

TRAINING COURSE ON TRADE IN SERVICES NEGOTIATIONS

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Session 7: The treatment of investment in services
trade liberalization

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Points to cover

- ✓ Definition of Mode 3
- ✓ Treatments in the GTAS
- ✓ Investment trends in Asia and the Pacific
- ✓ International Agreements
- ✓ ISDS

Mode 3

Commercial presence implies that a service supplier of one Member establishes a territorial presence, including through ownership or lease of premises, in another Member's territory to provide a service (e.g. domestic subsidiaries of foreign insurance companies or hotel chains).

Provisions in the GATS

National Treatment: A commitment to national treatment implies that the Member concerned does not operate discriminatory measures benefiting domestic services or service suppliers. The key requirement is not to modify, in law or in fact, the conditions of competition in favour of the Member's own service industry. Again, the extension of national treatment in any particular sector may be made subject to conditions and qualifications.

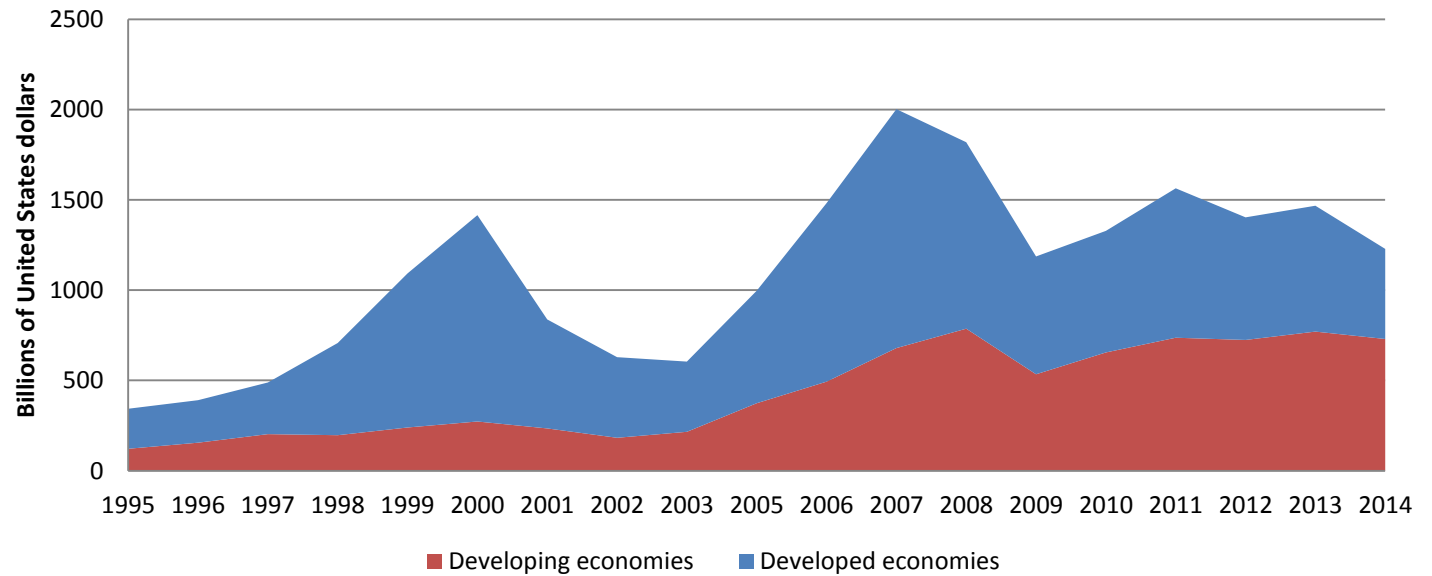
Members are free to tailor the *sector coverage* and substantive content of such commitments as they see fit. The commitments thus tend to reflect national policy objectives and constraints, overall and in individual sectors. While some Members have scheduled less than a handful of services, others have assumed market access and national treatment disciplines in over 120 out of a total of 160-odd services.

The existence of *specific commitments* triggers further obligations concerning, *inter alia*, the notification of new measures that have a significant impact on trade and the avoidance of restrictions on international payments and transfers.

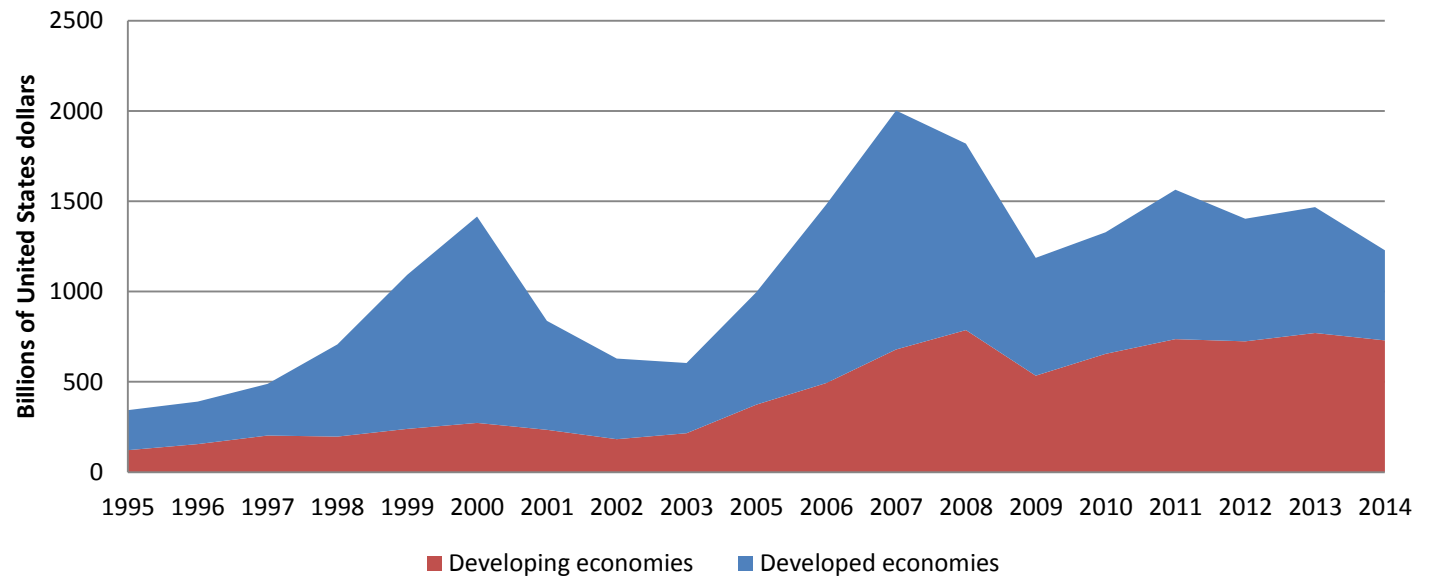
***Investment flows important for AP
Economies***

FDI Flows

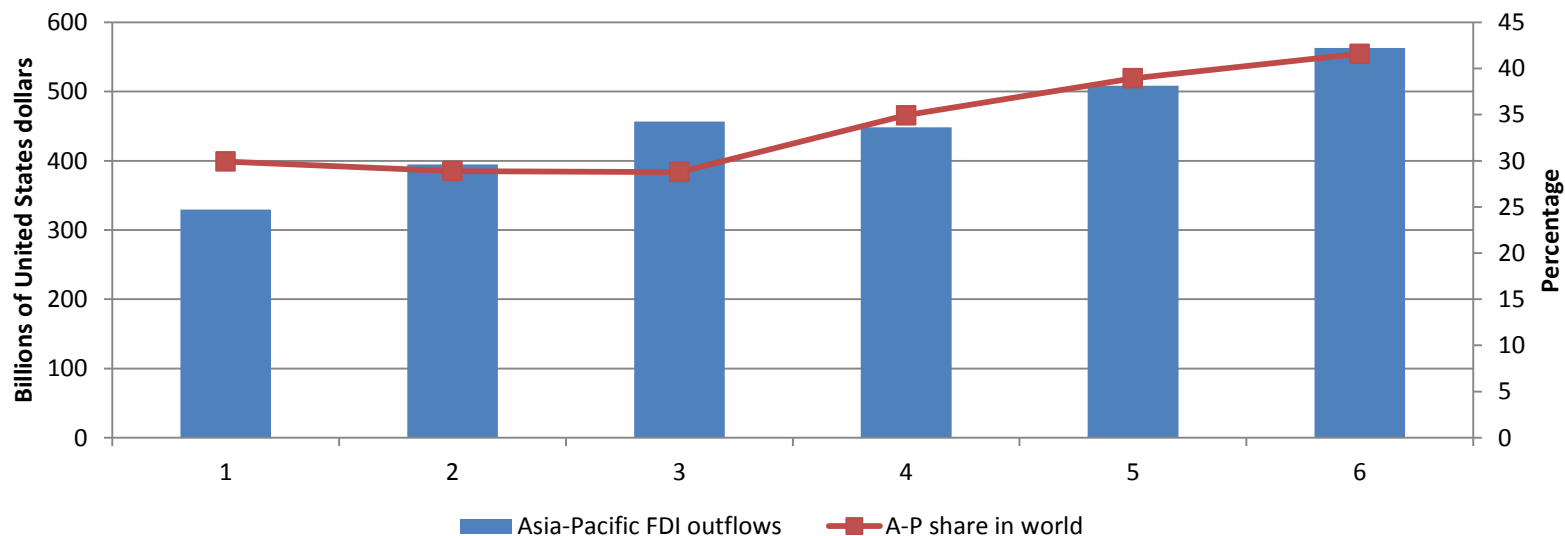
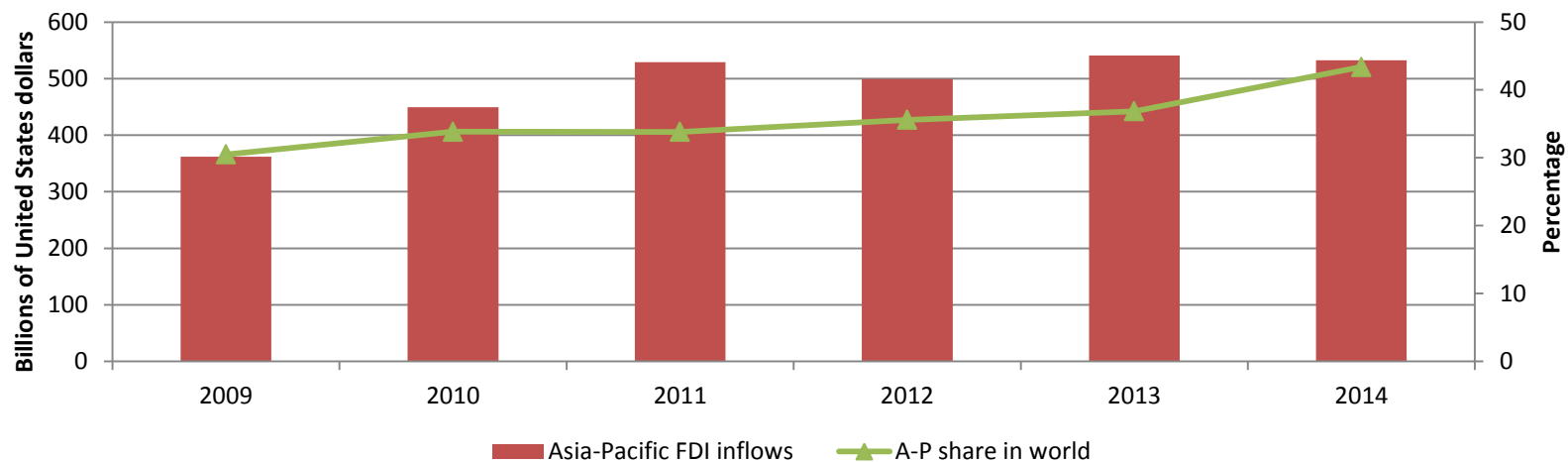
Outflows



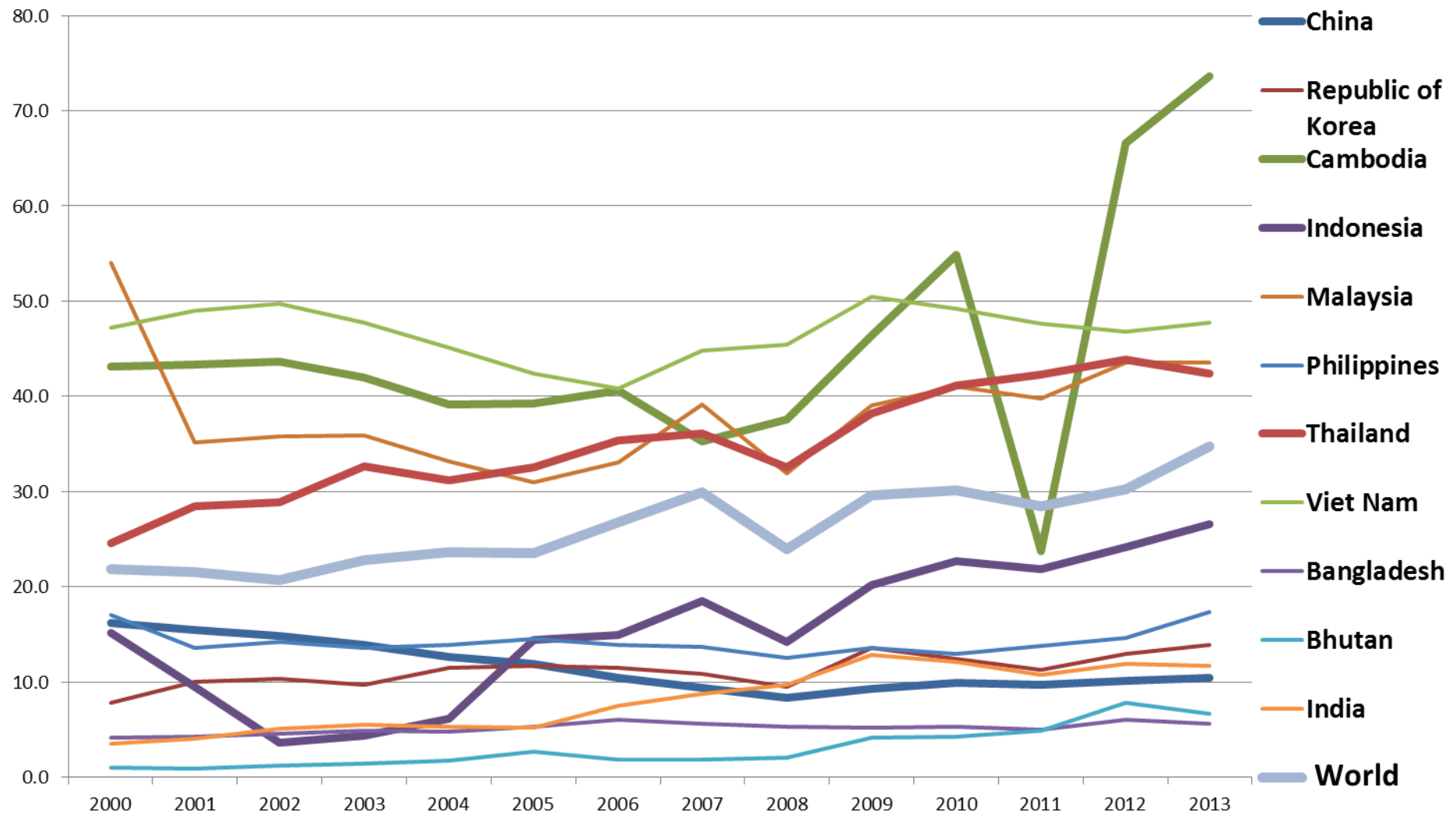
Inflows



FDI in Asia and the Pacific



Inward FDI as a % of GDP, selected economies



FDI as a means to expand capacity

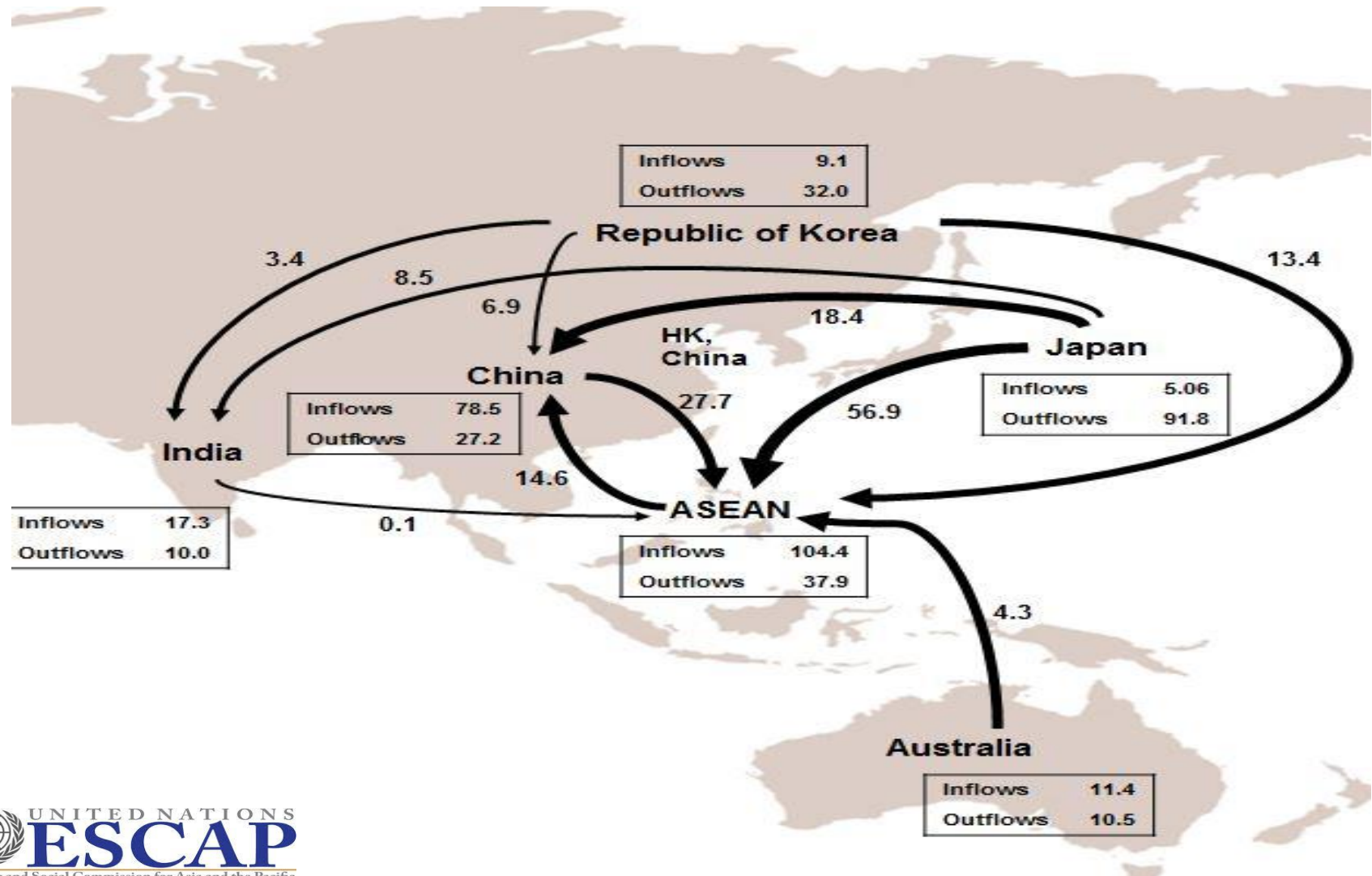
While global FDI flows have declined, the Asia-Pacific region continues to experience strong growth.

Much of this growth has come from within Asia itself.

Developing Asia's FDI outflows were 1.1 times the dollar value of North American outflows and 1.4 times that of Europe.

East Asia alone accounted for 43% of all Developing-economy FDI.

Intraregional greenfield FDI flows in the Asia-Pacific region, 2012-2014



Investment Agreements in AP

International Investment Agreements in Asia

- There are currently 837 International Investment Agreements, in various stages covering the whole of the Asian region, with 616 BITS currently in force (*UNCTAD 2015*).
- ASEAN countries are signatory to 352 BITS, 309 DTTs and 198 other IIAs.
- 26 BITS signed between ASEAN members, 16 of which have entered into force.

Distribution of ASEAN BITs

	Brunei Darussalam	Cambodia	Indonesia	Lao PDR	Malaysia	Myanmar	Philippines	Singapore	Thailand	Viet Nam
Brunei Darussalam										
Cambodia			signed (not in force)	signed (not in force)	signed (not in force)		signed (not in force)	in force	in force	signed (not in force)
Indonesia		signed (not in force)		in force	in force		signed (not in force)	terminated	in force	in force
Lao PDR		signed (not in force)	in force		signed (not in force)	signed (not in force)		in force	in force	in force
Malaysia		signed (not in force)	in force	signed (not in force)						in force
Myanmar				signed (not in force)			in force		in force	signed (not in force)
Philippines		signed (not in force)	signed (not in force)			in force			in force	in force
Singapore		in force	terminated	in force						in force
Thailand		in force	in force	in force		in force	in force			in force
Viet Nam		signed (not in force)	in force	in force	in force	signed (not in force)	in force	in force	in force	

ASEAN IIAs

Some outstanding IIAs in ASEAN:

1. ASEAN Comprehensive Investment Agreement (ACIA)
2. ASEAN-AUS-NZ FTA with an Investment Chapter (AANZFTA)
3. ASEAN-China Investment Agreement (ACHIA)
4. ASEAN-Korea Investment Agreement (AKIA)

Pending major regional agreements with investment provisions: RCEP (All ASEAN); TPP (Brunei, Singapore, Viet Nam).

These ASEAN IIAs could suggest a convergence towards a rule of law system while recognizing the limitations of their developing administrative processes (in particular).

Investment and Services in RTAs

The way investment and services are treated in RTAs can be seen to broadly follow two approaches: *NAFTA-inspired* and *GATS-inspired* agreements differ, therefore, in their coverage of investment in services. This leads to four major types of interaction between these chapters.

1. NAFTA-inspired with limited interaction between investment and services provisions.
2. GATS-inspired where no explicit interaction is stated
3. GATS-inspired where interaction is stated
4. GTAS-inspired where interaction is treated in services chapter

NAFTA-inspired agreements

1. Limited interaction

- Characterised by a clear separation between the Investment chapter and Cross-Border Trade in Services (CBTS) chapters;
- Designed to limit the interaction between the two chapters.
- The Investment chapter acts as the depositary of, or controls, all the investment provisions of both goods and services (except for financial services).
- The CBTS chapter, which is partly inspired by the GATS, is uniquely devoted to the liberalisation of services provided without a commercial presence.
- Both chapters use a negative list approach for lodging reservations to their respective obligations.

GATS-inspired where no explicit interaction is stated

- This approach solely relies on the rules of interpretation of international law to sort out the relationship between the investment and services provisions. T
- Mainly concerns separate agreements on investment and trade in services (e.g. ASEAN agreements and Andean Community Decisions).
- May also arise within individual agreements (e.g. Japan-Singapore or EFTA-Korea agreements).
- More recent agreements are abandoning this approach in favour of an explicit and more precise mode of interaction between the investment and services chapters.

GATS-inspired where interaction is stated

- While GATS-inspired agreements generally have separate chapters on investment and services, investment in services is typically covered by both chapters.
- Liberalisation of the supply of services, including through commercial presence is controlled by the Trade in Services chapter whereas the protection of investments in services, notably the clauses on expropriation, compensation for losses, investor state dispute resolution, is located in the chapter on Investment.
- These agreements also usually employ a positive list approach for specific commitments for Trade in Services.
- A majority of these agreements have adopted a second type of interaction between the investment and services chapters which is stated in the Investment chapter.
- The Trade in Services chapter comes first and contains the market access and non-discrimination obligations on commercial presence. The Investment chapter – which has a broader coverage based on an asset-based definition of investment – identifies the scope of its application and rules to deal with potential inconsistency between this chapter and the Trade in Services chapter(s).

GATS-inspired where interaction is treated in Services chapter

- Services chapter contains a “Service-Investment” linkage clause which determines which provisions from the Investment chapter listed therein would apply.
- This approach has been used in the India-Singapore CECA.
- The specific provisions borrowed from the Investment chapter concern compensation for losses, expropriation, repatriation, subrogation, measures in public interest, special formalities and information requirements, access to courts of justice, senior management, investment disputes, other obligations and performance requirements.
- This type of interaction seeks to minimize any possible conflict between the two chapters by listing the various liberalisation and protection obligations that would apply to investment in services.

GTAS-inspired vs NATFA-inspired scheduling liberalization Commitments in RTAs

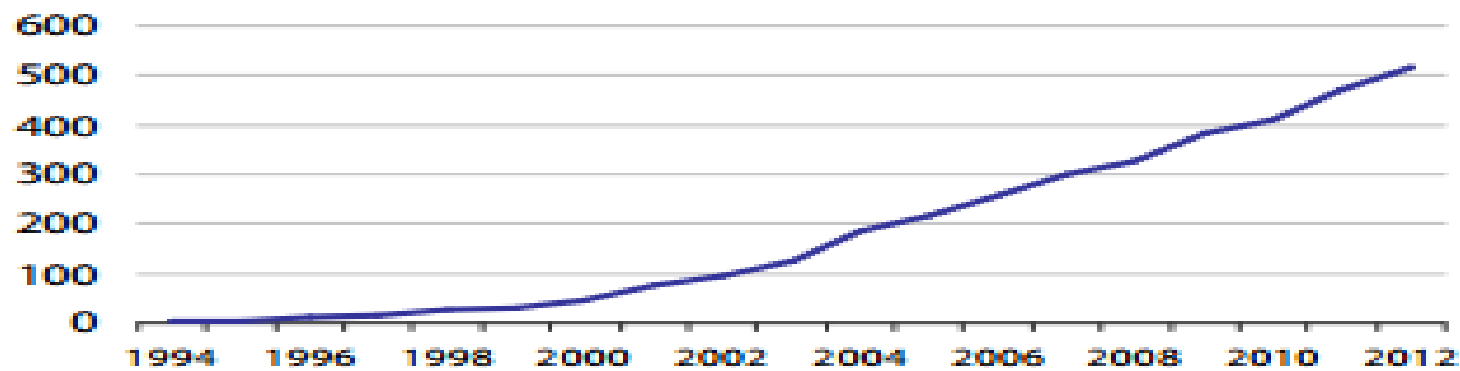
	NAFTA-inspired negative list approach	GATS-inspired “hybrid” approach with a positive list of sectors where commitments are made
Type of commitments or reservations listed	National treatment and MFN reservations are listed. ¹	Market access and national treatment commitments (covering also non-discriminatory quantitative restrictions). ²
Bound commitments?	Commitments are bound. Standstill and ratchet mechanism (any new liberalisation of non-conforming measures becomes a commitment in the agreement).	Commitments are bound. Standstill in sectors where commitments are made (subject to reservations listed).
Further liberalisation?	No further liberalisation foreseen. The agreement might include phasing out non-conforming measures (but already stipulated when the agreement is signed).	Further liberalisation foreseen in the agreement through a review of commitments (sometimes with a view to provide for the elimination of all remaining discrimination at the end of a certain period).
Transparency	The top-down approach offers a higher degree of transparency for investors as all sectors are covered by non-discriminatory disciplines and only listed limitations apply. This transparency is reduced when some of these reservations are not listed (<i>e.g.</i> , non-conforming measures at the sub-federal level).	No information is provided in the schedules of commitments on the liberalisation of investment in services sectors where no commitments are made. However, transparency is a general obligation of the agreement and information on the investment regime in all sectors should be made available.
Flexibility	Flexibility can be introduced through reservations on future measures but such reservations have to be taken when the agreement is signed.	Countries can take commitments in the sectors of their choice and limitations are listed only in committed sectors, leaving some flexibility on the degree of liberalisation offered in other sectors.
Predictability	The ratchet mechanism locks in any new liberalisation of a non-conforming measure. New services sectors are automatically covered by non-discriminatory disciplines.	Predictability is limited to the sectors where commitments are made.

Investor State Dispute Settlement

- Investor-State Dispute Settlement (ISDS) mechanisms are found in more than 3 000 international investment treaties, but have been increasingly criticised in recent years.
- International investment agreements, and the ISDS mechanism, were originally created to protect investors from arbitrary expropriation and ensure non-discriminatory treatment for foreign investments, in countries considered risky.
- In countries where the judiciary was not fully independent from government, arbitration was considered a more neutral framework to ensure enforcement of the host state's obligations towards investors.
- The progress made on comprehensive free trade agreements (FTAs) –including provisions for ISDS – has intensified discussion on the mechanism.
- The relatively broad interpretation given to provision in agreements has been raised concerns over states' freedom to regulate, creating an imbalance between the investor's right to protection and the host state' sovereign right to regulate its market.
- These concerns have led the European Commission, for example, to propose some innovative provisions in the framework of negotiations on EU trade and investment agreements, but without calling into question the ISDS system itself.

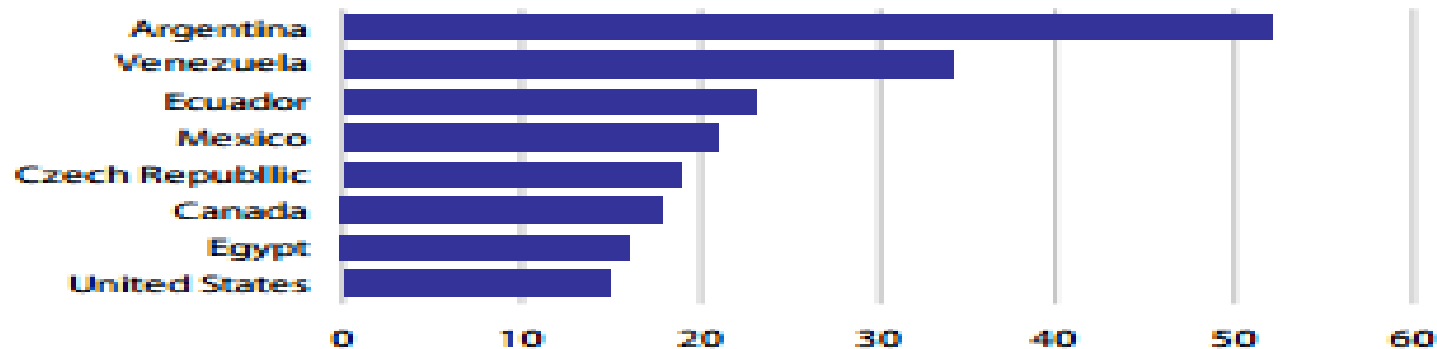
ISDS Cases

Figure 1 – Known ISDS cases (cumulative)



Data source: UNCTAD, 2013.

Figure 2 – Most frequent respondents in ISDS cases (total as of end of 2012)



Data source: UNCTAD, 2013.

Thank you for your attention

Questions?