

CHALLENGES FOR COUNTRIES IN TRADE IN SERVICES' NEGOTIATIONS WITH THE NAFTA APPROACH: THE EXPERIENCE OF CHILE IN THE FREE TRADE AGREEMENT WITH THE UNITED STATES

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ABSTRACT

The negotiation of trade in services in the context of a free trade agreement is particularly challenging for developing countries in view of the diverse nature of the services sector, the broad regulation applicable to the supply of services, the different modes of supply and the different approaches available for the adoption of the rules governing bilateral trade in services. Two main approaches are available for these negotiations, the General Agreement on Trade in Services (GATS) model or positive list approach, and the North American Free Trade Agreement (NAFTA) model or negative list approach. Even though these two models are similar with respect to the substantive obligations covering the conditions for supplying services, they differ significantly with respect to the manner and the structure of commitments.

Chile faced significant challenges in concluding a free trade agreement with the United States. The importance of the trading partner and its market for Chilean exports meant that Chile had to adopt a number of unfamiliar features, particularly in relation to financial services and e-commerce, in order to facilitate and consolidate the process of opening its market. This article focuses on the chapters of the United States-Chile Free Trade Agreement addressing trade in services, i.e. cross-border trade in services, financial services, telecommunications, temporary entry of business persons and some provisions on e-commerce. Some investment issues will also be address, particularly those interacting with cross-border trade in services. Finally, the article explains the relevance of this approach as a model or basis for bilateral and plurilateral negotiations on trade in services for the Pacific Rim countries and as the preferred model for services trade liberalization for the Latin American countries.

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CONTENTS

I. INTRODUCTION.....	373
II. CROSS-BORDER TRADE IN SERVICES IN THE UNITED STATES-CHILE FREE TRADE AGREEMENT.....	375
III. THE STRUCTURE OF THE AGREEMENT.....	376
A. Cross-Border Trade in Services	377
B. Investment	381
C. Financial Services.....	383
D. Telecommunications.....	387
E. E-Commerce	388
F. Temporary Entry of Business Persons	389
IV. THE INFLUENCE OF THE NAFTA APPROACH.....	390
V. CONCLUDING REMARKS.....	393

I. INTRODUCTION

Chile currently has 25 Free Trade Agreements (FTAs) in force. In economic terms, these agreements represent an 86.3% of Chile's gross domestic product, cover more than 60 countries¹ and encompass the quasi-totality of Chilean exports and products. For a small economy like Chile, international trade is an essential tool for economic growth. In this context, the negotiation of a free trade agreement with the United States (U.S.) in 2001 represented a major challenge for Chile and established new standards for future trade negotiations, not only because of the broad scope of the agreement, but also because of the high standards introduced in different provisions across its chapters.

Negotiations on trade in services involve several challenges arising from the particular nature of the sector and the range of activities that services cover - from social services, professional services, transport, and distribution to banking services - as well as from the multiple modes of services provision. Indeed, frequently a service is provided on a cross-border basis (mode 1), or through the establishment of commercial presence (mode 3) or by the movement of either the consumer or the supplier of the service (modes 2 and 4 respectively), or even all modes simultaneously. According to Sáez, another characteristic of trade in services is that for many services the final stage of "production" takes place simultaneously with the consumption of the service. In such cases, the exports of a country's services rely on the infrastructure and factors of production available in the host/destination country where consumption of the service will also take place.²

During the 1990s, the negotiating experience in international free trade agreements, including trade in services' commitments in the Latin American region was limited to the General Agreement on Trade in Services (GATS),³ adopted in the context of the Uruguay Round. This was also the case for Chile until the negotiations of free trade agreements with Canada and Mexico. Originally, Chile was invited to participate in the North American Free Trade Agreement (NAFTA).⁴ However, the failure of the United States President to obtain congressional approval blocked the negotiations. Chile was then compelled to adopt a new strategy with the North American countries, namely, to negotiate separate free trade agreements with each NAFTA member. The interest of the Canadian government in concluding a free trade agreement allowed Chile to initiate the negotiations with Canada, followed by negotiations with Mexico.

The text of NAFTA was used as the basis for the negotiations of the free trade agreement with Canada, albeit with some improvements and modifications

¹ Information available at <https://www.direcon.gob.cl/acuerdos-comerciales> (last visited Jun. 18, 2016).

² SEBASTIAN SAÉZ, TRADE IN SERVICES NEGOTIATIONS: A REVIEW OF THE EXPERIENCE OF THE UNITED STATES AND THE EUROPEAN UNION IN LATIN AMERICA, 15 (N.U., ECLAC, Division of international Trade and Integration, Dec. 2005).

³ General Agreement on Trade in Services, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, THE LEGAL TEXTS: THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS 284 (1999), 1869 U.N.T.S. 183, 33 I.L.M. 1167 (1994).

⁴ North American Free Trade Agreement, US-Can.-Mex., Dec.17, 1992, 32 I.L.M. 289 (1993)

accounting for specific issues and sensitivities of both countries. The Chile-Canada Free Trade Agreement constituted a milestone in Chile's foreign trade negotiations, not only because it was the first concluded with a developed country, but also due to the high level of ambition and the depth of issues covered, such as tariffs, non-tariff barriers and customs procedures. In addition, the agreement included a non-discrimination provision for the supply of services and adequate protection of foreign investments. This was also the first time that Chile introduced chapters on cross-border trade in services, investment and temporary entry of business persons in a free trade agreement.⁵

The major challenge for Chile in negotiating with North American countries on trade in services, investment and related matters was to adapt to their approach, commonly known as the NAFTA approach, which differs from GATS in many respects. In a NAFTA-type model, matters relating to trade in services are regulated in separate chapters: cross-border trade in services, investment, financial services, telecommunications and temporary entry of business persons. In contrast, GATS includes all services provisions while its annexes on specific issues are part of the same structure and disciplines included in the main text. It is therefore essential to fully comprehend the scope of each chapter and the manner in which the different chapters interrelate, in order to accurately understand the implications of the specific commitments.

In terms of scheduling techniques, NAFTA adopts the so-called negative list approach, whereas GATS adopts the positive list approach. Under the negative list approach, parties make no specific commitments; all sectors are included. As a result, all provisions of the trade in services chapter, apply to all services, except for those specifically exempted in the annexes under specific terms, conditions and limitations. The annexes contain a full list of reservations describing measures in specific sectors which are not required to conform to the obligations contained in the specific chapter. Reservations for the chapters on trade in services apply also to commitments in the investment chapter. Furthermore, unlike GATS which includes all four modes of supply, the NAFTA approach to cross-border trade in services chapters includes only modes 1, 2 and 4 and therefore omits the supply of a service through commercial presence established in the territory of the other party (mode 3). Mode 3 is dealt instead within the investment chapter, regulating investment in all sectors of the economy, including services provided by a company established in the territory of the other party. Finally, GATS includes annexes on specific service sectors, addressing particular issues of those sectors, such as the Annex on Financial Services, mode 4, Telecommunications and Air Transport Services. Those sectors are regulated by both the core text of the GATS and the specific provisions included in its Annexes. NAFTA-inspired free trade agreements, in contrast, include separate chapters covering specific sectors, namely financial services, telecommunications and entry of business persons.

Investment chapters in NAFTA-type agreements regulate services supplied through commercial presence. Cross-border trade in services chapters govern cross-border supply, consumption abroad and temporary movement of natural persons.

⁵ CHILE: 20 AÑOS DE NEGOCIACIONES COMERCIALES 127-129 (Dirección General de Relaciones Económicas Internacionales, 2009), *available at* <https://www.direcon.gob.cl/wp-content/uploads/2013/09/Chile-20-a%C3%B1os-de-negociaciones-comerciales1.pdf> (last visited Jun. 13, 2016).

The rules on temporary movement of business persons deal with procedural terms and conditions, as well as with general formalities to be complied with by a natural person falling within one of the four categories of business persons.⁶ In addition, the NAFTA approach contains two chapters relating to trade in services: i) a telecommunications chapter, dealing with regulatory issues of the sector, amongst others, related to access and use of public telecommunication networks and the treatment of major suppliers; and ii) a chapter on financial services, dealing in a self-contained manner with disciplines for the supply of financial services and the establishment of a commercial presence of financial institutions in the territory of the other party. Finally, an e-commerce chapter includes provisions on the supply of services regarding specific issues such as non-discrimination of digital products and electronic supply of services. GATS, on the other hand, is a self-contained agreement which includes rules applicable to all service sectors and additional specific rules applicable only to sectors on which the parties have made specific commitments. In this second category fall the Schedule of Specific Commitments, mainly related to market access and national treatment, as well as the Annexes on certain services, in particular, on most-favored-nation exemptions, movement of natural persons, air transport services, financial services and telecommunications.

The approach chosen for services in the negotiations between Chile and the United States was to incorporate a cross-border trade provision in the Services Chapter including modes 1, 2 and 4 of the GATS, thus regulating only the cross-border dimension of services supply, irrespective of whether the service is provided on a cross-border basis (mode 1), or by the movement of the supplier (mode 4), or the consumer (consumption abroad or mode 2). Mode 3 or the establishment of a commercial presence was not regulated in this chapter but falls within the scope of the Investment Chapter. This latter covers all types of investment in all sectors of the economy, except for investment in financial institutions, regulated in a special chapter. The United States-Chile Free Trade Agreement includes also a specific Chapter on Telecommunications, addressing sectorial domestic regulation issues, especially with regards to non-discriminatory access, the use of public telecommunications networks and services as well as in relation to major suppliers. Financial Services are regulated also in a specific self-contained chapter that includes both the supply of financial services in a cross-border manner (modes 1, 2 and 4) and the investment (mode 3) in financial institutions. Finally, the Agreement includes a Chapter on Temporary Entry of Business Persons, designed to facilitate the entry and stay of business persons in the territory of the other party and a Chapter on E-Commerce, regulating mainly the treatment of digital products.

II. CROSS-BORDER TRADE IN SERVICES IN THE UNITED STATES-CHILE FREE TRADE AGREEMENT

The United States-Chile Free Trade Agreement entered into force on January 1, 2004. It contains 24 chapters covering the full range of trade-related matters,

⁶ See SAÉZ *supra* note 2, at 20.

including provisions on Market Access for Goods, Sanitary and Phyto-Sanitary Measures, Technical Barriers to Trade, Rules of Origin, Trade Remedies and Competition, Investment, Cross-Border Trade in Services (CBTS) and Financial Services, E-Commerce, Telecommunications, Intellectual Property Rights, Institutional Arrangements and Dispute Settlement provisions. The Agreement eliminates tariffs and opens markets, reduces barriers for trade in services, provides protection for intellectual property, ensures regulatory transparency, guarantees non-discrimination in the trade of digital products, commits parties to maintain competition laws prohibiting anticompetitive business conduct, and requires effective labor and environmental enforcement.⁷

The United States-Chile Free Trade Agreement was the outcome of the most comprehensive and challenging negotiation Chile had ever been involved in, covering a new range of issues, for the first time in Chile's bilateral trade policy history. In spite of the experience that Chile had acquired on the NAFTA model during its negotiations with Canada and Mexico, the negotiations with the United States were particularly challenging at that the time, not only because of the new provisions, such as on financial services and e-commerce and their legal implications for the domestic regulation, but also because of the level of ambition and the depth of other "old" provisions, such as Telecommunications and CBTS.

Although the structure of the free trade agreements between Chile and Canada, Mexico and the United States has many similarities, these agreements differ in numerous key provisions, in terms of content and extent alike. For example, the legal effects of the Market Access Article of the United States-Chile Free Trade Agreement are completely different from those of the Quantitative Non-Discriminatory Restrictions included in the agreements with Canada and Mexico. The latter were adopted solely for transparency purposes and the obligations introduced therein were limited to the listing of quantitative restrictions. In contrast, in the case of the United States-Chile Free Trade Agreement, the Market Access obligation is subject to standstill and ratchet obligations while commitments for the sectors listed are binding. Even though Chile had already made specific commitments in the respective GATS Schedules, the extent and coverage of those commitments in terms of the number of sectors included was very low compared to the commitments made under the Annexes on reservations in the United States-Chile Free Trade Agreement. Furthermore, Chile's specific commitments in its agreements with Canada and Mexico were much more flexible. For example, Chile was given more policy space to introduce specific sectorial carve-out, such as the exclusion of cultural industries in its agreement with Canada.

III. THE STRUCTURE OF THE AGREEMENT

The United States-Chile Free Trade Agreement contains provisions and obligations affecting trade in services in several different chapters. Even though the CBTS

⁷ United States-Chile Free Trade Agreement, Jan. 1, 2004, OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, *available at* <https://ustr.gov/trade-agreements/free-trade-agreements/chile-fta> (last visited Aug. 8, 2016).

Chapter contains the most important provisions in relation to market access and non-discrimination of foreign suppliers, the Investment and Financial Services Chapters contain also key provisions, intertwined with the CBTS Chapter. By way of illustration, the Investment Chapter includes commitments on the establishment of commercial presence (mode 3) while the Financial Services Chapter specifically regulates all 4 modes of supply of financial services, whether provided in a cross-border manner (modes 1, 2 and 4) or through the establishment of a commercial presence (mode 3). Specific provisions linked to trade in services are found also in the Chapters on Telecommunications, E-Commerce, and Temporary Entry for Business Persons.⁸

A. CROSS-BORDER TRADE IN SERVICES

The CBTS Chapter applies to measures adopted or maintained by a party affecting cross-border trade in services by service suppliers of the other party.⁹ Cross-border trade in services or cross-border supply of services, as defined in Article 11.1.2. of the CBTS Chapter, includes the supply of a service “from the territory of one Party into the territory of the other Party” (mode 1); “in the territory of one Party by a person of that Party to a Person of the other Party” (mode 2); and “by a national of a Party in the territory of the other Party” (mode 4). In contrast, the scope of application of the Chapter does not include the supply of a service in the territory of a party through commercial presence of the other party (mode 3). This latter mode is regulated in the Investment Chapter. Moreover, Article 11.1.4 stipulates that the Chapter does not apply to financial services, procurement, subsidies and air transport services. Finally, the Chapter contains a general carve-out for services supplied in the exercise of governmental authority.

The main obligations introduced in relation to services covered by the CBTS Chapter include the National Treatment, Most-Favored-Nation Treatment, Local Presence and Market Access. The parties were allowed to introduce exceptions to those obligations in the Annexes on reservations. In principle, under the NAFTA approach, all services sectors are included in the scope of application of the relevant chapter, except for those specific sectors mentioned in the annexes on reservations. All other sectors are therefore liberalized and there is no possibility to introduce new restrictions. The Annexes on reservations of the CBTS Chapter include Annex I (Existing Non-conforming Measures) and Annex II (Future Measures). The first contains a list of current measures non-conforming with the obligations of the

⁸ This article focusses only on the main provisions affecting the supply of trade in services and not necessarily in all obligations potentially having an implication on services trade. Thus some Intellectual Property and Government Procurement provisions are not included in the analysis.

⁹ United States-Chile Free Trade Agreement, *supra*, note 7, art. 11.1 (“Such measures include measures affecting: (a) the production, distribution, marketing, sale, and delivery of a service; (b) the purchase or use of, or payment for, a service; (c) the access to and use of distribution, transport, or telecommunications networks and services in connection with the supply of a service; (d) the presence in its territory of a service supplier of the other Party; and (e) the provision of a bond or other form of financial security as a condition for the supply of a service”).

Chapter. This Annex is subject to the obligation of consolidation of the level of liberalization, parties are obliged not to increase the restrictiveness of the measures (standstill effect) while any further future liberalization will be automatically incorporated in the commitments of the Chapter (ratchet effect). These two effects combined allow for the locking-in or freezing of the existing regime and the level of market openness to foreign suppliers of services. The second contains a list of specific services sectors that are not necessarily currently restricted, but were included for policy reasons, because of their sensitivity to market openness and in order to offer the parties regulatory space for the introduction of new non-conforming measures in the future. This exclusion aims to carve-out specific sensitive sub-sectors like, for example, social services, educational services and some of the environmental services, typically listed under Annex II, from the scope of all or some of the obligations of the Chapter.

The Articles on National Treatment¹⁰ and Most-Favored-Nation Treatment¹¹ provide for service suppliers of one party treatment which is no less favorable than that accorded, in the same circumstances, to national service providers of the other party or to service providers of a third country which is not a party to the free trade agreement. This non-discrimination principle is one of the key obligations of the Chapter and, along with the Market Access obligation is at the center of the liberalization commitments of the CBTS Chapter.

The Local Presence obligation forbids the introduction of residence requirements for the supply of services in the territory of the other party,¹² thus allowing cross-border supply of services. The measures related to this obligation however are also subject to the Annexes on reservations for services and investment commitments. As a result, any type of existing residence requirement may be maintained. Arguably, local presence restrictions required for foreign suppliers fall within the scope of the National Treatment rather than within that of the Local Presence. Chile has consistently listed restrictions affecting the Local Presence obligation also against the National Treatment obligation.¹³

Chile's free trade agreements with Canada¹⁴ and Mexico,¹⁵ introduced the Market Access discipline, under the heading Quantitative Restrictions, only for transparency purposes. In the case of the United States-Chile Free Trade Agreement, it was agreed - for first time in a bilateral context - to introduce a relevant binding obligation. In addition, the Market Access discipline is subject to specific commitments under the Annexes on reservations. However, the manner in which Chile adopted the commitments under the negative list approach was

¹⁰ United States-Chile Free Trade Agreement, *supra*, note 7, art. 11.2.

¹¹ *Id.* art. 11.3.

¹² *Id.* art. 11.5.

¹³ In the case of the TPP, this issue was solved through the introduction of interpretative notes to the Annexes on non-confirming measures, requiring parties to list such measures only against the Local Presence obligation and not against the National Treatment obligation.

¹⁴ Canada-Chile Free Trade Agreement, Can.-Chi, Dec., 5, 1996, art. H-07, GLOBAL AFFAIRS CANADA, <http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/chile-chili/menu.aspx?lang=en> (last visited Oct. 4, 2016).

¹⁵ Chile-Mexico Free Trade Agreement, Chi.-Mex., Apr., 17, 1998, art. 10-08, OAS INFORMATION SYSTEM ON FOREIGN TRADE, <http://www.sice.oas.org/Trade/chmefta/indice.asp> (last visited Oct. 4, 2016).

slightly different from the one adopted in its free trade agreements with the other North American countries. Inspired by the approach of the United States consisting of the reference to the commitments of GATS, Chile included a Market Access general carve-out in its reservations of Annex II. This entry led to the conversion of the negative into a positive list - in the same way the United States did with GATS - because it excludes all services sectors from the scope of the Market Access obligation, except for those specifically listed in the entry. As a result, any specific sector that was not mentioned, was excluded from the scope of the obligation and the relevant commitments.

Generally speaking, the content of the Market Access obligation in Chile's free trade agreements is similar to that of GATS Article XVI which prohibits the imposition of any type of quantitative restrictions on sectors where commitments have been made (with the exception of Article XVI (f) referring to mode 3 restrictions falling within the scope of the National Treatment obligation of the Investment Chapter). Article 11.4 of the CBTS Chapter stipulates that no party may adopt or maintain measures that

- a) impose limitations on:
 - i. The number of service suppliers, the total value of service transactions or assets, the total number of service operations or on the total quantity of services output, the total number of natural persons that may be employed in a particular service sector or that a service supplier may employ, or the requirement of an economic needs test; and ...
- b) restrict or require specific types of legal entity or joint venture through which a service supplier may supply a service.

Letter f) of GATS Article XVI refers to the possibility of introduction of restrictions or limitations in the participation of foreign capital, such as maximum percentages of foreign shareholding or total value of individual or aggregate foreign investment. In the United States-Chile Free Trade Agreement, there was no need to include this specific provision in the Market Access obligation since mode 3 is regulated in the Investment Chapter and not in the CBTS Chapter. However, the Agreement restricts the introduction of such types of limitations to the extent of their specific commitments, by the inclusion of the National Treatment obligation under the Investment Chapter.

As stated before, regarding the Market Access obligation, the final outcome for Chile was the introduction of a positive list of services sectors under the Annex II on reservations. This was due to the complexity of identifying *a priori* sectors in which policy space was necessary for Chile to be able to regulate in the future without breaching the Market Access obligation. The most straightforward approach was to include those sectors that had already been identified as sectors that Chile could make Market Access commitments. It is also relevant to stress that the level of commitments made under the United States-Chile Free Trade Agreement was much more ambitious than what Chile had accepted in other bilateral free trade agreements,¹⁶ and even in the GATS Schedules on Specific Commitments.

¹⁶ In the free trade agreements with Canada and Mexico already in force at the time of the negotiation of the United States-Chile Free Trade Agreement, the Market Access obligation was introduced only for transparency purposes. The relevant articles stipulate

Following the results achieved in relation to Market Access and National Treatment, Chile was keen on introducing enhanced commitments for the Domestic Regulation obligation.¹⁷ At the time, Chile's increasing exports of services were being affected by behind-the-border restrictions or measures impeding Chile from reaping the benefits of access liberalization. Domestic measures play an important role in facilitating and enhancing cross-border trade in services but more needs to be done in order to establish a clear set of relevant rules. The Domestic Regulation provision ensures that the parties will develop and administer measures of general application, including licensing processes, in a fair and reasonable manner as well as that they will be transparent and impartial in the adoption and administration of such measures, while, on the other hand, fully recognizing their right to regulate and introduce new regulations to assure the quality of the services suppliers in order to meet legitimate policy objectives, but in a trade-enhancing manner.

The provision applies also to the Investment Chapter and establishes a common ground for the application of regulation affecting trade in services, and is further developed in the Telecommunications Chapter in relation to the supply of telecommunication services. The provision is also related to some extent to the provisions contained in the Temporary Entry Chapter. Guidelines for the regulation of the trade in services are necessary for the supply of any service, if parties are to profit from the market openness granted under the CBTS and Investment Chapters. Otherwise, market access would be meaningless.

Apart from the references to licensing and certification of the CBTS Chapter, the parties introduced a specific Annex on Professional Services establishing the basic principles or elements for licensing procedures and transparency for the supply of services. This Annex contains three sections: the first covers general provisions of the application processes for licensing and certification, principles for developing mutually acceptable standards and criteria for certification and granting of licenses; the second includes specific commitments for foreign legal consultant services and the third introduces specific obligations for the issuance of temporary licenses for engineers.¹⁸

The parties also agreed to introduce stronger commitments in order to facilitate the supply of professional services. In particular, they included an Annex setting out the criteria for granting licenses for legal consultants and engineers. However, the implementation of the relevant provisions requires the participation of the relevant professional bodies of each country. To date no such commitment has been implemented, *inter alia*, because of the lack of interest of some professional bodies and the difficulties to meet all the criteria established in the different states of the United States, since it is the individual states, and not the Federal Government that have the authority to regulate these types of professional services.¹⁹

Finally, the Chapter includes specific provisions on the development and implementation of regulations related to services trade, on mutual recognition

that restrictions on Market Access are allowed and that the parties are obliged to list them for transparency reasons. No standstill or ratchet effect applied to those measures.

¹⁷ United States-Chile Free Trade Agreement, *supra*, note 7, art. 11.8.

¹⁸ *Id.* annex 11.9.

¹⁹ RICARDO LAGOS WEBER & JUAN ARAYA ALLENDE, UNA GUIA SOBRE LOS TRATADOS DE LIBRE COMERCIO: A 10 AÑOS DEL TLC CON ESTADOS UNIDOS 108 (Universidad de Valparaíso, 2015).

of titles and degrees as well as a denial of benefits clause. An Annex on Express Delivery Services was also included because of the strong U.S. interest in this sector.²⁰

B. INVESTMENT

The Investment Chapter covers any type of measure adopted or maintained by a party relating to investors of the other party regarding all types of investments.²¹ The Chapter provides for the protection of investors and their covered investments. Investors are entitled to be treated as favorably as the host party treats its own investors and their investments or investors and investments from any third country, in other words, the chapter guarantees non-discrimination, namely National Treatment plus Most-Favored-Nation Treatment. The non-discrimination treatment applies in the full life cycle of investment, i.e. from the establishment, through the management, operation and expansion, up to the disposition of the investment, in other words both the pre-establishment and the post-establishment phases.²²

Although no provision in the Investment Chapter refers explicitly to mode 3 or investments in the services sector, the broad scope of the Chapter implicitly includes them as well. The explicit exclusion of mode 3 from the scope of the CBTS Chapter, aiming to avoid the spillover effects between the Investment and the CBTS Chapters, confirms that mode 3 is indeed included in the scope of application of the Investment Chapter.

Paragraph 3 of Article 10.1 of the Chapter stipulates that the mere requirement of a form of financial security by a party as a condition for the provision of a specific service in its territory does not make the Investment Chapter applicable to the supply of that cross-border service.²³ This paragraph is another example of this attempt to clearly distinguish the scope and coverage of the CBTS and Investment Chapters for fear of their potential overlaps and interactions.

Furthermore, the Scope and Coverage Article establishes that the Investment Chapter "does not apply to measures adopted or maintained by a Party to the extent that they are covered by Chapter Twelve (Financial Services)."²⁴ The scope of this exclusion is determined by the scope of the Financial Services Chapter, a self-contained chapter which includes not only measures related to cross-border trade in financial services, but also investment in financial institutions.²⁵ Furthermore,

²⁰ United States-Chile Free Trade Agreement, *supra* note 7, annex 11.6 (Express Delivery).

²¹ The Chapter adopts a broad asset-based definition with a non-exhaustive list of assets that may be considered as investment owned and controlled by an investor [United States-Chile Free Trade Agreement, *supra* note 7, art. 10.27].

²² The pre-establishment phase is addressed in the National Treatment and Most-Favored-Nation Treatment Articles as well as in the definition of Investor of a Party, referring to "an investor that attempts to make ... an investment" [United States-Chile Free Trade Agreement, *supra* note 7, art. 10.27 (Definitions)].

²³ United States-Chile Free Trade Agreement, *supra* note 7, art. 10.1.3.

²⁴ *Id.* art. 10.1.4.

²⁵ With regard to specific financial services not provided by financial institutions the question of whether they are completely excluded by the Agreement or not and of the extent to which they are included in the scope of the CBTS and/or the Investment Chapter, remains open.

the Financial Services Chapter introduces specific investment provisions through cross-references to the specific obligations of the Investment Chapter.²⁶

In general, the Agreement introduces a clear distinction between the CBTS and Investment Chapters, designed to restrict the interaction between the two. The Investment Chapter acts as the depository of, or controls, all investment provisions on both goods and services (except for financial services). The CBTS Chapter, partially inspired by the GATS, is devoted to the liberalization of services provided without a commercial presence. Both follow the negative list approach for lodging reservations for their respective obligations.²⁷

A concrete interaction between the Investment and the CBTS Chapters is found in Paragraph 3 of Article 11.1 of the CBTS Chapter, establishing the application of the provisions of the Chapter on Market Access, Domestic Regulation and Transparency to investors of the other party and investments covered by the Investment Chapter. This cross-reference permits the lock-in of behind-the-border issues of particular interest to mode 3 commercial presence.

As in the case of the CBTS Chapter, the liberalization commitments of the Investment Chapter are introduced in the Non-Conforming Measures Article.²⁸ This provision allows parties to list their non-conforming measures with respect to the main obligations of the Chapter, namely, National Treatment, Most-Favored-Nation Treatment, Performance Requirements and Senior Management and Board of Directors, in their Annexes on reservations. If no measure is listed, it is understood that the specific sector has been liberalized and no measure can be found that is not in conformity with these obligations. Therefore, under the NAFTA approach, in principle, all investment sectors are included in the scope of application of the Investment Chapter and all measures are liberalized, except for restrictions listed in the Annexes on reservations relating to specific sectors. Furthermore, there is no possibility to introduce new restrictions in the future once the sector has been liberalized. In other words, the NAFTA-inspired agreements aim to provide market openness for all kinds of investments and grant non-discriminatory treatment for all sectors covered by the chapter.

The coverage of the NAFTA-inspired agreements is generally wider than that in GATS-inspired agreements and reservations are fewer, although some of them can be quite general, offering parties an opportunity to maintain or even introduce new non-conforming measures in a certain number of activities. The ratchet effect of NAFTA-inspired agreements locks in the investment regime and includes as commitments under a regional trade agreement any new effort towards liberalization. As a result, these agreements generally offer a higher degree of certainty and predictability for investors.²⁹

Annexes I and II on reservations also apply for listing reservations under the obligations of the Investment Chapter in the same terms as it applies to the CBTS Chapter, and are consequently subject to the standstill and ratchet principles.

²⁶ The Articles on Expropriation and Transfers of the Investment Chapter explicitly included in the Financial Services Chapter are prime examples of the cross-reference technique.

²⁷ OECD, INTERNATIONAL INVESTMENT LAW: UNDERSTANDING CONCEPTS AND TRACKING INNOVATIONS, 243 (OECD 2008).

²⁸ United States-Chile Free Trade Agreement, *supra* note 7, art. 10.7.

²⁹ OECD, *supra* note 27 at 249.

Normally, when listing their non-conforming measures in each entry, the parties specify whether the reservation applies only for services and/or investment, and also define the obligation against which the measure is listed.

This NAFTA-inspired approach did not constitute a novelty for Chile. Chile had already followed this approach in its free trade agreements with Canada and Mexico. It was also the approach adopted in the negotiations of the free trade agreement with Korea, negotiated in parallel with that with the United States. Therefore, most of the measures contained in the Annexes on reservations of Chile were already identified during the negotiation of the free trade agreement with Canada in terms of content and degree of non-conformity. After the negotiation of the free trade agreement with the United States, Chile consolidated its current services and investment regimes and its legal framework due to the inclusion of a Market Access obligation and because of the level of ambition of the commitments taken in this free trade agreement, in terms of market openness and liberalization for the services and the investment sector.

C. FINANCIAL SERVICES

The vast majority of free trade agreements adopted by Chile contain provisions and obligations on services' trade and investment that are now considered to be part of Chile's trade policy and an important aspect of its future trade negotiations. Currently, Chile has included financial services chapters in its free trade agreements with Canada,³⁰ the United States,³¹ the European Union,³² Japan,³³ Australia,³⁴ and the Pacific Alliance.³⁵ It also has agreed to introduce a financial services chapter in the Trans-Pacific Partnership (TPP), not yet in force.³⁶

The inclusion of a financial services chapter in the free trade agreement with the United States was a novelty for Chile which did not have any previous experience in negotiating such provisions on the bilateral level. At the time of the negotiations with the United States, apart from the GATS, there was no other relevant agreement, while in the case of Mexico and Canada, this chapter was only

³⁰ Agreement to Amend the Free Trade Agreement Between the Government of Canada and the Government of the Republic of Chile, app. I, ch. H *bis* (Financial Services), GLOBAL AFFAIRS CANADA <http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/chile-chili/amend2.aspx?lang=eng> (last visited Oct. 4, 2016).

³¹ United States-Chile Free Trade Agreement, *supra* note 7, ch. 12.

³² Chile-European Free Trade Area Association Agreement, Jun. 26, 2016, ch. 2, available at <https://www.direcon.gob.cl/wp-content/uploads/2012/01/Acuordo-de-Asociaci%C3%B3n-Chile-Uni%C3%B3n-Europea-Parte-I.pdf>.

³³ Agreement between Japan and Chile for a Strategic Economic Partnership, Chi.-Jap., Mar. 27, 2007, ch. 10, OAS INFORMATION SYSTEM ON FOREIGN TRADE, http://www.sice.oas.org/Trade/CHL_JPN/CHL_JPN_Index_e.asp.

³⁴ Chile-Australia Free Trade Agreement, Jul. 30, 2008, ch. 12, OAS INFORMATION SYSTEM ON FOREIGN TRADE, http://www.sice.oas.org/Trade/CHL_AUS_Final_e/CHL_AUSInd_e.asp (last visited Oct. 4, 2016).

³⁵ Pacific Alliance, Apr. 28, 2011, ch. 11, available at <https://alianzapacifico.net/?wpdmdl=1327>.

³⁶ Trans-Pacific Partnership text released Jan. 26, 2016 following legal scrub, ch. 11, available at <https://tpp.mfat.govt.nz/text>.

subsequently negotiated. There are two main explanations for Chile's hesitation to include financial services in its trade policy. The first relates to the sensitivity of this sector, highly regulated in Chile in order to avoid future financial crises and therefore cannot be easily liberalized. The second relates to Chile's decision to pursue the gradual liberalization of this sector in order to avoid the errors of the past that led to the financial crisis in the 1980s. Chile requires to retain the possibility of restricting trade in the financial sector in the future, when facing financial distress.

Since the negotiation with the United States, Chile's approach in negotiating financial services was based on three principles: autonomy of the provisions, specificity of the commitments, and handing the institutional framework to experts. The autonomy principle is demonstrated by the inclusion of a specific self-contained financial services chapters, separate from the services and investment chapters. These chapters include their own provisions on the supply of financial services and the investment in financial institutions, such as national treatment and most-favored-nation treatment obligations, and some provisions are included by cross-reference from another chapter, such as in the transfers and expropriation obligations, incorporated from the investment chapter. At the same time, it is made clear that no provision of the free trade agreement apart from those included in the financial services chapter will apply to financial services. Another feature of the principle of autonomy is that the financial services chapter negotiated by Chile includes all four modes of supply with their own specific liberalization commitments, independently of the approach taken for the services and investment liberalization scheme. The specificity principle can be found in the particular obligations of the financial services chapter, to the extent that these provisions prevail over other provisions of the agreement and even they allow the possibility of imposing measures at the expense of market openness of the sector and their liberalization commitments. This is a key feature because it ensures the application of prudential measures. Finally, the institutional framework and the potential dispute settlement, State-State and Investor-State alike, of the financial services chapter are left in the hands of experts such as the experts committee and the panel of arbitrators. The architecture of the chapter thus departs from the original scheme of dispute settlement entrusted to international trade experts.³⁷

In general terms, the negotiation of the Financial Services Chapter in the United States-Chile Free Trade Agreement followed the basic principles described above together with the NAFTA approach but included also some updates and improvements resulting from the experience accumulated under NAFTA, especially in relation to the application of the NAFTA's Financial Services Chapter. The final outcome was a chapter which includes an improved version of NAFTA with some new additions and features of GATS, especially with respect to provisions included in its Annex and in the Understanding on Commitments in Financial Services.³⁸

³⁷ See LAGOS WEBER & ARAYA ALLENDE, *supra* note 19, at 111-12.

³⁸ Following the approach of the GATS, the NAFTA Financial Services Chapter adopted a national treatment model, submitting market openness to the domestic regulation of the country where the financial services are supplied. Financial institutions are therefore subject to a double regulatory burden, having to meet both the requirements of the country of origin and those of the country in which their services are supplied. The Chapter comprises all financial services, defined as services of any financial services nature, irrespective of whether they are supplied by a financial services supplier or

In terms of the substantive provisions of the financial services negotiations, the non-discrimination principle was introduced by the inclusion of the National Treatment and Most-Favored-Nation Treatment obligations. Nevertheless, the National Treatment Article differs from the corresponding article of NAFTA, mainly due to the fact that it introduces an obligation of general application, without specifications regarding the treatment accorded at the sub-federal level of government. However, in their specific commitments, the United States make clear that the national treatment obligation has to be understood as the treatment provided by the legislation of the state in which the supplier was established (home-state rule). Conversely, the Most-Favored-Nation clause is identical in both agreements.³⁹

On the other hand, the United States-Chile Free Trade Agreement includes a specific provision on Market Access for Financial Institutions, similar to that of GATS Article XVI described above. However, the provision does not include the limitation relating to foreign equity participation as a Market Access restriction. It was agreed to introduce this restriction as a National Treatment limitation rather than as a Market Access limitation.

With respect to the obligation on Cross-Border Trade, which includes mode 1 and mode 2, a positive list included commitments for the supply of cross-border trade in services and for the consumption of specific services abroad. There is no standstill effect for the supply of services through modes 1 and 2 in sectors other than those specifically listed under this provision. Non-listed service sectors are excluded from the scope of the relevant obligations. In sum, the commitments made under the cross-border supply article were taken under a positive list for a specific number of financial services sectors and without standstill.

The provision on Senior Management is identical to the relevant NAFTA obligation in terms of prohibiting nationality and/or residency requirements for senior management positions and for more than a minority of the board of directors. The Transparency provision and the article on Treatment of Confidential Information introduce similar to the relevant NAFTA and GATS obligations.

not. However, the Chapter distinguishes between financial services suppliers that might be regulated, and financial institutions that must be regulated. It also includes a Most-Favored-Nation Treatment clause, subject to a list of exceptions, thus allowing discrimination, especially in the area of the mutual recognition. As was the case in GATS, the National Treatment clause contained the obligation to provide to foreign suppliers treatment no less favorable than the treatment accorded to national suppliers. However, the main difference with GATS is that the treatment is applicable only when the foreign supplier is in the same or similar circumstances with the local service provider. Finally, NAFTA's Financial Services Chapter contains no provision similar to the GATS' Market Access Article. NAFTA includes also other relevant provisions such as transparency of regulations, prudential measures or exceptions, new financial services and data processing, the latter two inspired by the Memorandum of Understanding. In relation to commitments, reservations and market openness, NAFTA has followed a negative list approach, introducing standstill for commitments made on establishment, cross-border trade in financial services, national treatment, most-favored-nation treatment, new financial services and senior management. These commitments are also subject to the ratchet principle, providing for the automatic incorporation of any future liberalization of current reservations.

³⁹ RAÚL E. SAÉZ & SEBASTIÁN SAÉZ, *LAS NEGOCIACIONES DE SERVICIOS FINANCIEROS DE CHILE* 27 (N.U., CEPAL, Division de Comercio e Integración Jun. 2006).

As in the case of NAFTA, the Article on New Financial Services allows the authorization of new financial services, but recognizes the role of the supervisory body in regulating these activities, taking into account prudential considerations. The exception contained in Article 12.10 adopts the terms of NAFTA and GATS. It allows a party to adopt or maintain any measure for prudential reasons or in order to ensure the integrity and stability of the financial system, or any non-discriminatory measures of general application taken by any public entity in pursuit of monetary and related credit policies or exchange rate policies. Such measures may be introduced notwithstanding any commitment included in the Financial Services, the Investment, Services, Telecommunication, E-commerce and Competition Chapters. The Article also includes a specific exception related to the Transfers obligation and to measures related to the prevention of deceptive and fraudulent practices or to deal with the effects of a default on financial services contracts. The drafting of this Article recognizes the interaction between the different Chapters of the Agreement and the prevalence of the Financial Services Chapter, in the sense that these exceptions apply without prejudice not only to the commitments of the Financial Services Chapter, but also to those of the Services, Investment, E-Commerce, Competition and Telecommunication Chapters.⁴⁰

For the Non-Conforming Measures Article, the Chapter adopted a hybrid approach for the scheduling of specific commitments. For some obligations a positive list approach was used whereas for others the parties adopted a NAFTA negative list approach. In the case of banking services and other services, with the exception of insurance, they followed a negative list approach with respect to the National Treatment, Most-Favored-Nation Treatment and Senior Management obligations; and for the Market Access obligation the parties adopted commitments under the form of Right of Establishment. However, in the insurance services sectors, the parties adopted a positive list approach with respect to the Market Access restrictions.⁴¹

⁴⁰ See United States-Chile Free Trade Agreement, *supra* note 7, Ch. 12 (Financial Services), art. 12.10 (“Notwithstanding any other provision of this Chapter or of Chapters Ten (Investment), Eleven (Cross-Border Trade in Services), Thirteen (Telecommunications), Fifteen (Electronic Commerce), and Sixteen (Competition Policy, Designated Monopolies, and State Enterprises), including specifically Article 13.16 (Telecommunications - Relationship to Other Chapters), a Party shall not be prevented from adopting or maintaining measures for prudential reasons, including for the protection of investors, depositors, policy holders, or persons to whom a fiduciary duty is owed by a financial institution or cross border financial service supplier, or to ensure the integrity and stability of the financial system. Where such measures do not conform with the provisions of this Agreement referred to in this paragraph, they shall not be used as a means of avoiding the Party’s commitments or obligations under such provisions. Nothing in this Chapter or Chapters Ten (Investment), Eleven (Cross-Border Trade in Services), Thirteen (Telecommunications), Fifteen (Electronic Commerce), and Sixteen (Competition Policy, Designated Monopolies, and State Enterprises), including specifically Article 13.16 (Telecommunications - Relationship to Other Chapters), applies to nondiscriminatory measures of general application taken by any public entity in pursuit of monetary and related credit policies or exchange rate policies. This paragraph shall not affect a Party’s obligations under Article 10.5 (Performance Requirements) with respect to measures covered by Chapter Ten (Investment) or Article 10.8 (Transfers) ...”).

⁴¹ Most of the limitations or restrictions listed by Chile in their annexes on reservations are related to the right of Establishment Article and especially with respect to a specific legal juridical type of organization for the establishment of a company in their territory.

The scope of NAFTA's right of establishment article was further developed and enhanced in the United States-Chile Free Trade Agreement. This provision, as mentioned above, applies to banking and other financial services, excluding insurance services, and is not subject to the ratchet effect. To some extent, this provision restores the approach taken in the Understanding, facilitating the adoption of commitments under a negative list approach. On the other hand, inspired by GATS, the Market Access Article applies to insurance services and adopts a positive list approach for the listing of specific commitments.

D. TELECOMMUNICATIONS

Chile has included telecommunication chapters in its agreements with the United States,⁴² Canada,⁴³ Mexico,⁴⁴ Korea,⁴⁵ Australia,⁴⁶ the European Union⁴⁷ and the Pacific Alliance.⁴⁸ The telecommunication chapters of these agreements are not identical. They contain different commitments, mainly because they reflect the emergence of new technologies that have redefined this sector. The most straightforward example is that of the supply of fixed telecommunication services as opposed to the supply of mobile phone services.

However, the chapter's objective to provide common standards for the domestic regulation applicable to the supply of telecommunications services remains. Based on the NAFTA approach, the telecommunication chapters neither provide for market openness nor contain liberalization commitments. As a result, whether the sector is open to foreign suppliers of services and foreign investors or not depends on the commitments made under the Annexes on reservations for the CBTS and investment chapters, and not on the commitments made under this chapter.

At the time of the negotiations with the United States, Chile had already negotiated telecommunication chapters with Canada and Mexico, both of them on the basis of the text of NAFTA. Provisions on Telecommunications of United States-Chile Free Trade Agreement were structured on the basis of the obligations contained in the GATS Annex on Telecommunications and in the WTO Reference Paper on Basic Telecommunications. The Chapter therefore ensures that all service suppliers of the other party shall have access to and use of any public telecommunications network or service offered in its territory or across its borders in a timely fashion, on reasonable and non-discriminatory terms and conditions.⁴⁹

⁴² United States-Chile Free Trade Agreement, *supra* note 7, ch. 13.

⁴³ Canada-Chile Free Trade Agreement, *supra* note 14, ch. I.

⁴⁴ Chile-Mexico Free Trade Agreement, *supra* note 15, ch. 12.

⁴⁵ Chile-Korea Free Trade Agreement, Feb. 15, 2003, OAS INFORMATION SYSTEM ON FOREIGN TRADE, http://www.sice.oas.org/Trade/Chi-SKorea_e/ChiKoreaind_e.asp (last visited Oct. 4, 2016).

⁴⁶ Chile-Australia Free Trade Agreement, *supra* note 34, ch. 11.

⁴⁷ Chile-European Free Trade Area Free Trade Agreement, *supra* note 32.

⁴⁸ Pacific Alliance, *supra* note 35.

⁴⁹ The most important feature of the Telecommunications Chapter is the reasonable access to networks by foreign suppliers in a competitive environment. This depends on the ability of suppliers to access each other's facilities and services, in which the operators have the necessity to interconnect with each other, which normally requires to have access to the infrastructure of the competitors.

Accordingly, the Telecommunications Chapter contains provisions intended to ensure that local companies offer such access on a reasonable and timely basis while guaranteeing that foreign suppliers have equal access, relative to local suppliers, to government-controlled resources such as spectrum, rights of way, and phone numbers, necessary for the supply of the service, thus enhancing competition in the sector. In order to ensure access and use of public telecommunication networks for suppliers, the Chapter introduces an obligation of local suppliers of public telecommunications services to provide interconnection to foreign suppliers of such services.

The Chapter introduces also obligations on major suppliers of public telecommunications services in order to ensure a non-discriminatory treatment regarding the availability, provisioning, rates, or quality of like public telecommunications services, and the availability of technical interfaces necessary for interconnection. Moreover, it also contains disciplines regarding competitive safeguards, unbundling of networks, co-location and resale.

The relevant provisions on number portability and dialing parity were drafted in a general manner, taking into consideration the development of Chilean legislation at the time that did not allow the introduction of more ambitious commitments. However, the legislation ensuring number portability and dialing parity is now fully implemented. This new framework allows Chile to undertake much stronger commitments in these areas in the TPP negotiations. Similarly, the lack of an appropriate regulatory framework to ensure non-discriminatory access to submarine cable systems, made it challenging for Chile to include a stronger provision on Submarine Cables Systems, raising concerns among regulators.

In relation to the domestic legal framework for the supply of public telecommunications services, the Chapter includes provisions on transparency in rule-making, developing and enforcing rules, transparent criteria for the licensing procedure, ensuring the independence of the regulatory body as well as establishing due process and rights of appeal for resolving domestic telecommunication disputes. Finally, the Chapter also includes obligations in relation to the regulation of the telecommunications sector in general, such as the obligation to provide universal service, allocation and use of scarce resources, flexibility in the choice of technologies and forbearance.

E. E-COMMERCE

Chile included a Chapter on Electronic Commerce in a bilateral free trade agreement for the first time in its agreement with the United States.⁵⁰ Chilean past experience was limited to the multilateral level, through the work program established by the WTO on E-Commerce, a topic discussed in several WTO bodies and committees as well as on the APEC and the OECD level. E-commerce provisions relate to trade in goods, services, telecommunications and intellectual property rights. In that sense, the regulation of e-commerce has a multidimensional approach given that it addresses horizontal issues which are subject to different regulation.

Article 15.2 of the E-Commerce Chapter begins by recognizing that the supply of a service through digital means falls within the scope of the CBTS or

⁵⁰ United States-Chile Free Trade Agreement, *supra* note 7, ch. 15.

Financial Services Chapters, depending on the type of service supplied by digital means. As a result, reservations listed as non-conforming measures apply also to the E-Commerce Chapter. Moreover, the Chapter establishes the commitment not to apply any type of customs duties to digital products.⁵¹ However, Article 15.1 prescribes that there is no obligation to prevent a party from imposing internal taxes, directly or indirectly, on digital products, provided they are imposed in a manner consistent with the Agreement.⁵²

Article 15.4, perhaps the most important provision of the Chapter, guarantees the non-discrimination principle for the treatment of digital products of the other party. However, this obligation of National Treatment and Most-Favored-Nation Treatment is subject to specific requirements and to the possibility of listing exceptions or non-conforming measures, even though the parties have not exchanged any list of non-conforming measures under this Chapter. Finally, the parties introduced a Cooperation Article, highlighting the importance of small and medium enterprises in using and participating in the e-commerce, the importance of information sharing and regulatory experience and also of developing the private sector self-regulation in this field.

F. TEMPORARY ENTRY OF BUSINESS PERSONS

Finally, unlike the agreements of the United States with Central America and Dominican Republic (CAFTA-DR), Peru and Colombia, the United States-Chile Free Trade Agreement includes a Chapter on Temporary Entry of Business Persons.⁵³ This Chapter aims to facilitate the temporary entry of business persons on a reciprocal basis, establish transparent criteria and procedures for temporary entry as well as to ensure border security and protect the domestic labor force and permanent employment in the respective territories of the parties. The main obligation consists of applying all the measures relating to the entry in an expeditious manner so as to avoid unduly impairing or delaying the trade in goods or services or the conduct of investment activities.

The requirement of an entry visa for natural persons is not considered to be a breach of this Chapter. The obligation of granting temporary entry to business persons is subject to the relevant domestic regulation of the country in accordance with the provisions of the Chapter, including those of Annex 14.3. This latter defines entry requirements, activities and permits for specific categories of business persons, namely, for Business Visitors, Trade and Investors, Intra-Company Transferees and Professionals, each being subject to specific conditions and requirements for granting a temporary entry and for staying in the territory of the other party.

A major concession granted by the United States government was its commitment to annually approve up to 1,400 initial applications of Chilean business persons seeking temporary entry under Section D of Annex 14.3 to engage in a

⁵¹ Digital products are defined as computer programs, text, video, images, sound recordings, and other products that are digitally encoded and transmitted electronically, regardless of whether a party treats such products as a good or a service under its domestic law.

⁵² The Agreement recognizes the same principle with respect to duties imposed on trade in goods [United States-Chile Free Trade Agreement, *supra* note 7, art. 3.5].

⁵³ United States-Chile Free Trade Agreement, *supra* note 7, art. 14.1

business activity at a professional level. This advantage is of particular importance given that it has been granted only to Chile and Singapore and was never extended to other United States trading partners.⁵⁴

IV. THE INFLUENCE OF THE NAFTA APPROACH

In relation to trade in services negotiations in the context of a free trade agreement with the United States, Latin American countries had to adopt and adapt to the U.S. model. Trade in services and related matters were largely inspired by the NAFTA as a general legal reference in terms of structure of commitments and disciplines in which trade in services is addressed. This approach has also included provisions from GATS/WTO obligations and new developments that have taken place since the entry into force of NAFTA, particularly in the telecommunications and financial services negotiations. The differences in the outcomes of the bilateral trade negotiations is explained by the countries' degree of liberalization at the moment of initiating negotiations and, as mentioned previously, by the entry into force of GATS. Although free trade agreements with the United States cover a wide range of services, financial and telecommunications services arise as the main targeted sectors.⁵⁵

Moreover, when negotiating trade in services with other countries, Latin American countries apparently prefer to negotiate under the NAFTA-type approach. In this regard, the adoption of a negative list of reservations for cross-border services' trade and investment, the introduction of separate chapters on telecommunications and financial services and the inclusion of e-commerce and temporary entry provisions has been the preferred approach for some Latin American countries in the last 10 years, most notably for countries like Chile, Peru, Mexico, Colombia (the Pacific Alliance members).

Since NAFTA, Mexico has played a pivotal role in extending this liberalization approach and similar types of disciplines on services to other sub-regional agreements that it has signed with countries in South and Central America, such as Colombia,⁵⁶ Venezuela,⁵⁷ Bolivia,⁵⁸ Chile,⁵⁹ Costa Rica, Nicaragua, El Salvador, Guatemala, and Honduras.⁶⁰

⁵⁴ See LAGOS WEBER & ARAYA ALLENDE, *supra* note 19, at 130-31.

⁵⁵ See SAÉZ, *supra* note 2, at 23-24.

⁵⁶ Colombia-Mexico Free Trade Agreement, Col.-Mex., Jun. 13, 1994, OAS INFORMATION SYSTEM ON FOREIGN TRADE, <http://www.sice.oas.org/Trade/go3/G3INDICE.ASP> (last visited Oct. 4, 2016).

⁵⁷ Mexico and Venezuela originally signed a Free Trade Agreement as part of the Mexico-Colombia Agreement [See M. Angeles Villarreal, *Mexico's Free Trade Agreements*, CONGRESSIONAL RESEARCH SERVICE 11 (2012) available at <https://www.fas.org/sgp/crs/row/R40784.pdf> (last visited Oct. 4, 2016)].

⁵⁸ Bolivia-Mexico Free Trade Agreement, Bol.-Mex., May 17, 2010, OAS INFORMATION SYSTEM ON FOREIGN TRADE, http://www.sice.oas.org/Trade/BOL_MEX_66/BOL_MEX_Index_s.asp (last visited Oct. 4, 2016).

⁵⁹ Chile-Mexico Free Trade Agreement, *supra* note 15.

⁶⁰ Central America-Mexico Free Trade Agreement, Costa Rica-El Salv.-Guat.-Hond.-Nic.-Mex., Apr. 17, 1998, OAS INFORMATION SYSTEM ON FOREIGN TRADE, http://www.sice.oas.org/Trade/CACM_MEX_FTA/Index_s.asp (last visited Oct. 4, 2016).

Likewise, countries that have negotiated services chapters with the United States after the entry into force of NAFTA have benefited from the experience and the reservations introduced by the NAFTA members. In fact, in many instances, some of the reservations introduced by non-NAFTA members in their negotiations with NAFTA members were “mirror reservations” covering important sensitive issues, including, among others, social services, minority and aboriginal affairs.⁶¹ This was the case in the free trade agreements between the United States and Colombia,⁶² Panama,⁶³ Peru,⁶⁴ and Central America and Dominican Republic (CAFTA-DR).⁶⁵

In terms of structure, these free trade agreements have followed the pattern of the Investment, Services and Related Matters Part of NAFTA: a CBTS chapter regulating only modes 1, 2 and 4; an investment chapter addressing investments in all sectors, including mode 3 or commercial presence, a specific self-contained chapter on financial services dealing not only with the supply of financial services, but also with the establishment of a commercial presence; a telecommunications chapter regulating the access and use of public telecommunication networks; and a chapter including issues on e-commerce. In this respect, the only difference that could be identified is the lack of a temporary entry chapter. Since the negotiations with Chile and Singapore, the United States did not include a chapter on Temporary Entry of Business Persons in their free trade agreements negotiations.

With regard to the commitments made by the Latin American countries under these agreements, the results of the negotiations were similar to the concessions exchanged in other bilateral free trade agreements with other countries, but the trend has been to some extent broader and deeper in the commitments made under their agreements with the United States. On the other hand, the United States have not introduced any meaningful modification to their regulatory regime in the context of these negotiations, but committed themselves to maintaining their current level of liberalization of services' trade and investment in similar terms to their GATS Schedule of Specific Commitments, albeit subject to the standstill and the ratchet principles.

Substantive obligations of the free trade agreements between the United States and the Latin American countries have numerous differences. For example, in the case of the United States-Chile Free Trade Agreement, there was no provision for the transfers obligation included in the CBTS Chapter and, as stated before, the United States did not include a temporary entry chapter in their agreements with Central America and Dominican Republic (CAFTA-DR), Peru and Colombia. Such differences may be attributed to the specific interests of the parties involved in each bilateral negotiation.

⁶¹ See SAÉZ, *supra* note 2, at 23-24.

⁶² United States-Colombia Trade Promotion Agreement, Aug. 24, 2006, <https://ustr.gov/trade-agreements/free-trade-agreements/colombia-fta/final-text> (last visited Oct. 4, 2016).

⁶³ United States-Panama Trade Promotion Agreement, Oct., 31, 2012, <https://ustr.gov/trade-agreements/free-trade-agreements/panama-tpa/final-text> (last visited Oct. 4, 2016).

⁶⁴ United States-Peru Trade Promotion Agreement, Feb. 9 2009, <https://ustr.gov/trade-agreements/free-trade-agreements/peru-tpa/final-text> (last visited Oct. 4, 2016).

⁶⁵ United States-Dominican Republic-Central America Free Trade Agreement (CAFTA-DR), Costa Rica-Dom R.-I Salv.-Guat.-Hond.-Nic.-U.S., Aug. 05, 2016, <https://ustr.gov/trade-agreements/free-trade-agreements/cafta-dr-dominican-republic-central-america-fta/final-text> (last visited Oct. 4, 2016).

Several bilateral free trade agreements concluded among Latin American countries have also followed the approach of NAFTA. Chile and Peru negotiated a bilateral agreement including a CBTS chapter regulating modes 1, 2 and 4, an investment chapter for investments in all sectors and a temporary entry chapter for business persons. The agreement did not contain a telecommunications or a financial services chapter because these services were not part of their respective commercial interests. However, the agreement did include a commitment for future negotiations in financial services. The Mexico-Peru Free Trade Agreement,⁶⁶ follows the structure of the Chile-Peru Free Trade Agreement,⁶⁷ but includes also a financial services chapter. This is also the case for the Colombia-Mexico Free Trade Agreement⁶⁸ that includes also a telecommunications chapter. The Free Trade Agreement between Chile and Colombia includes also an e-commerce chapter and a future negotiation clause in relation to financial services.⁶⁹

Most notably, the trend to adopt the NAFTA approach is not limited to free trade agreements negotiated among Latin American countries, it is also extended to their trade relations with Canada and to trade agreements with some Asia Pacific countries, such as Japan, New Zealand and Australia. Perhaps one of the reasons why most of those countries have been part of the TPP negotiations was the fact that they have already had experience in negotiations with the NAFTA model and most of them, with the exception of Japan and New Zealand, had already concluded a free trade agreement with the United States.⁷⁰

Finally, the Pacific Alliance Trade Protocol constitutes a consolidation of the NAFTA model for trade in services. Mexico, Chile, Colombia and Peru decided to adopt a negative list approach for their commitments on services' trade and investment, introduce a specific self-contained chapter on financial services cross-border trade and investment and incorporate a separate chapter on telecommunications and e-commerce. Despite the differences between the substantive provisions of the Pacific Alliance Trade Protocol and the NAFTA prototype, the basic structure as well as the scope and coverage of the specific chapters and their interaction was maintained almost unaltered. This confirms the preference of the Pacific Alliance members for a NAFTA-inspired model of regulation of their trade and investment relations.

⁶⁶ Mexico-Peru Free Trade Agreement, Mex.-Per., Apr. 6, 2011, OAS INFORMATION SYSTEM ON FOREIGN TRADE, http://www.sice.oas.org/Trade/MEX_PER_Integ_Agrmt/MEX_PER_Ind_s.asp (last visited Oct. 4, 2016).

⁶⁷ Chile-Peru Free Trade Agreement, Chi.-Per., Aug. 22, 2006, OAS INFORMATION SYSTEM ON FOREIGN TRADE, http://www.sice.oas.org/Trade/CHL_PER_FTA/Index_s.asp (last visited Oct. 4, 2016).

⁶⁸ Colombia-Mexico Free Trade Agreement, *supra* note 56.

⁶⁹ Chile-Colombia Free Trade Agreement, Chi.-Col., Nov. 27, 2006, OAS INFORMATION SYSTEM ON FOREIGN TRADE, http://www.sice.oas.org/Trade/CHL_COL_FTA/CHL_COL_Ind_s.asp (last visited Oct. 4, 2016).

⁷⁰ Countries like Vietnam, Brunei and Malaysia adopted the negative list approach for services and investments and introduced chapters on telecommunication and financial services, for the first time in the context of free trade agreement negotiations. However, for the rest of the TPP member states, the negative list approach for trade in services and related matters has already been the preferable approach in their trade relations or at least they had prior some experience by adopting this model in some of a their free trade agreements.

V. CONCLUDING REMARKS

The establishment of the World Trade Organization and the adoption of GATS had a major impact on the definition and the development of global rules governing international trade flows. However, the NAFTA model has also shaped global trade relations among numerous countries, especially among those who had negotiated a free trade agreement with the United States and with the other NAFTA member states. Some aspects of the NAFTA model have moved beyond its members' trade policy scope and have been adopted by other countries, especially in Latin America and the Pacific Rim, as their preferred approach to their own bilateral trade arrangements.

In the case of Chile, the free trade agreement with the United States was, at that time, the most challenging bilateral trade negotiation, not only because of the importance of the trading partner, but also because of the level of ambition in terms of scope and coverage of the agreement. One of the most demanding issues was addressing the entire implications of the structure of the agreement and the interaction between different chapters in order to assess the effects of the commitments undertaken. These effects were particularly complex in the context of the services' trade related matters negotiations. Arguably, the rest of Latin American countries that entered into free trade agreement negotiations with the United States faced the same difficulties.

Unlike GATS, under the NAFTA approach trade in services is addressed in several chapters of the agreement. On one hand, the modes of supply of services having a cross-border element (modes 1, 2 and 4) are regulated in the CBTS chapter while the establishment of a commercial presence (mode 3) is regulated in the Investment chapter. On the other hand, the NAFTA approach involves the introduction of a separate and self-contained financial services chapter regulating all issues related to the supply of financial services and investment in financial institutions. Moreover, it involves the introduction of specific chapters on telecommunications, e-commerce and on occasions on temporary entry of natural persons, dealing with regulatory issues of specific sectors in order to facilitate the supply of telecommunications services, the entry of natural persons (mode 4) and some aspects of the electronic supply of services.

The trade liberalization aspects of the NAFTA approach are based on a negative listing, whereby all sectors and measures are to be liberalized unless otherwise specified in the annexes on reservations containing non-conforming measures to the obligations of mainly the CBTS and investment chapters. Under this so-called "list or lose" technique, listing refers to measures which are not in conformity with one or more of the obligations of the chapters (most-favored-nation treatment, national treatment, performance requirements, local presence, and market access). The same approach applies for commitments made under the financial services chapters. Apart from reservations for the specific commitments on financial services, the general reservations for CBTS and investment apply also to financial services.

In general terms, the content of obligations in NAFTA-inspired services trade negotiations and in GATS-type agreements do not differ much. National treatment and most-favored-nation treatment are the essential building blocks for any agreement on services. Despite the different techniques, substantive provisions in both cases are subject to some sort of reservations or exceptions, whether

through a positive list of specific commitments or through a list of reservations.⁷¹ Likewise, agreements that have followed the NAFTA approach introduced general obligations of most-favored-nation treatment and national treatment. Country-specific reservations for both principles were introduced on services and investment sectors. Such reservations included measures that violated the principles and, in order for the parties to maintain them or continue to apply them, it was required to list them as exceptions to the specific principle. This approach applies also to the other obligations of the services chapter such as market access and local presence.

The investment chapter has exactly the same structure in terms of listing of non-conforming measures that violate the general obligations included therein. It also contains specific national treatment and most-favored-nation treatment provisions along with an article on performance requirements and senior management and board of directors. In this case, the annexes on reservations contain the non-conforming measures to both the CBTS and investment chapters. Furthermore, the non-conforming measures article of both chapters is subject to the standstill and ratchet principle.

The chapter on liberalization commitments in the financial services sector has its own specific set of reservations. The obligations and the specific financial services included depend on the way that the commitments are listed. In some cases a positive list of sectors is introduced and whereas in others a negative list is adopted. The ratchet principle has some exceptions.

Telecommunications, temporary entry and e-commerce chapters have no annexes on reservations since they relate to specific regulation on these topics and have no market liberalization component. Those chapters are designed to complement the market access granted by the main CBTS and investment chapters.

This negative list approach has been incorporated into a large majority of the sub-regional agreements in the Western Hemisphere encompassing services. Since NAFTA came into force the United States and Mexico have played an essential part in extending the NAFTA approach in Latin America and Asia Pacific. Likewise, Chile has adopted this NAFTA negative list approach as the preferred model for services negotiations and has concluded similar agreements with Canada, Mexico, Peru, Colombia, Central America, P4 (New Zealand, Singapore and Brunei Darussalam), Australia and Japan.

In Latin America and in the Pacific Rim, the network of bilateral and regional free trade agreements such as the Pacific Alliance and the TPP has created a significant amount of treaty practice for countries adopting the NAFTA approach, generating an opportunity for harmonizing global rules applicable to trade in services, at least on a regional level. In terms of importance, GATS continues to be the only multilateral agreement governing trade in services. However, the growing number of countries adopting the negative list approach has made the NAFTA model one of the most relevant frameworks for the adoption of trade in services commitments in the future.

⁷¹ National Treatment under GATS is not a general obligation but rather the result of a specific commitment made by each member in its Schedule of Specific Commitments. This is also the case for the Market Access obligation. It is also important to bear in mind that even though the Most-Favored-Nation provision is a general obligation, it is subject to a list of exemptions.