

Chapter 2

SERVICES

(1) Background of the Rules

The purpose of the disciplines regarding trade in services under FTAs/EPAs is, as under the General Agreement on Trade in Services (GATS), to enhance trade liberalization by eliminating barriers to trade in services and increasing the transparency of governmental measures affecting trade in services in the contracting parties' countries. In that sense, all FTAs/EPAs share a similar framework. However, provisions on specific matters have been gradually developed and advanced, and on some matters, the text of the relevant provisions greatly varies from FTA/EPA to FTA/EPA. This variation reflects certain distinctions between the contracting party countries, such as their policies on liberalization in service areas, negotiation history regarding the relevant FTA/EPA (for example, issues in respect of multilateral negotiations or political situations of the negotiating countries), etc.

Unlike trade in goods, with respect to which negotiations concern the maximum tariff rate stated in the relevant schedule of concessions, the liberalization commitment approaches, including those with respect to the liberalization of trade in services in individual sectors, deal with domestic regulations in such individual sectors, and with respect to which it is difficult to indicate the effect of trade restrictions in numerical values. These liberalization commitment approaches can be generally classified into the following two categories: (i) the "negative list approach" (also referred to as either the NAFTA approach or the top-down approach), under which commitments toward a general liberalization obligation are made and those measures and sectors which are exempted from that obligation are explicitly indicated; and (ii) the "positive list approach" (also referred to as either the GATS approach or the bottom-up approach), under which the subject sectors of liberalization and the conditions and restrictions of liberalization are specifically and explicitly indicated. The basic structure and text of provisions in each agreement on trade in services largely depends on whether such agreement adopts the negative list approach or the positive list approach.

The FTA/EPA framework in respect of major disciplines is analyzed below.

(2) Overview of Legal Disciplines

1) Four modes

As under GATS, provisions regarding trade in services under FTAs/EPAs cover the following four modes of supply: cross-border supply ("Mode 1"), consumption abroad ("Mode 2"), commercial presence ("Mode 3") and presence of natural persons ("Mode 4"). In the case of a NAFTA style negative list, Mode 3 (i.e. supply of services through commercial presence) is generally dealt with in the chapter on investments of the relevant FTA/EPA.

2) Definition of Service Supplier

FTAs/EPAs normally provide for definitions of basic terms in order to clarify the coverage of such basic terms. One such basic term is "service supplier." Entities which are eligible to be a service supplier include both natural persons and juridical persons. In addition, FTAs/EPAs usually provide for definitions of a "juridical person of the other party," and under such definitions, such persons are

entitled to the benefit of the agreements through, *inter alia*, a liberalization commitment in respect of trade in services. A “juridical person of the other party” is usually defined as (i) with regard to Mode 1 and Mode 2, a juridical person established within the territory of the other contracting party, and (ii) with regard to Mode 3, a juridical person that is established within the territory of the other contracting party country, or owned or controlled by (a) a natural person in the other contracting party country or (b) another juridical person established within the territory of the other contracting party country. Some FTAs/EPAs require as a criteria for such definition engagement by the “juridical person of the other party” in substantial activity in the territory of the other contracting country, while the others not. FTAs/EPAs normally define “ownership” and “control” as follows:

a juridical person is deemed to be “owned” by persons if more than fifty percent (50%) of the equity interest in it is owned by such persons. Under GATS, the term “owned” is construed to mean direct ownership. Under the aforesaid definition of a “juridical person of the other party” for Mode 3 such person could mean a juridical person (a “subsidiary”) established within the territory of one contracting party country and directly owned by another juridical person (a “parent company”) established within the territory of the other contracting party country, but would not include a sub • -subsidiary (a company that is indirectly owned by a parent company through subsidiary established within the territory of the other contracting party). In contrast, the chapter on investments in the relevant FTA/EPA normally define “investment” (which is the subject of protection granted pursuant to that chapter), as an asset of an investor in one contracting party, and such includes any “enterprise” owned, whether directly or indirectly, by such an investor or investors.

Under the chapter on services in the relevant FTA/EPA, a juridical person is “controlled” by persons if such persons have the power to name a majority of its directors or otherwise to legally direct the actions of the juridical person.

3) Most-Favored-Nation (“MFN”) Treatment

Under Article II of GATS, WTO member countries are to mutually accord to each other MFN treatment (described below). However, under paragraph 1 of Article V of GATS, the preferential treatment accorded under any FTA/EPA entered into between certain member countries of GATS may be exempted from MFN treatment in relation to the WTO member countries which are other than contracting party countries to such FTA/EPA, provided that certain requirements (such as substantial sectoral coverage) are satisfied.

The MFN treatment provided in FTAs/EPAs is required to be treatment no less favorable than the most favorable preferential treatment accorded to a non-party country by one contracting party country. NAFTA and the U.S.A.-Singapore FTA are examples of such FTAs/EPAs providing for MFN treatment as a general obligation.

Certain agreements include review provisions aimed at effectively according MFN treatment while not specifically providing for the MFN treatment. Such provisions are peculiar to FTAs/EPAs. That is to say, pursuant to a review provision, if country B newly enters into a B-C FTA/EPA with country C and if such new B-C FTA/EPA accords a more favorable treatment to country C (which is a non-party country from country A’s perspective), then the A-B FTA/EPA, which contains a review provision, may obligate the contracting party country B to consider whether it should revise such A-B FTA/EPA in order to accord to country A treatment no less favorable than that provided to country C under the new B-C FTA/EPA. The India-Singapore FTA is an example of an FTA/EPA providing an MFN provision of this type.

4) Market Access

As under GATS, FTAs/EPAs provide market access provisions, primarily in order to liberalize restrictive measures imposed on market entries due to economic factors. Following the GATS approach, most such agreements are structured in the positive list format described above. However, NAFTA, which is a negative list format agreement (which entered into force before GATS), also contains disciplines on “quantitative restrictions” on trade in services.

5) National Treatment

As under GATS, national treatment under FTAs/EPAs is a concept whereby the treatment accorded by a contracting party to the services and the service suppliers of the other contracting party country shall be no less favorable than the treatment accorded to its own like services and service suppliers.

Under the positive list approach, the sectors in respect of which national treatment obligations are committed and the conditions and restrictions therefor are inscribed in the “Schedule of Commitments” of the relevant FTA/EPA. On the other hand, under the negative list approach, both the sectors for which national treatment obligations are not committed and the measures which are exempted from such commitments i.e. conditions and restrictions in respect of the remaining sectors are inscribed in the “Schedule of Reservations” of the relevant FTA/EPA. Under either approach, the scope of commitments or reservations, as the case may be, is to be explicitly specified in order to enhance transparency and promote liberalization of trade in services.

6) Additional Commitments

As under GATS, commitments which go beyond market access and national treatment obligations may be inscribed in the “Schedule of Commitments” of the relevant FTA/EPA. Some FTAs/EPAs adopting the positive list approach provide examples of additional commitments (such as disciplines promoting competition in the telecommunications sector and additional commitments in respect of domestic regulations in the financial sector) with a view to incorporating the outcome of the GATS negotiation. No example of additional commitments is found in FTAs which adopt the negative list approach.

7) Standstill Obligation

Under NAFTA, which adopts the negative list approach, if the contracting party country makes reservations on any obligation under the agreement (such as with respect to the national treatment obligation, the MFN treatment obligation with regard to existing measures in certain sectors etc.), it owes an obligation to maintain the *status quo* in respect of such reservations as of the entry into force of the agreement (that is, it owes an obligation not to adopt any measure which is more restrictive than existing measures). This is referred to as a “standstill obligation.” A contracting party country may make a reservation not only on existing measures, but also on the relevant service sector, where the country does not owe any such standstill obligation with respect to existing measures, and thus may adopt any measures and maintain existing measures to an extent not inconsistent with any generally applicable obligation (such as the national treatment obligation).

In cases where standstill obligations are provided in an FTA/EPA which adopts the positive list approach (for example, under paragraph 3 of Article 75 of the Japan-Philippines EPA, and with respect to the sectors marked as “SS” (the abbreviation of “short for standstill”) in the Schedule of Commitments attached thereto (such sectors are referred to as the “SS sectors”)), the conditions and restrictions therefor may be inscribed therein only in relation to existing measures which do not conform to either market access obligations or national treatment obligations. Without regard to whether or not the relevant sector is marked “SS”, any commitment inscribed in the Schedule of Commitments for a certain sector is binding. Further, the contracting party countries would be

obligated to maintain the *status quo* of existing measures as of the entry into force of the agreement in connection with the SS sectors. The Japan-Philippines EPA is the first agreement that adopted this approach with respect to services.

8) Authorizations, Licenses and Qualifications

With a view to ensuring that measures relating to qualification requirements and procedures, technical standards and licensing requirements do not create unnecessary barriers to trade in services, most FTAs/EPAs obligate contracting party countries to establish objective and transparent criteria: (i) so as to ensure that any such requirements, procedures and standards are not more burdensome than necessary to ensure the quality of the service, and (ii) so as to ensure that licensing procedures are not in and of themselves a restriction on the supply of the services. In addition, some FTAs/EPAs (for example, the U.S.A.-Singapore FTA, the U.S.A.-Australia FTA, and the India-Singapore FTA) explicitly provide that the parties thereto shall review the relevant disciplines in response to the progress, if any, in working programs concerning qualification requirements and procedures, technical standards and licensing requirements contemplated by paragraph 4 of Article VI of GATS.

9) Mutual Recognition

Mutual recognition provisions effectively provide that contracting party country may recognize authorizations, licenses or certifications to service suppliers of the other party country, depending on the education, experience, etc. which such service suppliers have obtained in such other contracting party country. A similar provision is provided for in Article VII of GATS.

Many FTAs/EPAs contain such provisions on mutual recognition. Some agreements go a step further and explicitly provide that the contracting parties negotiate on the framework of mutual recognition by professional associations, and some even require such negotiation to be completed by specific deadlines and/or in respect of certain sectors (see, for example, the India-Singapore FTA). Furthermore, some FTAs/EPAs effectively provide that, where an A-B FTA/EPA exists and contracting party country A and a non-party country C have entered into an agreement containing a framework for mutual recognition, contracting party country A shall provide contracting party country B the opportunity to participate in the mutual recognition framework between countries A and C (see, for example, the EFTA-Singapore FTA and the U.S.A.-Singapore FTA).

10) Transparency

As under GATS, in order to ensure transparency, contracting party countries have obligations to (or obligations to make efforts to) promptly publish domestic measures in connection with the disciplines regarding services, establishment of enquiry points, etc. In addition, some agreements effectively provide that a contracting country party may change any existing measure, or introduce any new measure, but only after the expiration of a certain period of time after publishing a draft of such measure, and that it shall receive comments from the other contracting party country during such period. Some agreements even effectively provide that the parties thereto should adopt such comments to the greatest extent possible.

11) Safeguards

While most FTAs/EPAs lack specific provisions on safeguard measures for service sectors (as there has been little progress in respect of negotiation on safeguards contemplated in Article X of GATS), some FTAs/EPAs do contain provisions in this regard. These agreements effectively provide, *inter alia*, that (i) the contracting party countries shall refrain from taking safeguard measures against the other contracting party; (ii) shall not initiate investigations therefor (see, for example, the Australia-Singapore FTA, and the India-Singapore FTA); and/or (iii) the parties thereto shall review the issue of safeguard measures in the context of developments in multilateral negotiations (see, for example, the India-Singapore FTA).

12) Denial of Benefits

Denial of benefit provisions under FTAs/EPAs effectively provide that a contracting party country may, under certain conditions, deny the benefits provided to service suppliers of the other party (i.e. resulting in better market access opportunities). A contracting party country may deny such benefit to a service supplier of the other contracting party country, for example, if such service supplier is a juridical person that is owned or controlled by a juridical person in the territory of a non-contracting country and is not engaging in substantial activities in the contracting party country's jurisdiction. Whether benefits will actually be denied is left to the discretion of the contracting party country.

Under GATS, member countries may deny benefits of services, to non-member countries, maritime transport services provided by vessels of a non-member country, etc. (Article XXVII).

13) Payments and Transfers

As under GATS, while restrictions on payments and transfers for current transactions relating to trade in services are generally prohibited, restrictions on payments and transfers for the purpose of protecting the balance of international payments are permitted under FTAs/EPAs.

Some FTAs/EPAs limit the coverage of this prohibition to the sectors committed by the contracting party country in the Schedule of Commitments, as under GATS, while others apply this prohibition to all sectors as a general obligation.

14) Exceptions

Most EPAs/FTAs contain provisions equivalent to those of Articles IV and IV*bis* of GATS, and exempt (as general exceptions) measures to protect public morals, to maintain public order, health and safety, and measures in respect of national security interests.

15) Review of Commitments (Review Provisions)

While GATS provides that Members shall enter into successive rounds of negotiations for progressive liberalization (Article XIX), many FTAs/EPAs provide that reviews of commitments shall be made several years after the entry into force of the agreement for the purpose of further liberalization of trade in services.

FTAs/EPAs include a variety of provisions in this regard. Some agreements follow the GATS model, and advocate efforts toward progressive liberalization (see, for example, the India-Singapore FTA), some do not contain any special provisions in this respect (see, for example, the U.S.A.-Singapore FTA, and the U.S.A.-Australia FTA), some provide for biannual review of the agreement (see, for example, the EFTA-Singapore FTA), etc.

(3) Summary of Japan's EPAs

1) Major Provisions

• Market Access

The Japan-Singapore EPA, Japan-Malaysia EPA and Japan-Philippines EPA adopt the GATS-type positive list approach, and the market access provisions in these three agreements follow those of the GATS model.

The Japan-Mexico EPA adopts the NAFTA-type negative list approach and contains no obligatory provisions in respect of market access (NAFTA contains disciplines over quantitative restrictions on trade in services (Article 1207), but does not use the concept of market access in connection with trade in services).

- National Treatment

The provisions on national treatment under the Japan-Philippines EPA are the same as those of GATS, and those of the Japan-Mexico EPA also follow GATS for the most part. The Japan-Singapore EPA and Japan-Malaysia EPA also have provisions regarding national treatment obligations which are modeled on GATS, but provide that the foregoing provisions may not be invoked “under Chapter 21” with respect to any measure that falls within the scope of a tax treaty relating to the avoidance of double taxation. This is based on the premise that dispute resolution regarding measures covered by a bilateral tax treaty shall be conducted pursuant to such tax treaty.

- Transparency

Both the Japan-Singapore EPA and Japan-Malaysia EPA provide in the chapter therein on general provisions that those measures which pertain to or affect the operation of the agreement be published, at least within the country, and that each contracting party country is obligated to respond to questions posed by the other country with respect to such measures. In addition, the chapter on trade in services in the Japan-Malaysia EPA requires that information regarding restrictive measures affecting, *inter alia*, market access, national treatment obligations and provision on white papers, in respect of trade in services be provided.

The Japan-Philippines EPA provides for the preparation, delivery to the counterparty country and publication of a list of existing measures not conforming to the market access and national treatment obligations (“transparency list”), regardless of whether a specific commitment covers the relevant sector. Simply put, a transparency list is prepared solely for the purpose of increasing the transparency of restrictions, and greatly contributes to the enhancement of transparency with respect to the chapter on trade in services as a whole. Measures to be covered by a transparency list include (in addition to measures included at the national level), measures of local governments (at the prefectural level in Japan and at the state level in the Philippines). Moreover, in addition to the provisions in the chapters on general provisions in the foregoing Japan-Singapore EPA and Japan-Malaysia EPA, the Japan-Philippines EPA effectively provides that a contracting party country must respond to and provide information in response to questions by a service supplier of the counterparty country through its contact point. This is significant because, unlike with respect to what information is to be provided under general provisions, such information is to be provided to the service supplier and not the government of the contracting country.

As commitments under the Japan-Mexico EPA are determined using the negative list approach, it is clearly understandable from the structure of the agreement which sectors contain a measure not conforming to certain obligations (for example, the national treatment obligation), and, if any measures not conforming to such obligations exist, the nature of such measure or measures, as the case may be. This ensures a high level of transparency. In addition, it effectively provides that if a new measure which affects the implementation or the operation of the agreement is to be introduced to a sector on the transparency list, notification shall be made to the counterparty country, to the greatest extent possible, thereby contributing to the enhancement of transparency of regulatory measures.

- Standstill Obligations

The Japan-Mexico EPA, which adopts the NAFTA-type negative list approach, provides that the following measures are to be covered by standstill obligations:

- (i) Existing measures not conforming to certain obligations (for example, national treatment) maintained by the federal or central government and inscribed in the Schedule of Reservations (Annex 6: list of sectors reserved under the existing measures).
- (ii) Existing measures not conforming to obligations (for example, national treatment) maintained by the local government at the prefectural level as measures of the Japanese local government and inscribed in the Schedule of Reservations (Annex 6: list of sectors reserved under the existing measures), and existing measures not conforming to obligations (for example, national treatment) maintained by the local government other than at the prefectural level (municipalities such as cities and villages).
- (iii) Existing measures not conforming to obligations (for example, national treatment) maintained by the state government as measures of the Mexican local government and inscribed in the Schedule of Reservations (Annex 6: list of sectors reserved under the existing measures), and existing measures not conforming to obligations (for example, national treatment) maintained by the local government (local government of the state).

In the case of the positive list approach, sectors subject to standstill obligations are those marked SS in the Schedule of Commitments. Although the terms of such standstill obligations are provided in both the Japan-Philippines EPA and the Japan-Malaysia EPA (as stated in Paragraph (2) 7) hereof), such terms limit those specific commitments of such sectors marked SS to conditions and restrictions under the existing measures not conforming to national treatment, etc..

- MFN Treatment

With respect to EPAs entered into by Japan, the Japan-Mexico EPA and Japan-Philippines EPA effectively provide that the contracting parties' countries shall mutually accord to each other general MFN treatment, and shall separately enumerate in the annex (MFN Schedule of Reservations) as exceptions those sectors in respect of which MFN treatment is not accorded.

The Japan-Singapore EPA, on the other hand, does not automatically accord to each party MFN treatment. However, under such EPA, where one contracting country (assume, for example, Singapore) accords preferential treatment to a non-contracting party country (assume, for example, the United States), the other contracting country (for example, Japan) may request the first contracting country allow it to participate in such preferential treatment on an equal basis, and such first contracting country i.e. Singapore must consider whether to so permit.

Although the Japan-Malaysia EPA provides for MFN treatment as a general obligation, Malaysia made reservations with respect to all sectors in the annex, and excepted those sectors that would not be accorded MFN treatment (MFN Schedule of Reservations). Malaysia consequently accords MFN treatment only in some sectors (such as rental and leasing services, etc.) as exceptions to the exceptions in the MFN Schedule of Reservations (i.e. "all sectors except:").

- Denial of Benefits

Under the Japan-Singapore EPA, in addition to those services in respect of which benefit is denied under GATS (i.e. services from non-member countries, maritime transport services by vessels of a non-member nationality, etc., as described above), benefit under the EPA is denied to (i) a juridical person which is controlled or owned by a party of a non-party country, established in the territory of the other contracting country and not engaged in a substantial activity in the territory of either contracting country, and (ii) a juridical person established in the territory of one of contracting countries by a service supplier of a non-party country and which does not engage in a substantial activity in such contracting party countries.

The Japan-Mexico EPA and the Japan-Philippines EPA, for the most part, adopt the text of the provisions of NAFTA. They provide that a service supplier of the other contracting party country will be denied benefits if it is a (i) juridical person that is owned or controlled by persons of a non-contracting party country with which Japan does not maintain diplomatic relations, or by persons of a non-contracting party country upon whom Japan is imposing economic sanctions, and (ii) juridical person that is owned or controlled by persons of a non-contracting party country and that has no substantial activities in the territory of that other contracting party country.

The Japan-Malaysia EPA effectively provides that only with respect to clause (i) discussed in the foregoing paragraph addressing the Japan-Mexico EPA and the Japan-Philippines EPA will benefits be denied. It does not provide the same in respect of clause (ii) of the foregoing paragraph because, in its definition of a “juridical person of the other Party,” the Japan-Malaysia EPA exempts from application of the agreement a juridical person which does not engage in substantive activity in the territory of the other contracting party.

• Payments and Transfers

The Japan-Singapore EPA extends GATS disciplines only to committed sectors. The Japan-Philippines EPA and the Japan-Malaysia EPA, however, extend GATS disciplines to all sectors pertaining to trade in services as general obligations and do not limit such disciplines to committed sectors. The Japan-Mexico EPA effectively provides that no restrictive measures on payments and transfers shall be applied to cross-border trade in services in the chapter therein on exceptions (which enumerates those that are beyond the scope of the entire agreement).

| | GATS | Japan-Singapore EPA | Japan-Mexico EPA | Japan-Malaysia EPA | Japan-Philippines EPA |
|---|---|---|--|---|---|
| Places of Provisions concerning Services | | Provides a chapter on trade in services | Covered by each chapter on Investment, Cross-Border Trade in Services and Financial Services | Provides a chapter on trade in services | Provides a chapter on trade in services |
| Format of Annexes Cited in Chapters on Investment and Services (Schedules of Commitments, and Schedule of Reservations) | | Separate | Common | Separate | Separate |
| Approach to Annexes (Schedules of Commitments, and Schedule of Reservations) | Positive list approach | Positive list approach | Negative list approach | Positive list approach | Positive list approach |
| Possibility of Modification of Commitments | Provided | Not Provided | Not Provided | Provided | Not Provided |
| Market Access Commitments | Yes, to the extent permitted in the Schedule of Commitments | Yes, to the extent permitted in the Schedule of Commitments | Not covered as an obligation | Yes, to the extent permitted in the Schedule of Commitments | Yes, to the extent permitted in the Schedule of Commitments |
| National Treatment Commitments | Yes, to the extent permitted in the Schedule of Commitments | Yes, to the extent permitted in the Schedule of Commitments | Yes, excluding the reserved sectors | Yes, to the extent permitted in the Schedule of Commitments | Yes, to the extent permitted in the Schedule of Commitments |
| Transparency / Notification Requirements | Not fully obligated | Not fully obligated - Provided in general provisions | Fully obligated | Not fully obligated | Fully obligated |
| Standstill (SS) | No provision on SS obligations in the agreement | No provision on SS obligations in the agreement | Fully obligated | None- No sector is subject to an SS commitment in the Schedule of Commitments | Fully obligated |
| Disciplines over Domestic Regulations | Fully obligated | Fully obligated | Fully obligated | Fully obligated | Fully obligated |
| Most-Favored-Nation Treatment | Fully obligated | Not fully obligated- Extends consideration | Fully obligated | Not fully obligated- de facto extension of consideration | Fully obligated |
| Denial of Benefits | Yes | Yes | Yes | Yes | Yes |
| Payments and Transfers, Balance of Payments | Not fully obligated | Not fully obligated | Fully obligated - Provided in the chapter on "Exceptions" | Fully obligated | Fully obligated |

2) Salient Features of Liberalization Commitments of the Counterparty Country

• Japan-Singapore EPA

The domestic laws and regulations of Singapore set forth few restrictions on market entry with respect to foreign equity participation. The Japan-Singapore EPA contains no horizontal limitation with respect to market entry into Singapore by Japanese enterprises in all or a wide range of industries (or sectors). In addition, with respect to individual sectors, commitments were made regarding 139 sectors (an increase of 76 sectors compared to the commitments under GATS). Moreover, many of the commitments regarding such sectors do not contain any market entry limitation with respect to foreign equity participation, and the level of liberalization is generally high. Specific sectors for which commitments with a level of liberalization higher than that of GATS are as follows:

- No limitation on market entry (allows 100% Japanese capital)

Rental/leasing services, placement and supply services of personnel, packaging services, distribution services, environmental services and shipping agency services

- Major sectors in respect of which commitments are made with certain conditions on market entry

Financial services (insurance, banking): alleviation of foreign equity participation restrictions, alleviation of aggregate loan restrictions, liberalization of new services, etc.

Maritime transport services, and international transport (freight and passengers) liberalization of sectors other than those pertaining to registration of Singapore-flag ships

• Japan-Mexico EPA

The chapter on services in the Japan-Mexico EPA adopts, as does NAFTA, the negative list approach. Under such approach, only specifically enumerated sectors in respect of which reservations (for example, reservations regarding national treatment) are made are eligible for complete liberalization. Under this approach, sectors can be divided into those in respect of which reservations are made in relation to existing laws and regulations (with obligations to maintain the *status quo* of such laws and regulations) and sectors in respect of which reservations are made, but not in relation to existing laws and regulations (and thus, without obligations to maintain the *status quo* of laws and regulations).

- (i) Sectors in respect of which reservations are made in relation to the existing laws and regulations (including investment in the service sector)

Communications (telecommunications services and public networks, etc.), education, construction (petroleum related), educational services (private schools), retail trade (sale of non-food products in specialized establishments), air transport, specialty air services, land transportation, railway transport, water transport, etc.

- (ii) Sectors in respect of which reservations are made but not in relation to the existing laws and regulations (including investment in the service sector)

Entertainment services (broadcasting, recreational and leisure services), postal services and telecommunications, telecommunications services and networks (and related maritime telecommunications services), professional services (law firms), etc.

In addition, the chapter on services in the Japan-Mexico EPA provides for the accordance to each contracting party of MFN treatment in principle, and accordingly, Japan enjoys the benefit of

preferential treatment granted by Mexico under NAFTA or any other FTA/EPA, to any third party country thereunder to the Japan-Mexico EPA (except in respect of some sectors in respect of which Mexico made reservations on MFN treatment (i.e. telecommunications, water transport, etc.)).

Although Mexico made a reservation of 49% foreign equity participation regarding Mode 3 on the rental/leasing, repair and maintenance, audio visual services, etc., under GATS, such sectors are excluded from the negative list in the commitments under the Japan-Mexico EPA, and Japanese enterprises are not subject to such foreign equity participation restrictions.

- Japan-Philippines EPA

The Philippines made commitments for more sectors (approximately 100 sectors) than under GATS (approximately 30 sectors). Among those sectors, it made standstill commitments (i.e., commitments on the basis of existing laws and regulations) which require the maintenance of the *status quo* of laws and regulations for 65 sectors pursuant to Japan's request.

Thus, with respect to the conditions for entering the Philippine market for these approximately 100 sectors, there is no discrepancy between, on the one hand, conditions for entering the market for these sectors and, on the other hand, the domestic laws and regulations, which were not fully assured under GATS. This ensures transparency and stability of the Philippines' domestic laws and regulations under which Japanese enterprises conduct business operations in the Philippines.

In addition, as the Japan-Philippines EPA provides for the accordance to each contracting country of MFN treatment in principle, Japan is unconditionally and automatically entitled to the preferential treatment accorded to a non-party country under NAFTA or any other FTA/EPA (except in respect of some sectors in respect of which the Philippines made reservations on MFN treatment (i.e. commercial banking, financing companies, etc.)).

Major sectors in respect of which standstill commitments for specific sectors are made (limited to commitments of sectors with a level of liberalization higher than that of GATS) are as follows:

- Computer and related services (consultancy services related to the installation of computer hardware, software implementation services, data processing services), distribution services, and motion picture or video tape production services (1 only animated cartoons)

Substance of commitments:

An enterprise in any of such sectors which satisfies the following may be funded by 100% Japanese equity participation:

- (i) Paid-in equity capital of 200,000 dollars or more.
- (ii) Paid-in equity capital of 100,000 dollars or more and employs 50 employees or more.
- (iii) Paid-in equity capital of 100,000 dollars or more and requires developed technology, etc.

Other enterprises in any of such sectors may be funded by only 40% Japanese capital.

- Rental and leasing services, without operators, relating to ships, services incidental to energy distribution, telecommunication services (excluding cable television), aircraft maintenance and repair services

Substance of commitments:

An enterprise in any of such sectors may be funded by up to 40% Japanese equity participation.

- Advertising services

Substance of commitments:

An enterprise in such sector may be funded by up to 30% Japanese equity participation; however, all officers must be Philippine citizens.

- Services incidental to mining (investigation and development of petroleum, gas, geothermal heat and coal)

Substance of commitments:

An enterprise in such sector may be funded by up to 40% Japanese equity participation, with reservations regarding conditions upon execution of agreements with Japanese enterprises.

- Commercial banking

An enterprise in such sector may be funded by up to 60% Japanese equity participation.

- Educational services (primary, secondary, adult)

Substance of commitments:

An enterprise in such sector must be funded by 60% or more Filipino equity participation; congress may request that this 60% threshold be raised.

- Japan-Malaysia EPA

Malaysia implements a foreign capital policy in respect of the service sector primarily in accordance with the administrative guidelines, and a domestic policy (Bumiputra Policy) requiring that enterprises incorporate Bumis (Malayan) capital of 30% or more. Malaysia's foreign capital policy thus makes it difficult to achieve complete liberalization, but, in the sectors of rental and leasing services, maintenance and repair, etc., the Japan-Malaysia EPA contains a higher level of liberalization commitments than that to which Malaysia committed under GATS.

(i) Commitments of Specific Sectors (GATS plus)

- If products manufactured in Malaysia are used in respect of rental and leasing services relating to construction machinery and equipment, and to office machinery and equipment, etc., funding in respect thereof may consist of up to 51% Japanese equity participation. Funding of products manufactured in Malaysia may also consist of up to 51% Japanese equity participation if such products enter the market through leasing vendors as products used in respect of maintenance and repair of office machinery and equipment, etc., (copying machines, facsimiles, boilers, turbines, compressors, etc.).
- With respect to foreign equity participation restrictions, liberalization commitments with a level higher than that of GATS were made regarding specific services (such as accounting (35%), engineering, market surveying (35%), research and development regarding medical services, etc., (49%), domestic travel agencies (35%), etc.).

(ii) MFN Treatment (on conditions competitive with non-member country enterprises)

Malaysia committed to accord to Japanese enterprises unconditional MFN treatment, provided that such enterprises are in respect of certain rental and leasing services, or maintenance and repair relating to construction machinery and equipment or to office machinery and equipment. With respect to other sectors, when Malaysia executes agreements with a non-member country in the future, the Malaysian government must consider according to Japan the same preferential treatment it accords to any such third party country pursuant to Japan's request.

(4) Substance of Agreements on Services in other Countries

If a member of the WTO enters into an FTA regarding trade in services, it must notify the WTO under Article V of GATS. As of September, 2006 a total of 45 regional integrations (customs unions as well as FTAs/EPAs) in respect of such notifications were made.

Prior to 1993, there were only two cases of regional integrations (which included integration in the services sector). Such cases were the European Union, which entered into force in 1958 and the Australia New Zealand Closer Economic Relations Trade Agreement (ANZCERTA), which entered into force in 1989. In addition, from 1994 (after the execution of NAFTA) to 2000, there were only 10 regional agreements which included integration in the services sector that entered into force. Nevertheless, there were seven such cases in 2001, four such cases in 2002, and thereafter FTAs/EPAs regarding trade in services have entered into force at a rate of three to seven times each year. A recent trend is that most regional integrations include trade in services. This Report analyzes eight of these agreements.

1) Overall Structure

The eight agreements covered in this analysis share a common framework, but differ in substance, depending on when they entered into force, the contracting countries, the substance of the provisions already existing in the FTAs/EPAs between the contracting countries, etc.. NAFTA is the only such agreement which entered into force before GATS, and the other seven agreements entered into force in 2003 or later.

Such agreements can be classified into the following categories, depending on the manner of commitments and reservations: (i) NAFTA, the Australia-Singapore FTA, the U.S.A.-Singapore FTA and the U.S.A.-Australia FTA, which adopt the negative list approach, and (ii) the EFTA-Singapore FTA/EPA, the Australia-Thailand FTA/EPA, the India-Singapore FTA, and the EFTA-Korea FTA, which adopt the positive list approach. In the case of the negative list approach, Mode 3 is generally dealt with in the chapter on investments in the relevant agreement (only Australia-Singapore FTA deals with Mode 3 in the chapter on services).

The treatment of specific sectors (financial services, communications, air services and movement of natural persons) are often provided in separate chapters.

2) Basic Principles, etc.

The agreements which provide for the accordancy of MFN treatment in principle are NAFTA, the U.S.A.-Singapore FTA and the U.S.A.-Australia FTA. The EFTA-Singapore FTA and the EFTA-Korea FTA also provide for the accordancy of such treatment in principle, but contain exceptions. The India-Singapore FTA effectively provides that if, in the FTA/EPA to be entered into in the future by one of the contracting countries with a non-member country, preferential treatment is to be accorded to such non-member country, then the first country must consider according such treatment to the other contracting country pursuant to its request. The Australia-Singapore FTA and the Australia-Thailand FTA do not contain MFN provisions, but contain provisions similar to the foregoing India-Singapore FTA in the provisions regarding "Review of Commitments."

All agreements provide for national treatment obligations.

FTAs/EPAs that adopt the positive list approach follow Article XVI of GATS and contain similar provisions (The U.S.A.-Singapore FTA and U.S.A.-Australia FTA which adopt the negative list approach provide Mode 3 in the chapter on investments, but provide content similar to the portion on market access in Article XVI of GATS on quantitative restrictions and restrictions on corporate forms.).

NAFTA, the U.S.A.-Singapore FTA and the U.S.A.-Australia FTA contain provisions prohibiting requirements that the contracting country counterparty establish a local representative office or be a resident in order to engage in cross-border trade in services.

Disciplines over domestic regulations are provided in all agreements.

With respect to remittances (freedom of payments and transfers), the scope of application in respect of which the contracting party countries do not impose any restrictions on current transactions (payments and transfers incidental to trade in services) is limited to the committed sectors in the case of FTAs/EPAs adopting a positive list approach. No special limitations exist in the case of FTAs/EPAs adopting a negative list approach.

Provisions on recognition vary among the agreements. Some agreements (such as the India-Singapore FTA) explicitly provide sectors subject to mutual recognition be negotiated by professional associations and the timing of the implementation of such mutual recognition (“accounting and auditing, architecture, medical (doctors), dental and nursing... within twelve months of the date of entry into force of this Agreement”) be determined pursuant to a separate agreement; some agreements such as Australia-Singapore FTA and Australia-Thailand FTA “encourage” negotiations by professional associations in respect of mutual recognition and some agreements provide that contracting parties “may” recognize under agreed conditions.

Neither the EFTA-Singapore FTA nor the EFTA-Korea FTA contains any provisions with regard the denial of benefits.

(5) *Economic Aspects and Significance*

As discussed in “Part II, Chapter 11, Trade in Services (4) Economic Aspects and Significance” hereof, trade in services by nature may include the movement of production factors as an element and the development of service industries, and has a great positive spill-over effect into other industries, as is clear with regard to the financial and telecommunication industries. Thus, although the liberalization of bilateral and regional trade in services has some temporary effect on existing service providers (as it does in respect of efforts in multilateral trade), over the long term, it will contribute to the enhancement of the competitiveness of service industries as well as to the enhancement of manufacturing efficiency in other sectors and in manufacturing industries.

EPAs between Countries other than Japan: Framework of Chapter on Services

| Name (Abbreviation) | North American Free Trade Agreement (NAFTA) | Free Trade Agreement between the EFTA States and Singapore (EFTA-Singapore FTA) | Singapore-Australia Free Trade Agreement (Singapore-Australia FTA) | Free Trade Agreement between the United States and Singapore (U.S.A.-Singapore FTA) | Free Trade Agreement between the United States and Australia (U.S.A.-Australia FTA) | Free Trade Agreement between Thailand and Australia (TAFTA) | India-Singapore Free Trade Agreement (India-Singapore FTA) Official name: Comprehensive Economic Cooperation Agreement between the Republic of India and the Republic of Singapore (CECA) | Free Trade Agreement between the EFTA States and the Republic of Korea (EFTA-Korea FTA) |
|---|--|---|--|---|---|--|---|--|
| [In Effect as of] | 1994.1.1 | 2003.1.1 | 2003.7.28 | 2004.1.4 | 2005.1.1 | 2005.1.1 | 2005.8. | 2006.9.1 |
| Approach of Agreement (Annexes, Schedules of Commitments) | Negative list approach | Positive list approach | Negative list approach | Negative list approach | Negative list approach | Positive list approach | Positive list approach | Positive list approach |
| Most-Favored-Nation Treatment | Fully obligated - In principle, provides MFN | Partially obligated- In principle, MFN; however, provides for exceptions to FTA. | Partially obligated - MFN not provided; however, in the provisions on "Review of Commitments," provides parties to favorably consider preferential treatment accorded to a third party country to be accorded to the counterparty on an equal basis. | o In principle, MFN | o In principle, MFN | Partially obligated - MFN not provided; however, in the provisions on "Review of Commitments," provides parties to favorably consider preferential treatment accorded to a third party country to be accorded to the counterparty on an equal basis. | Partially obligated - If, after the Agreement enters into force, a Party provides more favorable treatment to a non-Party, shall give consideration to a request by the other Party for the provision of the same treatment (Article 7.6) | Partially obligated - In principle, MFN; however, provides for exceptions to FTA. |
| National Treatment | Fully obligated -Accords NT in principle | Fully obligated - Liberalization secured to the extent inscribed in the Schedule of Commitments | Fully obligated - Liberalization secured to the extent inscribed in the Schedule of Commitments | Fully obligated - Accords NT in principle | Fully obligated - Accords NT in principle | Fully obligated - Liberalization secured to the extent inscribed in the Schedule of Commitments | Fully obligated - Liberalization secured to the extent inscribed in the Schedule of Commitments | Fully obligated - Provides to that Article XVII of GATS shall effectively apply. Liberalization secured to the extent inscribed in the Schedule of Commitments |
| Market Access Commitments | Not provided; however provides similar concept of "quantitative restriction" | Yes, similar to Article XVI of GATS (Market access provision) | Yes, similar to Article XVI of GATS (Market access provision) | Yes, provides content similar to the portion on market access in Article XVI of GATS on quantitative restrictions and restrictions on types of legal entities. No restrictions by foreign capital ratio regulations due to lack of establishment of commercial presence (Mode 3). | Yes, provides content similar to the portion on market access in Article XVI of GATS on quantitative restrictions and restrictions on types of legal entities. No restrictions by foreign capital ratio regulations due to lack of establishment of commercial presence (Mode 3). | Yes, similar to Article XVI of GATS (Market access provision) | Yes, similar to Article XVI of GATS (Market access provision) | Yes, provides that Article XVI of GATS shall effectively apply |
| Prohibition of Requiring Establishment of Local Representative Office | Yes | Provisions concerning business forms of local representative office (prohibition on requiring specific types of legal entities, etc.) as being one of the | Provisions concerning business forms of local representative office (prohibition on requiring specific types of legal entities, etc.) as being one of the | Yes | Yes | Provisions concerning business forms of local representative office (prohibition on requiring specific types of legal entities, etc.) as being one of the | Provisions concerning business forms of local representative office (prohibition on requiring specific types of legal entities, etc.) as being one of the | Not Provided; however, provides that Article XVI of GATS shall effectively apply with respect to market access. (Also includes provisions concerning the |

| Name (Abbreviation) | North American Free Trade Agreement (NAFTA) | Free Trade Agreement between the EFTA States and Singapore (EFTA-Singapore FTA) | Singapore-Australia Free Trade Agreement (Singapore-Australia FTA) | Free Trade Agreement between the United States and Singapore (U.S.A.-Singapore FTA) | Free Trade Agreement between the United States and Australia (U.S.A.-Australia FTA) | Free Trade Agreement between Thailand and Australia (TAFTA) | India-Singapore Free Trade Agreement (India-Singapore FTA) Official name: Comprehensive Economic Cooperation Agreement between the Republic of India and the Republic of Singapore (CECA) | Free Trade Agreement between the EFTA States and the Republic of Korea (EFTA-Korea FTA) |
|---|---|---|--|---|---|---|--|--|
| | | market access commitments | the market access commitments | | | market access commitments | the market access commitments | business form of local representative office) |
| Disciplines over Domestic Regulations | Yes | Yes | Yes | Yes | Yes | Yes | Yes | Yes, provides that Article VI of GATS shall effectively apply |
| Transparency Requirements | Yes | Not Provided | Yes | Yes | Not Provided | Not Provided | Yes | Yes, provides that Article III, paragraphs 1 and 2 of GATS shall effectively apply with respect to the rights and obligations of the contracting countries in relation to transparency |
| Prohibition on Restrictions on Payments and Transfers | Not Provided. | Not Provided | Provided | Provided | Provided | Provided | Provided | Provided |
| Denial of Benefits | Provided | Not Provided | Provided | Provided | Provided | Provided | Provided | Not Provided |