, of EU Member States' BITs with South Korea.[37] Generally speaking,

---

[36] Please note that modern literature (Adlung and Molinuevo, *id*.,) distinguishes between two main prototypes of investment treaties. The first type, used mostly by European countries and developing countries, is focussed on the protection of foreign investors and investments once established in the host country (so-called 'investment protection treaties'). The other type (used mainly by Canada and the United States, and increasingly by Japan) includes also disciplines regulating access of foreign investments to host markets (so-called 'investment liberalization treaties'). The two models may also differ in relation to their sector and policy coverage: investment liberalization treaties allow for sector reservations, whereas investment protection treaties provide for unrestrained sector coverage. In addition, whereas most investment protection treaties do not provide for policy area exclusions, investment liberalization agreements contain more policy-related reservation carve-outs, such as, for example, the exclusion of subsidies from national treatment. Lastly, the scope of national treatment may also differ: 'investment liberalizing treaties' tend to include national treatment coverage for both pre-establishment and post-establishment investment, whereas EU Member State BITs have historically included national treatment commitments only for post-establishment investment. The EU Member States BITs with South Korea selected for the purpose of this comparison (see footnote below) fall within the 'investment protection treaties' prototype. Therefore, any reference to BITs in the article will related to this prototype.

[37] South Korea has concluded BITs with 22 EU Member States in total. For the purposes of this article, the following BITs have been considered: the Treaty Between the Republic of Korea and the Federal Republic of Germany Concerning the Promotion and Reciprocal Protection of Investments, signed at Seoul on 4 February 1964, entered into force on 15 January 1967 (hereinafter, Germany – South Korea BIT); Agreement Between the Government of the Republic of Korea and the Government of the United Kingdom of Great Britain and Northern Ireland for the Promotion and Protection of Investments, signed at Seoul on 4 March 1976, entered into force on 4 March 1976 (hereinafter, UK – South Korea BIT); Exchange of Notes Between the Government of the United Kingdom and Northern Ireland and the Government of the Republic of Korea Concerning the Extension to the Bailiwicks of Jersey and Guernsey and the Isle of Man of the Agreement for the Promotion and Protection of Investments, signed at Seoul on 4 March 1976, entered into force on 22 September 1983; Agreement Between the Government of the Republic of Korea and the Government of the Republic of Italy Concerning the Encouragement and the Reciprocal Protection of Investments, signed at Seoul on 10 January 1989, entered into force on 26 June 1992 (hereinafter, Italy – South Korea BIT); Décret no. 79-290 du 30 mars 1979 portant publication de l'accord entre le Gouvernement de la République française et le Gouvernement de la République de Corée sur l'encouragement et la protection des investissements, signé à Paris le 28 décembre 1977, entrée en vigueur le 1 février 1979 (hereinafter, France – South Korea BIT); Agreement Between the Government of the Republic of Korea and the Government of the Czech Republic for the Promotion and Reciprocal Protection of Investments, signed at Seoul on 27 April 1992, entered into force on 16 March 1995 (hereinafter, Czech Republic – South Korea BIT). South Korea has concluded BITs with the following additional EU Member States: Austria, Belgium, Luxembourg, Bulgaria, Denmark, Finland, Greece, Hungary, Latvia, Lithuania, the Netherlands, Poland, Portugal, Romania, Slovakia, Spain, and Sweden. Information sourced at United Nations Conference on Trade and Development, Investment Instruments Online, Bilateral Investment Treaties: http://www.unctadxi.org/templates/docsearch.aspx?id=779.

the latter focus on the protection of foreign investments and investors once they are established in the host country and often do not include an obligation of the host country to grant access to the other Party's investments[38] or provide that such access be 'according to the laws and regulations' of each Party.[39] In addition, they provide for a broad definition of investment, which comprises any kind of asset owned by foreigners, including minority participations and portfolio investments.[40] As compared to the EU – South Korea FTA, the scope of investment under the BITs is much broader: in the former framework investment is covered to the extent that the requirements of the definition of establishment seen above are complied with. EU Member States' BITs apply to all measures affecting investments covered.[41] In terms of sectoral coverage, EU Members States' BITs with South Korea do not provide for carve-outs for particular areas or sectors, and they usually envisage unrestrained sector coverage.[42]

The content and obligations of BITs develop, with varying degrees of depth and coverage, along three main lines: the treatment of foreign investors; investment protection; and enforcement through dispute settlement.

---

38) The Germany – South Korea BIT provides that each Contracting Party "…shall endeavor to admit in its territory investments […] by nationals or companies of the other Contracting Party".

39) The Italy – South Korea BIT provides that '[e]ach Contracting Party shall […] admit such investments according to its laws and regulations […]'. A similar provision is included in, *inter alia*, the France – South Korea BIT. The Czech Republic – South Korea BIT provides, however, that '[e]ach Contracting Party shall admit such investments [of investors of the other Contracting Party]'.

40) The following definition of investment is found in the Italy – South Korea BIT:

'(1) The term 'investment' means every kind of asset accepted in accordance with the respective laws and regulations of either Contracting party, and more particularly, though not exclusively:

(a) Movable and immovable property as well as any other rights in rem, such as mortgages, liens, pledges, usufructs and similar rights;
(b) Shares, stocks and debentures of companies or interests in the property of such companies;
(c) Claims to money utilized for the purpose of creating an economic value or to any performance having an economic value;
(d) Copyrights, industrial property rights, technical process, know-how, trademarks and trade names;
(e) Business concessions conferred by law or under contract, including concessions to search for, extract or exploit natural resources".Similar definitions can be found in other EU Member States' BITs.

41) Argument *ex* Adlung and Molinuevo, *supra*, note 35 at p. 374.

42) No sectoral or policy exclusions have been found in the sampled EU Member States BITs. Sectoral exclusions and carve-outs are infrequent in so-called 'investment protection treaties' When provided for, they relate, *inter alia*, to taxation measures, land and real estate and measures concerning investments in border areas. Adlung and Molinuevo, *supra*, note 35 at p. 375.

The treatment of foreign investors is usually reflected through three standards: national treatment; MFN treatment; and fair and equitable treatment. In particular, national treatment 'requires that foreign investors should receive treatment no less favourable than that accorded to nationals of the host country engaged in similar business activity'.[43] Clauses mandating MFN treatment are found in most BITs. Securing MFN treatment ensures that investors are treated no less favourably within a host country than are any other third country with which the host country has concluded an agreement. The goal of obtaining MFN treatment is to ensure the 'equality of competitive conditions'.[44] Some EU Member States BITs with South Korea provide for exception from MFN treatment for advantages based on the following: membership in a customs union, common market, free trade zone; economic agreements, or conclusion of an agreement with a third state on avoidance of double taxation; and facilitation of frontier trade.[45]

Fair and equitable treatment clauses set out a minimum standard of investment treatment to be accorded to investors located in BIT signatories. Such clauses generally assess government conduct based on internationally accepted standards of good governance. However, there is an ongoing academic debate on whether the standard for fair and equitable treatment should be interpreted in accordance with the minimum standard found in international law, or if BITs generally apply a more rigorous standard of protection.[46] Recent BITs from Germany, and BITs signed between Canada and Latvia, Slovakia, the Czech Republic and Romania have included a reference linking fair and equitable treatment to the customary international law minimum standard of treatment. EU Member States have typically provided for fair and equitable treatment in BITs, and have sometimes gone further by combining this with other treatment standards, such as 'full protection and security.'

EU Member States BITs with South Korea frequently bind parties to: grant national treatment to post-establishment investments made by nationals and companies from the other country; accord fair and equitable treatment to the investments made by nationals and moral persons from the other party; and give MFN treatment to investors. Few BITs allow Parties to accord fair and

---

43) S. Woolcock & J. Kleinheisterkamp, *The EU Approach to International Investment Policy After the Libson Treaty* (Brussels: Directorate-General for External Policies, Policy Department, 2010), p. 31. Originally cited in P. Muchlinski, "The Framework of Investment Protection: The Content of BITs", in K. Sauvant & L. Sachs, eds., *The Effect of Treaties on Foreign Direct Investment: Bilateral Investment Treaties, Double Taxation Treaties, and Investment Flows* (New York: Oxford University Press, 2009).

44) *Id.*, at p. 33. Originally cited in A. Newcombe & L. Paradell, *Law and Practice of Investment Treaties* (Waterloo, U.K.: Kluwer Law International, 2009), p. 195.

45) See *e.g.*, Article 3.3 of the Italy – South Korea BIT.

46) For further reading on this topic see, *e.g.*, Graham Mayeda, *Playing Fair: The Meaning of Fair and Equitable Treatment in Bilateral Investment Treaties*, Journal of World Trade, Vol. 41.2, 2007.

equitable treatment to investments and returns of investors of the other Party, as well as national or MFN treatment, whichever is more favourable.[47] Some BITs also provide for limitations to national treatment; the BIT between France and South Korea limits the scope of national treatment to fiscal measures, according a 'fair and equitable treatment' at least equivalent to MFN treatment. Under the UK – South Korea BIT Parties may, in relation to particular matters, accord to the nationals or companies of the other Contracting Party treatment less favourable than that which it accords to its own national or companies.[48]

Investment protection provisions generally protect the right of an investor to transfer investment funds out of the host country, as well as the right to receive compensation for losses due to expropriation, armed conflict or internal disorder. The scope of provisions dealing with the free transfer of funds varies according to, *inter alia*, the type of funds covered by the right of free transfer, any host country restrictions on an investor's right to liquidate an investment, convertibility rights in terms of the type of foreign currency and the exchange applicable at the time of transfer, and any permissible waivers to the right of free transfer during balance of payments crises. Provisions covering compensation for losses due to armed conflict or internal disorder typically provide that, in determining compensation, host governments must treat investors in accordance with national treatment and MFN principles. Investment protection provisions typically provide for compensation in cases of direct government expropriation of an investment (*e.g.*, nationalisation of an investor's asset). However, a host country may also engage in indirect expropriation, by which a state interferes with the use or enjoyment of an asset, even though there is no formal seizure of the asset. Many EU BITs do not extend protection to indirect expropriation. For instance, Italy's BITs do not cover indirect expropriation, and only approximately half of the BITs concluded by Germany and France extend protection to indirect expropriation. Investment protection clauses in EU Member States' BITs with South Korea often limit investment protection to situations of direct expropriation of investments by either country, and extend national treatment to foreign investors for any compensation given by a country to its domestic investors who have suffered the loss of an investment due to armed conflict, revolution, national emergency or revolt.[49]

---

47) See the Italy – South Korea BIT and the Czech Republic – South Korea BIT; see also the UK – South Korea BIT.

48) See Article 3.2 of the UK – South Korea BIT.

49) See, *e.g.*, Articles 3 and 4 of the Germany – South Korea BIT. This agreement features provisions mandating compensation for direct expropriation, and national treatment in the case of any compensation given to domestic investors who suffer the loss of an investment due to armed conflict, revolution, national emergency or revolt.

Most international investment agreements contain provisions which establish a system for dealing with the settlement of disputes both between the contracting parties ('state-to-state dispute settlement'), and between the host state and investors ('investor-state dispute settlement'). State-to-state disputes are usually settled by diplomatic means rather than international arbitration. Investor-state dispute settlement provisions give investors in BITs signatories a right to pursue dispute settlement proceedings against foreign governments in their own right under international law. Dispute settlement provisions are a prevalent feature of BITs between EU Member States and South Korea. These clauses typically cover both state-to-state and investor-state disputes, and often stipulate a fixed period for negotiations, to be followed by binding arbitration if negotiations are unsuccessful.[50]

III. Implications

III.1 The GATS regime and the exception provided by GATS Article V

GATS Article V provides that the GATS Agreement 'shall not prevent any of its Members from being a party to or entering an agreement liberalizing trade in services,' subject to the balance of the conditions imposed by that Article. As in GATT Article XXIV for customs unions and free-trade areas for trade in goods, the primary obligation affected by the operation of GATS V is that of MFN, GATS Article II. To understand the scope of GATS V as an exception to GATS Article II:1, we should first consider the scope of this underlying MFN obligation. GATS MFN is characterized as having a very broad scope because of the provision's reference to 'any measures covered by this agreement'. These measures are defined by GATS Article I:1 (Scope and Definition) as 'measures by Members affecting trade in services.'

This 'affecting trade' standard, as borrowed from GATT Article III panel interpretations, is known for its broad scope of application, as distinguished from a narrower set of measures that would directly govern or regulate trade.[51]

---

[50] See, *e.g.*, Articles 10 and 11 of the Italy – South Korea BIT. Article 10 contains an investor-state dispute settlement mechanism, mandating a period of negotiations to be followed by arbitration under the auspices of the International Center for Settlement of Investment Disputes. Article 11 contains a state-to-state dispute settlement mechanism. The provisions provide that if any dispute cannot be settled within six months from the date on which either party informs the other party of a dispute in writing, then the dispute shall, at the request of either party, be submitted for settlement to an *ad hoc* international arbitral tribunal. Article 11 sets out additional rules for the composition of an *ad hoc* arbitral tribunal.

[51] Adlung and Molinuevo, *supra* note 35 at p. 392, and citing Panel and Appellate Body Reports, WT/DS37, *EC - Bananas III*.

Thus, as in GATT Article III, GATS Article II can be understood to apply to 'any state measures that *potentially* adversely modify the *conditions of competition*' between like services and service suppliers.[52] The key here is the attention given to the effect of a measure rather than to its legal form. This means the measures governing trade in goods can affect trade in services just as measures governing investment and investors, including investor protection provisions, may also potentially affect trade in services. Since GATS MFN is a general obligation, this scope can be applied whether or not there has been a market access commitment in the GATS (GATS Article XVI) and, as suggested above, whether or not the subject area of the measure is addressed in any manner within the GATS Agreement. While the term 'services' is not itself defined by the GATS Agreement, the term is understood to be comprehensive in light of the limited 'carve outs' designated in the GATS for activities such as services supplied in the exercise of governmental authority.[53]

Since GATS Article V operates as an 'exception' from GATS MFN, it is not clear if the scope of this exception extends to the full range of possible measures that can be captured by the GATS general MFN provision. While GATS V proclaims that 'this agreement shall not prevent' an agreement liberalizing trade in services, this does not necessarily mean that everything that can be put into an economic integration agreement is entitled to the value of the MFN exception. Here an analogy to GATT Article XXIV can be considered in that what is 'necessary' to liberalize among regional members also defines the scope of what can be drawn into the provision for the value of the exception. Thus, for example, GATT Article XXIV requires the elimination of tariff duties on substantially all of the originating trade between the regional parties. As a result of this requirement, it is clear that a tariff duty elimination between the regional members on an originating product should qualify for the exception from MFN granted by Article XXIV.

Taking this same concept over to GATS V, this Article requires an 'agreement' by members 'liberalizing trade in services' to the degree of 'substantial sectoral coverage' and upon which coverage there is also an 'elimination of existing discriminatory measures.' Since GATS obligations are characterized as either general (Part II) or specific (Part III), the reference for what is contemplated for GATS V coverage must refer to those types of liberalizing

---

52) E. Vranes, *The Overlap Between GATT and GATS: A Methodological Mate*, Legal Issues of Integration, 36:3, 2009, pp. 215-238 at p. 222, (italics in original), and also citing the WTO Appellate Body, WT/DS37AB/R, *EC - Bananas III*, para. 7.281.

53) GATS Article I:3(b), and as according to Vranes, certain measures listed in the GATS Annex on Air Transport. (*id.*, Vranes, at p. 223. One also notes the MFN exemptions permitted by Member declaration under the GATS Annex on Article II Exemptions, which include a number of notified preferential services agreements and arrangements, comprehensive and sectoral.

measures that are provided by the GATS as the possible forms of specific commitments. The general obligations are, after all, already incurred by and between WTO Members, whether or not they are also members of regional integration agreements. In the first instance this would include the commitments noted as falling within GATS Article XVI (Market Access). These are the measures to be progressively eliminated by the regional members, and would therefore fall within the MFN exception provided by GATS Article V. In the EU - South Korea FTA, one sees that set of commitments undertaken in Article 7.11, where the list of limitations to be eliminated is repeated from the same listing as contained in GATS Article XVI. A second set of liberalizing measures within the GATS Part III category of specific obligations is made explicit in Article V, as it refers to the elimination of discrimination in the form national treatment 'in the sense of Article XVII.' Preferential national treatment commitments contained in an economic integration agreement therefore also fall within the exception of GATS Article V. In the EU – South Korea FTA, the provision for national treatment made upon the market access commitments is found in Article 7.12.

If this were the extent of the liberalizing commitments possible in reference to GATS Part III, we would be able to draw a fairly clear and somewhat narrowly defined scope for what GATS Article V will accommodate in the way of an MFN exception. This narrower scope would also grant the widest possible field for MFN to remain in operation in respect to other possible trade liberalizing provisions in WTO Members' economic integration agreements, such as regulatory cooperation activities in the form of harmonization or recognition of qualifications, or the use of advanced transparency and notification provisions. This would also limit the scope of the MFN exception as it might apply to the parties' provisions in other agreements, such as their BITS with their provisions for investor protection and dispute settlement procedures, all of which may also 'affect' the supply of a service or service supplier.[54]

For the application of GATS MFN for scheduled investment commitments that are not in the delivery of a service according to GATS mode 3, *i.e.*, some of the investment sectors scheduled in the EU – South Korea integrated approach, these 'economic activities' would appear to fall outside the scope of GATS Article V completely, since they are not by their nature provisions liberalizing services. Indeed, they may not be within the scope of the GATS Agreement at all, since the defining scope of the agreement refers to measures affecting trade in services, with the caveat, as noted above, that the 'affecting trade in services' standard is broad; and one cannot exclude the possibility

54) In accord, Adlung and Molinuevo, *supra* note 35 at pp. 392 and 402. The statement is also subject to the caveat of declared GATS MFN exemptions, not treated here.

that liberalizing an investment activity may not affect the trade in a service. This may not, however, bring it within the scope of GATS V, unless this measure affecting trade in services can also be characterized as a 'liberalizing' measure. For the EU – South Korea FTA, the parties have scheduled commitments for a number of mining and manufacturing activities, economic activities that appear in the GATS sectoral list as only 'services incidental to' mining or manufacturing.[55] According to the construct laid out above, in order to argue that those preferential investment commitments are under the scope of the GATS, the activity of mining or manufacturing needs to affect the trade of a service. Perhaps that connection would be made to those services incidental to mining or manufacturing.

However such a link might be made to establish the application of GATS MFN, the signatories would potentially then seek the cover of GATS Article V. This would require evidence that the investment commitment was liberalizing trade in a service. That may be more difficult than the first connector, where the 'affecting trade' standard is explicit in GATS Article I but not present at all in GATS V. One is left with the following conclusions regarding scheduled investment activities not directly related to establishment in the sense of GATS mode three. It is likely that the GATS, including GATS MFN, does not apply at all to those commitments. If a connection can be made to draw those commitments under GATS MFN, then it is even less likely that they would be within the scope of GATS V for the purpose of the exception.

That said, it is possible that the gateway for GATS V coverage is wider than the analytical framework set out above. GATS Part III also contemplates the concept of 'additional commitments' as provided by GATS Article XVIII. This Article says that Members may also undertake commitments 'affecting trade in services' that are *not subject* to scheduling under Article XVI (or XVII), 'including those regarding qualifications, standards or licensing matters.' This is not a confining provision and it is also a non-exhaustive listing. The only definitional limitation that appears in the provision is the requirement that 'such commitments shall be inscribed in a Member's schedule.' While we could look at the scheduling practice and determine how Article XVIII has been employed by Members in their GATS schedules, this may not be a limiting factor. If regional members choose to 'schedule' a range of possibilities that fall within the category of liberalizing measures that affect trade in services, it could bring them within the scope of GATS Article V coverage.[56] This view

---

55) WTO, Services Sectoral Classification List, MTN.GNS/W/120, 10 July 1991, under the heading, 'F. Other Business Services'.

56) It may also be a question of whether such additional commitments would even need to be scheduled in the economic integration agreement, since what might be suggested by GATS Article XVIII as to regional members is that they are *able* to be scheduled. Regulatory

allows 'reading in' the 'affecting trade' standard of GATS Article XVIII into the scope of GATS Article V and thereby broadening it. The suggestion here, in contrast to the limited scope set out above, is that the advanced regulatory cooperation activities referred to may all be considered as 'additional commitments' where they affect trade in services and are liberalizing measures. GATS Article XVIII arguably broadens the possibilities for the GATS V exception.[57]

Can GATS Article XVIII capture investment commitments that are not related to service sectors for the purpose of GATS Article V? This assumes we have made that first connection for GATS application generally, and that the commitment affects trade in services. Then for the GATS Article XVIII gateway, it may be helpful to return to the distinction between 'liberalization' v. 'protection' investment agreements.[58] Since many (if not most) investor protection BITS do not provide for any significant market access commitments, there is little that investor protection provisions can attach themselves to in the way of a GATS V agreement. If an agreement is not liberalizing in mode 3, then it does not have the elements of an economic integration agreement in the first place.[59] The case of a liberalizing investment agreement in the form of an economic integration agreement, but also with accompanying investor protection provisions (affecting trade in services), may be on a different footing. Here, market access commitments for investment are scheduled, and their supportive protection provisions are within the same agreement. Overall, the Agreement is drafted to be notified as an economic integration agreement under GATS Article V. Since most would agree that these types of protection provisions affect the supply of the service, we should not discount their possible status as 'additional commitments'. One can also ask the threshold question posed by GATS V:1: are protection provisions instruments or commitments 'liberalizing trade in services'? That may be answered in the positive if one considers that mode 3 'commercial presence' is defined by GATS Article

---

cooperation activities tend to be set out in separate chapters and provisions within an economic integration agreement.

57) There is a counter-argument that Article XVIII does not play this role to the extent suggested here. That considers the link between 'substantial sectoral coverage' AND the 'elimination of discriminatory measures' requirement of set out in GATS Article V. As this is stated in the conjunctive, only liberalizing measures capable of being addressed by the additional national treatment requirement would be within the GATS V scope. While harmonization of qualifications can be eliminating discrimination, recognition for a foreign qualification is not a national treatment activity. Neither is a provision for advanced transparency.

58) As in note 36 above.

59) See for possible accord, S. Stephenson, *Regional Agreements on Services in Multilateral Disciplines: Interpreting and Applying GATS Article V*, in S. Stephenson, ed., *Services Trade in the Western Hemisphere, Liberalization, Integration, and Reform*, Brookings Institution and Organization of American States, 2000, pp. 86-104 at p. 92. '…does an integration agreement have to cover investment?' It seems that the answer would have to be 'yes'.

XXVIII as a business or establishment 'within the territory of a Member for the purpose for the purpose of supplying a service.' To the extent such an establishment is accorded rights of international standards of fair and equitable treatment, compensation for expropriation, *etc.*, this would suggest that these are commitments that have the effect of liberalizing trade in services to the extent they liberalize the foreign direct investment supplying the service.

A final aspect in considering the scope of GATS Article V's exceptional character, is located in the transparency notification provisions for such agreements under current WTO law. This could also provide insight into the scope of what should be examined for a notified agreement, and what would likely be of MFN concern for WTO Members. For this, the Transparency Instrument requires the members to provide 'the full text of the RTA (or those parts they have decided to apply) and any related schedules, annexes and protocols,'[60] This does not tell us very much about the positive aspects to be covered by an agreement. It does however tell us something about the status of liberalizing measures that may be in *other* agreements between the parties (their BITS), and how those provisions – affecting services as potentially liberalizing and preferential though they may be – are not a part of the economic integration agreement being notified and supplied to the WTO. If they are not an aspect of what is contained in an integration agreement, then the provisions of GATS V, including its grant of an exception from MFN, would not apply to them.

This all suggests a possible anomaly in the application of GATS V to 'protection' agreements as compared to 'liberalization' agreements which also have protection provisions. This is because the latter are structured for preferential market access and national treatment, and that is what GAT Article V intends to treat. That they carry investor protection provisions may not necessarily bring them under the scope of the GATS V MFN exception. But they certainly have a more arguable position for 'tagging along' with that possibility than with provisions within agreements that have no relation to service sector liberalization in the first place.

Whether this possibility is implicit in the FTA liberalization/protection approach noted for previous US and Canada agreements, and whether the EU is moving in this same direction, is not addressed here. However, in the context of the European Commission's communication 'Towards a Comprehensive European International Investment Policy', which is all about the inclusion of

---

60) Transparency Mechanism For Regional Trade Agreements, Draft Decision, TN/RL/18, 13 July 2006, para b(4). Annex 3(3) provides for additional data required for GATS V agreements as, trade or balance of payments statistics (by services sector/subsector and partner), gross domestic product data or production statistics (by services sector/subsector), and relevant statistics on foreign direct investment and on movement of natural persons (by country and, if possible, by services sector/subsector).

investor protection provisions in the Common Commercial Policy, the Commission makes this note,

> (A) further legal argument for incorporating investment commitments into trade agreements relates to the fact that trade agreements, when they comply with relevant WTO rules on economic integration are sheltered from the WTO obligation of most-favored nation treatment.[61]

This comment may only be about 'market access' commitments, but the context of the note is within a paragraph discussing the incorporation of investment protection provisions into EU external trade agreements.

III.2 Comparative analysis of the national treatment requirement

The national treatment requirement under the EU – South Korea FTA provides, in relevant part, that in sectors inscribed in the list of commitments, and subject to the conditions and qualifications set out therein, with respect to all measures affecting establishment, each Party shall accord to establishments and investors of the other Party treatment no less favorable than that which it accords to its own like establishments and investors. Like the GATS, which provided the model for the EU – South Korea FTA, national treatment commitments and market access commitments are closely related: trade liberalization is furthered through both market access and national treatment.[62]

Although the content of national treatment clauses varies between the different EU Member States' BITs with South Korea, the most comprehensive national treatment clauses found in EU Member States BITs cover the following:

a) investments and returns of investors of the other Contracting Party;
b) nationals or companies, in respect to the management, maintenance, use, enjoyment or disposal of their investments; and
c) compensation for damage or loss owed to war, armed conflict, national emergency, revolt, insurrection, riot or other similar events.[63]

The practice of international investment treaties allows for a distinction to be drawn between two defining moments of the investment process: the admission stage – which relates to the conditions of entry of the foreign investment in the host country; and the post-admission stage – which covers the

---

61) Communication from the Commission, COM (2010) 343 Final, Brussels 7.7.2010, p. 7, note 16.
62) Without a relevant market access commitment a national treatment binding may remain moot. See note 33 above.
63) See the Italy – South Korea BIT and the Czech Republic – South Korea BIT.

operation of the investment once it has entered the host country. Typically, commitments extending national treatment to the admission stage relate to the conditions of the entry and establishment of an investment, defined in terms of the constitution and acquisition of companies, and are coupled with market access commitments. On the other hand, national treatment commitments relating to the post-admission stage cover established investments and companies, whose entry in the host country may not *per se* be the object of a separate (market access) commitment and, where such commitments are made, is often 'according to' the legislation of the host country.

This distinction – which is not limited to national treatment but relates to other core disciplines of investment agreements (such as MFN treatment) – is relevant to the relationship between investment provisions in the EU – South Korea FTA and EU Member States' BITs with South Korea.

In particular, under the EU – South Korea FTA, the Parties undertook market access and national treatment commitments with respect to 'establishment', which is defined as the constitution, acquisition and maintenance of a juridical person (according to the thresholds specified above), or the creation or maintenance of a branch or representative office of an enterprise. Thus, as noted above, the Agreement covers the conditions of admission and establishment of investments, securing access to EU and South Korean establishments and investors through binding market access and national treatment commitments on the economic activities detailed in the list of commitments, and subject to the reservations indicated therein. In this respect, the framework of the EU – South Korea FTA does not depart substantially from that offered by the GATS through commercial presence, with the additional extension of the commitments to non-services sectors.

In contrast, EU Member States' BITs with South Korea seldom provide for an obligation to admit the other Party's investments, and often subject such ability to the 'laws and regulations' of each Party. In such treaties, national treatment may extend to cover, with varying degrees, the contents outlined above under letters a), b) and c). Although national treatment on investments (letter a) is difficult to confine to either stage of the investment, as it could, in theory, affect both admission and post-admission stages, it is clear that the focus of the national treatment obligation in EU Member States' BITs with South Korea is on the treatment of the investment after it has entered in either Party. The possible extension of national treatment to the admission stage may be located in the very definition of investment, which includes shares, stocks and any other form of participation in companies, and could arguably cover the acquisition of companies. However, where such a requirement is not coupled with an obligation to admit foreign investment without any further qualification (*i.e.*, without subjecting such admission to the legislation of the host country), the possible extension of national treatment to the admission stage appears

moot. In relation to letters b) and c), the national treatment coverage makes no mention of the constitution or acquisition of a company and clearly excludes the admission stage.[64]

Therefore, a first conclusion to be drawn from the comparison between the national treatment clauses in the EU – South Korea FTA and EU Member State BITs with South Korea is that, in relation to the admission stage of investments, the potential for overlap is limited to the extent that clauses envisaging national treatment for 'investments' may cover admission via the acquisition of shares, where such requirement is coupled with an obligation to admit foreign investment without any further qualification (*i.e.*, without subjecting such admission to the legislation of the host country). Where this is not the case – as it appears in the majority of the sampled BITs[65] – the disciplines arising from the EU – South Korea FTA and those of the EU Member States' BITs with South Korea should be viewed as complementary to each other, as they each have respective spheres of application. In fact, through the Agreement, EU Member States and South Korea exchanged binding commitments in respect to the entry and establishment of investments in the other Party, an area in which no commitments had so far been exchanged.[66]

The potential for overlap of national treatment obligations under the two frameworks may significantly expand in relation to the post-establishment stage of investments. In the EU – South Korea FTA, the national treatment obligation covers all measures affecting establishment in sectors where commitments have been undertaken. Establishment, as seen above, covers not only the constitution and acquisition of a juridical person, or the creation of a branch, but also the maintenance of any such juridical person or branch. 'Maintenance' implies the conservation (and protection) of an establishment, and is also expressly covered by certain BITs that provide for national treatment to nationals or companies, in respect of, *inter alia*, the maintenance of their investments.[67]

In addition, as it has already been argued in relation to the GATS,[68] the range of measures that are covered by the market access and national treatment

---

64) Argument *ex* Adlung and Molinuevo, *supra*, note 35 at p. 381-382.

65) Within the sampled BITs, only the Czech Republic – South Korea BIT provides for an unconditional obligation to admit South Korea's investments.

66) However, the actual coverage of investment liberalization achieved through the Agreement: a) is limited by the sectoral exclusions and carve-outs of the Agreement (see above, section II.2.2); b) applies inasmuch as the investment is made through establishment, according to the thresholds and definitions above; c) invests only the (economic) sectors for which specific commitments have been undertaken by the Parties in their list of commitments; and d) is subject to the limitations therein inscribed. In addition, single measures affecting establishment may be exempted due to the operation of the exception clause provided under the Agreement.

67) See the Italy – South Korea BIT and the Czech Republic – South Korea BIT.

68) Argument *ex* Adlung and Molinuevo, *supra*, note 35, p. 382.

commitments on establishment under the EU – South Korea FTA are capable of affecting either or both stages of investment. An example of market access limitations affecting the admission stage are foreign equity caps and joint venture requirements that may be scheduled, respectively, under Article 7.11 (d) and (e) of the Agreement. An example of market access limitations affecting the post-admission stage are the limitations that Parties may schedule on the total value of transactions or assets, and the limitations on the total number of operations or on the total quantity of output, that may be scheduled, respectively, under Article 7.11 (b) and (c) of the Agreement. National treatment limitations such as, *inter alia*, limitations on the purchase of real estate and certain restrictions on the operation of branches and representative offices, are likely to affect both stages of the investment process. Therefore, the reach of the national treatment obligation under the EU – South Korea FTA may certainly extend to the post-admission stage of investments. In this arena, and without prejudice to the carve-outs, sectoral exclusions and other limitations that apply under the EU – South Korea FTA, the national treatment obligation will cover both *de jure* and *de facto* discrimination.[69]

The emergence of concrete instances of overlap – and potential conflict – depends on the content of the national treatment requirement in EU Member States' BITs. This is usually broad, as it encompasses (at least) 'investment,' and may extend to the management, maintenance, use, enjoyment or disposal of each Party's investments, as well as compensation for losses (in fewer instances). It is not clear to what extent national treatment under the BITs may cover limitations scheduled in the EU – South Korea FTA (such as, for example, restrictions on real estate and nationality requirements).[70] Such an overlap would result in conflict; consider a case, for example, where a Party schedules a limitation under the Agreement that would affect the post establishment treatment guaranteed by a BIT between the same parties.

The overlap of national treatment provisions as they apply to post establishment activities in both the group of EU Member States' BITS and the FTA brings our attention to the institutional dispute settlement provisions of the different agreements, and the relationship between them. The EU – South Korea FTA defines the relationship between the Agreement and the dispute system of the WTO, making it clear that the identical claim cannot be brought

---

69) As seen above, in the EU – South Korea FTA the national treatment requirement for establishment is crafted on the basis of Article XVII of the GATS. Parties must accord to establishments and investors of the other Party treatment no less favourable than that they accord to their own like establishments and investors. Under the GATS, national treatment covers both *de jure* and *de facto* discriminatory treatment. It is reasonable to assume that Parties of the EU – South Korea FTA intended to confer to the national treatment requirement on establishment arising from the FTA the same breadth.

70) Argument *ex* Adlung and Molinuevo, *supra*, note 35, p. 382.

in both dispute settlement fora concurrently.[71] However, the agreement does not prescribe a similar relationship between it and other international treaties, including the existing BITS. Aside from dispute settlement provisions that may be found in any particular BIT, this leaves the parties to analyze the applicable national treatment obligation in light of the governmental measure being contested, in order to determine the appropriate forum and remedy. This apparently does not foreclose the possibility of moving in both fora at the same time. As we understand it, the identity of the subject matter of the claim in both fora can still be distinguished by the different parties making a claim and by the difference in the remedies being sought in each forum.[72] Thus, for a BIT which permits private investor action seeking a monetary compensation remedy, this action could proceed separately from a state to state action brought under the FTA, even where both actions are complaining of the same governmental measure as a violation of each agreement's respective national treatment obligation. This same concept likely applies to state to state actions considered under both agreements where, for the BIT, monetary compensation may be awarded and, for the Agreement, the cessation of the offending measure or a countermeasure of suspending trade agreement commitments for noncompliance may be sought.[73] Rather than presenting areas of conflict, the overall situation appears to provide for a system of multiple remedies.

IV. Conclusions

We have examined the EU's approach in including investment liberalization as part of an FTA through the expansion of activities under the notion of 'establishment'. This has been done with an eye toward the application of the WTO GATS provisions governing the formation of economic integration agreements and the relationship that results between the establishment provisions of the FTA and the existing EU Member State BITs with South Korea.

Examining the GATS Article V provisions for economic integration, we can see that there are limits to how extensive such an agreement can be and still find coverage under the regional exception provisions. This should not be so

---

71) As in a claim 'regarding the same measure'. See Section I above, referring to Article 14.19, EU - South Korea FTA.

72) As for example, 'Mexico does not take issue with the Panel's finding that 'neither the subject matter nor the respective positions of the parties are identical in the dispute under the NAFTA…', Appellate Body report, *Mexico – Tax Measures on Soft Drinks and Other Beverages*, WT/DS308/AB/R para 54.

73) Generally, Article 14.8 *et. seq.*, EU – South Korea FTA.

surprising. What is perhaps more surprising is that there are analytical possibilities in the 'affecting trade' standard whereby provisions not so directly related to GATS-like activities may find some claim on the value of the economic integration exception. This seems the stronger possibility for investor protection types of provisions that are located within an Article GATS V agreement. We doubt this is conceivable for pure investment commitments, but are not entirely discounting the possibility.

Our comparative analysis of the national treatment clauses reveals that, for the admission phase, the potential for overlap of the national treatment provisions appears to be limited to those instances in which the applicable BIT provides for unconditional market access. Among the sampled agreements, this seems the case of the Czech Republic BIT with South Korea. The overlap exists to the extent that clauses envisaging national treatment for 'investments' may cover admission via the acquisition of shares, where such a requirement is coupled with an obligation to admit foreign investment without any further qualification (*i.e.*, without subjecting such admission to the legislation of the host country).

Where this is not the case in regard to the admission phase – as it appears not to be in the majority of the sampled BITs,[74] the disciplines arising from the EU – South Korea FTA and those of the EU Member States' BITs with South Korea should be viewed as complementary to each other, given their operation in separate spheres. In fact, through the EU – Korea FTA, EU Member States and South Korea have exchanged binding commitments in respect of the entry and establishment of investments in the other Party, an area in which no establishment commitments had so far been exchanged.

Thus one turns to the potential for overlap of national treatment obligations under the two frameworks, and its significant expansion in relation to the post-establishment stage of investments. A determination of this overlap specifically depends on the content of the national treatment requirement in the EU Member States' BITs. This is usually broad, as it encompasses (at least) 'investment,' and may extend to the management, maintenance, use, enjoyment or disposal of each Party's investments, as well as compensation for losses (in fewer instances). Another factor in determining the potential overlap of the national treatment provisions is the extent to which the obligations under the BITs may cover limitations scheduled for national treatment in the EU – South Korea FTA. An example might be scheduled restrictions on real estate and nationality requirements. With this limitation in mind, such an overlap – and some potential inconsistency between the two frameworks – cannot be excluded.

---

[74] Within the sampled BITs, only the Czech Republic – South Korea BIT provides for an unconditional obligation to admit South Korea's investments.

While this paper has not focused directly on the potential inclusion of investor protection principles into an evolving EU – South Korea FTA, we see these developments will have implications for the scope of coverage under GATS Article V, as well as for the operation of the GATS national treatment provisions for scheduled sectors. This will be the subject of additional discussion as these elements emerge with more clarity over time.