REGIONAL RULES IN THE GLOBAL TRADING SYSTEM

Edited by

ANTONI ESTEVADEORDAL,

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REGIONAL RULES IN THE GLOBAL TRADING SYSTEM

The proliferation of regional trade agreements (RTAs) over the past two decades has highlighted the need to look closely at the relationships between regional and WTO rules or disciplines. A major obstacle to advancing understanding of RTAs is the absence of detailed information about their contents. This has limited the debate between those who view RTAs as discriminatory instruments hostage to protectionist interests and those who see them as conducive to multilateral trade opening.

This book provides detailed analysis of RTA rules in six key areas – market access, technical barriers to trade, contingent protection, investment, services and competition policy – across dozens of the main RTAs in the world. The analysis helps to provide new insights into the interplay between regional and multilateral trade rules, advances understanding of the economic effects of RTAs and contributes to the discussion on how to deal with the burgeoning number of RTAs.

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Mapping investment provisions in regional trade agreements: towards an international investment regime?

BARBARA KOTSCHWAR*

1 Introduction

As stated in the introduction to this volume, regional trade agreements (RTAs) have been essential not simply in connecting countries through increased trade and investment flows but also in terms of shaping and pushing forward the architecture for conducting international trade. This is certainly true in the area of investment, an area in which the multilateral regime is still rather rudimentary, and where incipient international disciplines have rather been forged *de facto* at the bilateral and regional level.

Although largely absent from the international trade regime after the failure of the 1948 Havana Charter, international foreign direct investment (FDI) emerged as a main topic of interest in international trade arrangements, gaining momentum in the late 1980s with the inclusion of trade-related investment measures in the Uruguay Round negotiations and an investment chapter in the Canada–US Free Trade Agreement (CUSFTA). This interest may be attributed to two main trends. First is the changing domestic attitudes towards international investment, particularly by previously sceptical developing countries that unilaterally opened their economies to trade and investment starting in the 1980s. Investment provisions encapsulated within trade agreements could be seen as signalling their will and ability to 'lock in' that liberalization. The

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second and related trend is the increased role investment has played in the international economy: since the 1980s, flows of investment have grown faster than both trade flows and GDP.

International investment protection and liberalization issues are currently regulated by a multilayered set of bilateral, plurilateral, regional and multilateral agreements spanning the globe. As such, investment provisions have evolved along two different paths: at the multilateral level, where investment has only recently been formally addressed as part of the international trade regime, and the bilateral/regional path, which was in the early days, starting from the 1950s, dominated by bilateral investment treaties (BITs) which in the mid-1990s gave way to investment provisions in RTAs. The years 1994–5 marked a sea-change in the evolution of an international investment regime. Largely kept out of the General Agreement on Tariffs and Trade (GATT) text, aspects of investment have, since the 1995 founding of the World Trade Organization (WTO), been addressed through a number of WTO agreements, which will be discussed in the following section. However, these provisions do not add up to an overarching comprehensive international investment agreement. At the bilateral/regional level, the 1994 North American Free Trade Agreement (NAFTA) was the first RTA to include comprehensive services provisions with a chapter on investment that included investment protection language similar to that included in BITs and went beyond most BITs in terms of investment liberalization. NAFTA also paved the way institutionally, including a separate forum for disputes between investors and the state. These two trends have continued to evolve since the mid-1990s, with significant results for the international approach to investment.

As a result, different investment provisions coexist and to some degree overlap. This multilayered approach can be interpreted as an effort by countries, particularly developing countries, to gain additional credibility – through commitments to protection, stability, predictability and transparency – in the eyes of investors, in the absence of an international investment regime by incorporating such provisions in the RTAs into which they enter. At the systemic level, this phenomenon has generated a complex and somewhat atomized web of agreements without regular coordination. While most agreements share a set of core disciplines (such as national and MFN treatment), many differences exist. This paper explores the variation in coverage of some issues and marked differences in substantive approaches and the growing convergence in terms of key issues resulting from the overlap in RTAs.

2 Multilateral policy developments on investment

Before entering into an evaluation of the variation in investment provisions, it is important to understand the efforts that have been made to craft a multilateral regime. Numerous attempts have been made to forge a consensus set of multilateral principles and create some form of overarching coordination tool on investment. These initiatives include the efforts to incorporate investment in the 1948 Havana Charter, the OECD Draft Convention on the Protection of Foreign Property (drafted in 1962, revised in 1967), the United Nations Code of Conduct on Transnational Corporations in the late 1970s and 1980s and, more recently, the initiative to forge a Multilateral Agreement on Investment (MAI) by the Organization for Economic Cooperation and Development (OECD) in the mid-1990s. The lack of success at institutionalizing multilateral investment provisions is attributed to divisions among countries over the extent of protection, the depth of liberalization, and whether and how to address the development dimensions of investment.[1]

Early discussions towards the establishment of an International Trade Organization (ITO) sought to include an integrated package on trade and investment. The Charter was never ratified and the investment provisions in draft Articles 11 and 12, which included proposals on protection of foreign investors, were not incorporated into the eventual GATT.[2] The main opponents to including investment were developing countries, particularly Latin American countries who upheld the Calvo Clause, which asserted the rights of sovereign states to maintain control over their jurisdictions and gave exclusive jurisdiction over foreign investment disputes to national courts.[3]

While the early GATT did not include provisions on investment, the issue remained on the table. In 1955, contracting parties adopted the 'Resolution on International Investment for Economic Development', exhorting countries to adopt policies providing protection and security

[1] See Drabek (1998) for an expanded summary of these issues.

[2] For a detailed recounting of the history of investment at the international level, see Graham (1997).

[3] The Calvo Clause is an offshoot of the Calvo doctrine, adopted in 1933 at the Conference of American States. Calvo Clauses in contracts effectively required foreign investors to waive all rights to diplomatic protection afforded by the home country under international law. This was seen by many investors as subjecting foreign investment to national control and was seen as a disincentive to foreign direct investment and an obstacle to the internationalization of norms on investment. See Sornarajah (2004), Lipstein (1955) and Baker (1999).

for foreign investment. In the 1980s, a GATT dispute between the United States and Canada again raised the issue of the relationship between international trade and investment. In *Canada – Administration of the Foreign Investment Review Act (FIRA)*,[4] a GATT dispute settlement panel concluded that local content requirements set out under Canada's Foreign Investment Review Act regarding local subsidiaries of foreign firms were inconsistent with the national treatment principle.[5] The panel upheld Canada's right to regulate foreign investment but ruled that performance requirements on foreign investment served as trade-distorting measures.[6] The case brought to light the limited scope of the multilateral trading rules with respect to investment.

The 1986 Punta del Este declaration, which launched the Uruguay Round, included language again urging consideration of investment.[7] The Uruguay Round concluded with a set of multilateral provisions on investment – principally through the Agreement on Trade-Related Investment Measures (TRIMs) and the General Agreement on Trade in Services (GATS) that, although limited, are seen as going further than any other initiative in terms of forging multilateral provisions on investment (OECD 2002).

2.1 *Multilateral investment provisions*

As a result of the Uruguay Round, investment is addressed more thoroughly at the multilateral level than ever before, although the coverage is far from comprehensive. Investment is covered in the Agreement on Trade-Related Investment Measures (TRIMs) and in the General Agreement on Trade in Services (GATS), and, less directly, in the

[4] BISD 30S/140, 1984.

[5] Article III:4 of the GATT states that 'the products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use'.

[6] The panel did not find the export requirements to be inconsistent with Article XVII, which prevents parties from preventing enterprises from acting in a non-discriminatory manner (see Graham and Krugman 1990).

[7] 'Following an examination of the operation of GATT Articles related to the trade-restrictive and trade-distorting effects of investment measures, negotiations should elaborate, as appropriate, further provisions that may be necessary to avoid such adverse effects on trade.'

Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) and the Agreement on Subsidies and Countervailing Measures.[8]

The TRIMs Agreement is limited in scope as it applies only to measures that affect investment-related aspects of trade in goods. It is essentially limited to interpreting and clarifying the GATT provisions as they relate to investment measures, particularly on national treatment for imported goods and quantitative restrictions. The objective of the TRIMs is to prevent the use of trade-related investment measures that are inconsistent with the basic provisions of the GATT, such as discrimination against foreign goods or foreign investors (violation of national treatment), the use of investment measures that lead to quantitative restrictions or the use of measures that require particular amounts of local content or procurement, such as local content requirements.[9] The Agreement holds that no Member shall apply a measure that is prohibited by the provisions of GATT Article III (national treatment) or Article XI (on the elimination of quantitative restrictions). The Agreement includes an illustrative list that identifies local content and trade-balancing requirements as provisions that are not consistent with these GATT Articles and that 'include those which are mandatory or enforceable under domestic law or under administrative rulings, or compliance with which is necessary to obtain an advantage'. In the Agreement's Annex's illustrative list of TRIMs that are inconsistent with the obligations of national treatment and of eliminating quantitative restrictions, the TRIMs spells out examples of inconsistent measures, including local content or trade-balancing requirements. A Committee on TRIMs was set up to monitor the operation and implementation of the commitments.

The GATS represents the broadest investment provisions at the multilateral level, covering measures affecting trade in services, including any service in any sector delivered by any of the four modes defined

[8] Investment can also be considered covered under the Agreement on Government Procurement (GPA Agreement), although this agreement, unlike the others, is a plurilateral agreement, and, as such, does not apply to all Members. The GPA Agreement requires that foreign suppliers may not be discriminated against and that there be no discrimination against locally established suppliers on the basis of foreign affiliation or ownership.

[9] The preamble to the Agreement states an objective as 'the expansion and progressive liberalization of world trade and to facilitate investment across international frontiers so as to increase the economic growth of all trading partners, particularly developing country members, while ensuring free competition'.

in GATS, with the exception of services provided by government entities or measures affecting air traffic rights and associated services.[10] GATS covers services that are provided through a 'commercial presence in the territory of any other member' (mode 3) – i.e. an investment – in a foreign territory (GATS Article I:2(c)). In the GATS, 'commercial presence' means any type of business or professional establishment including through (1) the constitution, acquisition or maintenance of a juridical person, or (2) the creation or maintenance of a branch or a representative office, within the territory of a Member for the purpose of supplying a service. The Agreement requires most-favoured-nation treatment through its Article I (although MFN exemptions can be made if listed in a country annex) as well as national treatment, but limits this to services sectors in which commitments have been scheduled by the Member. The scheduling of sectors in which commitments are made, as done in GATS, is known as the 'positive list' approach. The GATS also provides for preferential treatment of suppliers in the case of an economic integration agreement (Article V). The GATS includes a commitment to continue liberalizing trade in services through a 'built in agenda'.

Given the increasing importance of intangible assets to corporations, intellectual property rights is increasingly an important component of an investment framework. The WTO's Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) contains no explicit provisions addressing investment, but aims at securing and enforcing the protection of intellectual property rights, increasingly considered an important component of investment protection. Most modern investment agreements include intellectual property within the definition of investment.

The Agreement on Subsidies and Countervailing Measures establishes disciplines on the provision of subsidies, including investment incentives that may fall under the definition of subsidy and are prohibited or limited if found to cause 'adverse effects'.

[10] The four modes of supply are: cross-border supply (services flows from one Member into another); consumption abroad (services consumed by a consumer who has moved into another Member's territory to consume a service); commercial presence (in which a service supplier from one Member establishes a territorial presence, including through ownership or lease of premises, in another Member's territory to provide a service); presence of natural persons (persons from one Member enter the territory of another Member for the purposes of providing a service).

2.2 *Post-Uruguay Round negotiations*

Investment continued to be discussed at the multilateral level, slated as one of the principal issues for discussion at the first WTO ministerial meeting held in Singapore in December 1996. Here, a Working Group on the Relationship between Trade and Investment was set up, to clarify the scope and definition of investment issues including transparency, non-discrimination, ways of preparing negotiated commitments, development provisions, exceptions and balance-of-payments safeguards, consultation and dispute settlement.[11] Investment was thus included as a 'Singapore Issue' and slated for subsequent negotiation.[12]

At the fourth ministerial meeting, in Doha, Qatar, in November 2001, Members reiterated the mandate to further work towards a multilateral framework for investment. The Doha Declaration, in paragraphs 20–2, recognized the importance of 'transparent, stable and predictable

[11] The checklist of issues suggested for study by the group, as set out in Annex I to the Group's first report (WT/WGTI/1/Rev.1, 9 December 1997), listed the following as topics for study: I. Implications of the relationship between trade and investment for development and economic growth, including: economic parameters relating to macroeconomic stability, such as domestic savings, fiscal position and the balance of payments; industrialization, privatization, employment, income and wealth distribution, competitiveness, transfer of technology and managerial skills; domestic conditions of competition and market structures. II. The economic relationship between trade and investment: the degree of correlation between trade and investment flows; the determinants of the relationship between trade and investment; the impact of business strategies, practices and decision-making on trade and investment, including through case studies; the relationship between the mobility of capital and the mobility of labour; the impact of trade policies and measures on investment flows, including the effect of the growing number of bilateral and regional arrangements; the impact of investment policies and measures on trade; country experiences regarding national investment policies, including investment incentives and disincentives; the relationship between foreign investment and competition policy. III. Stocktaking and analysis of existing international instruments and activities regarding trade and investment: existing WTO provisions; bilateral, regional, plurilateral and multilateral agreements and initiatives; implications for trade and investment flows of existing international instruments. IV. On the basis of the work above: identification of common features and differences, including overlaps and possible conflicts, as well as possible gaps in existing international instruments; advantages and disadvantages of entering into bilateral, regional and multilateral rules on investment, including from a development perspective; the rights and obligations of home and host countries and of investors and host countries; the relationship between existing and possible future international co-operation on investment policy and existing and possible future international co-operation on competition policy.

[12] The other Singapore Issues are competition policy, transparency in government procurement and trade facilitation.

conditions for long-term cross-border investment'. The Declaration further recognized that developing countries required 'enhanced support' in this area and that developing and least-developed countries would need some flexibility. The declaration also recognized the existence of bilateral and multilateral commitments on investment and held that these be taken into account.

Investment continues to be a controversial issue at the multilateral level. Negotiations in this area within the context of the Doha Development Agenda met resistance by several developing countries and groups of developing countries.[13] On 1 August 2004, as part of the so-called 'July package' framework for advancing the Doha Development Agenda, investment, along with competition policy and government procurement, was dropped from the Doha negotiating agenda. There are currently no further negotiations towards a multilateral investment framework ongoing at the WTO.

In parallel to the efforts at the WTO, OECD members also attempted, in the mid-1990s, to forge an international investment framework. The negotiations towards a Multilateral Agreement on Investment (MAI) were launched at the OECD Council annual meeting in May 1995.[14] The MAI was to be a 'free standing international treaty, open to all OECD Members and the EU, and to accession by non-OECD Member Countries' (OECD 1995).[15] Its proposed objective was to 'provide a broad multilateral framework for international investment with high standards for the liberalization of investment regimes and investment protection and with effective dispute settlement procedures' (OECD 1995). Negotiations ended without fruition in December 1998. While the failure of the MAI negotiations is better known for the way in which

[13] See, for example, ICTSD (2003).

[14] Australia, Austria, Belgium, Canada, the Czech Republic, Denmark, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Japan, Korea, Luxembourg, Mexico, the Netherlands, New Zealand, Norway, Poland, Portugal, Spain, Sweden, Switzerland, Turkey, the United Kingdom and the United States, as well as the European Communities. Argentina, Brazil, Chile and Hong-Kong participated as observers from an early stage. Estonia, Latvia, Lithuania and the Slovak Republic were later also invited as observers.

[15] OECD investment instruments include the 1961 Code of Liberalization on Capital Movements and the Code of Liberalization of Current Invisible Operations. These are open to non-OECD members and are legally binding rules, moving towards the liberalization of capital movements, the right of establishment and current invisible transactions. The 1976 OECD Declaration on International Investment and Multinational Enterprises is a policy commitment to improve the investment climate, subscribed to by thirty OECD members and ten non-member countries as of July 2007.

opposition from anti-investment NGOs galvanized against the talks, the ultimate failure to achieve an investment framework was due to the inability of governments to come to a consensus.[16] As at the WTO, divisions were generally along country groupings, with developed countries supporting the MAI and developing countries opposing it.

Currently no negotiations on investment rules are taking place at the multilateral level. At the regional and bilateral level, however, provisions on investment proliferated during the 1990s and have continued to proliferate. Bilateral investment instruments and investment provisions contained in RTAs (many of which are largely based on BITs) have evolved, creating a web of emerging international norms regarding investment. As such, the international policy framework for investment has evolved on two tracks: more hesitantly and with starts and stops at the multilateral level and more quickly, but with variations, at the regional level.

3 Evolving bilateral and regional investment provisions

Given the lack of multilateral-level rules, investment protection and liberalization have been addressed principally on a bilateral and regional basis. Evidence of this is the number of bilateral investment treaties (BITs) in force: at the end of 2006, there were over 2,500 BITs in existence (UNCTAD 2006 p. 2). A majority of those in force have been signed since the 1990s.

Since European countries inked the first bilateral investment treaties in the 1950s, BITs have been the main international legal instrument used to protect and facilitate foreign investment. BITs assured predictability and stability in otherwise often uncertain environments, as both parties agreed to accept certain standards of treatment and to have these enforced by an international dispute settlement mechanism. Initially principally instruments of protection, BITs have evolved substantially over the years and are more and more oriented towards integration and liberalization. Since the 1980s and 1990s, more countries, particularly developing countries, have signed up to BITs, often as a means of signalling their attractiveness as a location for foreign investment. As a result, BITs began to incorporate elements of investment liberalization as well as protection.

[16] For an in-depth analysis of the MAI negotiations see Graham (2000).

The contents of BITs have increasingly become standardized over the past decade and a half – in part because two of the main parties, the United States and the EU use templates for their BITs – and have been influential in shaping the regional investment regime.[17]

Since the 1980s, there has been a significant increase in North–South BITs, and, more recently, South–South BITs have also begun to increase in number. In the countries of the Americas, which have been recent enthusiastic participants in signing BITs, economic reforms after the 1980s debt crisis ushered in a very different attitude towards foreign investment than was seen during the Calvo Clause days. This has brought about an unprecedented growth in investment provisions signed onto by countries in the Americas since the US–Panama BIT, the first in the Americas, was signed in 1982.

Along with a growing body of BITs, there is a rapidly growing body of investment provisions contained within bilateral and regional trade agreements. Since the 1990s, and particularly after the signing of the NAFTA, regional and bilateral free trade agreements have increasingly included provisions on investment – provisions that were previously addressed bilaterally through BITs. The 'second wave' agreements (Pomfret 2007 p. 924), also known as agreements that aim towards deeper integration (Lawrence 1996), are generally among countries with fewer trade barriers among them and go beyond the more market-access-focused free trade agreements, incorporating areas such as policies related to increasing returns, policy harmonization and services. The NAFTA, which incorporated and built upon its predecessor agreement, the Canada–US Free Trade Agreement, marks a point of departure in the area of international investment rules, being the first RTA to include BIT-like provisions as part of a trade agreement (OECD 2006 p. 6).

Although investment protection provisions in RTAs are often similar to those found in BITs – with some agreements in fact incorporating by reference a pre-existing BIT among the partners as the regulatory apparatus applicable to investment within the RTA – there is greater substantive variance in the content of provisions in RTAs than in BITs. Countries have been able to tailor their investment provisions depending

[17] For example, the United State's model BIT was updated in 2004 (this can be found at www.ustr.gov/assets/Trade_Sectors/Investment/Model_BIT/asset_upload_file847_6897.pdf). The first BIT using the new model is the US–Uruguay BIT of 2006.

on their trading partners, adapting their approach according to whether they are negotiating with countries that are at similar or different levels of development or have similar or different approaches to investment.

In some cases, chapters in RTAs in large measure replicate what is contained in pre-existing BITs with respect to investment protection, although many RTA provisions have been used to expand and to correct perceived deficiencies in BITs, often aiming for greater liberalization. The new US model BIT, for example, is substantively similar to the investment provisions in RTAs negotiated by the United States since 2002 (such as the CAFTA) and can be seen to have been inspired by US RTAs. As such, the line between BITs and RTA provisions in investment is blurred. In other cases, RTA investment provisions go beyond what is found in BITs. With more variation in their scope and content than bilateral investment treaties (BITs), which generally are constructed following a template, this surge in RTA investment provisions has given way to overlapping commitments – a 'spaghetti bowl' of investment provisions at the regional level.

In the same vein, RTAs can be seen as ways of advancing the rule-making on investment that failed to emerge at the multilateral system – such as for example under the proposed MAI. The remainder of this paper explores the investment provisions in RTAs, with a view to comparing these to current international norms on investment and to assessing the influence of these provisions on the international investment regime.

4 Mapping of RTAs and RTAs as compared to the multilateral system

This study forms part of a broader study on provisions in RTAs. For the sake of consistency, the data in this paper is based on the investment provisions contained in the sample of fifty-two RTAs that is used in IADB (2006). This data set includes countries from Africa, America, Asia and Europe; it includes RTAs among developed countries, among developing countries and between developed and developing countries.

Table 7.1 lists the RTAs examined in this paper. The table includes the partner countries or, in cases such as NAFTA and CAFTA, the name of the agreement; the date of entry into force of the agreement (the RTAs are ordered by date from the oldest to the most recent); the geographic

Table 7.1 *Agreements used in sample and date of entry into force*

Agreement	Date of entry into force	Geographic composition	Income classification
GATS and TRIMs	01/01/1995	Multilateral	
Australia–New Zealand	03/28/1983	Asia–Asia	Advanced–Advanced
United States–Israel	09/01/1985	Americas–Middle East	Advanced–Advanced
NAFTA	01/04/1994	Americas–Americas	Advanced–Developing
COMESA	12/08/1994	Africa–Africa	Developing–Developing
Mexico–Colombia–Venezuela (G3)	01/01/1995	Americas–Americas	Developing–Developing
Mexico–Bolivia	01/01/1995	Americas–Americas	Developing–Developing
EC–Lithuania	01/01/1995	Europe–Europe	Advanced–Developing
EU–Romania	02/01/1995	Europe–Europe	Advanced–Developing
MERCOSUR–Chile	10/01/1996	Americas–Americas	Developing–Developing
Canada–Israel	01/01/1997	Americas–Middle East	Advanced–Advanced
MERCOSUR–Bolivia	02/28/1997	Americas–Americas	Developing–Developing
Canada–Chile	07/05/1997	Americas–Americas	Advanced–Developing
Mexico–Nicaragua	07/01/1998	Americas–Americas	Developing–Developing
Chile–Peru	07/01/1998	Americas–Americas	Developing–Developing
Chile–Mexico	08/01/1999	Americas–Americas	Developing–Developing
EC–South Africa	01/01/2000	Europe–Africa	Advanced–Developing
EC–Morocco	03/01/2000	Europe–Middle East	Advanced–Developing
Mexico–Israel	07/01/2000	Americas–Middle East	Advanced–Developing
New Zealand–Singapore	01/01/2001	Asia–Asia	Advanced–Advanced
Mexico–Northern Triangle	03/15/2001 (SV, GU), 06/01/2001 (HO), 03/14/2001 (MX)	Americas–Americas	Developing–Developing
EFTA–Mexico	07/01/2001	Americas–Europe	Advanced–Developing
EC–Mexico	07/01/2001	Americas–Europe	Advanced–Developing
United States–Jordan	12/17/2001	Americas–Middle East	Advanced–Developing
Central America–Dominican Republic	03/07/2002 (CR), 10/04/2001 (SV), 10/03/2001(GU), 12/19/2001 (HO)	Americas–Americas	Developing–Developing
Central America–Chile	02/15/2002 (CR), 06/03/2002 (SV)	Americas–Americas	Developing–Developing
Canada–Costa Rica	11/01/2002	Americas–Americas	Advanced–Developing
Japan–Singapore	11/30/2002	Asia–Asia	Advanced–Advanced
EFTA–Singapore	01/01/2003	Europe–Asia	Advanced–Advanced
Chile–EC	02/01/2003	Americas–Europe	Advanced–Developing
Singapore–Australia	07/28/2003	Asia–Asia	Advanced–Advanced
United States–Chile	01/01/2004	Americas–Americas	Advanced–Developing
United States–Singapore	01/01/2004	Americas–Asia	Advanced–Advanced
China–Hong Kong, China	01/01/2004	Asia–Asia	Advanced–Developing
Chile–Korea	04/01/2004	Americas–Asia	Advanced–Developing
Mexico–Uruguay	07/15/2004	Americas–Americas	Developing–Developing
Mexico–Costa Rica	01/01/2005	Americas–Americas	Developing–Developing
US–Australia	01/01/2005	Americas–Asia	Advanced–Advanced
Australia–Thailand	01/01/2005	Asia–Asia	Advanced–Developing
MERCOSUR–CAN	01/05/2005 (AR, UY–VE), 02/01/2005 (AR, BR, UY–CO; BR–VE), 04/01/2005 (AR, BR, UY–EC), 04/19/2005 (PY–CO, EC, VE)	Americas–Americas	Developing–Developing
Mexico–Japan	04/01/2005	Americas–Asia	Advanced–Developing

Table 7.1 (*cont.*)

Agreement	Date of entry into force	Geographic composition	Income classification
Chile–New Zealand–Singapore–Brunei	06/03/2005	Americas–Asia	Advanced–Developing
New Zealand–Thailand	07/01/2005	Asia–Asia	Advanced–Developing
MERCOSUR–Peru	02/06/2006 (PAR), 12/29/2005 (BR), 12/16/2005 (UY), 12/13/2005 (AR), 12/12/2005 (PE)	Americas–Americas	Developing–Developing
United States–Morocco	01/01/2006	Americas–Middle East	Advanced–Developing
United States–Bahrain	01/01/2006	Americas–Middle East	Advanced–Developing
CAFTA	03/01/2006 (SV), 04/01/2006 (HO), 07/01/2006 (GU), 04/01/2006 (NI), 03/01/2007 (DR)	Americas–Americas	Advanced–Developing
Panama–Singapore	07/24/2006	Americas–Asia	Advanced–Developing
Chile–China	10/01/2006	Americas–Asia	Developing–Developing
United States–Peru	Not yet in force as of 01/2008	Americas–Americas	Advanced–Developing
United States–Panama	Not yet in force as of 01/2008	Americas–Americas	Advanced–Developing
United States–Colombia	Not yet in force as of 01/2008	Americas–Americas	Advanced–Developing
United States–Korea	Not yet in force as of 01/2008	Americas–Asia	Advanced–Advanced

area of origin of the partner countries; and the level of development of the partner countries. This latter category uses the IMF's categorization of 'Advanced Economy' and 'Developing Country'.[18]

Table 7.1 demonstrates that the number of regional trade agreements incorporating investment provisions is large and growing more rapidly every year. The sample includes only agreements that can be considered free trade agreements. Customs unions are not included except in cases such as MERCOSUR agreements with third parties in which the customs union is a party to a free trade agreement. The sample includes twenty-two free trade agreements among countries of the Americas, ranging from the 1994 NAFTA to the CAFTA agreement implemented in 2006 and 2007 and including three agreements (US–Colombia, US–Panama and US–Peru) that have been signed but are not yet in force.[19] Seventeen agreements are included that pair countries of the Americas with countries outside the Americas, including eight with Asian countries, six with countries in the Middle East and three with European partners. Eight agreements are between Asian countries, two agreements among European countries or groups (European transition agreements), and one each of Europe–Africa, Europe–Asia, Europe–Middle East and Africa–Africa. Two agreements are from the 1980s, thirteen from the 1990s and thirty-three from the 2000s. Four agreements have not yet entered into force. Ten RTAs are among advanced economies, twenty-six are between advanced economies and developing countries, and the remaining sixteen are between developed countries.

The divisions among geographic area and by level of development were to answer the question of whether geographic area and level of development impact the choices countries make in incorporating investment into the RTAs into which they enter. The most active countries in terms of incorporating investment provisions in RTAs have been the countries of the Americas, largely as a result of changing attitudes towards investment following the debt crisis of the 1980s and subsequent reforms oriented towards openness and attracting

[18] According to the IMF, the Advanced Economies are: Australia, Austria, Belgium, Canada, Cyprus, Denmark, Finland, France, Germany, Greece, Hong Kong, Iceland, Ireland, Israel, Italy, Japan, Korea, Luxembourg, Netherlands, New Zealand, Norway, Portugal, Singapore, Slovenia, Spain, Sweden, Switzerland, Taiwan, the United Kingdom and the United States. This information can be found in the World Economic Outlook's Database – WEO Groups and Aggregates Information, at www.imf.org.

[19] The CAFTA has been implemented by six of the seven signatory countries; Costa Rica has been granted until 1 October 2008 to pass implementing legislation.

investment into their relatively capital-poor countries. Of the RTAs with investment provisions, the United States and the EU (mostly through BITs), early on tended to act as hubs, but recently Asian countries have increasingly participated in this trend, both in agreements among themselves and with countries in the Americas.[20] In terms of levels of development, developing countries have been seen as tending to utilize investment provisions as signals to foreign investors.

This paper does not aim to draw correlations between investment provisions and actual investment flows.[21] Rather, its objective is to explore the policies adopted to address investment within RTAs. As such, the paper relies on the texts of the agreements as they relate to the discipline of investment. The template utilized for comparing investment provisions within RTAs is structured using sub-categories found in BITs, in NAFTA-type agreements and in the GATS. This covers the scope of coverage of the agreement; the approach (GATS-type 'positive list' versus NAFTA-type 'negative list'); the types of restrictions on nationality of directors and management allowed; provisions on performance requirements; transparency; whether denial of benefits is included; coverage in case of expropriation; treatment of transfers and payments; and the inclusion or not of an investor–state dispute settlement mechanism. RTA provisions are compared against the GATS

[20] Several agreements have been signed between countries of the Americas and countries in Asia: the United States implemented an FTA with Singapore in 2004 and with Australia in 2005; Chile implemented an RTA with Korea in 2004, with its P-4 partners (New Zealand, Singapore and Brunei) in 2005 and with China in 2006; Mexico was the first developing country to enter into a regional trade agreement with Japan in 2005, and Panama and Singapore entered into an RTA in 2006. On the European side, there is the EFTA–Singapore RTA of 2003. Among Asian countries, RTAs include Australia–New Zealand (1983), New Zealand–Singapore (2001), Japan–Singapore (2002), Singapore–Australia (2003), China–Hong Kong (2004) and Australia–Thailand (2005).

[21] A significant body of literature exists that addresses this question. It should be noted that evidence establishing a clear link between changes in the levels of foreign direct investment (FDI) and the existence of investment provisions is difficult to find. Various studies on whether bilateral investment treaties, whose stated objective is to increase investment, have found little robust evidence that such provisions increase foreign investment. Hallward-Driemier (2003) and Rose-Ackerman and Tobin (2005) tested this relationship over the period 1980–2000 and found, first, no statistically significant relationship and in a second study a negative effect at high levels of risk and a positive effect at low levels of risk. A study by Salacuse and Sullivan (2005) finds positive effects for US BITs. Neumayer and Spess (2005) use a longer time period than in previous models, 1970–2001, and find a positive effect of BITs on investment flows. Dee *et al.* (2006) find that economic fundamentals are more important in attracting investment than investment agreements.

and TRIMs provisions of the WTO in order to assess how the international investment provisions, as they evolve at the bilateral and regional level compare with multilateral commitments and to provisions adopted by other RTAs. RTAs are assigned a score of 1 if the provision is present; a 0 if it is not. For example, if an RTA includes an investor–state dispute settlement mechanism, it receives a score of 1. If it does not, it receives a 0. The data are set out in the Annex to this chapter.

5 Overview of the results

Tables 7.2 and 7.3 provide a summary of the results of the evaluation of investment provisions in the sample of agreements. The section below evaluates by topic coverage in the RTAs evaluated.

5.1 Scope and coverage

5.1.1 Definition of investment

Investment is traditionally defined in either a broad, asset-based way (including both FDI and portfolio investment) or by using a narrow, enterprise-based definition (comprising the establishment or acquisition of a business enterprise). The vast majority of BITs and FTA provisions in this study have adopted the broad definition. Those agreements that use the GATS-type services-based approach often utilize the narrower (enterprise-based) definitions.

5.1.2 Sectoral coverage

The OECD classifies RTAs into two broad categories: GATS-type and NAFTA-type agreements (OECD 2006). In GATS-type agreements, investment disciplines are contained in the services chapter as well as a limited investment chapter and interactions between these chapters are governed as stated in one of these chapters. In the NAFTA-type agreements, investment disciplines are contained in the investment chapter and there is limited interaction with the services chapter.

Most NAFTA-type agreements tend to be between or among countries that have already liberalized their investment regimes and are willing to lock that liberalization in with a trade treaty. RTAs negotiated by these countries tend to include a separate investment chapter, in the model of the NAFTA, that goes beyond the disciplines of a GATS-type agreement. Agreements negotiated by the NAFTA member countries tend to include provisions that resemble those of NAFTA Chapter 11.

Table 7.2 *Mapping of investment provisions: results by geographic pairing*

Category		Total and score (per cent of total)					
		Intra-Americas Total: 22	Americas–Asia Total: 8	America–Europe Total: 3	Americas–Middle East Total: 6	Intra-Asia Total: 7	Others Total: 6
Sectoral coverage	Beyond services (in separate chapter)	15 (.68)	6 (.75)	2 (.67)	1 (.17)	5 (.71)	2 (.33)
	Services only (mode 3 in services chapter)	0 (.00)	1 (.13)	1 (.33)	1 (.17)	1 (.14)	0 (.00)
	Based on bilateral treaties	4 (.18)	0 (.00)	0 (.00)	1 (.17)	0 (.00)	0 (.00)
	Endeavours without specified scope	4 (.18)	1 (.13)	0 (.00)	1 (.17)	0 (.00)	2 (.33)
Scope of non-discrimination provisions	Establishment (i.e. greenfield)	18 (.82)	7 (.88)	2 (.67)	4 (.67)	5 (.71)	2 (.33)
	Acquisition (i.e. merger)	18 (.82)	7 (.88)	2 (.67)	4 (.67)	5 (.71)	1 (.17)
	Post-establishment operation	18 (.82)	7 (.88)	2 (.67)	4 (.67)	4 (.57)	2 (.33)
	Resale (i.e. free movement of capital)	18 (.82)	7 (.88)	2 (.67)	3 (.50)	4 (.57)	1 (.17)
MFN	Negative-list bindings	18 (.82)	7 (.88)	0 (.00)	0 (.00)	3 (.43)	1 (.17)
	Positive-list bindings	0 (.00)	0 (.00)	0 (.00)	0 (.00)	0 (.00)	0 (.00)
National treatment	Negative-list bindings – all sectors	18 (.82)	7 (.88)	0 (.00)	0 (.00)	4 (.57)	2 (.33)
	Positive-list bindings – all sectors	0 (.00)	0 (.00)	1 (.33)	0 (.00)	1 (.14)	0 (.00)
Standard of treatment	Minimum standard of treatment	13 (.59)	6 (.75)	0 (.00)	2 (.33)	2 (.29)	1 (.17)
	Treatment in case of strife	15 (.68)	6 (.75)	0 (.00)	2 (.33)	4 (.57)	1 (.17)
	Expropriation and compensation	17 (.77)	6 (.75)	0 (.00)	2 (.33)	4 (.57)	1 (.17)
Transfers and payments	No restrictions except to safeguard balance of payments	1 (.05)	0 (.00)	2 (.67)	1 (.17)	0 (.00)	2 (.33)
	Restrictions in other prescribed circumstances	14 (.64)	7 (.88)	1 (.33)	2 (.33)	5 (.71)	1 (.17)
Performance requirements	No local content, trade or other specified requirements (e.g. on tech transfer, or where to sell)	13 (.59)	6 (.75)	0 (.00)	2 (.33)	1 (.14)	0 (.00)
	No local content or trade requirements i.e. as in TRIMs	3 (.14)	0 (.00)	0 (.00)	1 (.17)	0 (.00)	0 (.00)
	Provisions more limited than TRIMs	0 (.00)	0 (.00)	0 (.00)	0 (.00)	0 (.00)	0 (.00)

Table 7.3 *Mapping of investment provisions: results by levels of development*

Category		Total and Score (per cent of total)		
		Advanced-Advanced Total: 10	Advanced-Developing Total: 26	Developing-Developing Total: 16
Sectoral coverage	Beyond services (in separate chapter)	7 (.70)	16 (.62)	8 (.50)
	Services only (mode 3 in services chapter)	0 (.00)	4 (.15)	0 (.00)
	Based on bilateral treaties	0 (.00)	2 (.08)	2 (.13)
	Endeavours without specified scope	1 (.10)	2 (.08)	5 (.31)
Scope of MFN, NT etc provisions	Establishment (i.e. greenfield)	8 (.80)	20 (.77)	10 (.63)
	Acquisition (i.e. merger)	8 (.80)	19 (.73)	10 (.63)
	Post-establishment operation	8 (.80)	19 (.73)	10 (.63)
	Resale (i.e. free movement of capital)	7 (.70)	18 (.69)	10 (.63)
MFN	Negative-list bindings	5 (.50)	16 (.62)	10 (.63)
	Positive-list bindings	0 (.00)	0 (.00)	0 (.00)
National treatment	Negative-list bindings – all sectors	7 (.70)	16 (.62)	10 (.63)
	Positive-list bindings – all sectors	0 (.00)	3 (.12)	0 (.00)
Standard of treatment	Minimum standard of treatment	5 (.50)	14 (.54)	5 (.31)
	Treatment in case of strife	6 (.60)	15 (.58)	7 (.44)
	Expropriation and compensation	6 (.60)	15 (.58)	9 (.56)
Transfers and payments	No restrictions except to safeguard balance of payments	1 (.10)	4 (.15)	1 (.06)
	Restrictions in other prescribed circumstances	*7 (.70)*	*16 (.62)*	*7 (.44)*
Performance requirements	No local content, trade or other specified requirements (e.g. on tech transfer, or where to sell)	4 (.40)	12 (.46)	6 (.38)
	No local content or trade requirements, i.e. as in TRIMs	1 (.10)	1 (.04)	2 (.13)
	Provisions more limited than TRIMs	0 (.00)	0 (.00)	0 (.00)
Nationality (residency) of management and board of directors (including exceptions in Annex)	Cannot restrict either	0 (.00)	1 (.04)	1 (.06)
	Cannot restrict either, with sectoral exceptions	0 (.00)	0 (.00)	0 (.00)
	Can partially restrict board of directors	3 (.30)	12 (.46)	5 (.31)
	Can partially restrict management or both. Alternatively, sectoral promises to liberalize, but no general promise	0 (.00)	0 (.00)	2 (.13)
Denial of benefits (i.e. rules of origin)	Denial only to persons that do not conduct substantial (or any) business operations in other party	2 (.20)	5 (.19)	7 (.44)
	Tougher treatment to specific sectors	0 (.00)	0 (.00)	0 (.00)
	Tougher treatment to all sectors	2 (.20)	11 (.42)	2 (.13)
Transparency (in any part of the agreement)	Prior comment	4 (.40)	12 (.46)	8 (.50)
	Publish (as in GATS)	7 (.70)	16 (.62)	9 (.56)
	National inquiry point (as in GATS)	4 (.40)	12 (.46)	9 (.56)
Investor–state dispute settlement		6 (.60)	15 (.58)	10 (.63)

Table 7.2 (*cont.*)

Category		Total and score (per cent of total)					
		Intra-Americas Total: 22	Americas–Asia Total: 8	America–Europe Total: 3	Americas–Middle East Total: 6	Intra-Asia Total: 7	Others Total: 6
Senior management and board of directors (including exceptions in Annex)	Cannot restrict either	1 (.05)	0 (.00)	0 (.00)	1 (.17)	0 (.00)	0 (.00)
	Cannot restrict either, with sectoral exceptions	0 (.00)	0 (.00)	0 (.00)	0 (.00)	0 (.00)	0 (.00)
	Can partially restrict board of directors	13 (.59)	6 (.75)	0 (.00)	1 (.17)	0 (.00)	0 (.00)
	Can partially restrict management or both. Alternatively, sectoral promises to liberalize, but no general promise.	2 (.09)	0 (.00)	0 (.00)	0 (.00)	0 (.00)	0 (.00)
Denial of benefits (i.e. rules of origin)	Denial only to persons that do not conduct substantial (or any) business operations in other party	7 (.32)	3 (.38)	1 (.33)	0 (.00)	3 (.43)	0 (.00)
	Tougher treatment to specific sectors	0 (.00)	0 (.00)	0 (.00)	0 (.00)	0 (.00)	0 (.00)
	Tougher treatment to all sectors	9 (.41)	4 (.50)	0 (.00)	2 (.33)	0 (.00)	0 (.00)
Transparency (in any part of the agreement)	Prior comment	15 (.68)	5 (.63)	0 (.00)	1 (.17)	3 (.43)	0 (.00)
	Publish (as in GATS)	17 (.77)	7 (.88)	1 (.33)	2 (.33)	4 (.57)	1 (.17)
	National inquiry point (as in GATS)	16 (.73)	4 (.50)	1 (.33)	0 (.00)	4 (.57)	0 (.00)
Investor–state dispute settlement		18 (.82)	5 (.63)	0 (.00)	2 (.33)	5 (.71)	1 (.17)

Countries that have undertaken less unilateral liberalization tend to enter into agreements with a narrower scope on investment. Such RTAs cover investment provisions mainly as part of the provisions on services. Some other agreements, particularly those among developing countries, aim less at investment liberalization than at investment promotion, including developing and promoting local and/or regional firms. These may take on endeavour proclamations without committing to investment provisions. There are also a number of agreements for which the depth of investment liberalization remains to be seen: these RTAs have been implemented on the basis of market access and other trade-related commitments, with the investment provisions held for future negotiation.

Of the fifty-two agreements surveyed, thirty-one included investment provisions in a separate investment chapter that went beyond services – nearly 70 per cent of the agreements among countries in the Americas; 75 per cent of Americas–Asia agreements and 71 per cent of intra-Asia agreements. In terms of the level of development, the highest incidence of countries with a separate investment chapter going beyond services was among advanced economies (70 per cent) with the agreements that did not incorporate such provisions being the older agreements: US–Israel, Australia–New Zealand and the slightly more recent Canada–Israel. Seventy per cent of advanced–developing agreements included a separate investment chapter or incorporated a recent BIT.

Three RTAs included investment provisions only in a services chapter: these agreements are relatively spread out geographically, including EC–Chile, China–Hong Kong, and the Trans-Pacific Strategic Economic Partnership (Trans-Pacific SEP) Agreement among Brunei Darussalam, Chile, New Zealand and Singapore (the 'P-4') – although in the latter case, negotiations towards an investment agreement are incipient. Four other agreements base the legally binding commitments on investment on existing BITs. Three of these are in the Americas and one is an Americas–Middle East agreements – Canada–Costa Rica FTA, Chile's agreement with Central America; Chile–MERCOSUR and the US–Bahrain FTA.[22] The US–Jordan FTA does not include an investment

[22] The Canada–Costa Rica references the Agreement between the Government of Canada and the Government of Costa Rica for the Promotion and Protection of Investments, signed in 1998. Annex 10.01 to the Central America–Chile free trade agreement references the following bilateral investment treaties for incorporation: Acuerdo entre la República de Chile y la República de Costa Rica para la Promoción y Protección Recíproca de las Inversiones (1996); Acuerdo entre la República de Chile y la República de El Salvador para la Promoción y Protección Recíproca de las Inversiones, suscrito entre El Salvador y Chile (1996); Acuerdo entre la República de Chile y la República de Guatemala para la Promoción y Protección Recíproca de las Inversiones (1996); Acuerdo entre la República de Chile y la República de Honduras para la Promoción y Protección Recíproca de las Inversiones (1996); and Acuerdo entre la República de Chile y la República de Nicaragua para la Promoción y Protección Recíproca de las Inversiones (1996). The US–Bahrain agreement references the Treaty between the Government of the United States of America and the Government of the State of Bahrain Concerning the Encouragement and Reciprocal Protection of Investment.

provision; while it is not referenced in the FTA, the 1997 US–Jordan BIT is the principal investment instrument between the two countries. MERCOSUR's other agreements invoke bilateral investment treaties among parties, but no third party other than Chile has yet signed bilateral investment treaties with all MERCOSUR members so only MERCOSUR–Chile was counted.

A number of others incorporate investment as endeavours but without a specified scope. Half of these are intra-Americas, all agreements signed by the MERCOSUR customs union.[23] The other agreements that contain endeavours are also more limited in their liberalization scope: US–Israel (1985), the EC agreements with South Africa (2000) and Morocco (2000); and Chile–China (2006). Others, while including investment as part of their objectives contain no investment provisions. Canada–Israel (1997), for example, states as one of its objectives: 'Wishing to create a framework for promoting investment and cooperation . . .' (Preamble) but contains no provisions on investment or services. The Mexico–Israel agreement includes as an objective to substantially increase investment opportunities in the territories of the parties (Article 1.03). The Australia–New Zealand Closer Economic Relations Trade Agreement (ANZCERTA) contains as an objective 'co-operation in such fields as investment, marketing, movement of people, tourism and transport', but does not include specific investment provisions. This is largely due to similar economic structures and practices as well as the close economic relationship between the two countries. The COMESA effort towards a free trade agreement includes 'to co-operate in the creation of an enabling environment for foreign, cross border and domestic investment including the joint promotion of research and adaptation of science and technology for development' and also provisions urging regional co-operation on investment incentives to spur investment in the region, but no traditional investment provisions.

[23] MERCOSUR agreements with Chile (1996) and Bolivia (1997) as well as later agreements with the Andean Community (2005) and Peru (2005/6).

A few agreements have yet to determine the shape that the investment provisions will take. The Chile–Central America agreement (2002) includes investment as part of a future work programme. In the Chile–China agreement, investment, as well as services, is included as part of a future work programme. The P-4 group signed a wide-ranging free trade agreement in 2006, but this did not include financial and investment services, and talks are set to begin to include them in the agreement. The COMESA passed a COMESA Investment Agreement in May 2007, which provides a framework for intra-COMESA investment and a draft text for an agreement on services is under discussion.

Investment chapters in the RTAs signed by Canada, Chile, the United States and Mexico, as well as those signed by Asian partners, Australia, Japan and Singapore, tend to cover both investment protection and liberalization issues, and go beyond the multilateral provisions of the GATS and TRIMs, incorporating investment provisions that go beyond services in a separate investment chapter (or by incorporating by reference comprehensive investment provisions already contained in a BIT).

5.2 Non-discrimination

The principle of non-discrimination is achieved through the application of national treatment and most-favoured-nation (MFN) standards. National treatment requires the host country to provide that investments and investors of the parties be treated as well as local investors and MFN treatment requires the host country to accord treatment as favourable as the best treatment accorded to any other foreign investor. The extent to which non-discrimination is applied depends upon how investment is defined in the agreement; the range of assets to which non-discrimination applies; upon whether the MFN standard is applied to the entire lifetime of the investment (pre- and post-establishment) or to part of its lifetime; and the number of exceptions.

Of the RTAs among countries in the Americas, all but the agreements forged by the MERCOSUR expressly provide national and MFN treatment in the establishment, acquisition, post-establishment and resale phases of the investment. Some agreements, for example those based on NAFTA, require that the investor and investment of one party be granted 'the better of' MFN or national treatment. These agreements also include a list of reservations – often including non-conforming measures at the federal and sub-federal level. RTAs between countries in the Americas and Asian countries have an even higher incidence of this coverage, at 88 per cent (if Chile–China is excluded (as investment is on the agenda for future negotiations), this increased to 100 per cent). With the exception of the Australia–Thailand FTA (which covers neither post-establishment nor resale), the Australia–New Zealand CERTA and the Hong Kong–China agreements (both of which do not include a chapter on investment), agreements among Asian countries cover all phases of investment. EFTA–Singapore follows the other Singapore agreements, covering all four aspects. EU agreements with third countries typically do not include national or MFN treatment for investment, as this is the purview of national Member States and is generally incorporated in bilateral investment treaties.

Some RTAs include a development aspect to their investment chapter. Particularly RTAs among developing countries, such as the COMESA, differentiate between domestic and foreign investors, and provide for the freedom to control FDI according to national policies. Such elements could lead to approaches for flexibility at the multilateral level should an international investment regime be set up in the future.

International investment liberalization is effected by two basic approaches. At the multilateral level, the GATS provisions regarding national treatment (Article XVII) are conditional, and applied to specific commitments listed in the Members' schedules. GATS uses what is known as the positive-list approach, in which Members identify the sectors that will be liberalized in the agreement. The alternative approach is the negative-list approach, in which signatories agree on a set of general obligations applicable to all industries and sectors, and list industries and sectors that will be exempted. This is also sometimes known as the NAFTA approach.[24] The GATS (positive-list) approach is often seen as less liberalizing: only sectors specifically listed are subject to liberalization. Under the 'negative-list' approach, favoured in post-NAFTA RTAs, all sectors are liberalized except those that are listed as exceptions. GATS-inspired agreements are often favoured by countries that want to preserve a certain flexibility and progressiveness in their liberalization, while they reform and establish new regulatory frameworks. NAFTA-inspired agreements tend to be seen as more liberalizing,

[24] Note that the positive-list and negative-list approaches are not mutually exclusive: Investment agreements can be structured so as to incorporate both methods; for example, obligations could be applied in a positive-list style on pre-establishment commitments, while using the negative-list method for post-establishment commitments.

and more transparent due to the 'one-shot' liberalization that encompasses all sectors but those listed and locks in future reforms.

RTAs among countries of the Americas, with the exception of those in which MERCOSUR is a party, take a negative-list approach to both MFN and national treatment. All agreements between countries in the Americas and Asian countries take this approach. The New Zealand–Thailand agreement takes a positive-list approach to national treatment.

5.3 *Standard of treatment*

Absolute standards of treatment – as opposed to the relative standards of treatment provided by national and MFN treatment, which are defined by treatment accorded to another investment – provide a floor, or minimum level of protection, for investors. These include standards such as fair and equitable treatment under international law, compensation for expropriation and, for example, free transfer of payments.

The minimum standard of treatment ensures that investors of a party will be accorded treatment in accordance with international law, including 'fair and equitable treatment' and 'full protection and security'. This standard has received growing attention, commensurate with the growing number of arbitral awards addressing claims of denial of fair and equitable treatment.

All US agreements that address investment within the body of the text contain this provision, as do Chile's agreements with Mexico and Peru; Mexico–Uruguay and Mexico–Northern Triangle; the agreements between Australia and Thailand; and Singapore's agreements (with the exception of Singapore–Australia). Recently concluded agreements, such as the AUSFTA, CAFTA and US agreements with Chile, Morocco and Singapore provide that each party must 'accord to the covered investments treatment in accordance with customary international law, including fair and equitable treatment and full protection and security'.

Many RTAs also include language ensuring non-discriminatory treatment with respect to measures adopted relating to losses suffered by investments due to armed conflict or civil strife.

5.4 *Expropriation and compensation*

Most RTAs contain in their investment chapters provisions to ensure that their investment is protected in the event that the host country

nationalizes or expropriates their investment. Not surprisingly, such provisions are most popular in RTAs in the Americas, particularly those to which the more developed countries are party. Over three-quarters of the agreements among countries in the Americas and between countries in the Americas and Asian countries include these provisions.

5.5 *Transfers and payments*

Another goal of investment agreements is to ensure that investors are able to transfer their profits back to the home country. At the multilateral level, the GATS contains provisions allowing limited restrictions in the event of balance-of-payments difficulties. RTAs have gone a step further, adding a number of additional restrictions in other prescribed circumstances. These agreements hold that a party may prevent a transfer through the application of its laws relating to bankruptcy, securities trading, criminal or penal offences, adjudicatory judgments and related matters. Such provisions are found predominantly in texts of RTAs among the Americas and between the Americas and Asian countries.

5.6 *Performance requirements*

Performance requirements include obligations to export a particular percentage of goods and services; to use a particular level or percentage of local content; to give preference to local goods or services; to observe trade and foreign exchange balancing requirements; to transfer technology; or to act as the exclusive supplier of goods or services.

NAFTA-type agreements prohibit performance requirements for both goods and services, with some exceptions to this prohibition.[25] Nearly three-quarters of the agreements among countries of the Americas and half of agreements between countries of the Americas and third states contained provisions restricting the ability to mandate local content, trade or other specified requirements (e.g. on technology transfer, or where to sell). Less than 20 per cent of the intra-Asia RTAs contained such a provision. With regard to the RTAs among countries of the Americas, performance requirements are not banned in the agreements by the MERCOSUR or in Chile's FTAs with Central America and Peru.

[25] NAFTA Article 1106.6, for example.

5.7 *Senior management and board of directors*

Most RTAs provide for the temporary entry of managers and key personnel related to an investment. Some agreements allow the hiring of top managerial personnel regardless of nationality, while other agreements hold that the investment may not stipulate the nationality of a majority of the board of directors.

Of the sample, agreements among countries in the Americas had a greater incidence of restricting the ability of the investor to determine the nationality (residency) of management and board of directors. Only one RTA, that between Central American countries and the Dominican Republic, allows restrictions on specifying nationality, and in this case this applies only when such provisions are stipulated in one of the parties' legislation.

Various agreements (the NAFTA-type agreements, slightly more than half of the RTAs among countries of the Americas and three-quarters of the agreements between Asian and American countries) allow some restrictions on the nationality or residency of boards of directors, provided such restrictions do not interfere with the investor's ability to exercise control over the investment.

5.8 *Denial of benefits*

Third-party investors often enjoy the same rights as investors of a party to the RTA when they have a substantial presence in one member and invest in the other party's territory through this presence. This implies a *de facto* transfer of investment rules to non-party actors.

Some RTAs include provisions that are akin to rules-of-origin provisions for goods that allow a party to deny benefits to a party's investors or investments if investors of a non-party controls the investments under certain conditions such as if the non-party does not conduct substantial business operations in the other party; if the denying party does not maintain diplomatic relations with that non-party; or if the denying party prohibits transactions with that non-party or its enterprises.

In our sample, one-third of the agreements among countries of the Americas and close to 40 per cent of the agreements between countries in the Americas and countries in Asia, follow the WTO (GATS and TRIMs) model of including provisions of denial only to persons that do not conduct substantial business operations in other party. Forty per cent included tougher treatment to all sectors. NAFTA and subsequent

RTAs signed by the United States, Mexico's agreements with Chile, with Japan and with the Northern Triangle and Chile's agreements with Canada and Korea include stronger language, allowing the denial of benefits if the denying party does not maintain diplomatic relations with the non-party or adopts or maintains measures with that non-party that prohibit transactions with the enterprise.

5.9 *Transparency requirements*

The GATS includes the obligation to publish all relevant laws and to set up enquiry points that companies can use to obtain information about regulations in the service sector. Member must also notify the WTO of changes in regulations that would affect their services commitments.

Many of the RTA investment provisions contain similar, or further-reaching, transparency commitments. NAFTA and NAFTA-like agreements provide for the setting up of national contact points, publication of relevant laws and regulations, and provide that parties must notify each other with regard to any proposed or actual matter that may be adopted that might affect the other party.

In our sample, the majority of agreements among countries in the Americas (around 70 per cent) contain the three transparency provisions: prior comment; publish and set up a national inquiry point. A number of agreements followed the GATS, in requiring a contact point and publication of laws but not including prior comment provisions.[26] The Mexico–Japan partnership agreement includes provisions to publish and prior comment but does not include contact points. A number of others require only publication.[27]

5.10 *Dispute settlement*

Investment disputes have increased as investment has grown and as more countries are signing on to agreements containing investment provisions. To illustrate, between 1972 and 1999, sixty-nine disputes were registered with ICSID, an average of just over two disputes per year. Between January 2000 and February 2002, twenty-nine disputes have been registered, an average of about thirteen per year. The increasing

[26] Mexico–Northern Triangle (2001); Chile–EC (2003); Singapore–Australia (2003); the P-4 (2005); Panama–Singapore (2006).

[27] Canada–Costa Rica (2002); Japan–Singapore (2002); EFTA–Singapore (2003); the P-4 (2005); and US–Bahrain (2006).

number of disputes may be a reflection of increasing investment, or may reflect the fact that the international mechanisms for the settlement of disputes are gaining credibility among economic operators by providing a set of clear and predictable rules (OECD 2002 p. 5).

Both BITs and investment provisions in RTAs contain dispute settlement provisions. Some RTAs provide for the settlement of disputes through coordination and negotiation. Some contain provisions only for the settlement of disputes between parties. The NAFTA introduced an innovation in RTAs, by including an investor–state dispute settlement provision. Under investor–state dispute settlement rules, an investor of a party may submit to international arbitration a claim that a party has breached the obligations under the investment provisions of the RTA. Since the signing of the NAFTA, all NAFTA members' subsequent agreements, with the exception of US–Australia, Canada–Israel and the Mexico agreements with European countries, have included investor–state dispute settlement mechanisms.[28]

In our sample, the majority of agreements between developing countries and between developed and developing countries include such a provision. All US RTAs subsequent to the NAFTA include an investor–state provision, with the exception of the US–Jordan and the US–Australia FTA. EC agreements, agreements with Israel, and MERCOSUR agreements do not provide for an investor–state dispute settlement provision. By far the highest percentage of RTAs with an investor–state dispute settlement mechanism is among countries of the Americas, at 80 per cent, compared with RTAs among Asian countries, of which about 70 per cent contained such a provision and agreements among countries of the Americas and Asian countries, of which just under half contained such a provision.

6 Variations among agreements

Figure 7.1 provides a snapshot of the coverage of the selected RTAs: RTAs showing greater coverage are those that 'go beyond' the GATS/TRIMs provisions of the WTO. They include separate investment chapters that cover more than services; they extend national and most-favoured-nation treatment, and often the best of such treatment, to pre- and post-establishment phases of the investment and to resale; they adopt a negative-list approach; they allow little restrictions in terms

[28] The US-Jordan FTA also does not include this provision, but it is included in the BIT.

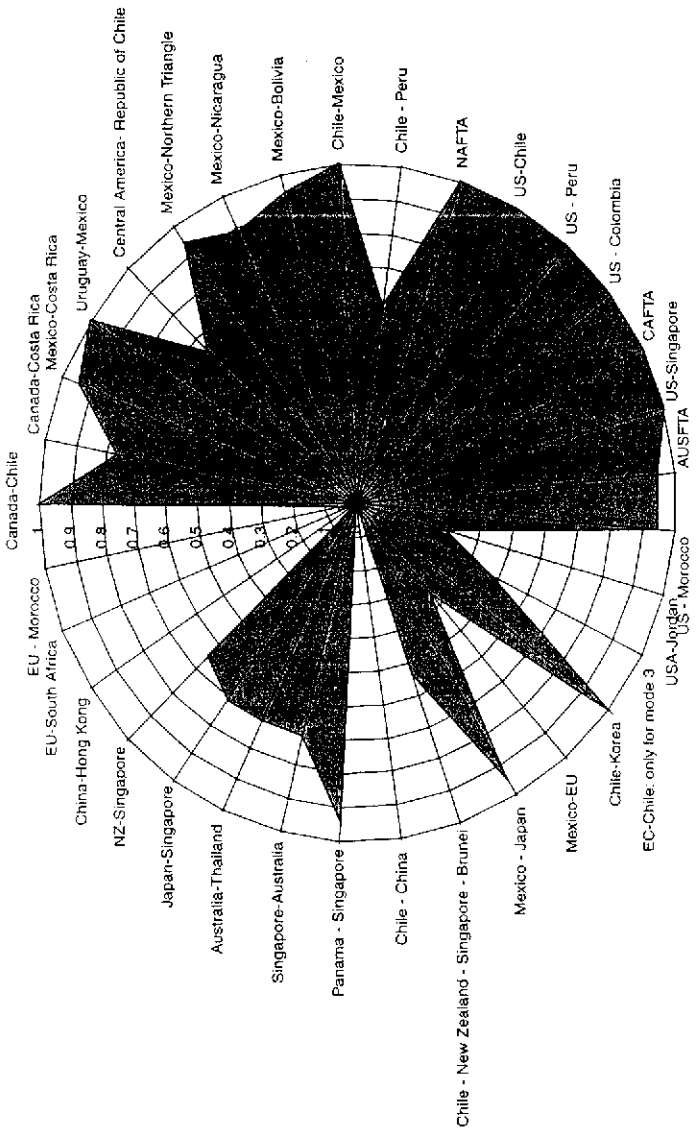

Figure 7.1 Coverage by country

of nationality of management or boards of directors, and do not allow performance requirements; they incorporate GATS-plus transparency measures; they include compensation measures in case of expropriation; and they include a separate dispute settlement mechanism. As seen in Figure 7.1, the RTAs with most coverage tend to be RTAs signed by the United States, Canada, Mexico, Chile and Singapore.

6.1 Agreements by geography

Table 7.2, along with Figure 7.1, shows that there are geographical trends in the treatments of investment. RTAs are grouped roughly into two hubs: a NAFTA-type hub, which includes agreements by countries in the Americas, except for the MERCOSUR, and increasingly in Asia, and the European-style hub. All RTAs forged by the three NAFTA members with their respective partners in the Americas are encompassing, applying the four modalities of investment – establishment, acquisition, post-establishment operations and resale – and also cover such disciplines as MFN treatment, national treatment and dispute settlement. Eighty per cent or more also cover transparency, denial of benefits and restriction of transfers, nationality of management and board of directors, performance requirements and expropriation. US PTAs again lead the way in being particularly comprehensive. In Asia, Singapore's and Australia's agreements are more encompassing, but other agreements have scant coverage. In inter-regional agreements, the coverage is somewhat lower due to the limited coverage of disciplines in the EU–Mexico and EU–Chile agreements, as well as in Chile–China FTA, P-4, and US–Jordan FTA.

6.2 Agreements by levels of development

The agreements signed among advanced economies tend to go beyond the provisions at the multilateral level. They tend to include separate investment chapters that go beyond services; cover all investment phases; employ a negative-list approach; and restrict limitations on nationality of board members and management. There is a geographic divide with respect to limitations on performance requirements: US agreements (except for US–Israel) do restrict performance requirements; Singapore agreements (except for US–Singapore and Japan–Singapore) do not. A similar division is seen in terms of transparency requirements: Americas agreements tend to add prior comment to the GATS obligations to

publish and establish a national enquiry point; Asian agreements, by and large, do not. Australian agreements (with the United States and with Singapore) incorporate GATS-style denial of benefits. Of agreements that include members from Asia, only a handful, all with countries in the Americas (Chile–Korea, Mexico–Japan, US–Korea and US–Singapore) adopt tougher-than-GATS treatment. Finally, agreements with Australia or Israel do not contain investor–state dispute settlement mechanisms except for the Singapore–Australia agreement – all Singapore agreements incorporate this element.

The agreements between advanced economies and developing countries display some heterogeneity. Americas agreements all contain a separate investment chapter or incorporate a BIT; EU agreements with developing countries generally do not. This category tends to track the agreements among advanced countries with the main hubs being the United States and Europe.

It was in the developing–developing group that there was the most variation. Here, agreements signed by Chile and Mexico with other developing countries looked much more like the agreements signed among advanced countries than similar agreements signed among other developing countries such as the MERCOSUR. These agreements tended to coincide more with RTAs such as the EU–developing countries RTAs, which tend to liberalize more gently and to incorporate more of a development dimension.

7 Conclusions

The exercise carried out in this paper, of mapping investment provisions from fifty-two RTAs to which countries of different geographic regions and different levels of development are party, has demonstrated two main phenomena: the increasing commonalities in investment provisions at the sub-multilateral level; and the importance of flexibility in the forging of investment provisions. While the former observation could be seen as a positive harbinger for an eventual multilateral investment regime, the latter may ensure that investment provisions at the bilateral and RTA level are driving the evolution of the international investment regime – but that a single, comprehensive and coordinated regime is unlikely in the near future.

At the regional and bilateral level, common approaches have emerged with respect to the scope of application, treatment, transfers, expropriation and mechanisms for the settlement of disputes. At the same

time as there is increasing convergence, the bilateral/regional approach allows countries to customize their investment relations and to express their national interests in terms of the depth of liberalization, the extent of protection, and demands by developing countries to address the development dimensions of FDI. As such, agreements among developing countries can differ from provisions found in agreements between developed and liberalizing developing countries or among developed countries. A case in point is the differences in US agreements, despite the US having a model BIT to draw upon. The US has been able to customize to serve its needs. A prime example is the difference between the AUSFTA and the CAFTA. While an investor–state dispute settlement mechanism is seen as important to guaranteeing due process for investors in the Central American trading partners, this was not seen as a compelling need in the negotiations with Australia. Through bilateral and regional trade agreements, countries can customize their investment provisions according to their comfort level, which is much more difficult to do at the multilateral level.

Annex

Table 7.4 *Scope and coverage*

	Sectoral coverage			
	Beyond services (in separate chapter)	Services only (mode 3 in services chapter)	Based on bilateral treaties	Endeavours without specified scope
GATS and TRIMs	0	1	0	0
Canada–Chile	1	0	0	0
Canada–Costa Rica	0	0	1	0
Mexico–Costa Rica	1	0	0	0
Uruguay–Mexico	1	0	0	0
Central America–Dominican Republic	1	0	0	0
Central America–Chile	0	0	1	0
MERCOSUR–Bolivia	0	0	0	1
MERCOSUR–Peru	0	0	0	1
MERCOSUR–CAN	0	0	0	1
MERCOSUR–Chile	0	0	1	1
Mexico–Northern Triangle	1	0	0	0
Mexico–Nicaragua	1	0	0	0
Mexico–Colombia–Venezuela	1	0	0	0
Mexico–Bolivia	1	0	0	0
Chile–Mexico	1	0	0	0
Chile–Peru	0	0	0	0
NAFTA	1	0	0	0
US–Chile	1	0	0	0
US–Peru	1	0	0	0
US–Colombia	1	0	0	0
US–Panama	1	0	0	0
CAFTA	1	0	0	0
US–Singapore	1	0	0	0
AUSFTA	1	0	0	0
US–Korea	1	0	0	0
Chile–Korea	1	0	0	0
Mexico–Japan	1	0	0	0
Chile–New Zealand–Singapore–Brunei	0	1	0	0

Table 7.4 (*cont.*)

	Sectoral coverage			
	Beyond services (in separate chapter)	Services only (mode 3 in services chapter)	Based on bilateral treaties	Endeavours without specified scope
Chile–China	0	0	0	1
Panama–Singapore	1	0	0	0
EC–Chile	0	1	0	0
Mexico–EU	1	0	0	0
Mexico–EFTA	1	0	0	0
US–Morocco	1	0	0	0
US–Jordan	0	0	1	0
US–Israel	0	0	0	1
US–Bahrain	0	0	1	0
Mexico–Israel	0	0	0	0
Canada–Israel	0	0	0	0
Singapore–Australia	1	0	0	0
Australia–Thailand	1	0	0	0
Australia–New Zealand	0	0	0	0
Japan–Singapore	1	0	0	0
NZ–Singapore	1	0	0	0
NZ–Thailand	1	0	0	0
China–Hong Kong	0	1	0	0
EFTA–Singapore	1	0	0	0
EU–Lithuania	0	0	0	0
EU–Romania	1	0	0	0
EU–South Africa	0	0	0	1
EU–Morocco	0	0	0	1
COMESA	0	0	0	0

Table 7.5 *Non-discrimination: most-favoured-nation and national treatment standards*

	MFN		National Treatment		Scope of MFN and National Treatment			
	Negative-list bindings	Positive-list bindings	Negative-list bindings	Positive-list bindings	Establishment	Acquisition	Post-establishment	Resale
GATS and TRIMs	1	0	0	1	1	1	1	1
Canada–Chile	1	0	1	0	1	1	1	1
Canada–Costa Rica	1	0	1	0	1	1	1	1
Mexico–Costa Rica	1	0	1	0	1	1	1	1
Uruguay–Mexico	1	0	1	0	1	1	1	1
Central America–Dominican Republic	1	0	1	0	1	1	1	1
Central America–Chile	1	0	1	0	1	1	1	1
MERCOSUR–Bolivia	0	0	0	0	0	0	0	0
MERCOSUR–Peru	0	0	0	0	0	0	0	0
MERCOSUR–CAN	0	0	0	0	0	0	0	0
MERCOSUR–Chile	0	0	0	0	0	0	0	0
Mexico–Northern Triangle	1	0	1	0	1	1	1	1
Mexico–Nicaragua	1	0	1	0	1	1	1	1

Table 7.5 (*cont.*)

	MFN		National Treatment		Scope of MFN and National Treatment			
	Negative-list bindings	Positive-list bindings	Negative-list bindings	Positive-list bindings	Establishment	Acquisition	Post-establishment	Resale
Mexico–Colombia–Venezuela	1	0	1	0	1	1	1	1
Mexico–Bolivia	1	0	1	0	1	1	1	1
Chile–Mexico	1	0	1	0	1	1	1	1
Chile–Peru	1	0	1	0	1	1	1	1
NAFTA	1	0	1	0	1	1	1	1
US–Chile	1	0	1	0	1	1	1	1
US–Peru	1	0	1	0	1	1	1	1
US–Colombia	1	0	1	0	1	1	1	1
US–Panama	1	0	1	0	1	1	1	1
CAFTA	1	0	1	0	1	1	1	1
US–Singapore	1	0	1	0	1	1	1	1
AUSFTA	1	0	1	0	1	1	1	1
US–Korea	1	0	1	0	1	1	1	1
Chile–Korea	1	0	1	0	1	1	1	1
Mexico–Japan	1	0	1	0	1	1	1	1
Chile–New Zealand–Singapore–Brunei	1	0	1	0	1	1	1	1
Chile–China	0	0	0	0	0	0	0	0
Panama–Singapore	1	0	1	0	1	1	1	1
EC–Chile	0	0	0	1	1	1	1	1
Mexico–EU	0	0	0	0	1	1	1	1
Mexico–EFTA	0	0	0	0	0	0	0	0
US–Morocco	1	0	1	0	1	1	1	1
US–Jordan	0	0	0	1	1	1	1	1
US–Israel	0	0	0	0	1	1	1	0
US– Bahrain	1	0	1	0	1	1	1	1
Mexico–Israel	0	0	0	0	0	0	0	0
Canada–Israel	0	0	0	0	0	0	0	0
Singapore–Australia	0	0	1	0	1	1	1	1
Australia–Thailand	1	0	1	0	1	1	0	0
Australia–New Zealand	0	0	0	0	0	0	0	0
Japan–Singapore	0	0	1	0	1	1	1	1
NZ–Singapore	1	0	1	0	1	1	1	1
NZ–Thailand	1	0	0	1	1	1	1	1
China–Hong Kong	0	0	0	0	0	0	0	0
EFTA–Singapore	1	0	1	0	1	1	1	1
EU–Lithuania	0	0	0	0	0	0	0	0
EU–Romania	0	0	1	0	1	0	1	0
EU–South Africa	0	0	0	0	0	0	0	0
EU–Morocco	0	0	0	0	0	0	0	0
COMESA	0	0	0	0	0	0	0	0

Table 7.6 *Standards of treatment*

	Minimum standard of treatment	Treatment in case of strife	Expropriation and compensation	Transfers and payments	
				BOP restrictions only	Restrictions in other prescribed circumstances
GATS and TRIMs	0	0	0	1	0
Canada–Chile	1	1	1	0	1
Canada–Costa Rica	1	1	1	0	0
Mexico–Costa Rica	0	1	1	0	1
Uruguay–Mexico	1	1	1	0	1
Central America–Dominican Republic	1	1	1	1	0
Central America–Chile	0	0	0	0	0
MERCOSUR–Bolivia	0	0	0	0	0
MERCOSUR–Peru	0	0	0	0	0
MERCOSUR–CAN	0	0	0	0	0
MERCOSUR–Chile	0	0	0	0	0
Mexico–Northern Triangle	1	1	1	0	1
Mexico–Nicaragua	0	0	1	0	1
Mexico–Colombia–Venezuela	0	0	1	0	1
Mexico–Bolivia	0	1	1	0	1
Chile–Mexico	1	1	1	0	1
Chile–Peru	1	1	1	0	0
NAFTA	1	1	1	0	1
US–Chile	1	1	1	0	1
US–Peru	1	1	1	0	1
US–Colombia	1	1	1	0	1
US–Panama	1	1	1	0	1
CAFTA	1	1	1	0	1
US–Singapore	1	1	1	0	1
AUSFTA	1	1	1	0	1
US–Korea	1	1	1	0	1
Chile–Korea	1	1	1	0	1
Mexico–Japan	1	1	1	0	1
Chile–New Zealand–Singapore–Brunei	0	0	0	0	1
Chile–China	0	0	0	0	0
Panama–Singapore	1	1	1	0	1
EC–Chile	0	0	0	1	0
Mexico–EU	0	0	0	0	1
Mexico–EFTA	0	0	0	1	0
US–Morocco	1	1	1	0	1
US–Jordan	0	0	0	0	0
US–Israel	0	0	0	1	0
US–Bahrain	1	1	1	0	1
Mexico–Israel	0	0	0	0	0
Canada–Israel	0	0	0	0	0
Singapore–Australia	0	1	1	0	1

Table 7.6 (*cont.*)

	Minimum standard of treatment	Treatment in case of strife	Expropriation and compensation	Transfers and payments	
				BOP restrictions only	Restrictions in other prescribed circumstances
Australia–Thailand	0	1	1	0	1
Australia–New Zealand	0	0	0	0	0
Japan–Singapore	1	1	1	0	1
NZ–Singapore	0	0	0	0	1
NZ–Thailand	1	1	1	0	1
China–Hong Kong	0	0	0	0	0
EFTA–Singapore	1	1	1	0	1
EU–Lithuania	0	0	0	0	0
EU–Romania	0	0	0	0	0
EU–South Africa	0	0	0	1	0
EU–Morocco	0	0	0	1	0
COMESA	0	0	0	0	0

Table 7.7 *Performance requirements and restrictions on nationality*

	Performance requirements			Senior management and Board of Directors		
	No local content, trade or other specified requirements	No local content or trade requirements	Provisions more limited than TRIMs	Cannot restrict either	Can partially restrict board of directors	Can partially restrict management or both
GATS and TRIMs	0	1	0	0	0	0
Canada–Chile	1	0	0	0	1	0
Canada–Costa Rica	0	1	0	0	1	0
Mexico–Costa Rica	0	1	0	0	1	0
Uruguay–Mexico	1	0	0	0	1	0
Central America–Dominican Republic	0	1	0	1	0	0
Central America–Chile	0	0	0	0	0	0
MERCOSUR–Bolivia	0	0	0	0	0	0
MERCOSUR–Peru	0	0	0	0	0	0
MERCOSUR–CAN	0	0	0	0	0	0
MERCOSUR–Chile	0	0	0	0	0	0
Mexico–Northern Triangle	1	0	0	0	1	0
Mexico–Nicaragua	1	0	0	0	0	1
Mexico–Colombia–Venezuela	1	0	0	0	0	1
Mexico–Bolivia	1	0	0	0	1	0
Chile–Mexico	1	0	0	0	1	0

Table 7.7 (*cont.*)

	Performance requirements			Senior management and Board of Directors		
	No local content, trade or other specified requirements	No local content or trade requirements	Provisions more limited than TRIMs	Cannot restrict either	Can partially restrict board of directors	Can partially restrict management or both
Chile–Peru	0	0	0	0	0	0
NAFTA	1	0	0	0	1	0
US–Chile	1	0	0	0	1	0
US–Peru	1	0	0	0	1	0
US–Colombia	1	0	0	0	1	0
US–Panama	1	0	0	0	1	0
CAFTA	1	0	0	0	1	0
US–Singapore	1	0	0	0	1	0
AUSFTA	1	0	0	0	1	0
US–Korea	1	0	0	0	1	0
Chile–Korea	1	0	0	0	1	0
Mexico–Japan	1	0	0	0	1	0
Chile–New Zealand–Singapore–Brunei	0	0	0	0	0	0
Chile–China	0	0	0	0	0	0
Panama–Singapore	1	0	0	0	1	0
EC–Chile	0	0	0	0	0	0
Mexico–EU	0	0	0	0	0	0
Mexico–EFTA	0	0	0	0	0	0
US–Morocco	1	0	0	0	1	0
US–Jordan	0	0	0	0	0	0
US–Israel	0	1	0	0	0	0
US–Bahrain	1	0	0	0	1	0
Mexico–Israel	0	0	0	0	0	0
Canada–Israel	0	0	0	0	0	0
Singapore–Australia	0	0	0	0	0	0
Australia–Thailand	0	0	0	0	0	0
Australia–New Zealand	0	0	0	0	0	0
Japan–Singapore	1	0	0	0	0	0
NZ–Singapore	0	0	0	0	0	0
NZ–Thailand	0	0	0	0	0	0
China–Hong Kong	0	0	0	0	0	0
EFTA–Singapore	0	0	0	0	0	0
EU–Lithuania	0	0	0	0	0	0
EU–Romania	0	0	0	0	0	0
EU–South Africa	0	0	0	0	0	0
EU–Morocco	0	0	0	0	0	0
COMESA	0	0	0	0	0	0

Table 7.8 *Denial of benefits, transparency and dispute settlement*

	Denial of benefits			Transparency			
	Only to persons w/no substantial business operations in other party	Tougher treatment to specific sectors	Tougher treatment to all sectors	Prior comment	Publish (as in GATS)	National inquiry point (as in GATS)	Investor–state Dispute Settlement
GATS and TRIMs	1	0	0	0	1	1	0
Canada–Chile	0	0	1	1	1	1	1
Canada–Costa Rica	0	0	0	0	1	0	1
Mexico–Costa Rica	1	0	0	1	1	1	1
Uruguay–Mexico	1	0	0	1	1	1	1
Central America–Dominican Republic	1	0	0	1	1	1	1
Central America–Chile	1	0	0	1	1	1	1
MERCOSUR–Bolivia	0	0	0	0	0	0	0
MERCOSUR–Peru	0	0	0	0	0	0	0
MERCOSUR–CAN	0	0	0	0	0	0	0
MERCOSUR–Chile	0	0	0	0	0	0	0
Mexico–Northern Triangle	1	0	1	0	1	1	1
Mexico–Nicaragua	1	0	0	1	1	1	1
Mexico–Colombia–Venezuela	1	0	0	1	1	1	1
Mexico–Bolivia	1	0	0	1	1	1	1
Chile–Mexico	0	0	1	1	1	1	1
Chile–Peru	0	0	0	0	0	0	1
NAFTA	0	0	1	1	1	1	1
US–Chile	0	0	1	1	1	1	1
US–Peru	0	0	1	1	1	1	1
US–Colombia	0	0	1	1	1	1	1
US–Panama	0	0	1	1	1	1	1
CAFTA	0	0	1	1	1	1	1
US–Singapore	0	0	1	1	1	1	1
AUSFTA	1	0	0	1	1	1	0
US–Korea	0	0	1	1	1	0	1
Chile–Korea	0	0	1	1	1	1	1
Mexico–Japan	0	0	1	1	1	0	1
Chile–New Zealand–Singapore–Brunei	1	0	0	0	1	0	0
Chile–China	0	0	0	0	0	0	0
Panama–Singapore	1	0	0	0	1	1	1
EC–Chile	0	0	0	0	1	1	0
Mexico–EU	1	0	0	0	0	0	0
Mexico–EFTA	0	0	0	0	0	0	0
US–Morocco	0	0	1	1	1	0	1
US–Jordan	0	0	0	0	0	0	0
US–Israel	0	0	0	0	0	0	0
US–Bahrain	0	0	1	0	1	0	1
Mexico–Israel	0	0	0	0	0	0	0

Table 7.8 (*cont.*)

	Denial of benefits			Transparency			
	Only to persons w/no substantial business operations in other party	Tougher treatment to specific sectors	Tougher treatment to all sectors	Prior comment	Publish (as in GATS)	National inquiry point (as in GATS)	Investor–state Dispute Settlement
Canada–Israel	0	0	0	0	0	0	0
Singapore–Australia	1	0	0	0	1	1	1
Australia–Thailand	1	0	0	1	1	1	1
Australia–New Zealand	0	0	0	0	0	0	0
Japan–Singapore	0	0	0	0	1	0	1
NZ–Singapore	0	0	0	1	1	1	1
NZ–Thailand	1	0	0	1	0	1	1
China–Hong Kong	0	0	0	0	0	0	0
EFTA–Singapore	0	0	0	0	1	0	1
EU–Lithuania	0	0	0	0	0	0	0
EU–Romania	0	0	0	0	0	0	0
EU–South Africa	0	0	0	0	0	0	0
EU–Morocco	0	0	0	0	0	0	0
COMESA	0	0	0	0	0	0	0

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8

Competition provisions in regional trade agreements

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1 Introduction

This paper maps and examines competition-related provisions in seventy-four regional trade agreements (RTAs). The template used for the mapping is based on previous work done to map competition-related provisions in RTAs and on recent thoughtful critiques of those approaches. The mapping undertaken in this paper applies to all competition-related provisions of the RTAs and not just to the competition policy chapter. This distinction is important because there are salient competition provisions in the other chapters of regional trade agreements which affect the conditions of competition among suppliers, undertakings and enterprises that operate in the markets of RTA members.

There has been a recent flurry of research on competition provisions in RTAs. In the past few years, the United Nations Economic Commission for Latin America and the Caribbean (Silva 2004), UNCTAD (Brusick, Alvarez and Cernat 2005) and the OECD (Solano and Sennekamp 2006) have analyzed competition policy provisions in RTAs. Of particular interest is the OECD study which conducts a mapping of the competition policy chapters in eighty-six RTAs. While acknowledging the contribution of the OECD study in bringing to light many salient features of competition provisions in these trade agreements,

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Anderson and Evenett (2006) have also critiqued the approach taken in the OECD mapping of focusing solely on the competition policy chapters of the agreements and neglecting the sector-specific provisions and horizontal competition principles which are, in their view, equally important. The sector-specific competition provisions they identify are those in the services, intellectual property and government procurement chapters of the trade agreements while the horizontal competition principles include non-discrimination, procedural fairness and transparency.

The mapping produced in this paper builds on this assessment by Anderson and Evenett and constructs an alternative mapping that incorporate these sector-specific elements and horizontal provisions. In a number of instances, this alternative approach produces new and interesting insights about the role of competition provisions in RTAs. Whereas the OECD study suggests that competition policy provisions in RTAs are all about trade, the mapping suggests a much more nuanced relationship between trade and competition. While the competition principles are embedded in trade agreements, they are not necessarily subordinated to trade tests or concerns. This paper should be seen as complementing or extending previous mappings by teasing out additional insights on the role of competition in trade agreements from a more comprehensive review of all competition-related provisions.

The plan for the rest of the paper is as follows. The next section describes the RTAs that were included in the analysis. Following that is a review of the available literature on the role of competition in trade agreements. Based on this review, a number of elements are identified which need to be reflected in the mapping. The most important shortcoming of previous mapping exercises is the neglect of sectoral provisions and horizontal competition principles. A template for mapping competition provisions in RTAs is then presented which seeks to address this lacuna. This template is then used as the basis for the mapping exercise. The results of the mapping are analyzed with the salient features found in the sectoral chapters, the horizontal principles and competition policy chapter being discussed in detail. Given the pronounced hub-and-spoke pattern of the RTAs in the sample, differences in the competition policy provisions negotiated by several major hubs – the US, the EU, EFTA and Mexico – are examined. While it may not be possible to speak of distinct families of RTAs, there are certain family resemblances in the competition provisions negotiated by some of the major hubs. The penultimate section emphasizes the non-preferential