



**Regional Training of Trainers
on how to design, negotiate, and implement FTAs**

Session 4B: Investment and Movement of Natural Persons

October 2022



Introduction

Article I:2 of the GATS defines trade in services in four modes.

conventional cross-border trade (mode 1),

consumption of services abroad (mode 2),

services supplied via commercial presence (mode 3), and

the presence of natural persons (mode 4).

Investment and Movement of Natural Persons

Mode 3 refers to any type of commercial or business establishment, including through the constitution, acquisition or maintenance of a juridical person or a branch or representative office.

Mode 4, on the other hand, defines Members' obligations and commitments regarding temporary labour market access.

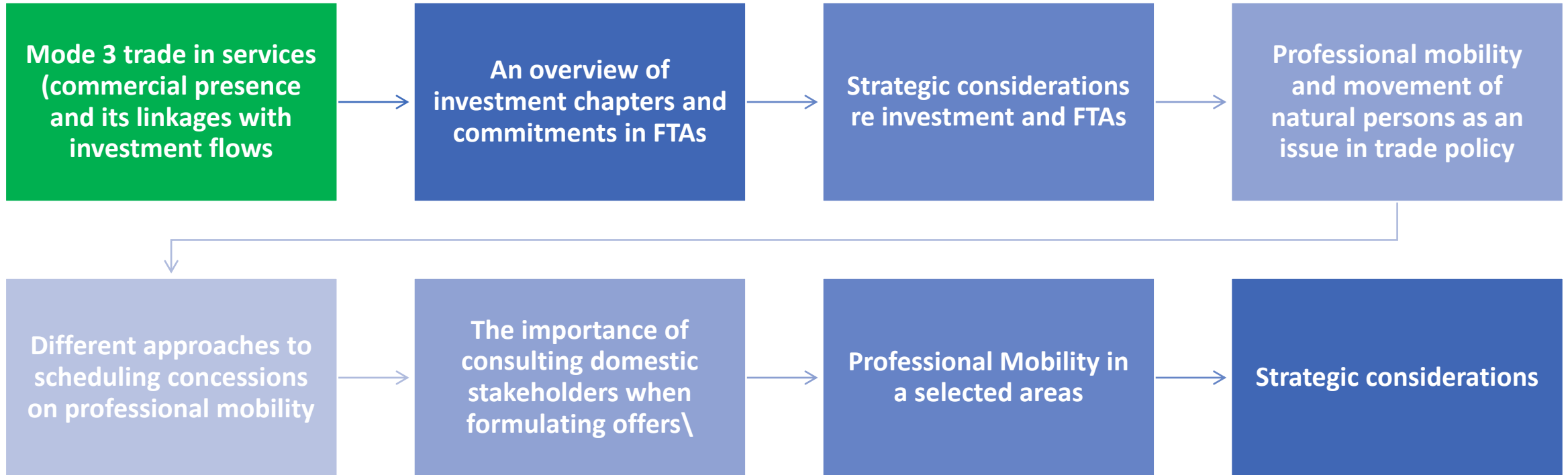
Pros and cons

Service suppliers falling under mode 3 and 4 are protected by disciplines provided in the GATS, including MFN treatment, national treatment, and other types of market access commitments.

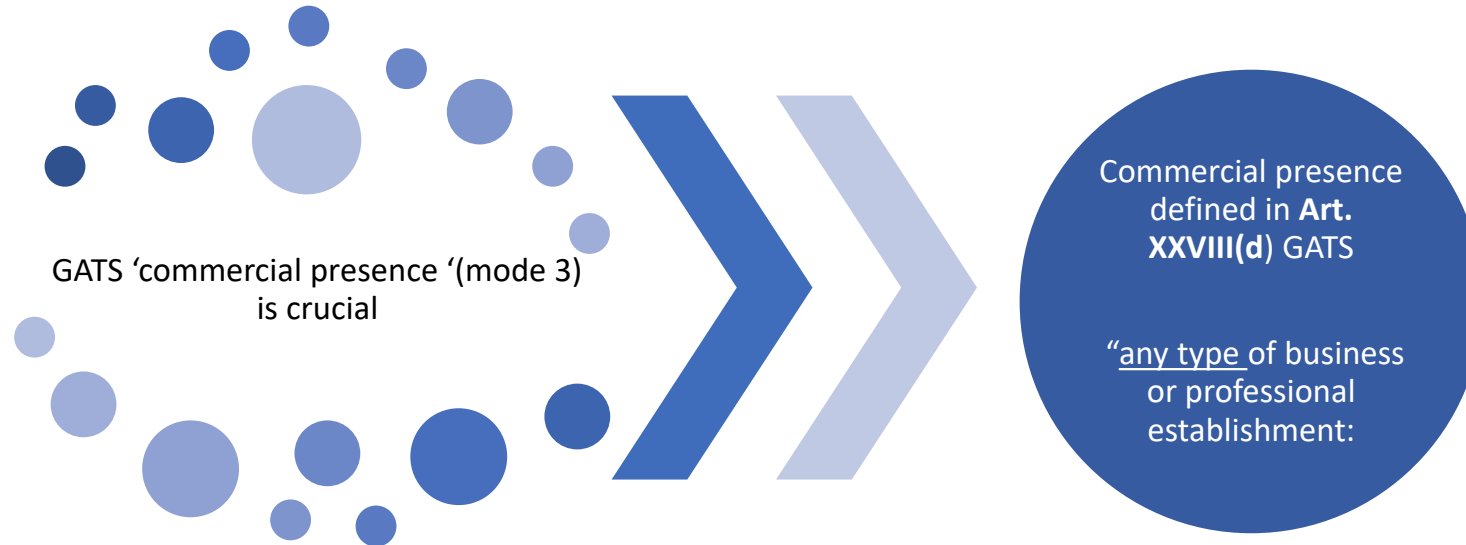
Schedules of Specific Commitments' annexed to the GATS

positive list approach is one of the major shortcomings of the GATS in regulating movement of natural persons, because members remain essentially free to operate non-discriminatory regulatory requirements in many service sectors liberalization is limited to current service suppliers.

Outline



Mode 3 trade in services



- through (i) the constitution, acquisition or maintenance of a juridical person,
- or (ii) the creation or maintenance of a branch or a representative office, within the territory of a Member for the purpose of supplying a service".

Mode 3 trade in services

- Service provider establishes or has a presence of commercial facilities in another country in order to render a service.
 - The service itself is supplied by setting up a business or professional establishment
 - The subsidiary corporation or a branch or representative office, in the territory of one member by an investor acting as service supplier of another WTO member
- GATS obligations affect the investment operational conditions
 - domestic regulation,
 - recognition,
 - monopolies and exclusive service suppliers, and
 - business practice obligations.

Mode 3 trade in services

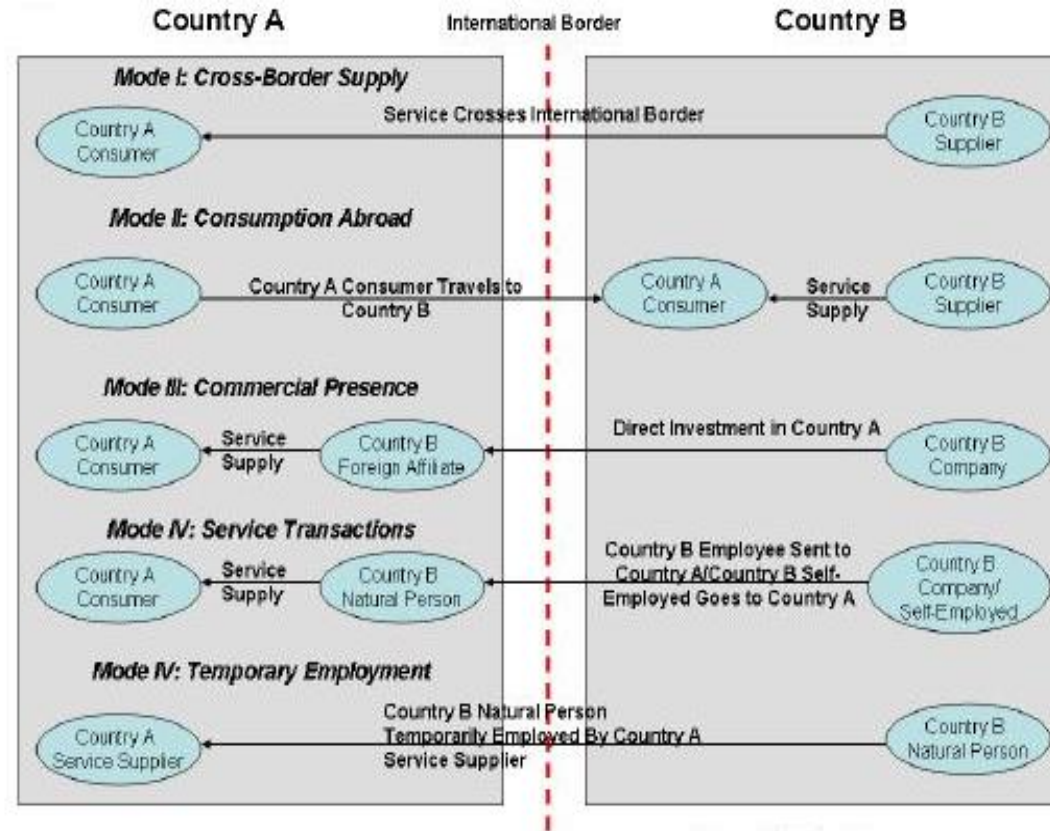
- The basic principles
 - The principle of most-favoured-nation treatment:
 - WTO members must accord immediately and unconditionally to any other member treatment no less favourable than the treatment which they accord to like services and service suppliers of any other country.
 - Article II:2 GATS permits members to maintain a measure inconsistent with the principle provided that such a measure is listed in, and meets the conditions of the Annex on Article II Exemptions (the “opt-out” approach)
 - The national treatment and market access
 - Market access for foreign services and service suppliers is the central focus of the GATS.
 - GATS fully reflects a model of progressive and individualized liberalization.
 - Articles XVI and XVII GATS adopt an “opt-in” or “positive list” approach.
 - Transparency
 - Articles III and IV:2 GATS reflect established standards on transparency / independent judicial review
 - Article VI – termed “Domestic Regulation” – contains a number of procedural and substantive norms

Mode 3 trade in services

The practice of specific commitments

- Horizontal commitments and sector-specific section
- Full liberalization
- Limited liberalization

Mode 3 trade in services



Mode 3 trade in services

In short:

GATS offers investment protection guarantees at the multilateral level to the extent that it regulates and liberalises the pre-accession stage of mode 3 services (commercial presence) through market access commitments and national treatment commitments entered into by WTO Members (at their own discretion) in the form of schedules of commitments pursuant to respectively Articles XVI and XVII of the GATS

GATS is important, however...

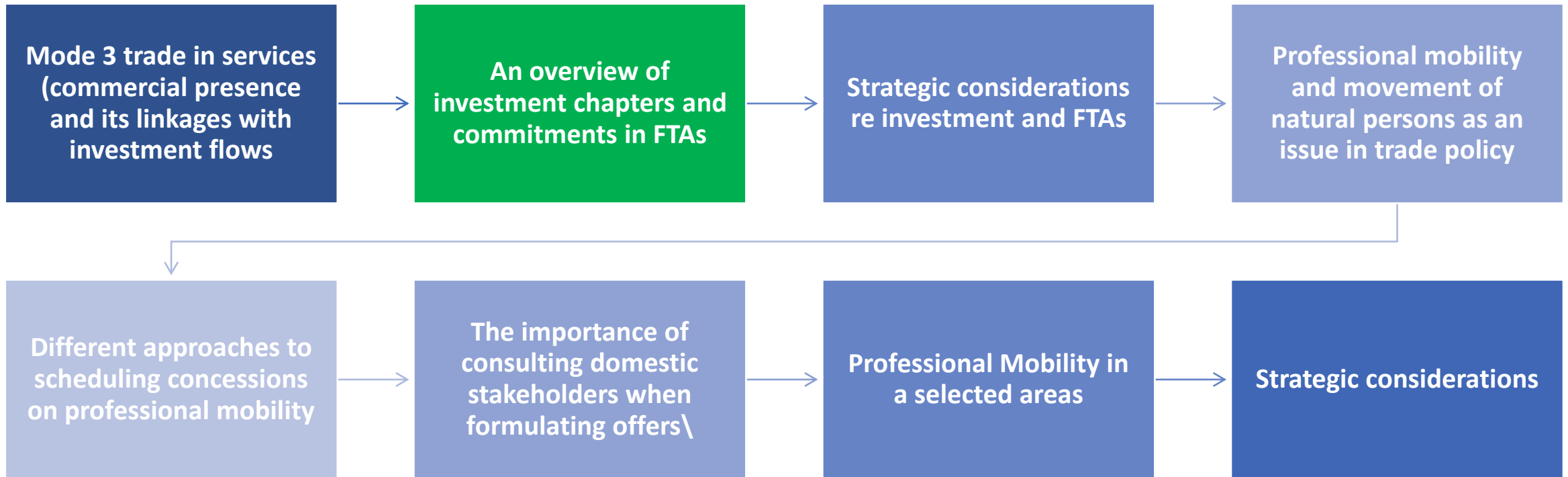
GATS addresses only liberalization of investment in services (again fragmentation)

Affords no private party recourse to international arbitration procedures (WTO)

Covers only a subset of investments subject to BIT or IIA disciplines (more narrow definition of investment)

Affords no protection to investors and their investments (post-establishment such as expropriation)

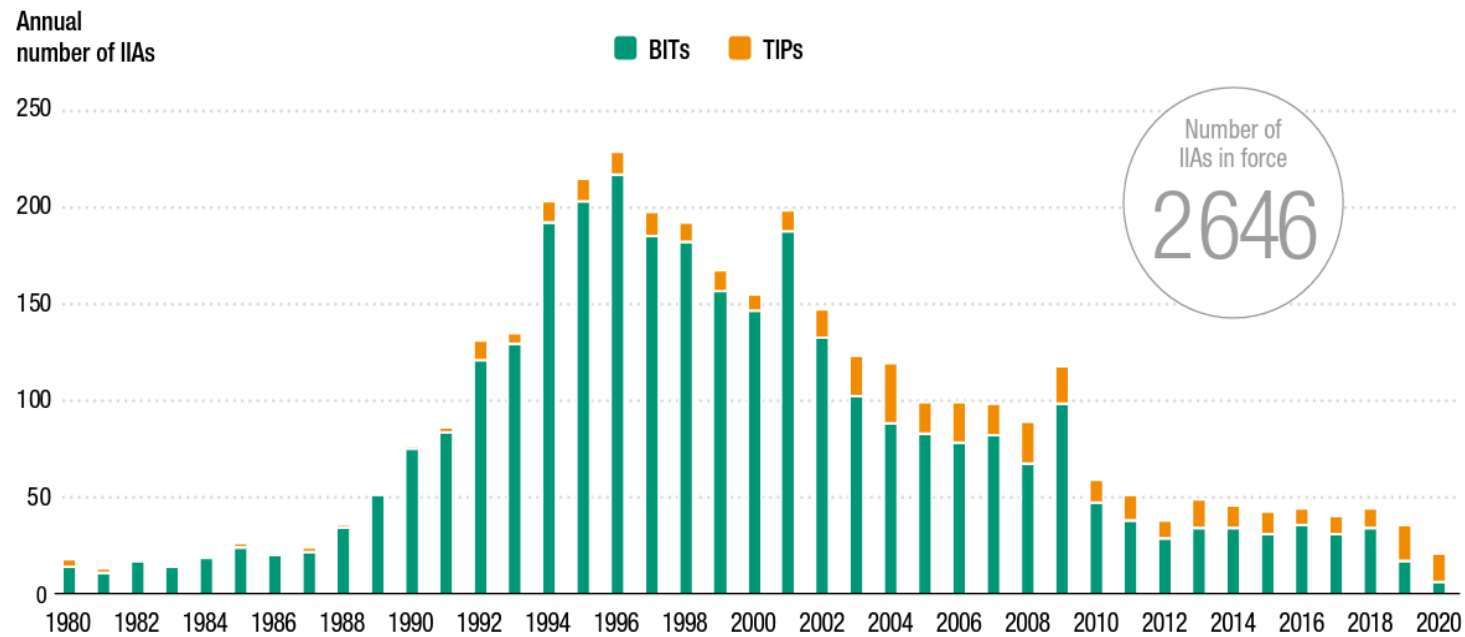
Outline



An overview of investment chapters and commitments in FTAs

- The inclusion of investment issues in PTAs is a very recent practice.
 - NAFTA and the GATS
 - PTAs increasingly include a broad set of investment provisions that liberalize, protect, and regulate investments.
- This has resulted in the combination of the investment protection elements traditionally found in BITs being merged with the trade liberalization elements found in PTAs.
 - Many PTAs that liberalize trade in services now have a distinct investment chapter that extends coverage of investment beyond the mode 3 services provision of the GATS and regulates a broader investment framework that applies to goods, intellectual property, and, depending on how investment is defined, portfolio investment.
 - UNCTAD lists 2,954 BITs and 362 other treaties with investment provisions, of which 2,319 BITs and 294 treaties with investment provisions are currently in force.

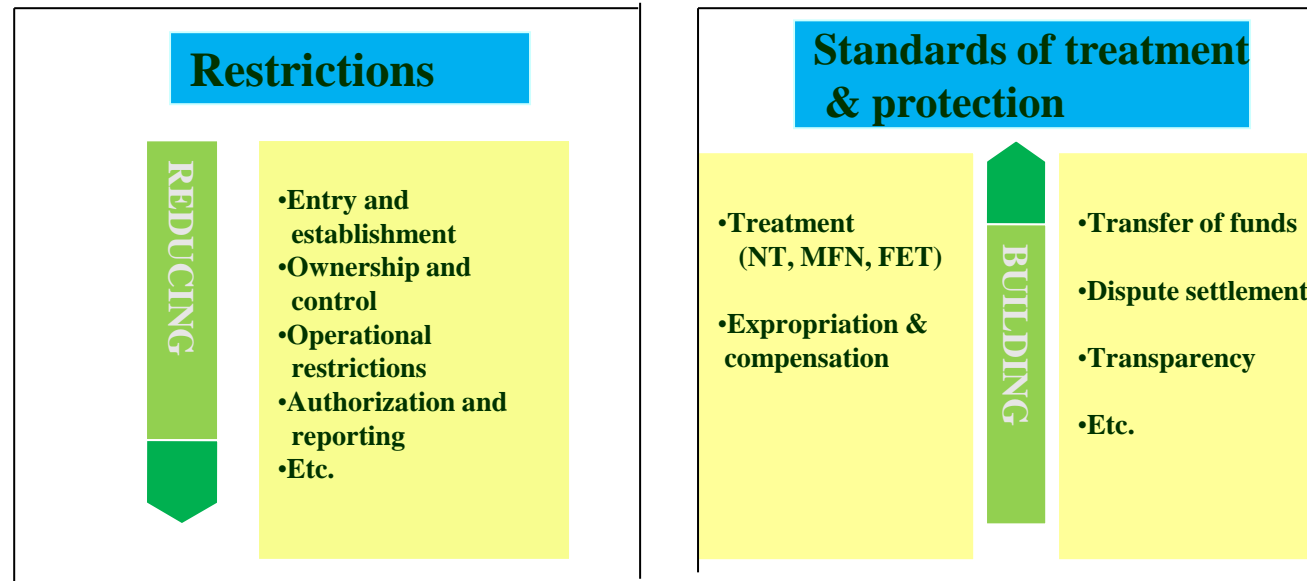
An overview of investment chapters and commitments in FTAs



Source: UNCTAD, IIA Navigator.

Note: This includes treaties (i) unilaterally denounced, (ii) terminated by consent, (iii) replaced by a new treaty and (iv) expired automatically.

An overview of investment chapters and commitments in FTAs



An overview of investment chapters and commitments in FTAs

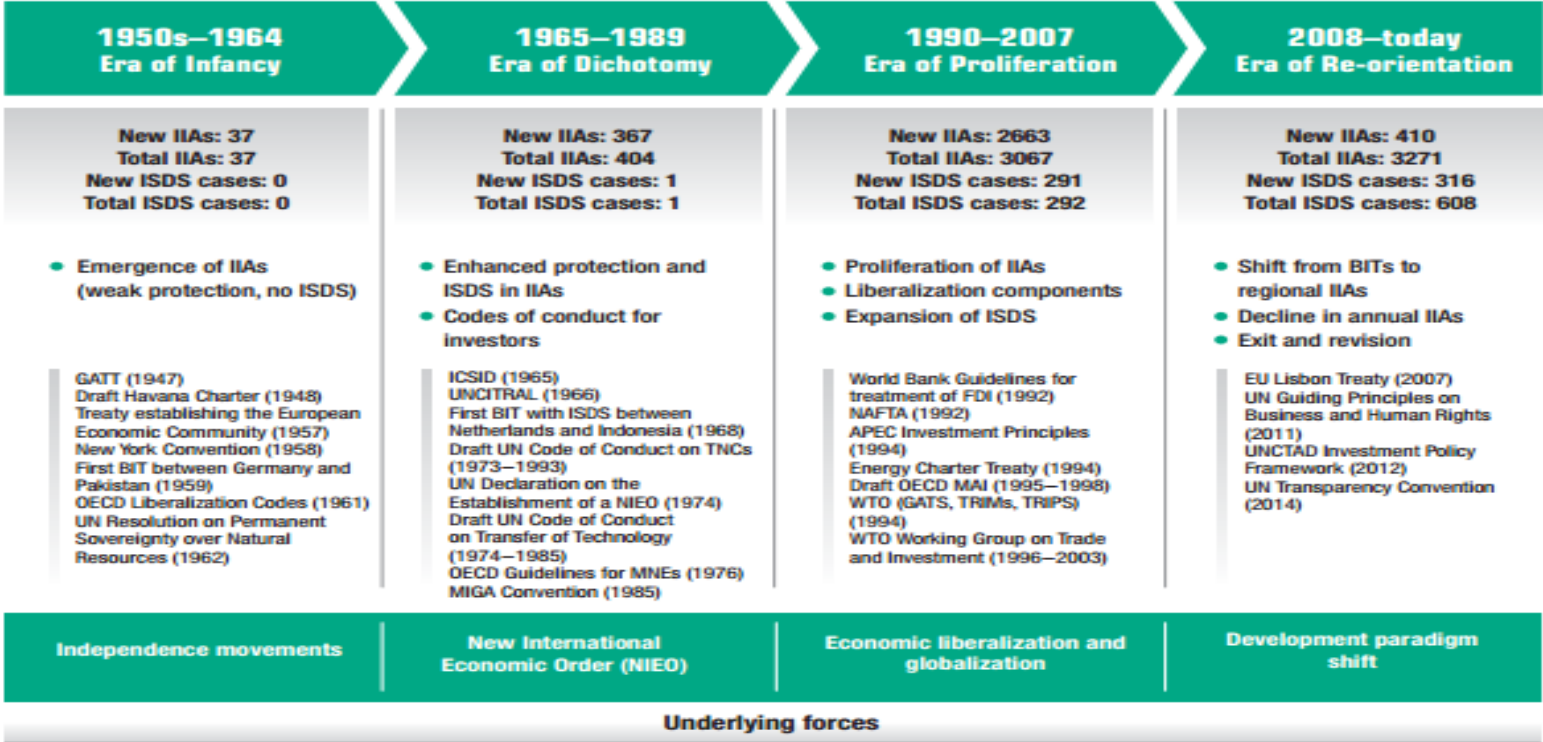
To which extent do PTAs such as free trade agreements go beyond traditional BITs in terms of investment protection?

PTA investment chapters essentially take their origins in BITs introduced in the late 1950s or early 1960s.

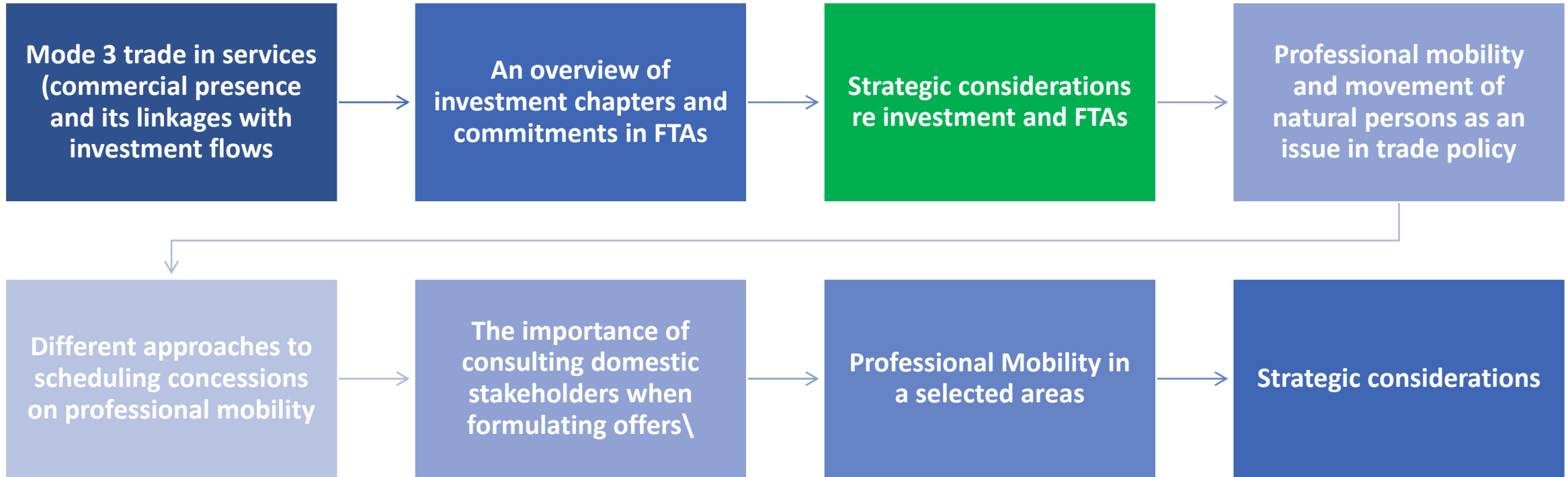
Today's PTA investment chapters typically provide broad investment coverage, strong protection and non-discrimination commitments and recourse to investor-state international arbitration.

Investment disciplines lodged in PTA services chapters are different (Obligations on market access and national treatment arise only to the extent liberalisation commitments are listed in separate schedules).

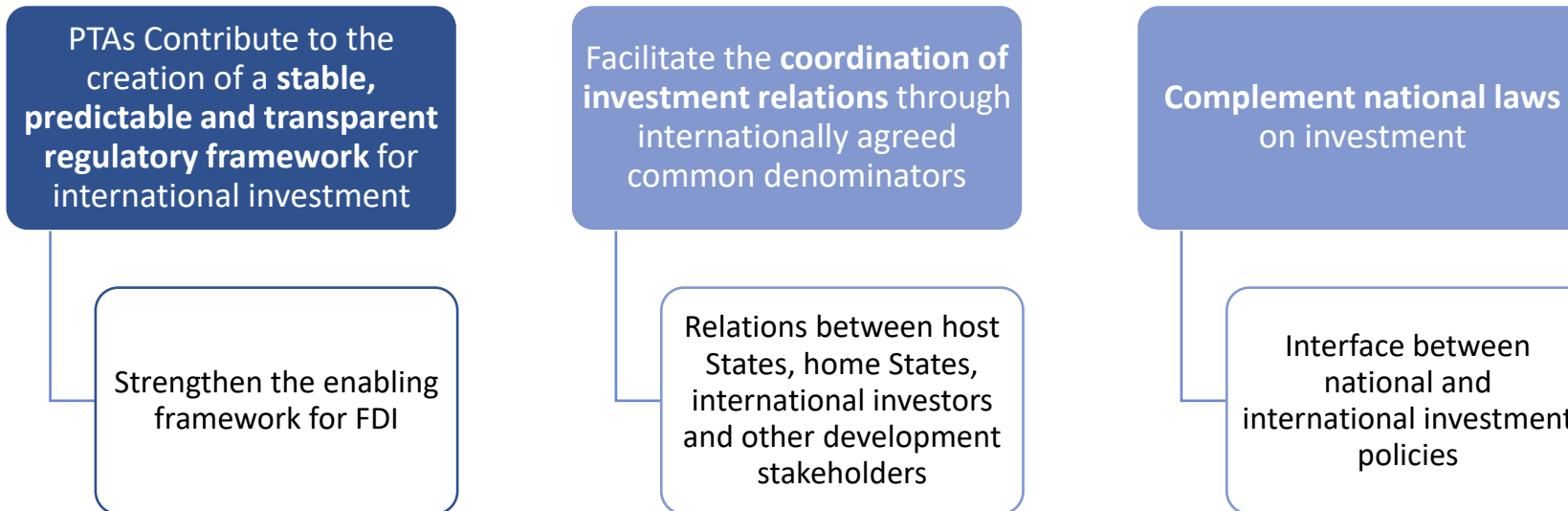
An overview of investment chapters and commitments in FTAs



Outline



Strategic considerations re investment and FTAs



Strategic considerations re investment and FTAs

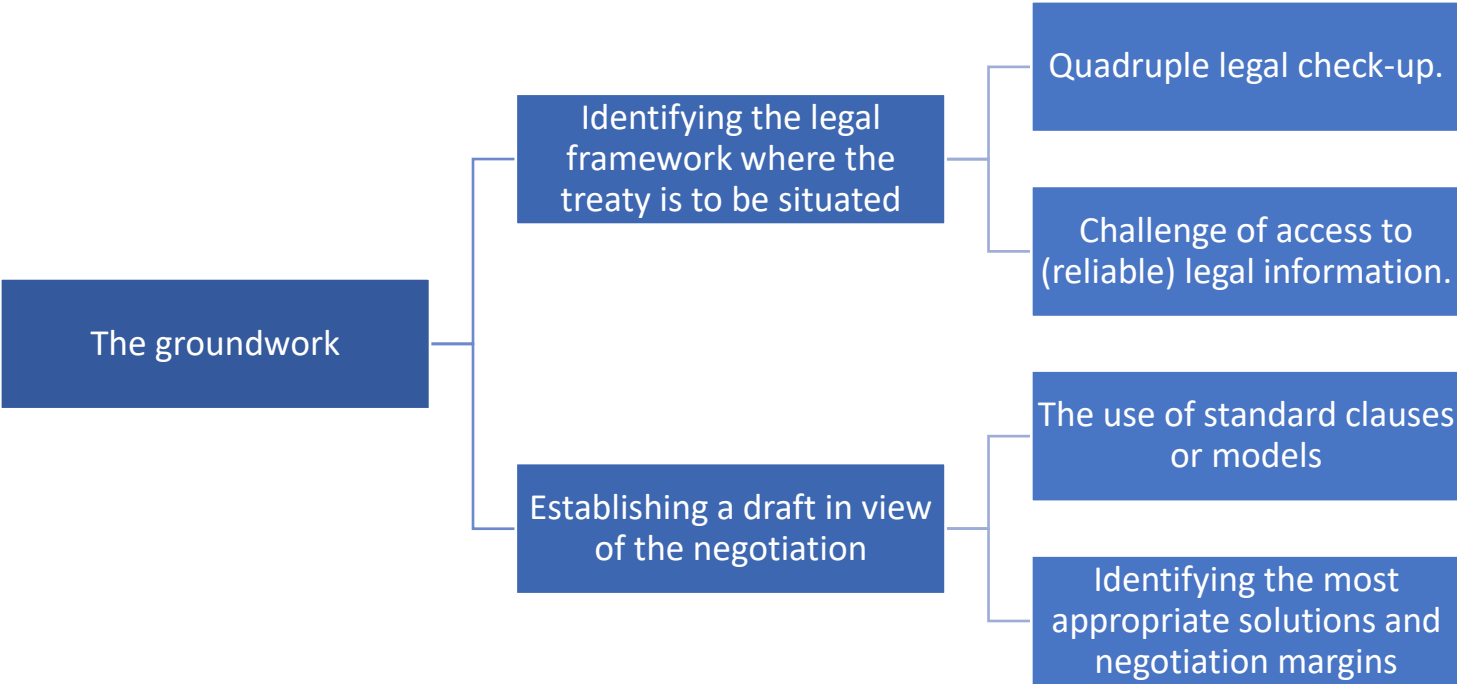
168 Asian Economic Integration Report 2016

Policy implications

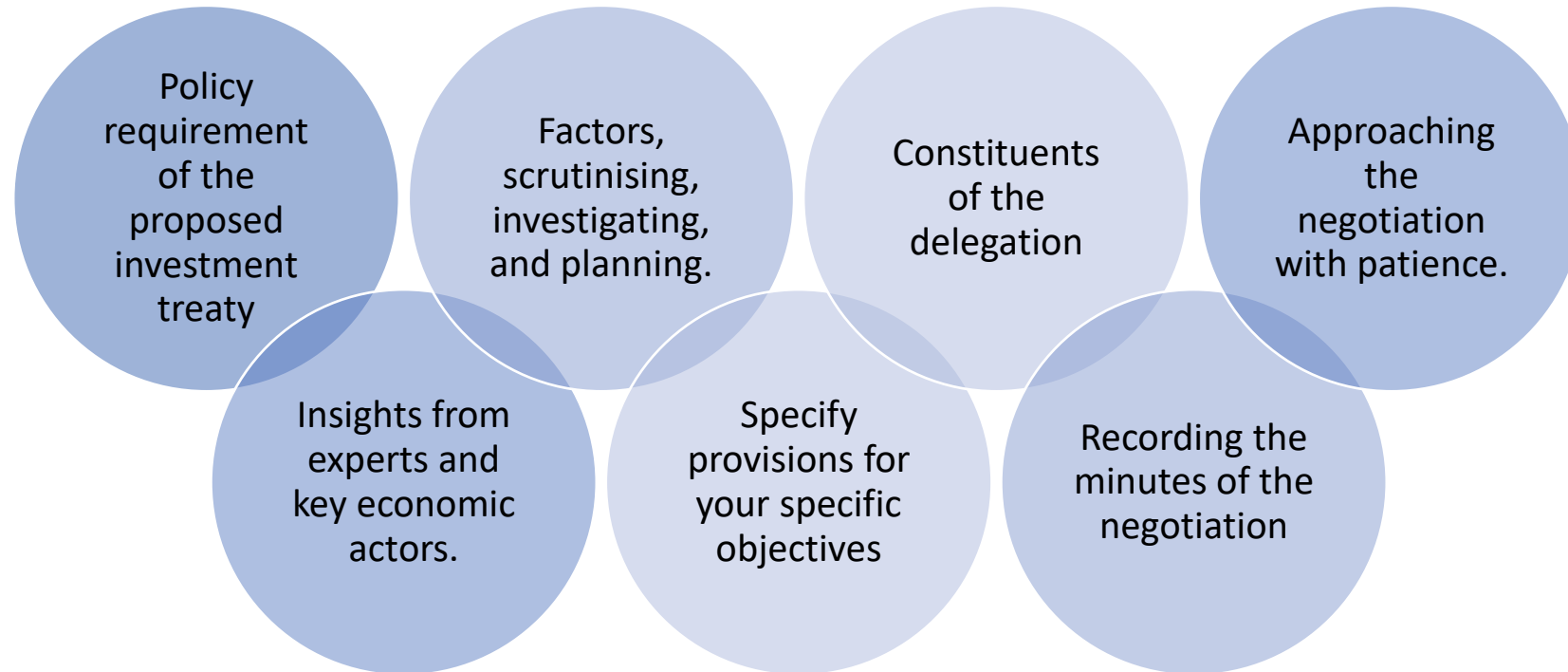
The cross sectional exponential model shows BITs and RTIAs can strongly encourage greenfield and M&A FDI projects. In the case of BITs, the presence of an investor-state-dispute mechanism (ISDM) is the only provision that appears to be significant across different model specifications. For RTIAs, foreign investors seem to be particularly sensitive to the provision expressed by TREAT, meaning that they will not be discriminated against domestic investors or other foreign investors. Provisions for national treatment and most-favored nation status in RTIAs may matter because they are possibly more comprehensive or take place alongside measures supporting international trade liberalization and the creation of regional supply chains. Overall a “pro-FDI” BIT can be expected to increase the number of FDI projects by 35.3%, or by 58.4% for a “pro-FDI” RTIA.⁶⁹ These findings suggest that IIAs which guarantee the credible protection of rights can be effective in attracting foreign investors.

*“Overall a **“pro-FDI” BIT can be expected to increase the number of FDI projects by 35,3%, or 58,4% for a “pro-FDI” RTIA.** These findings suggest that IIAs which guarantee the credible protection of rights can be effective in attracting foreign investors.”*

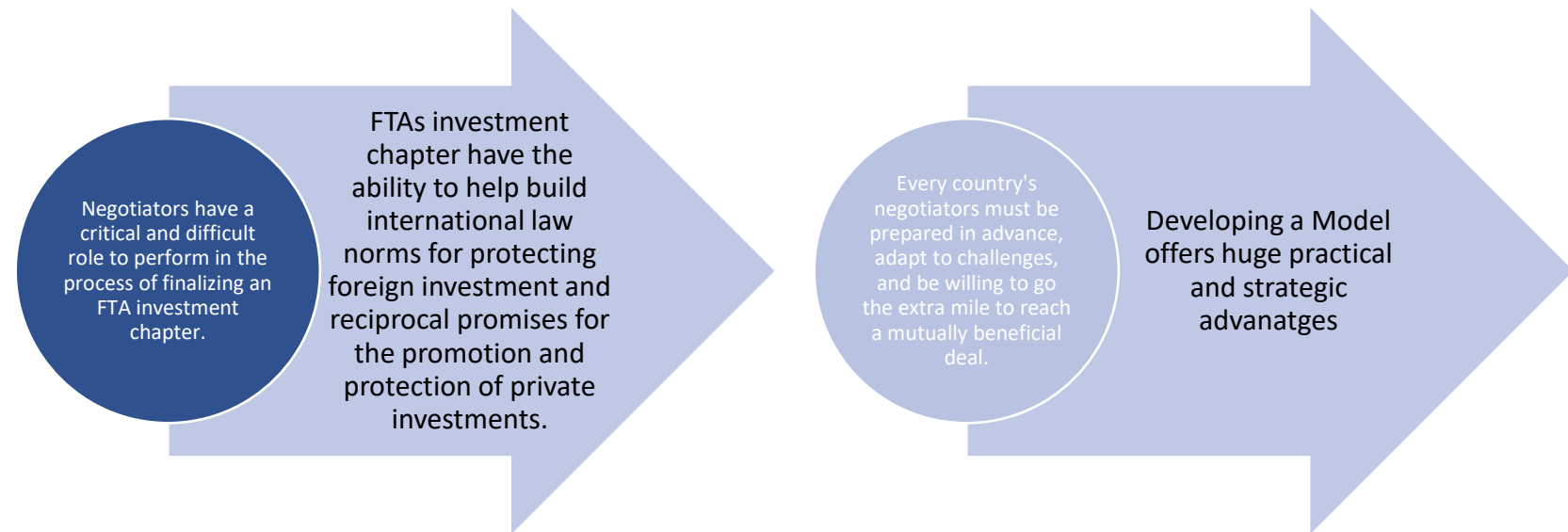
Strategic considerations re investment and FTAs



Strategic considerations re investment and FTAs



Strategic considerations re investment and FTAs



Strategic considerations re investment and FTAs

Main arguments made in favour of IIAs

IIAs:

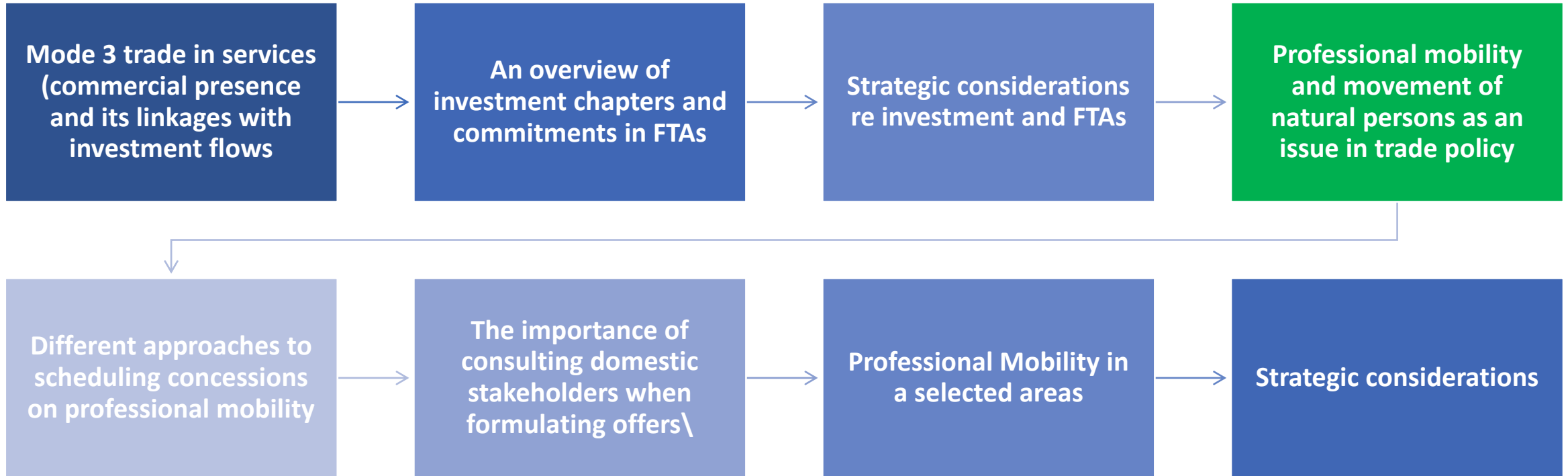
- Contribute to a favourable investment climate.
- Contribute to fostering and expanding economic and political cooperation between contracting parties.
- Contribute to the stability and predictability of the policy framework, foster good governance and the rule of law.
- Provide protection rights that are independent from host countries' domestic legislation (superiority of international law over national law).
- Compared with customary international law, improve legal certainty as protection rights are specified by treaty.
- Reduce political risks of investing abroad.
- May facilitate the granting of investment guarantees by the home country.
- Help to avoid politicization of investment disputes.

Main arguments made against IIAs

IIAs:

- Do not guarantee additional investment inflows.
- May negatively affect host countries' sovereign right to regulate in the public interest.
- Expose host States to ISDS and associated financial risks.
- Privilege foreign investors over domestic investors.
- Only provide for investor rights, not obligations.
- Reflect a negotiated outcome that is influenced by the bargaining power of the negotiating parties.
- May result in overlapping and inconsistent IIA obligations of contracting parties.
- Are difficult to amend in case of changing circumstances.

Outline



Professional mobility and movement of natural persons as an issue in trade policy

- Another matter closely relating to investment is labour mobility.
 - FDI will create employment opportunities in the labour market of the developing country that, in turn, may lead to less emigration.
 - If multinational enterprises relocate for the purpose of gaining access to cheaper labour, then people movement and FDI will be substitutes.
- However, countries that intends to attract FDI also need a proper supply of professional workers, and FDI also may induce short-term movements in the form of business trips and temporary or permanent movements in the form of intra-corporate job transfers.
 - As a result, international investment flows are often facilitated and accompanied by high-skilled labour flows (Freeman, 2006). In order to attract FDI, host countries therefore need to provide protection not only to investment but also to these high-skilled immigrants.
 - This is a crucial reason why professional mobility issue is incorporated into investment rules.

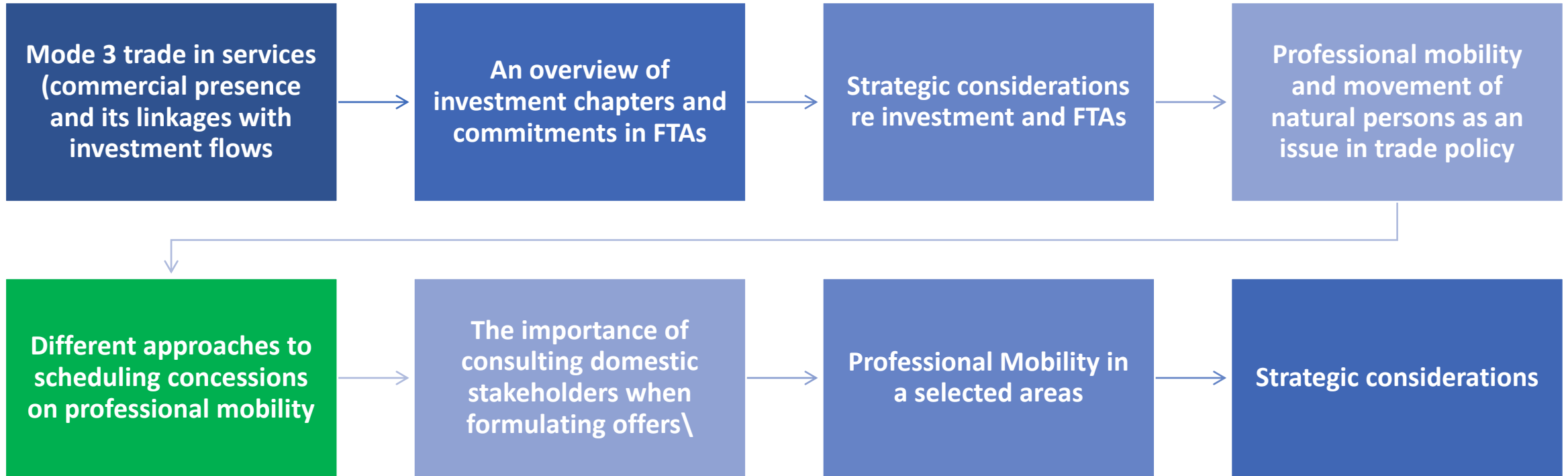
Professional mobility and movement of natural persons as an issue in trade policy

- Apart from investment, labour mobility is also pertinent to trade.
 - For the developing countries – which are normally those countries that send out labours or the so-called ‘source countries’ – the prospective economic benefits of accessing to the labour markets of OECD countries are large.
- Overview
 - Source countries seek to support their surplus labour, earn remittances, and improve the welfare of their nationals, through a predictable and orderly migration process.
 - Receiving countries, on the other hand, need organized cross-border workers to ease labour shortages and also to achieve political, social and strategic interests.
 - Although from the economic perspective, global flows of labour could potentially benefit both sides, destination and source countries often split on their specific demands.

Professional mobility and movement of natural persons as an issue in trade policy

- In practice, there are various regulatory barriers which could impede movement of natural persons, particularly for developing countries seeking access for lower-skilled workers.
 - These barriers include, for instance:
 - 1. economic needs tests (ENTs), meaning that entry is conditional on local job vacancies;
 - 2. quotas and other quantitative restrictions on entry;
 - 3. nationality, residence or establishment requirements in the host country;
 - 4. barriers to professional certification in the host country.
- A 2015 study in fact finds that ‘increasing trade openness has led to increasingly restrictive immigration.’ (Margaret, 2015)

Outline



Different approaches to scheduling concessions on professional mobility

- Commitments can be tabled in the normal request-offer process of PTA negotiations.
 - Most commitments are governed by quotas, with specified terms and conditions for entry and stay by foreign workers, and most tend to cover low-skilled jobs or workers.
- Overall, when scheduling substantive concessions relating to movement of natural persons, due regard must be given to the following aspects:
 - categories of workers;
 - scope of work;
 - temporariness (including renewal and extension provisions);
 - sectoral and occupational focus;
 - conditions imposed on employers and workers;
 - numbers to be admitted (through criteria and determination not indicated);
 - administrative mechanisms and institutional frameworks for recruitment and entry;
 - preferences to local workers;
 - wages and working conditions;
 - obligations on source and host countries;
 - flexibility in design and implementation to attune to local requirements (labour market and sector specific).

India–Singapore FTA

- An example of extensive chapter on movement of natural persons could be found in India’s PTA practice.
 - India–Singapore FTA, for instance, lays down the definition of the different categories of natural persons (i.e., contractual service suppliers, business visitors, independent professionals, and intra-corporate transferees), as well as the terms and conditions for entry and stay of these different categories.
 - A similar approach could be found in the Japan-Philippines EPA (JPEPA), which also contains provisions regarding the scope and coverage of natural persons, restrictions that may not be imposed, and the requirements and procedures for entry and stay of a natural person.

China-Georgia FTA

Modes of supply:	(1) Cross-border supply	(2) Consumption abroad	(3) Commercial presence	(4) Presence of natural persons
Sector or sub-sector	Limitations on market access	Limitation on national treatment	Additional commitments	
II. SPECIFIC COMMITMENTS				
1. BUSINESS SERVICES				
A. Professional Services (a) Legal Services (CPC 861, excluding Chinese law practice)	(1) None (2) None (3) Law firms of Georgia can provide legal services only in the form of representative offices. Representative offices can engage in profit-making activities. Business scope of representative offices of Georgia is only as follows: (a) to provide clients with consultancy on the legislation of the country/region where the lawyers of the law firm are permitted to engage in lawyer's professional work, and on international conventions and practices; (b) to handle, when entrusted by clients or Chinese law firms, legal affairs of the country/region where the lawyers of the law firm are permitted to engage in lawyer's professional work; (c) to entrust, on behalf of foreign clients, Chinese law firms to deal with the Chinese legal affairs; (d) to enter into contracts to maintain long-term entrustment relations with Chinese law firms for legal affairs; (e) to provide information on the impact of the Chinese legal environment.	(1) None (2) None (3) All representatives shall be resident in China no less than six months each year. The representative office shall not employ Chinese national registered lawyers.	(1) In accordance with Chinese laws, regulations and rules, Georgian law firms which have established their representative offices in the China (Shanghai) Pilot Free Trade Zone ("FTZ") may enter into contracts with Chinese law firms in the FTZ. Based on such contracts, these Georgian and Chinese law firms may dispatch their lawyers to each other to act as legal counsels. This means Chinese law firms may dispatch their lawyers to the Georgian law firms to act as legal counsels on Chinese law and international law, and Georgian law firms may dispatch their lawyers to the Chinese law firms to act as legal counsels on foreign law and international law. The two sides shall cooperate within their respective business scope.	

⁷ "Specialist" means a natural person within an organisation who possesses knowledge at an advanced level of technical expertise, and who possesses proprietary knowledge of the organisation's service, research equipment, techniques or management.

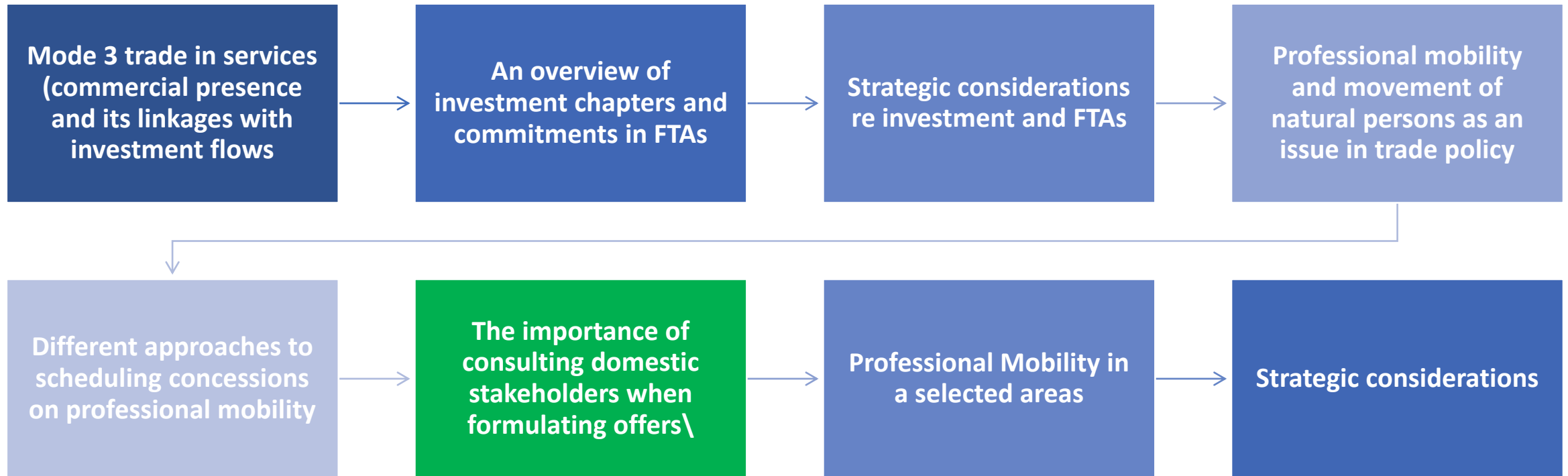
China-Georgia FTA

Modes of supply: (1) Cross-border supply (2) Consumption abroad (3) Commercial presence (4) Presence of natural persons			
Sector or sub-sector	Limitations on market access	Limitation on national treatment	Additional commitments
	<p>Entrustment allows the representative office of Georgia to directly instruct lawyers in the entrusted Chinese law firm, as agreed between both parties.</p> <p>The representatives of a Georgian law firm shall be practitioner lawyers who are members of the bar or law society in a WTO Member and have practiced for no less than two years outside of China. The Chief representative shall be a partner or equivalent (e.g., member of a law firm of a limited liability corporation) of a law firm of Georgia and have practiced for no less than three years outside of China.</p> <p>(4) Unbound except as indicated in horizontal commitments.</p>	<p>(4) Unbound except as indicated in horizontal commitments.</p>	<p>(2) In accordance with Chinese laws, regulations and rules, Georgian law firms which have established their representative offices in the China (Shanghai) Pilot Free Trade Zone ("FTZ") are permitted to form a commercial association with Chinese law firms in the Shanghai FTZ. Within validity of this commercial association, the two law firms of each side respectively have independent legal status, name, financial operation, and bear civil liabilities independently. Clients of the commercial association are not limited within the Shanghai FTZ. Georgian lawyers in this type of commercial association are not permitted to practise Chinese law.</p>
(a) Accounting, auditing and bookkeeping services (CPC 862)	<p>(1) None</p> <p>(2) None</p> <p>(3) Partnerships or incorporated accounting firms are limited to Certified Public Accountants (CPAs) licensed by the Chinese authorities.</p> <p>(4) Unbound except as indicated in horizontal commitments.</p>	<p>(1) None</p> <p>(2) None</p> <p>(3) None</p> <p>(4) Unbound except as indicated in horizontal commitments.</p>	<ul style="list-style-type: none"> - Accounting firms of Georgia are permitted to affiliate with Chinese firms and enter into contractual agreements with their affiliated firms in other WTO Members. - Issuance of licences to natural persons of Georgia who have passed the Chinese national CPA examination shall be accorded national treatment. - Applicants of Georgia will be informed of results in writing no later than 30 days after submission of their applications. - Accounting firms providing services in CPC 862 can engage in taxation and management consulting services. They are not subject to requirements on form of establishment in CPC 865 and 8630.

Different approaches to scheduling concessions on professional mobility

- Mutual recognition of qualifications and faster processing times for visa applications.
 - the ChAFTA incorporates the mutual recognition of traditional Chinese medicine.
 - The Japan - India PTA, the ASEAN - India Trade in Services Agreement also contain clauses on mutual recognition, so does the Mainland and Hong Kong Closer Economic Partnership Arrangement (CEPA).
 - Article 15 of the CEPA, titled 'Mutual Recognition of Professional Qualifications' is a good illustration
- A similar example is Japan-India PTA(Article 65:3), which prescribes restriction on timing:
 - it allows one party to unilaterally require the other party to 'encourage its professional bodies in a specific regulated sector to negotiate and conclude within 12 months an arrangement for mutual recognition of education, experiences, requirements, certification granted'. But most PTAs do not spell out in detail the requirements on mutual recognition.

Outline



The importance of consulting domestic stakeholders when formulating offers

The negotiation of a treaty implies by its very nature that the parties will discuss their respective positions.

Parties will look for compromise solutions.

It is not only the bargaining power that counts.

The ability of the negotiator can also play an important role.

Bargaining position is not only economic.

Base the discussion on a draft worked out by that party.

Continue the negotiation using the same document (thus giving the negotiator the advantage of discussing within a familiar context).

Reasonable requests, when they are explained and presented in the right way, may be considered seriously by the other party.

Particularly in the context of long-term treaties where it is important to create a good spirit of cooperation and to maintain it during the life of the treaty.

The importance of consulting domestic stakeholders when formulating offers

'Because it is not governments that engage in trade but rather businesses, it is crucial for governments to seek and obtain inputs from the private sector as policymakers start to formulate negotiating objectives in anticipation of launching negotiations on trade in services. Consulting with and actively affording the private sector a chance to participate in this process can do more than merely provide key insights to policymakers. Doing so can also help strengthen the business case for – and resulting democratic legitimacy of – any ultimate negotiated outcomes. Attention also must be given to, civil society also contains various other stakeholders who hold strong views on the perceived impact of future negotiations on trade in services. A failure to do so could prove costly at the ratification stage'.

UN Handbook on Negotiating Preferential Trade Agreement for Service Liberalisation

The importance of consulting domestic stakeholders when formulating offers

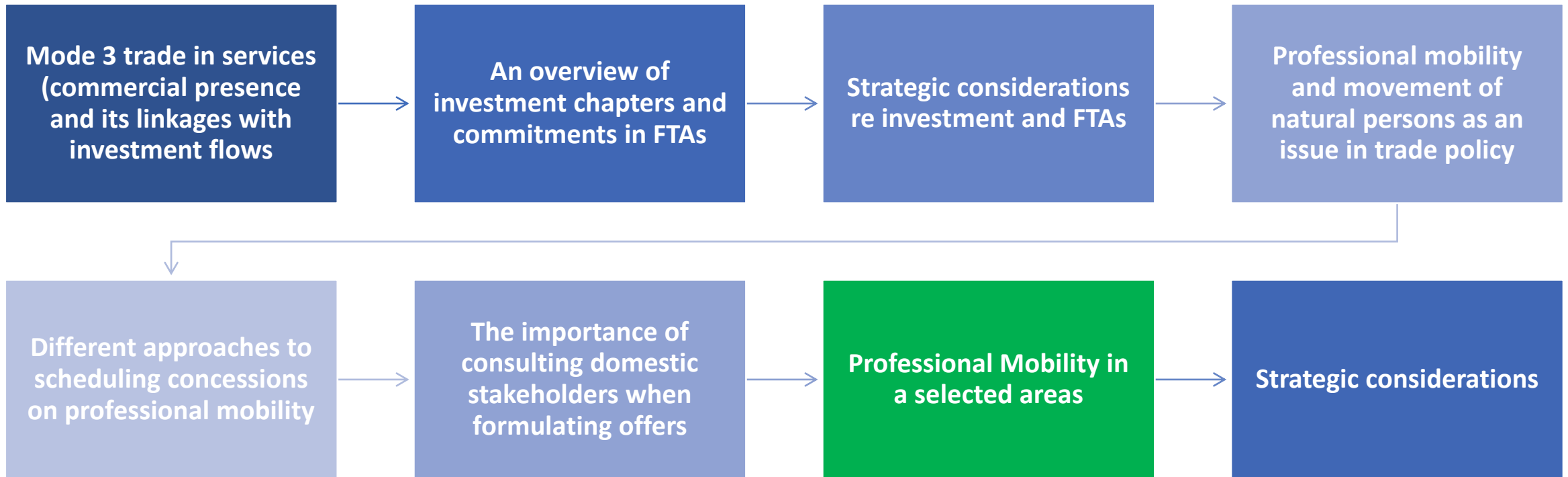
Involvement of stakeholders is a shared feature for all the successful agreement

- multiple government agencies, NGOs, workers, private sector, and international organizations to involve



Engaging these stakeholders in the end has ensured that 'different dimensions of the worker mobility process, from pre-entry, recruitment and selection, and stay to worker rights and welfare, repatriation of earnings, return, and reintegration are addressed'

Outline



Professional Mobility in a selected areas

- CAREC, so far no rules on movement of natural persons could be discerned.
 - However, in a recent CAREC report in a nod to developing the service sector, it is stated that ‘raising the efficiency of the labour market’ is one of the enabling conditions for robust development of the service sector and economic diversification.
 - It emphasized that among CAREC countries’ GTAS commitments, the presence of natural persons is so far the most restrictive in terms of market access and national treatment provisions.
- This is perhaps understandable as Mode 4 imports constitute but only a small share in the majority of CAREC countries and concentrate in construction and business sectors.
 - And China, on its part, is not pursuing better access to other CAREC countries at this stage, unlike the case of the ChAFTA.
 - Indeed, China might seek better protection for its investment and investors in CAREC countries. However, as with the GATS, the matters of labour protection and standard are not in the remit of movement of natural persons provisions in the PTAs.

Professional Mobility in a selected areas

- China has been active in advancing rules on labour mobility.
 - ‘recent Preferential Trade Agreements (PTAs) concluded by China espouse a significantly expanded set of rules on labor mobility or “mode 4” compared to both commitments in GATS and EU/US PTAs.’(Lavenex & Jurje, 2019)
 - Some examples are already discussed above.
- Of all, ChAFTA presents the most encompassing agreement.
 - Under ChAFTA, Australia has agreed on ‘guaranteed access’ for a quota of up to 1800 contractual service supplier annually in certain occupations along with up to 5,000 visas granted annually under a separate but connected Work and Holiday Arrangement.
 - In addition, the two countries commit on regulatory cooperation to ensure smooth implementation of the provisions, including expeditious and transparent visa and immigration procedures and cooperation on mutual skill recognition.
 - At the fringes of ChAFTA, moreover, a Memorandum of Understanding allowing for Investment Facilitation Arrangements gives Chinese-owned companies registered in Australia undertaking large infrastructure development projects the possibility to negotiate increased labor flexibilities.

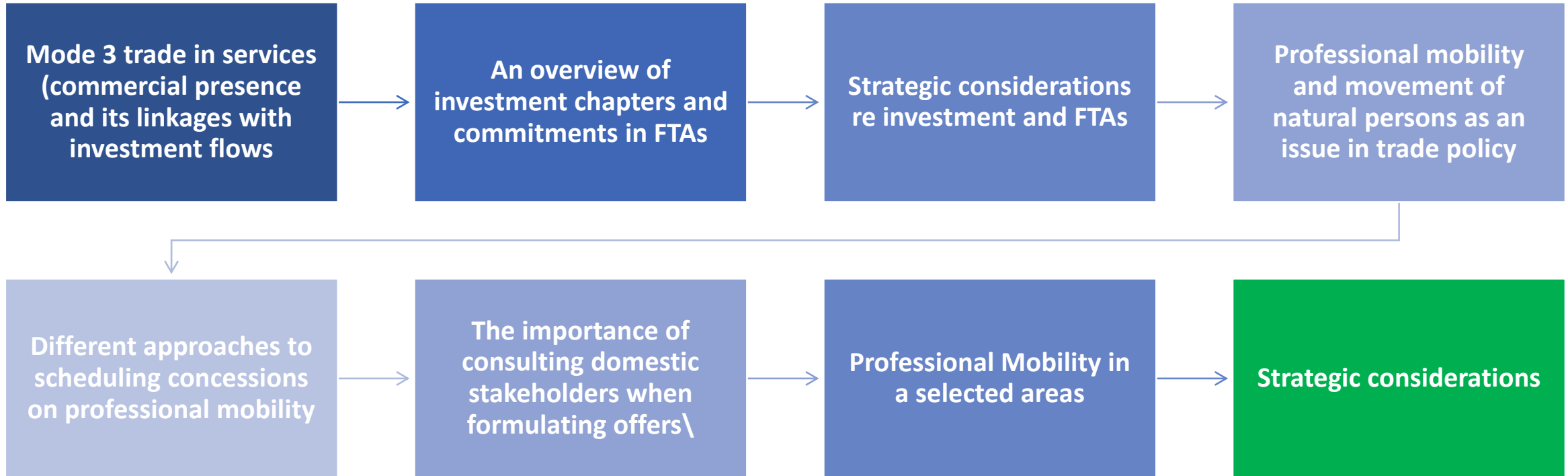
Professional Mobility in a selected areas

- The RCEP which includes China also makes an interesting example.
 - Chapter 9 of the RCEP regulated temporary movement of natural persons.
- Compared it with the state-of-the-art treaty practice, this chapter has the following salient attributes:
 - 1) it covers not only workers who supply services but also those who engage in trade in goods and the conduct of investment.
 - 2) it extends to spouse and dependents;
 - 3) it concerns immigration policy and sets out procedural requirements as to how a party should process applications for immigration formalities;
 - 4) although the chapter lacks mutual recognition clause, the Parties are permitted to discuss mutually agreed areas of cooperation;
 - 5) the chapter is subject to dispute settlement included in the RCEP, but ex ante conditions of exhausting local administrative remedies must be satisfied.

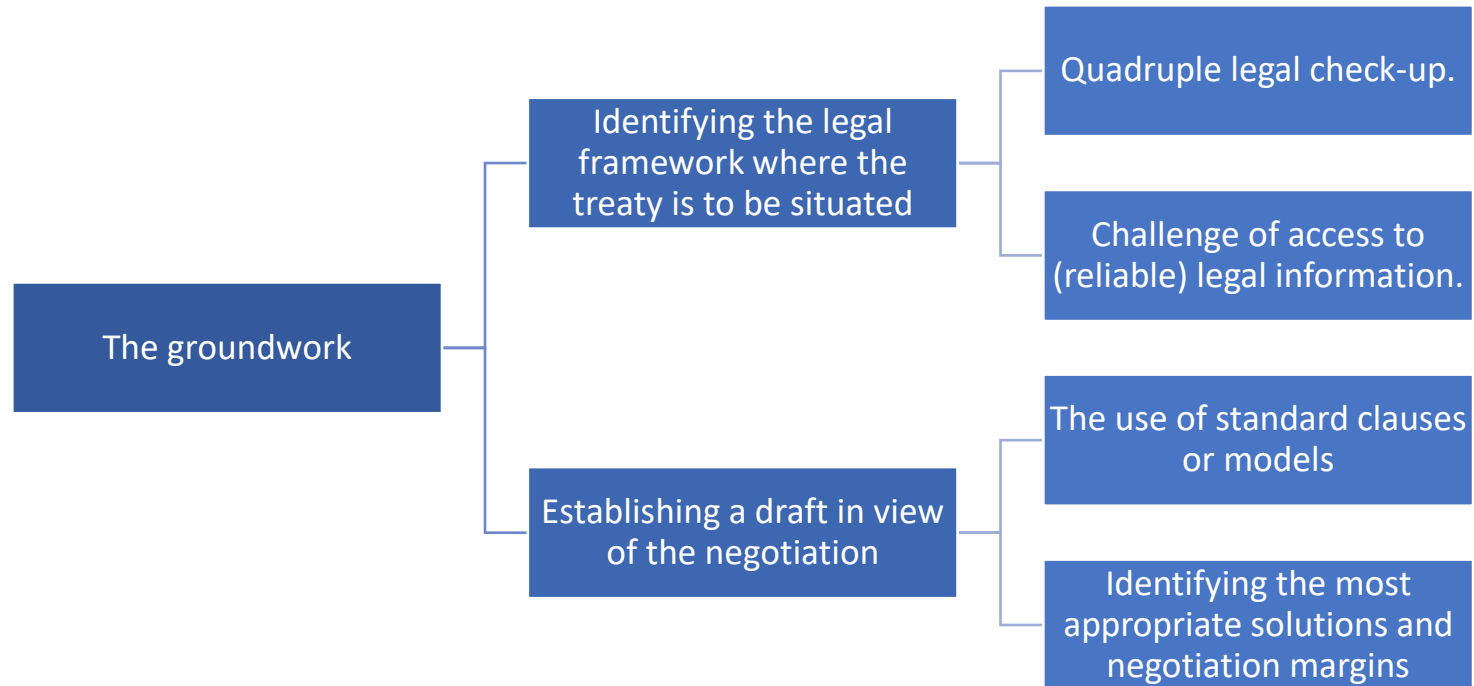
Professional Mobility in a selected areas

- The RECP's movement of natural persons chapter essentially extends from service to labour and immigration issues.
 - In China's own national schedules, for instance, the category of business visitors also include investors and goods sellers.
 - However, the RECP as a regional agreement that involves multiple states falls short of details regarding specific quotas and sectoral arrangements associated with movement of natural persons.
 - In general, in each party's schedules of commitments, both positive list and negative list are used.

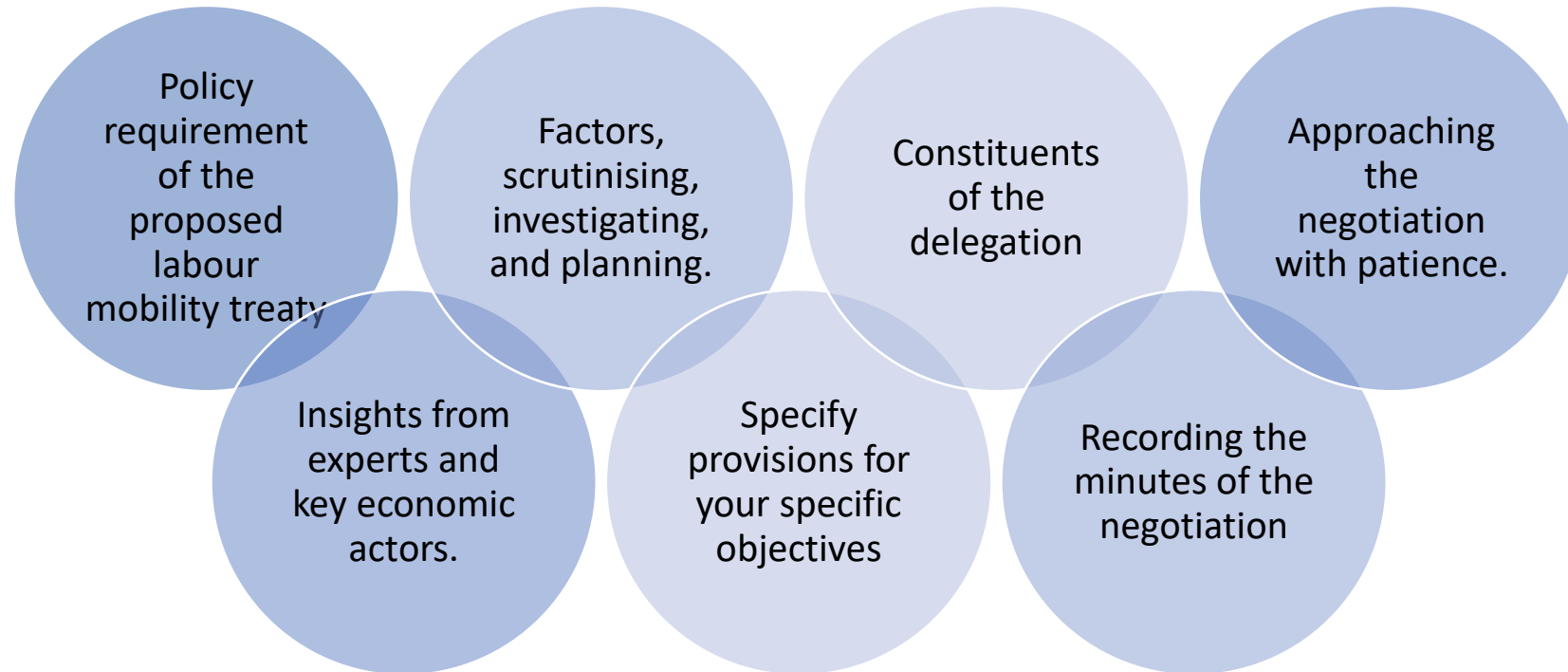
Outline



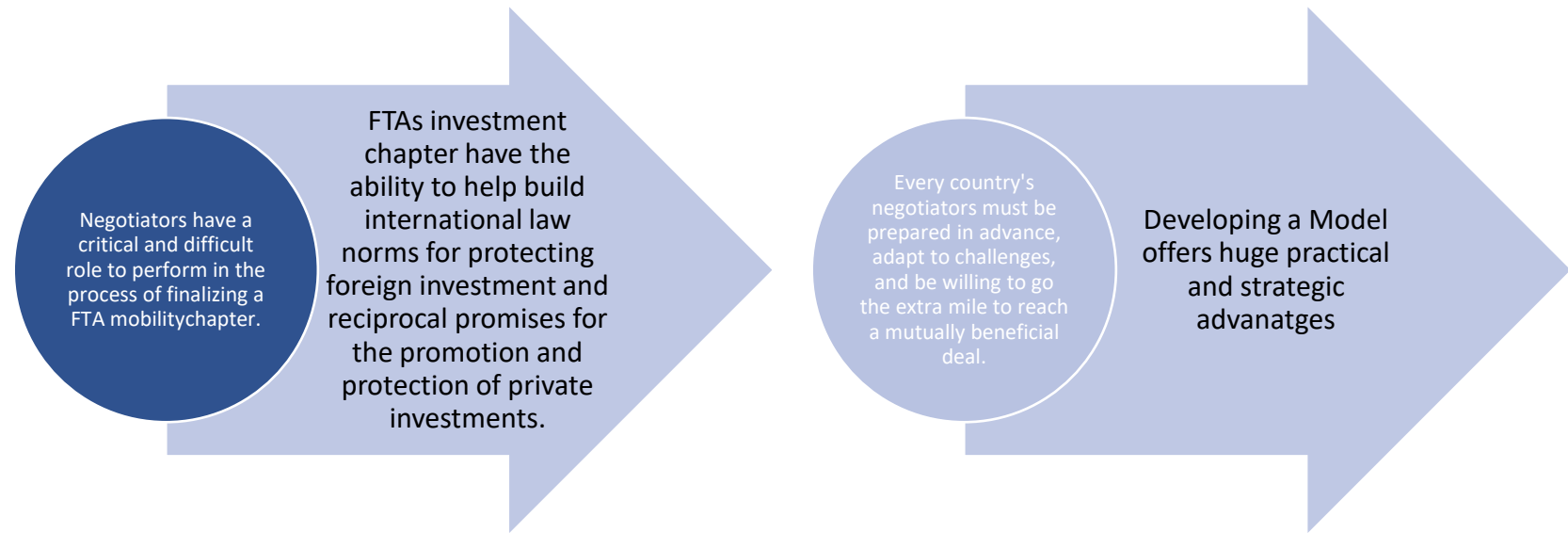
Strategic considerations re mobility and FTAs



Strategic considerations re mobility and FTAs



Strategic considerations re mobility and FTAs



Strategic considerations

- At the macro level, liberalising the international movement of people is likely to bring mutual benefits for both source and destination economies.
 - There may be augmentation of the gains from trade and investment liberalisation, enhanced inter-country linkages (including through remittances and the subsequent trade resulting from these), technological transfers and increased productivity.
- Nevertheless, countries vary in needs and demands with regard to the inflow and outflow of labour.
 - These differences could manifest in the recruitment, entry, and return of labours; legal and social protection; regulation and facilitation of financial flows; and capacity building and development efforts. In order to work out a more practical solution which will meet the specific needs of a country, PTA is a laudable venue for communication and negotiation.

Strategic considerations

- States could use provisions on movement of natural persons to gain better access to foreign labour market, to 'lock in' measures that affect labour mobility, and to protect and attract foreign investment and investors.
 - Mobility rights in PTAs are binding and enforceable obligations, which cannot be reversed unilaterally by domestic legislation if they do not necessitate domestic legislative changes at the time of adoption.
 - Therefore, PTA arrangement could increase the legal predictability.
 - Further, the cooperation laid down in the PTA is also an opportunity to formalize through a Memorandum of Understanding (MoU) other types of 'migration', including the temporary entry and stay for working holiday makers, a category outside of GATS mode 4.
- However, Mode 4 commitments are less useful if being too general.
 - Previous treaty experience shows that movement of natural persons provisions can bring direct and tangible economic benefits on developing country only if they are tailored to the specific needs and export capacities of the developing country in question.
 - The requirements therefore should be specific, clear, and detailed on the major aspects, including the types of the workers, duration, and conditions, etc.

Conclusion

