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A SURVEY OF INVESTMENT PROVISIONS IN REGIONAL TRADE AGREEMENTS

Vasyl Chornyi, Marianna Nerushay and Jo-Ann Crawford

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ABSTRACT

The liberalization and protection of investment flows has become an increasingly indispensable pillar of economic integration. The objective of this study is to contribute to a better understanding of the ways in which RTAs achieve such liberalization and protection. To this end, we have surveyed the investment provisions contained in 260 RTAs notified to the WTO by 31 December 2015 and in force on that date. More than half of these RTAs contain investment chapters, though they vary in terms of their substantive scope and coverage. Given the unabated increase in the number of RTAs and the push towards greater economic integration we expect this figure to further increase. The main categories of investment provisions in RTAs reviewed in the paper include the definitions of investment and investor, investment liberalization, investment protection and ISDS. Also included in our analysis are provisions supporting the investment framework, host state flexibilities, investment promotion, as well as provisions on sustainable and socially responsible investment.

Keywords: Regional Trade Agreements, investment

JEL Classifications: F15, F21

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LIST OF ABBREVIATIONS

AANZFTA	ASEAN-Australia-New Zealand Free Trade Agreement
ANCERTA	Australia-New Zealand Closer Economic Relations Trade Agreement
APTA	Asia Pacific Trade Agreement
ASEAN	Association of Southeast Asian Nations
BIT	Bilateral Investment Treaty
CACM	Central American Common Market
CAFTA-DR	Dominican Republic-Central America Free Trade Agreement
CARICOM	Caribbean Community and Common Market
CARIFORUM	Forum of the Caribbean ACP States
CBTS	Cross Border Trade in Services
CEFTA	Central European Free Trade Agreement
CEMAC	Economic and Monetary Community of Central Africa
CETA	Comprehensive Economic and Trade Agreement (between the EU and Canada)
CEZ	Common Economic Zone
CIS	Commonwealth of Independent States
COMESA	Common Market for Eastern and Southern Africa
DoB	Denial of benefits
EAC	East African Community
EAEU	Eurasian Economic Union
ECOWAS	Economic Community of West African States
EEA	European Economic Area
EFTA	European Free Trade Association
EU	European Union
FET	Fair and Equitable Treatment
FPS	Full Protection and Security
FTA	Free Trade Agreement
FYROM	Former Yugoslav Republic of Macedonia
GATT	General Agreement on Tariffs and Trade
GATS	General Agreement on Trade in Services
GCC	Gulf Co-operation Council
GSTP	Global System of Trade Preferences among Developing Countries
ISDS	Investor-State Dispute Settlement
MA	Market Access
MERCOSUR	Southern Common Market
MFN	Most favoured nation
MSG	Melanesian Spearhead Group
NAFTA	North American Free Trade Agreement
NT	National Treatment
OCT	Overseas Countries and Territories
PAFTA	Pan Arab Free Trade Agreement
PRs	Performance Requirements
PTN	Protocol on Trade Negotiations
RTA	Regional Trade Agreement
SACU	Southern African Customs Union
SADC	Southern African Development Community
SAFTA	South Asian Free Trade Agreement
SEP	Strategic Economic Partnership
SMNRs	Senior Management and Nationality Requirements
SPARTECA	South Pacific Regional Trade and Co-operation Agreement
TPP	Trans Pacific Partnership
TRIMs	Trade Related Investment Measures
TTIP	Transatlantic Trade and Investment Partnership
UNCTAD	United Nations Conference on Trade and Development
US-CAFTA-DR	United States-Dominican Republic-Central America Free Trade Agreement
WAEMU	West African Economic and Monetary Union
WTO	World Trade Organization

1 INTRODUCTION

An analysis of regional trade agreements (RTAs)[1] and their provisions can be undertaken from various angles and perspectives. From the WTO perspective, RTAs allow WTO Members to deviate from their MFN obligation with the objective of pursuing deeper liberalization than at the multilateral level. Through their participation in RTAs, WTO Members have elaborated on some of the core disciplines of the multilateral trading system and developed regulatory provisions in areas beyond the WTO's mandate. Therefore, our quest is, in part, to analyze RTA provisions on investment in order to highlight differences and complementarities with WTO rules as well as to uncover the patterns and trends that have developed over time. Where possible, we attempt to determine the value added by an RTA as compared to the existing multilateral trading rules.

When it comes to investment rules in RTAs, a perfect comparison with the WTO rules along these lines is not feasible due to the absence of analogous investment disciplines in the WTO. In this sense, RTAs that provide for substantive investment disciplines will by definition complement WTO rules. Nonetheless, a careful look at the WTO rules reveals at least two groups of investment disciplines relevant to our study: the GATS and the TRIMs Agreement.

First, the GATS deals with trade in services through four modes of supply, one of which is the establishment of commercial presence in the territory of the Member in which the service is provided (mode 3). Under the GATS, the establishment of commercial presence implies the acquisition of ownership of or control over a legal entity in the territory of another WTO Member.[2] The GATS provisions applicable to mode 3 thus regulate foreign direct investment in services. Second, with regard to trade in goods, the TRIMs Agreement prohibits trade-related investment measures (commonly known as performance requirements) if they violate Articles III or XI of the GATT, while the Annex to the TRIMs Agreement sets forth an illustrative list of those prohibited measures.

Alternatively, an analysis of RTA investment provisions could also be done through a comparison with bilateral investment treaties (BITs). This is an area where UNCTAD has over the years produced a lot of research and policy recommendations. Even though significant variations exist across both BITs and RTAs, many investment chapters of RTAs resemble BITs.[3] They typically define key terms such as the investor and investment, and provide for a set of investment protection obligations, such as national treatment (NT), MFN, fair and equitable treatment (FET) and rules on expropriation. Both also grant investors access to Investor-State dispute settlement (ISDS). However, as highlighted by UNCTAD in its 2006 study, there are important differences between BITs and the investment provisions found in RTAs.[4]

At one level, not many BITs except those concluded by the US and Canada after 2004, contain investment liberalization disciplines, while investment chapters of RTAs tend to provide such disciplines. On the other hand, BITs are more likely to include more comprehensive investment protections and tend to provide for ISDS more often than investment chapters of RTAs.[5] However, the key difference between the two lies in the fact that an RTA allows the parties to place investment within a broader trade and investment framework of their agreement. While RTAs locate the core investment framework in the investment chapter, many provisions supporting that framework, such as transparency, temporary stay of natural persons, and specific exclusions and exceptions, are often located in other parts of the agreement.

Additionally, most modern RTAs contain general services and financial services chapters that provide disciplines for investments in these sectors, thus complementing the framework

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[1] In this paper, the term "regional trade agreements" (RTAs) is used to refer to agreements that have been notified to the WTO under Article XXIV of the GATT 1994; Article V of the GATS; or paragraph 2(c) of the WTO Decision on "Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries" (Enabling Clause).

[2] Article XXVIII of the GATS, paras. (d) and (m).

[3] It is also interesting to note that those countries that use templates for negotiating their investment agreements (known as Model BITs), appear to use the same templates for negotiating investment chapters in their RTAs. This may mean that policies behind BITs and investment chapters of RTAs to a large extent coincide.

[4] UNCTAD, Investment Provisions in Economic Integration Agreements (New York and Geneva 2006), 55 – 58.

[5] Ibid, at 55.

established in the investment chapter. In a similar way, RTAs provide a platform for linking investment chapter disciplines with related issues, such as sustainable development or institutional co-operation to promote investment. Most of such complementarity is missing and is to a large extent impossible to achieve in BITs.

The analysis that follows in the sections below combines these two perspectives, whilst maintaining a pragmatic reading of the concept of investment provisions. As will be seen, this is o a value added of this study in comparison to some of the previous studies on the subject.

2 PURPOSE, SCOPE AND METHODOLOGY OF THE STUDY

2.1 Purpose of the study

Several studies have been conducted on investment provisions in RTAs. In 2006 UNCTAD finalized a report entitled "Investment Provisions in Economic Integration Agreements", which focused on the policy implications of different drafting variations of investment provisions. The UNCTAD study offers a comprehensive analysis of investment obligations in a broad range of agreements.[6] It is however gradually becoming outdated, given the proliferation of RTAs that contain investment provisions in the past ten years.

We should also mention several other studies of particular relevance to us, one of which is the WTO Staff Working Paper on Services Rules in Regional Trade Agreements.[7] As the regulation of investment and services go very much hand in hand, we found this paper useful in pursuing our own study. However, since we view RTA provisions using a predominantly investment-related prism, our results do not always coincide.

The findings of a project on the interaction between investment and services completed by the OECD[8] were also highly relevant for our study. Likewise, we drew inspiration from a survey of investment provisions in a sample of RTAs conducted by Barbara Kotschwar.[9]

Although all of the mentioned studies and papers shed light on the many aspects of investment rules found in RTAs, they do not offer an up-to-date and comprehensive review of such provisions. With the present survey of major trends in investment treaty practice across RTAs currently in force, we aim to fill this gap. Our goal is to deliver a comparison of investment disciplines in regional trade agreements contained in 260 RTAs notified to the WTO by 31 December 2015 and in force on that date.

2.2 Scope and methodology of the study

Our study is based on the analysis of the texts of RTAs as they have been notified to the WTO. In most cases, the relevant texts were found on the governmental websites indicated by the parties to the agreements. While we undertook every effort to verify the accuracy of information, we have relied on the texts of agreements as displayed on the respective websites. No attempt has been made to examine annexes containing investment-related schedules of commitments or reservations.

Our analysis combines qualitative and quantitative elements. We have sought to quantify the agreements that contain different drafting variations in order to discern major trends. This has been complemented by a qualitative assessment of different policy options and rationales. The analytical approach underlying our study seeks to pragmatically merge the perspectives of the WTO and of BITs. While we recognize the resemblance between investment chapters of RTAs and

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[6] UNCTAD's focus is on a broader set of investment agreements. We limit our analysis to RTAs in force and notified to the WTO by 31 December 2015. RTAs in the WTO terminology refer to agreements between two or more countries or customs territories that offer reciprocal preferential treatment among themselves.

[7] P. Latrille and J. Lee, WTO Staff Working Paper, Services Rules in Regional Trade Agreements: How Diverse and How Creative as Compared to the GATS Multilateral Rules? (Geneva 2012).

[8] M. Houde, A. Kolse-Patil and S. Miroudot (2007), "The Interaction between Investment and Services Chapters in Selected Regional trade Agreements", OECD Trade Policy Papers, No. 55, OECD Publishing. Available at: http://dx.doi.org/10.1787/054761108710 (last visited: 11 April 2016).

[9] B. Kotschwar, Mapping investment provisions in regional trade agreements: towards an international investment regime? In A. Estevadeordal, K. Suominen, and R. Teh (eds.), Regional Rules in the Global Trading System (Cambridge University Press 2009).

BITs, we also keep in mind the WTO side of investment, represented mainly by the rules on trade in services via mode 3 and the TRIMs Agreement.

While our survey does not address the relationship between RTAs and BITs concluded between the same parties, we note that in 155 of the 260 RTAs included in the study, there is a BIT in force (either between the parties to a bilateral RTA, or between at least one bilateral pair in the case of an RTA involving three or more parties).[10] However, we did not seek to determine to what extent RTAs are becoming a substitution for BITs through the termination of the latter as a result of the RTA coming into force. Annex 1 provides a complete list of RTAs surveyed indicating whether or not their parties have a BIT in force between them.

3 OVERVIEW OF INVESTMENT PROVISIONS IN THE STUDY

In this section we provide an overview of the investment provisions included in our study. It is difficult to determine precisely which provisions should qualify as "investment provisions". While a preliminary review of the relevant literature reveals that there is a broad consensus regarding most of such provisions, certain grey areas remain. In this study we approach this issue pragmatically, focusing on the obligations in an RTA that have direct relevance for investment, regardless of their location in the text.

We have broken down the investment provisions found in RTAs into eight functional categories. Table 1 reproduces our classification and shows in which part of the agreement the provision can typically be found.

Table 1: Classification of RTA investment provisions

Investment provision	Location in the RTA		
	Investment Chapter	Services Chapter	Another applicable Chapter
I. Provisions defining the scope of the investment framework			
Definition of investor	√	--	Definitions Chapter
Definition of investment	√	--	--
Exclusions from the scope of investment chapter	√	--	Exceptions Chapter
Denial of benefits	√	√	--
II. Investment liberalization provisions			
National treatment	√	√	--
Most favoured nation treatment	√	√	--
Market access	√	√	--
Scheduling	√	√	--
Performance requirements	√	--	Trade in Goods Chapter
Senior management nationality requirements	√	--	--
III. Investment protection provisions			
National treatment	√	√	--
Most favoured nation treatment	√	√	--
Standard of treatment and domestic regulation	√	√	--
Expropriation	√	--	--
Protection in war and civil strife	√	--	--
Subrogation	√	--	--
IV. Provisions supporting the investment framework			
Transfers	√	√	Capital Movements Chapter
Temporary entry of natural persons	√	--	Movement of Natural Persons Chapter or Annex

[10] In the case of EU-Egypt for instance, we noted the existence of a BIT if one exists between any of the 28 EU member states and Egypt. BITs by their nature involve two parties. Plurilateral RTAs on the other hand involve three or more countries. Thus an RTA such as the US-CAFTA-DR with seven members could potentially cover the same ground as 21 BITs.

Investment provision	Location in the RTA		
	Investment Chapter	Services Chapter	Another applicable Chapter
Transparency	√	√	Transparency Chapter
V. Host state flexibilities provisions			
Exceptions	√	√	Exceptions Chapter
Special formalities and information requirements	√	--	--
VI. Investment promotion and institutional cooperation provisions			
Institutional mechanism for investment cooperation	√	--	Institutional Chapter
Investment promotion	√	--	Investment Promotion or Cooperation Chapter
VII. Provisions on sustainable and socially responsible investment			
Sustainability and socially responsible investment	√	--	Environment, Labour or similar Chapter
VIII. Dispute settlement provisions			
Investor-State dispute settlement	√	--	--

Note: "--" means not present
Services chapter means the general trade in services chapter
Source: WTO Secretariat

As can be seen from Table 1, investment chapters define the scope of the investment framework and typically contain core investment liberalization and protection provisions, such as NT, MFN, minimum standard of treatment and expropriation, along with ISDS. Services chapters[11] usually provide for liberalization provisions (NT, MFN and market access) applicable to investment in services. Many provisions that support the investment framework, or establish investment co-operation or promotion mechanisms, as well as those relating to sustainable and socially responsible investment, are often located in other chapters of an RTA.

4 INVESTMENT CHAPTERS IN REGIONAL TRADE AGREEMENTS

Since one would naturally look for investment provisions in the investment chapter of an RTA, this section provides information about the number of agreements that contain such an investment chapter, their evolution over time and geographical distribution. As investment chapters vary in their depth and coverage, we classify them into several categories as found below.

4.1 Inclusion of an investment chapter

Slightly more than half of the 260 RTAs included in this study have an investment chapter (Table 2). Most RTAs that cover trade in both goods and services contain an investment chapter.[12] In the case of RTAs covering goods and services but without an investment chapter, some make reference to or reaffirm the existence of a BIT between their parties (but do not specifically incorporate it);[13] others have only provisions of limited scope or provisions on investment promotion or facilitation;[14] have an investment chapter or protocol that is not yet in force;[15] or make a commitment to negotiate investment provisions at some point in the future.[16] If an RTA contains a provision specifically incorporating a BIT or other investment agreement, we consider such an RTA to contain an investment chapter.[17]

[11] Throughout this paper references to a services chapter means the general trade in services chapter. Therefore it does not cover sectoral trade in services chapters, such as financial services.

[12] The coverage by RTAs of a goods and services component is based on the notifications of RTAs by the WTO Members. We note several agreements that have been notified as goods only but nevertheless contain a services component: CEZ; EU-Algeria; EU-Bosnia Herzegovina; and WAEMU.

[13] See for instance China-Costa Rica, GCC-Singapore, Panama-Chile, US-Bahrain and US-Jordan.

[14] See China-Chile; China-Hong Kong, China; and China-Macao, China.

[15] See the MERCOSUR Protocol of Colonia and the Investment Protocol of the CACM countries.

[16] For instance see Transpacific SEP.

[17] Nine RTAs fall into this category.

Among the RTAs notified to the WTO as covering only trade in goods, 17 contain an investment chapter, though their provisions on investment are for the most part limited in scope.[18] Only a handful of such RTAs have substantive investment provisions.[19]

Table 2: RTAs with an investment chapter

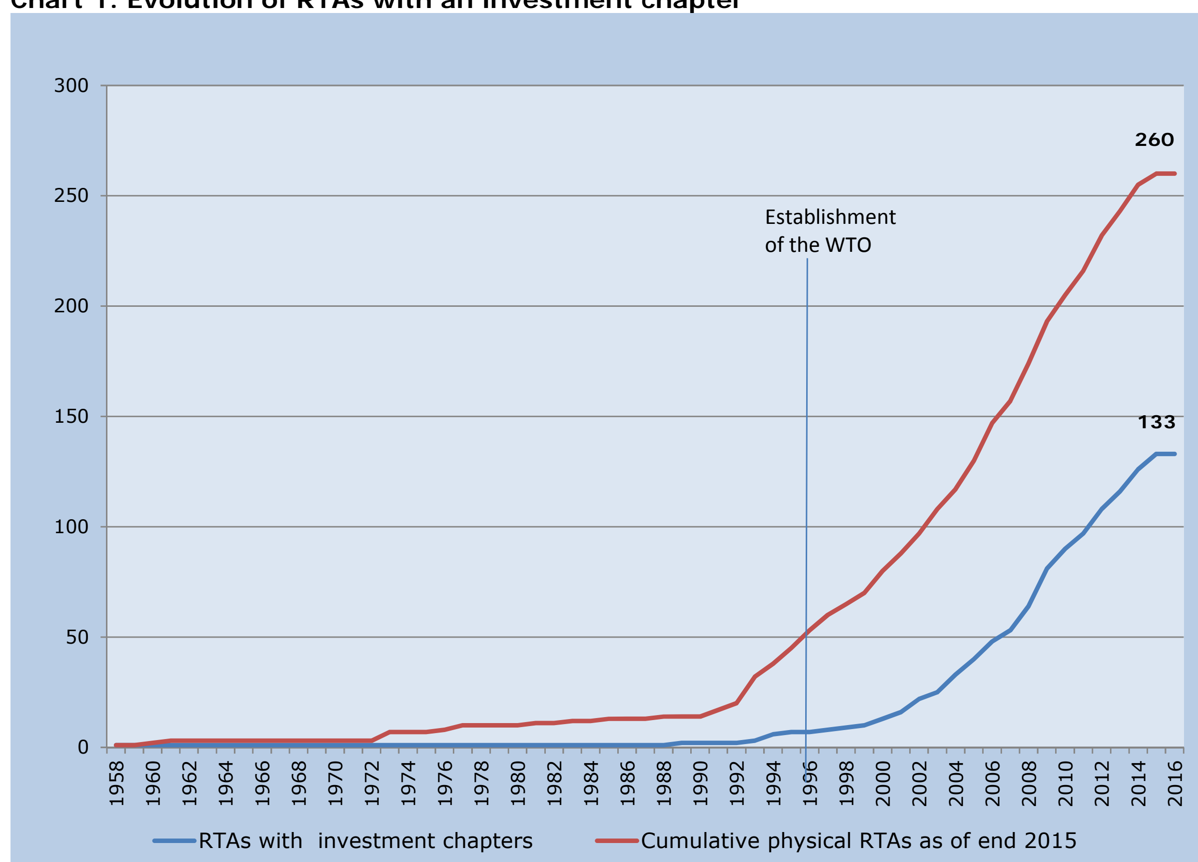
RTA type	Number of RTAs			Percentage with an investment chapter
	with an investment chapter	without an investment chapter	Total	
Goods & services	116	13	129	90%
Goods only	17	114	131	13%
Total	133	127	260	52%

Source: WTO Secretariat

RTAs containing investment chapters are a subset of the overall landscape of RTAs. Most were concluded after the establishment of the WTO in 1995 and the concurrent finalization of the GATS.

Chart 1 shows the evolution of RTAs (covering goods and/or services) in force, together with those that have an investment chapter.

Chart 1: Evolution of RTAs with an investment chapter



Note: GSTP, PTN, SPARTECA, EU-OCT, MSG, and PAFTA are not included in the total.
Source: WTO Secretariat

Of the 133 RTAs with investment chapters, a third (45 RTAs) are intra-regional and two thirds (88 RTAs) are cross-regional.[20] WTO Members in East Asia, Europe, South America, Central America

[18] See for instance EFTA-Albania, EFTA-Bosnia and Herzegovina, EFTA-Egypt, EFTA-Montenegro, CEFTA, ECOWAS, and COMESA amongst others.

[19] For instance, see EFTA-Peru, EU-Bosnia and Herzegovina, EU-Jordan among others. The ASEAN Framework Agreement on Services is in force but has not yet been notified to the WTO; its provisions are analysed in this study.

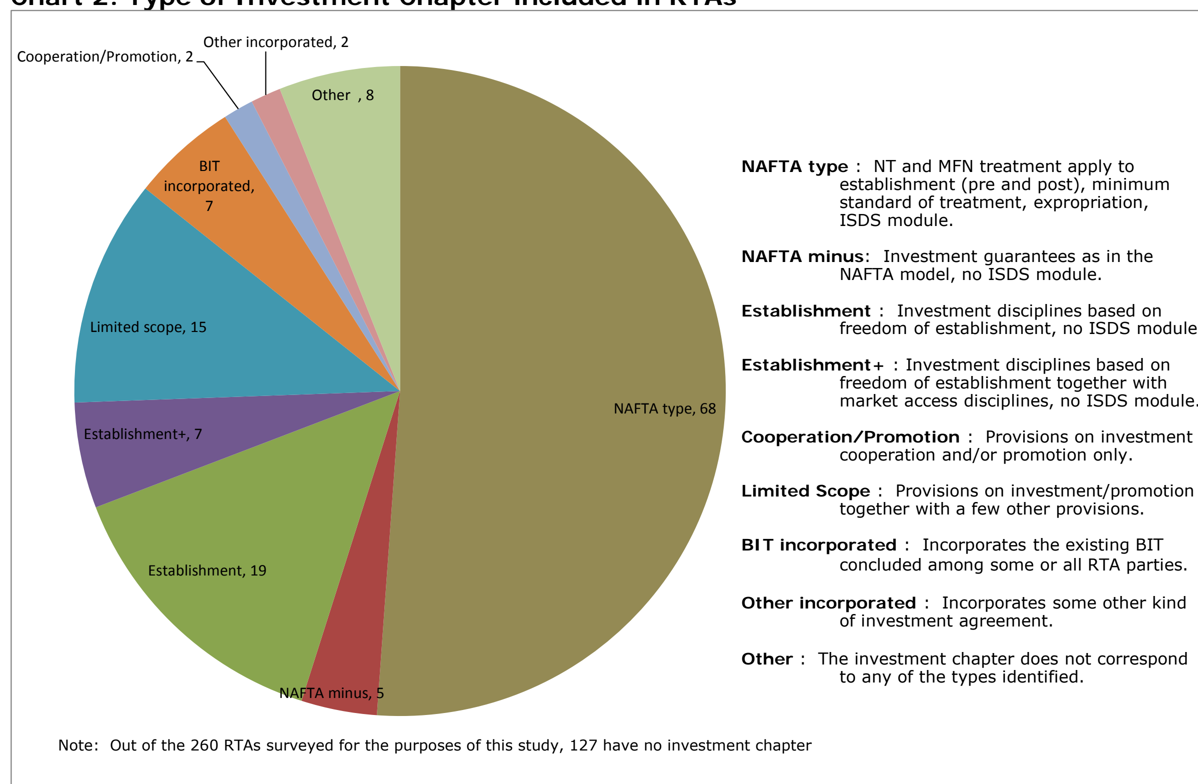
[20] Using the WTO's standard regional classifications: Africa, Caribbean, Central America, CIS, East Asia, Europe, Middle East, North America, Oceania, South America, and West Asia.

and North America are the most active and account for more than three quarters of RTAs with investment chapters. In the regions of the Middle East, the Caribbean, CIS and West Asia few RTAs have investment chapters. Many countries in these regions are involved in RTAs that for the most part cover disciplines on trade in goods only.

4.2 Typology of investment chapters

For the purposes of our study investment chapters of RTAs were classified into broad groupings depending on their characteristics (Chart 2). In doing so, we examined and categorised RTAs on the basis of their investment chapters only and did not investigate the general architecture of the RTA per se (particularly the relationship of the investment chapter with the trade in services chapter, which is discussed in Sub-section 6.1). Our purpose is merely to identify major groupings whose distinctive features and characteristics will be analysed in greater detail in the following sections.

Chart 2: Type of Investment Chapter included in RTAs



Source: WTO Secretariat

First and most prevalent among the RTAs surveyed are investment chapters modelled after the NAFTA, i.e. that apply national and MFN treatment to both pre- and post-establishment, contain disciplines on minimum standard of treatment and expropriation as well as an ISDS module.[21] All of Canada's RTAs (with a goods and services component) have an investment chapter based on the NAFTA model, as do the majority of RTAs involving the United States, Latin American countries, all of ASEAN's RTAs with third parties, and some RTAs of India, Japan and the Republic of Korea. In addition, we identified five RTAs that have an investment chapter based on the NAFTA model but no ISDS module.[22]

An investment chapter based on the freedom of establishment is the model used in the majority of RTAs (with a goods and services component) concluded by the EU and EFTA with third parties.[23] A

[21] Note however that this is a generalised grouping. Some RTAs despite broadly using the NAFTA model may diverge from it in certain elements.

[22] ANZCERTA, Japan-Australia, Japan-Philippines, Malaysia-Australia, and US-Australia.

[23] In such chapters, investment is defined as commercial presence, as is the case for instance the EU's RTAs with Balkan countries, EFTA-Chile, EFTA-Colombia and EFTA-Ukraine amongst others. Hong Kong, China-

deeper form of integration characterized by an investment chapter based on the right of establishment is found in the Treaty establishing the EU, the EFTA Convention and the EEA Agreement. An approach based on the freedom of establishment coupled with provisions on market access is used by the EU in some of its more recent RTAs beginning with EU-CARIFORUM which entered into force in 2008.[24]

RTAs whose provisions on investment extend solely to cooperation/promotion or that contain few substantive provisions account for around 10% of surveyed RTAs with an investment chapter.[25] A handful of RTAs simply incorporate a pre-existing BIT or some other investment agreement between the parties.[26] A small number of RTAs have an investment chapter that does not easily fit any of the above models and thus have been classified as "other".[27] Out of the 260 RTAs surveyed for the purpose of this study, 127 have no investment chapter.

Throughout this paper, we will refer to agreements with substantive investment chapters. This reference does not cover agreements with cooperation/promotion chapters and chapters that contain limited scope provisions. RTAs that explicitly incorporate a BIT or another investment agreement into the RTA are included in the number of agreements containing substantive investment chapters, as are those whose chapters are classified as "other". The number of RTAs identified with substantive investment chapters in the study is 116.[28]

4.3 Conclusions

The discussion in this section shows that the number of RTAs with investment chapters has been steadily growing since 1996. RTAs that cover trade in services are most likely to have a separate investment chapter. While the depth and coverage of investment chapters vary, the majority seem to follow the NAFTA model. This generally reflects a high degree of sophistication in the regulation of investment, as well as the influence of North American treaty practice. The majority of investment chapters contain substantive disciplines and for the accuracy of calculation they will be used as a reference in the rest of the paper, unless stated otherwise.

5 PROVISIONS DEFINING THE SCOPE OF THE INVESTMENT FRAMEWORK

The investment framework of an RTA usually revolves around the investment chapter.[29] The provisions that define investment and investor are fundamental in establishing the scope of such a framework. They determine which transactions and assets are liberalized and protected by the investment provisions of an RTA and who is entitled to benefit from the agreement. Similarly, denial of benefits provisions allow RTA parties to exclude from the scope of the agreement certain enterprises under foreign ownership or control. Provisions that exclude certain sectors, measures or activities from the scope of the investment chapter constitute another element setting out the limits of the investment framework. All these elements are discussed below.

Chile and the EAC also have an investment chapter based on the establishment model. See our discussion on the definition of investment in Sub-section 5.1 below.

[24] EU-Republic of Korea, EU-Colombia and Peru, and EU-Central America.

[25] Iceland-China, Switzerland-China, CARICOM, EFTA-Mexico, and EU-Mexico amongst others. We applied a qualitative judgement in order to characterise an investment chapter as “limited scope”, i.e. an investment chapter containing very few substantive obligations. An example is EFTA-Mexico that contains a section on investment (Section V, Chapter III “Services and Investment”) consisting of five provisions: definitions; transfers; investment promotion; international commitments on investment; and a review clause. EFTA-Mexico does not contain ISDS. The absence of most typical BIT-like disciplines, such as expropriation, fair and equitable treatment, NT, and MFN led us to classify it as “limited scope”.

[26] Chile-Central America (5 RTAs), Japan-Peru, Japan-Vietnam, China-Singapore, and EFTA-Republic of Korea. In such cases the provisions of the incorporated investment agreement are analysed for the purpose of the study.

[27] Dominican Republic-Central America, EFTA-Singapore, the EAEU, New Zealand-Singapore, Pakistan-China, Peru-China, Thailand-New Zealand and SADC.

[28] After subtracting two RTAs with investment cooperation/promotion chapters and 15 RTAs with limited scope investment chapters from the total of 133 RTAs with an investment chapter.

[29] Except agreements that contain substantive investment provisions only in their trade in services chapters that cover mode 3. For instance, Chile-China has a Supplementary Agreement on Trade in Services that covers mode 3 but has no separate investment chapter. Also see Ukraine-Montenegro, containing a chapter on trade in services that covers mode 3 but no investment chapter.

5.1 Definition of investment

The definition of "investment" is one of the key elements in investment agreements determining the investment flows covered by the RTA, the scope of investment protection and hence a state's exposure to possible investor-State claims.[30] All RTAs with substantive investment chapters surveyed in this study provide a definition of investment in their legal text. In our analysis the definition of investment included in an RTA is categorized as asset-based, enterprise-based, an approach mixing any of these two, or a definition based on commercial presence.[31] The first three approaches to defining investment normally cover a wide range of tangible and intangible assets, including intellectual property rights and portfolio investment. The last type of definition is narrower in scope, substantially overlapping with the concept of foreign direct investment.

The NAFTA uses an enterprise-based definition of investment in which investment is defined as "(a) an enterprise; (b) an equity security of an enterprise; (c) a debt security of an enterprise …."[32] Although the enterprise-based definition of investment continues to be used by Canada in most of its RTAs,[33] its use is less common elsewhere.[34]

In 2004, the United States broadened the definition of investment in its 2004 Model BIT, a treaty change that has been carried over into all its RTAs negotiated subsequently, beginning with US-Chile and US-Singapore which both entered into force in 2004.[35] Thus, for instance, the definition of investment in US-Chile reads "every asset that an investor owns or controls, directly or indirectly... Forms that an investment may take include: (a) an enterprise; (b) shares, stock, and other forms of equity participation in an enterprise; …"[36] We use the classification of "mixed" to capture this type of investment definition. It has been adopted by the majority of RTAs that we have classified as having a NAFTA-type investment chapter: almost 70% of the 73 RTAs that have a NAFTA-type investment chapter use the post-2004 mixed definition of investment.[37]

The remaining NAFTA-type RTAs use an asset-based definition. The majority of these RTAs are concluded by countries in Asia Pacific, including ASEAN's RTAs with third parties.[38] For instance, in ASEAN-Australia-New Zealand, investment is defined as "every kind of asset owned or controlled by an investor, including but not limited to the following: (i) movable and immovable property and other property rights such as mortgages, liens or pledges; (ii) shares, stocks, bonds and debentures and any other forms of participation in a juridical person and rights derived therefrom; …"[39] Moreover, two of Colombia's RTAs use an asset-based definition of investment.[40] Thus although many countries in Latin America and Asia have an investment chapter that is broadly based on the NAFTA model, investment disciplines of these RTAs may diverge in certain respects from those of the NAFTA.

Most of the RTAs that enshrine the right of establishment define investment as "commercial presence". For instance, in EFTA-Central America, where the scope of the investment chapter is limited to "commercial presence in all sectors, with the exception of services sectors", commercial presence is defined as "any type of business establishment, including through: (i) the constitution, acquisition or maintenance of a juridical person; or (ii) the creation or maintenance of a branch or

[30] For a full discussion of the definition of investment, see UNCTAD, Series on Issues in International Investment Agreements II, *Scope and Definition* (New York and Geneva 2011).

[31] We are aware of the critical nature of the definition of investment. Indeed an entire study could be devoted to analysing the nuances inherent therein. However, for our purposes we use a broad brush to categorize the definition of investment contained in agreements, making no distinction for instance between open-ended and closed list definitions. We are mindful that other studies use different categorizations.

[32] Article 1139 of the NAFTA.

[33] Canada-Republic of Korea is an exception as it uses a mixed definition of investment. Canada-Colombia which we have classified as using an enterprise-based definition of investment includes intellectual property rights in its definition of investment.

[34] Mexico uses an enterprise-based definition of investment in its RTAs with Chile, Japan and Uruguay.

[35] The definition of investment remains unchanged in the 2012 US Model BIT.

[36] Article 10.27 of US-Chile.

[37] Including those NAFTA-type RTAs with no ISDS module.

[38] Other examples include China-New Zealand, India-Singapore, Pakistan-Malaysia and Thailand-Australia amongst others.

[39] See Article 2 of Chapter 11 of ASEAN-Australia-New Zealand.

[40] Colombia-Mexico and Colombia-Northern Triangle.

a representative office; within the territory of another Party for the purpose of performing an economic activity."[41] Similar language is found in the RTAs signed by the EU with third countries.

Some parties to RTAs show a pronounced preference for specific definitions of investment. For instance, the Republic of Korea, Japan, Panama and Peru predominantly use the mixed definition, with few exceptions to this practice. The EU consistently uses a definition of investment based on the right of establishment or commercial presence, whereas EFTA's RTAs display considerable heterogeneity. While EFTA's RTAs tend to use a definition based on commercial presence, examples of asset-based, enterprise-based and mixed definitions can be found.[42]

Some RTAs add further precision to the definition of investment by setting forth the objective characteristics of investment that an asset or a transaction must possess in order to qualify as an investment. This drafting refinement appears to have its genesis in the United States' 2004 Model BIT, which provides that an investment should have characteristics such as "the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk". Many RTAs with a NAFTA-type investment chapter concluded after 2004 apply a definition of investment that includes the same characteristics. An exception is Canada's RTAs where the definition does not set the characteristics of investment.

Although the language of the provisions that list the three mentioned characteristics of investment differs, they appear to provide an indicative rather than a definitive list of such characteristics. In practice this means that they would rarely be interpreted rigidly as imposing a cumulative set of characteristics that must be present in order for an asset or transaction to qualify as an investment.

In its more recent RTAs, beginning with EU-CARIFORUM in 2008, the EU provides greater precision to its definition of investment by clarifying that the constitution and acquisition of a juridical person shall be understood as including capital participation in a juridical person with a view to establishing or maintaining "lasting economic links".[43]

About half of RTAs with substantive investment chapters contain exclusions from the definition of investment.[44] Typical examples of such exclusions are claims to money arising solely from commercial contracts for the sale of goods or services,[45] or orders and judgments entered in a judicial or administrative action.[46] A number of RTAs also explicitly exclude sovereign debt or "public debt operations" from the definition of investment.[47]

5.2 Definition of investor

The definition of "investor" is another key element of the scope of the investment framework as it determines which persons and legal entities are to benefit from the agreement, also delineating the scope of a state's exposure to ISDS. All RTAs in our study with substantive investment chapters provide a definition of "investor", "investor of a party", or define the main elements of an investor such as "juridical and natural persons". Natural persons that have the nationality of one of the parties to the agreement under domestic law[48] are typically considered investors in the other party.[49]

The nationality of the legal entity or juridical person is usually determined by either the country of incorporation, the country of the seat (i.e. where the effective management takes place), the

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[41] Article 5.2 of EFTA-Central America.

[42] For instance, EFTA-Republic of Korea uses a mixed definition, EFTA-Mexico uses an enterprise-based definition and EFTA-Singapore and EFTA-Ukraine use an asset-based definition.

[43] Similar language is found in EU-Republic of Korea, EU-Colombia and Peru, and EU-Central America.

[44] We did not systematically categorize the type of exclusions. For a fuller treatment of recent treaty practice regarding narrowing the scope of investment, see UNCTAD, *supra*, fn 30, pp. 28-48.

[45] See Article 9.01 of Canada-Panama.

[46] See fn. 46 to Article 11.28 of Australia-Republic of Korea.

[47] See for instance Article 838, footnote 11 of Canada-Colombia or Article 10.1 of Canada-Honduras.

[48] Some countries extend the scope of natural persons to include permanent residents.

[49] In EU-Jordan the right of establishment is granted only to EU or Jordanian companies, but not natural persons (except for international maritime transport where nationals of the parties may benefit from the agreement, subject to certain criteria).

country of ownership or control, or a combination of all three.[50] This means that for a legal entity to benefit from an RTA one or a combination of these elements must be present in one of the parties to an RTA. In almost two-thirds of RTAs with substantive investment chapters, the incorporation (organization or constitution) of a legal entity in a party to the agreement is sufficient to confer corporate nationality to such an entity – a precondition for it to become an investor.[51]

About one-third of RTAs with substantive investment chapters add additional requirements to determine investor nationality beyond the place of incorporation.[52] For instance, in EU-Central America, a juridical person must be established in accordance with the laws of one of the parties, and have its registered office, central administration, or principal place of business within one of the parties; where the juridical person has only its registered office or central administration within one of the parties, it shall not be considered as a juridical person, unless it is engaged in "substantive business operations".[53] Another example is India-Singapore, where an enterprise shall not include any legal entity, which is established and located in the territory of a Party "with negligible or nil business operations or with no real and continuous business activities" carried out in the territory of that Party.[54]

5.1 Denial of benefits

Denial of benefits clauses allow a party to an RTA to exclude certain enterprises from the scope of the agreement. This is achieved by refusing to apply its obligations under the investment or services chapter (i.e. to deny the benefits of those chapters) to an enterprise of another party if it is under foreign control or ownership (usually a third party, but may also apply to entities owned or controlled by nationals of the denying party). This can be done for foreign policy reasons (for instance the application of sanctions to the country the nationals of which control the enterprise) or because such an enterprise has no substantive[55] business operations (SBO) in the territory of the other party.

In our study, we have checked whether an RTA contains a denial of benefits clause and its presence in the investment or services chapter. We have further examined the drafting of the clause and determined the main variations regarding the grounds for its application.[56] In respect of denial of benefits clauses in the investment chapter, we have additionally looked into the procedure of its application. More specifically, we have checked whether the provision requires prior notification or consultations before a party may deny benefits.[57]

Approximately two-thirds of substantive investment chapters contain a denial of benefits clause. One half of these denial of benefits clauses allow the parties to an RTA to deny benefits when an enterprise of another party, being under foreign ownership or control, does not have SBO in the territory of the party it originates from. The other half allow denial of benefits on foreign policy grounds, in addition to a lack of SBO. The majority of denial of benefits provisions requires both notification and consultation before the benefits of the investment chapter may be denied; almost one-fourth provide no procedural requirements for denial of benefits.

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[50] For a full discussion, see UNCTAD, International Investment Agreements: Key Issues Volume 1 (New York and Geneva 2004).

[51] An exception is New Zealand-Singapore where the definition of investor includes "any company, firm, association or body, with or without legal personality, whether or not incorporated, established or registered under the applicable laws in force in a Party; making or having made an investment in the other Party's territory."

[52] The majority of agreements in this group are the EU and EFTA RTAs with third countries.

[53] Article 160 (e) of EU-Central America. In addition, shipping companies established outside the EU or the Central American party and controlled by nationals of the parties may benefit from the Agreement, if their vessels are registered in accordance with the respective legislation in one of the parties and carry the flag of one of the parties (Article 160 (f)).

[54] Article 6.1 para. 6 of India-Singapore.

[55] Note that both "substantive" and "substantial" are used in the texts of RTAs.

[56] We have examined only those grounds for denial of benefits that equally apply to all RTA parties. At times, RTAs contain provisions specific to only one or several parties. See for example Article 17.3 of ASEAN-Republic of Korea Investment Agreement.

[57] While this particular element was not part of our review, it should be noted that notifications and consultations procedures are usually required in order to invoke denial of benefits on the ground that an enterprise does not have substantive business operations. The invocation of the denial of benefits provision on foreign policy grounds is at times exempted from such requirements.

Similarly, almost two-thirds of services chapters that cover mode 3 contain a denial of benefits provision. Some variation in the drafting of these denial of benefits provisions can be observed. Slightly more than a quarter of denial of benefits provisions in services chapters allows the denial of benefits because of a lack of SBO. An equal number of denial of benefits provisions set forth two grounds – foreign policy and a lack of SBO. The rest are almost equally split between the provisions that follow the drafting of Article XXVII(c) of the GATS and those that deviate from all of the mentioned categories.[58]

A denial of benefits clause may be viewed as a provision that complements the definition of the investor.[59] In a broad sense, both determine the range of persons that may benefit from the agreement. Thus, when the parties wish to narrow the circle of the RTA's "beneficiaries" they could do it by either including additional conditions that must be met by companies in order for them to qualify as investors or by adding a denial of benefits clause. The former technique is employed by the EU and EFTA agreements with third countries. While none of them contains a denial of benefits provision in the investment chapter,[60] all of them impose additional conditions for legal entities to be covered by their definitions of the investor.[61] On the other hand, the latter situation may be illustrated by the RTAs concluded by Canada and the US.[62] The investment chapters of these agreements contain a relatively broad definition of investor and a denial of benefits clause allowing the parties to deny the benefits of the chapter to foreign-owned or controlled enterprises due to lack of SBO and foreign policy reasons.[63]

Despite a close link between the definition of investor and a denial of benefits clause, they operate differently. First of all, as we can see from the discussion above, the prevailing majority of denial of benefits clauses are drafted to operate in narrowly defined circumstances, most commonly when an entity that is constituted under the laws of a party is under foreign (third party or denying party) ownership or control. In contrast, even where definitions of the investor require a legal entity constituted under the laws of a party to have SBO or a continuous link with that party in order to qualify as an investor, the range of entities covered will still be broader. This is because such a definition will cover both legal entities that are under foreign ownership or control and those that are not.

Second, unlike the rules defining the investor, a denial of benefits clause does not apply automatically. Most denial of benefits clauses are formulated in a way that leaves the discretion with an RTA party to invoke it if the conditions set in the clause are met. The need for a host state to take an active action to invoke this provision, together with the procedural mechanism provided in such clauses, also implies that in some cases it may not be invoked retrospectively. For instance, the host state might not be able to deny the investor that meets the conditions set in a denial of benefits clause access to ISDS if it did not invoke the denial of benefits clause before the dispute.[64]

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[58] Japan-Malaysia and India-Malaysia allow denial of benefits of the services chapter only on the grounds of foreign policy.

[59] See our discussion in Sub-section 5.2.

[60] The EU and EFTA RTAs with third countries account for approximately two-thirds of RTAs whose investment chapters have no denial of benefits provision.

[61] For instance, Article 33 of EFTA-Chile stipulates that a juridical person of a Party means a juridical person constituted or otherwise organised under the law of an EFTA State or of Chile and that is *engaged in substantive business operations* in Chile or in the EFTA State concerned. Article 77 of EU-Georgia requires that when a juridical person that has only its registered office or central administration in the territory of any of the Parties, its operations must possess *a real and continuous link* with the economy of the EU or of Georgia, respectively, in order to be considered a juridical person of a Party (i.e. investor).

[62] The definition of investor in these agreements explicitly covers branches, in addition to enterprises. While a branch must carry out business activities on the territory of the party in order to qualify as an investor, no such condition is imposed in respect of enterprises.

[63] See for example Canada-Republic of Korea, where an enterprise constituted or organised under the domestic law of a Party qualifies as an investor but a Party may deny the benefits of this Chapter to an enterprise that has *no substantial business activities* in the territory of the other Party under whose domestic law it is constituted or organised and persons of a non-party, or of the denying Party, own or control the enterprise (Article 8.14.2).

[64] For a discussion of policy options and the arbitral case law on this score see UNCTAD, Series on Issues in International Investment Agreements II: Scope and Definition, A sequel (New York and Geneva 2011), 98-99.

The underlying policy behind denial of benefit clauses is the preservation of reciprocity.[65] They discourage "treaty shopping" or the establishment of so-called "letter-box" companies – the practice whereby the companies of a third state incorporate subsidiaries in one of the parties to a treaty with the sole purpose of benefiting from the treaty. As noted above, some denial of benefit clauses also operate to prevent the undesirable foreign policy outcomes for a party to an RTA: when companies from the counties with which a denying party does not maintain diplomatic relationship may indirectly benefit from the treaty, or when companies to which the denying party applies sanctions indirectly benefit from the RTA.

5.2 Exclusions from the scope of the investment chapter

Many RTAs exclude the application of certain (or all) obligations of the investment chapter to government procurement, subsidies or grants, services supplied in the exercise of governmental authority, and taxation measures.[66] Some exclusions are due to the sensitive nature of the policies involved (e.g. services supplied in the exercise of governmental authority), or because the issue may be covered in another chapter of an RTA, as sometimes is the case for government procurement.

The NAFTA and the majority of RTAs that use a NAFTA-type investment chapter exclude government procurement from the following obligations: MFN and NT, the prohibition of senior management nationality requirements (SMNRs) and certain performance requirements (PRs). Nonetheless some nuances are evident. For instance, a number of RTAs with a NAFTA-type investment chapter exclude government procurement from *all* obligations of the investment chapter.[67] Recent EU RTAs beginning with EU-CARIFORUM provide for the exclusion of government procurement from all obligations of the investment (or establishment) chapter.[68] Other EU RTAs which cover establishment, together with EFTA's RTAs, generally provide for no exclusion of government procurement in the text of the investment (or establishment) chapter.

Subsidies or grants are excluded from MFN, national treatment, and the prohibition of senior management nationality requirements in the majority of RTAs that have a NAFTA-type investment chapter. Again, certain nuances are apparent. A number of RTAs involving Asian Pacific countries exclude subsidies or grants from all obligations of the investment chapter.[69] Recent EU RTAs beginning with EU-CARIFORUM provide for the exclusion of subsidies from all obligations of the investment (or establishment) chapter[70], while other EU and EFTA RTAs generally provide for no exclusion for subsidies in the text of the investment (or establishment) chapter.

A number of RTAs provide an exclusion from the obligations of the investment chapter for services supplied in the exercise of governmental authority. These include the EU's RTAs, ASEAN's RTAs with third countries and a number of other RTAs.[71] None of the RTAs of the US or Canada provides for such an exclusion.

In the NAFTA, taxation is generally excluded from the obligations of the investment chapter, except for NT, MFN, expropriation and PRs, with some additional carve-outs and claw-backs.[72] About a third of RTAs with substantive investment chapters that follow the NAFTA model use a

[65] Lindsay Gastrell and and Paul-Jean Le Cannu, *Procedural Requirements of 'Denial-of-Benefits' Clauses in Investment Treaties: A Review of Arbitral Decisions*, 2015(30) ICSID Review, 81.

[66] It should be noted that exclusion of subsidies or grants from the obligations of the investment chapter could equally be achieved through scheduling a blanket reservation in the list of non-conforming measures or an exclusion from the scope of the whole agreement. If an RTA does not cover government procurement then there is no need to provide an exclusion from the obligations of the investment chapter. Again our analysis is limited to exclusions that are located directly in the investment chapter.

[67] Most are RTAs concluded among countries in Asia Pacific. For instance, ASEAN's RTAs with third parties, China-New Zealand, India-Malaysia, Japan-Singapore and Thailand-Australia, amongst others. But see also Panama-Singapore, Peru-Chile and Peru-Singapore.

[68] EU-Central America, EU-Colombia and Peru, EU-Georgia, EU-Republic of Korea, EU-Moldova, and EU-Ukraine.

[69] For instance, see China-New Zealand, India-Malaysia, Singapore-Australia and New Zealand-Malaysia, amongst others.

[70] EU-Central America, EU-Colombia and Peru, EU-Georgia, EU-Republic of Korea, EU-Moldova, and EU-Ukraine.

[71] See for instance Panama-Central America, Peru-Singapore, ECOWAS, and Republic of Korea-Chile, amongst others.

[72] See Article 2103 of NAFTA.

similar formulation to exclude taxation measures from the obligations of the investment chapter, while the rest provide for an exclusion for taxation measures but with significant variation in drafting techniques.[73] Only one RTA that follows the NAFTA model does not exclude taxation measures from the obligations of the investment chapter.[74] In its RTAs, the EU does not exclude taxation measures from the obligations of the investment (or establishment) chapter.

Finally, a number of RTAs contain provisions excluding certain sectors from the scope of the investment chapter. For instance, the EU, in its RTAs with Balkan countries, excludes air transport services, inland waterways transport services and maritime cabotage services from the scope of the establishment chapter.[75] In more recent RTAs with other parties, the EU expands this list to include mining, manufacturing and processing of nuclear materials; the production of or trade in arms, munitions and war material; and audio-visual services.[76]

5.3 Conclusions

This section has examined four types of provisions that define the scope of the investment framework: the definitions of investor and investment, denial of benefit clauses and exclusions from the scope of the investment chapter.

It appears that most substantive investment chapters of RTAs are uniform in allowing both natural persons and legal entities to become investors and benefit from their investment provisions. When it comes to the determination of the nationality of legal entities, most investment chapters require such entities to be incorporated or constituted by other means in the territory of an RTA party. A sizeable group of substantive investment chapters impose additional requirements.

Closely linked with the definition of investor are the denial of benefit clauses. Such provisions allow RTA parties in certain cases to deny the application of their investment or services obligations to foreign-owned or foreign-controlled enterprises. The non-automaticity in the application of most denial of benefits clauses leaves the ultimate decision on whether to deny benefits with the denying party, thus minimising the undesirable impact on investment.

Most RTAs, except those that limit the scope of investment to commercial presence, define investment with reference to a broad range of assets. A degree of variation in drafting is however observed. An interesting feature of the definition of investment is the use of the indicative characteristics that an asset or transaction must possess in order to qualify as an investment. The most commonly used characteristics are the commitment of capital, the assumption of risk and the expectation of profit.

Most substantive investment chapters exclude subsidies and government procurement from all or specified obligations of the investment chapter and some exclude services supplied in the exercise of governmental authority. Taxation is also routinely excluded from most obligations of the investment chapter, with some carve-outs and claw-backs.

6 INVESTMENT LIBERALIZATION PROVISIONS

This section discusses investment liberalization provisions, which in this study refer to NT (pre-establishment), MFN (pre-establishment), market access, performance requirements, SMNRs and scheduling.[77] Before we delve into a more detailed discussion of these obligations, we make some preliminary observations regarding the location of these provisions in the texts of RTAs.

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[73] See for instance ASEAN-Australia-New Zealand (Article 3 of Chapter 15), Japan-Malaysia (Articles 9 and 81.5), and Chile-Mexico (Article 19-05), amongst others.

[74] See Mexico-Colombia.

[75] See EU-Albania, EU-Montenegro, EU-FYROM, and EU-Serbia. Also EU-Mexico.

[76] See EU-CARIFORUM, EU-Moldova, EU-Central America, EU-Colombia and Peru (the processing of toxic waste is also excluded), EU-Georgia, EU-Republic of Korea, and EU-Ukraine.

[77] We are aware of the possibility that such provisions, together with the commitments or reservations recorded in the schedules, may only bind the status quo and thus not result in any liberalisation. However, our decision to describe them as "investment liberalization provisions" does not imply they always achieve a certain threshold of liberalization. Our characterization is rather based on the function they seek to perform in an RTA. In the BIT context, such provisions are often referred to as "admission and establishment". See UNCTAD, Series on Issues in International Investment Agreements II, *Admission and Establishment* (New York and Geneva 2002).

As has been touched upon in Section 3, investment liberalization provisions may be found in investment and services chapters of RTAs. In reality, this means that depending on the type of RTA such provisions may be found: (i) only in the investment chapter; (ii) only in the services chapter; or (iii) in both the investment and services chapters.

We have found that investment liberalization provisions are locked exclusively in the substantive investment chapter in 43 of the surveyed RTAs. The services chapters of these agreements do not cover commercial presence. Most of them have cross-border trade in services chapters with no obligations from such chapters applicable to investment.[78]

Only 18 RTAs contain investment liberalization provisions exclusively in their trade in services chapters.[79] These are the agreements that cover the provision of services via mode 3 but either have a non-substantive investment chapter or do not have an investment chapter at all. The national treatment, MFN, market access and scheduling of services chapters in these RTAs will thus function as liberalization provisions for investments in services through commercial presence.

Finally, in the largest group of RTAs with substantive investment chapters, consisting of 73 agreements, investment liberalization provisions are distributed between the investment and trade in services chapters. In contrast to the previous group, these agreements either have services chapters that cover commercial presence or make certain obligations from their CBTS chapters applicable to investment. The relationship between the services and investment chapters in this group of agreements has a direct bearing on the determination of which provisions apply to different types of investment. The next sub-section reviews this relationship in more detail.

6.1 The relationship between services and investment chapters

According to our findings above, the largest group of RTAs contain investment liberalisation provisions in both the investment and trade in services chapters. For analytical purposes, we have further divided all RTAs in this group into two subcategories, depending on how the relationship between their investment and services chapters is set up. The differences between these two sub-categories are summarised in Chart 3 below.

Even though we determine the relationship between the investment and services *chapters* as opposed to individual *provisions* of these chapters, our primary focus here is investment liberalisation. Therefore, our analysis is not intended to be equally valid for the relationship between the provisions of investment and services chapters other than investment liberalisation provisions.

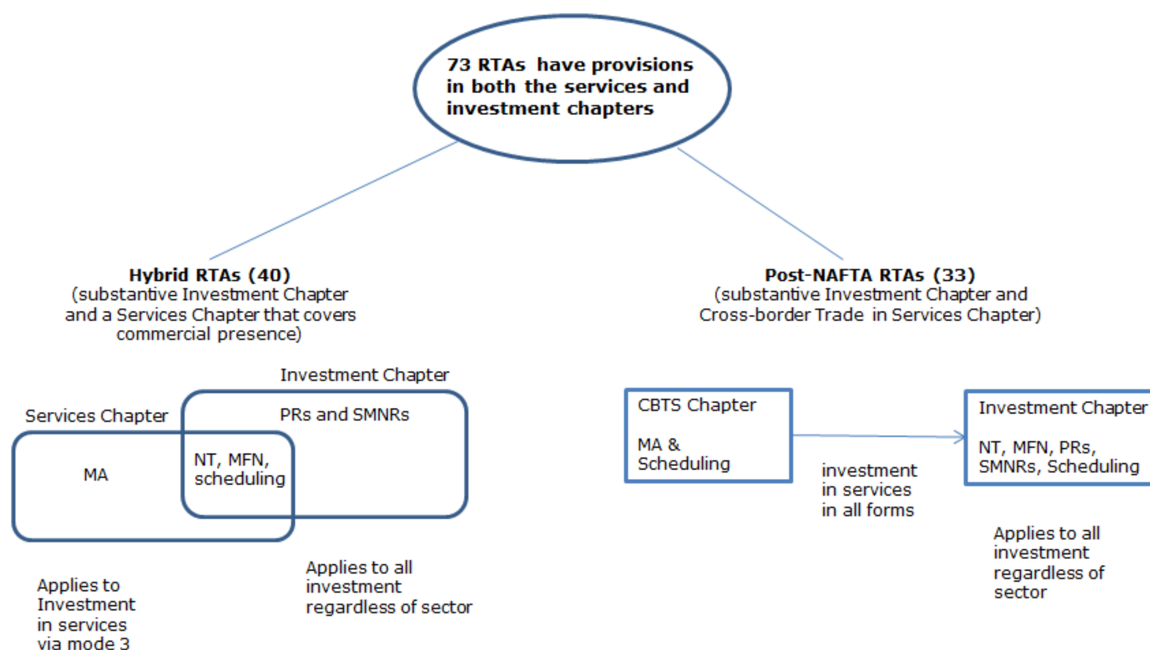
As can be seen from Chart 3, out of 73 RTAs, 40 belong to the "hybrid" sub-category and 33 make up the "post-NAFTA" sub-group. The main element of distinction between the two is that hybrid RTAs contain a services chapter that covers commercial presence, whereas services chapters of post-NAFTA RTAs cover only cross-border trade in services.[80] The distribution of investment liberalisation provisions between investment and services chapters in these sub-categories is further discussed below.

[78] Among such agreements are 19 RTAs whose chapters have been classified as "Establishment" or "Establishment+". They consist mainly of the EU and EFTA agreements with third countries, as well as the EFTA Convention, EEA Agreement and EC Treaty. This group also includes the NAFTA and agreements that copy its structure without making any obligations of the CBTS chapter applicable to investment.

[79] Among these RTAs, agreements concluded by China represent about one third.

[80] The NAFTA itself does not belong to this category since it does not contain any provisions in its CBTS chapter that apply to investment. For our purposes, the NAFTA is considered as having investment provisions only in its investment chapter.

Chart 3: Relationship between Investment and Services Chapters



Source: WTO Secretariat

In hybrid agreements, NT, MFN, market access and scheduling are found in the services chapter that covers commercial presence. The investment chapter provides for NT, MFN, scheduling, PRs and SMNRs. The provisions of the services chapter apply to investment in services via mode 3, whereas the investment chapter provisions cover all forms of investment regardless of the sector. Due to this structure, the regulation of investment in hybrid agreements follows two parallel tracks: one determined by the investment chapter and another by the services chapter. Furthermore, because investment in services via mode 3 (commercial presence) in hybrid agreements is covered by a broader definition of investment in the investment chapter, certain obligations of the two chapters applicable to investment in services via mode 3 overlap. These obligations include NT, MFN and scheduling provisions.

In order to avoid the negative consequences arising from the overlap in the applicable provisions, RTAs of this type often use various coordination techniques.[81] For instance, the services and investment chapters may apply in parallel; however, in case of an inconsistency between the two, the investment chapter prevails, except for its non-discrimination provisions.[82] A slightly different interaction technique makes the investment chapter applicable to a measure only to the extent that it is not covered by the services chapter, with several explicitly enumerated provisions from the investment chapter always applicable to investment in services.[83]

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[81] Often, a clause determining the interaction between the two sets of provisions is found either in the investment or the services chapter.

[82] An example of this type of interaction is Article 73.2 of the Japan-Malaysia that stipulates the following:

> In the event of any inconsistency between this Chapter and Chapter 8:
> (a) with respect to matters covered by Articles 75, 76 and 79 [NT, MFN and PRs], Chapter 8 [Trade in services] shall prevail to the extent of inconsistency; and
> (b) with respect to matters not falling under subparagraph (a), this Chapter [Investment] shall prevail to the extent of inconsistency.

[83] Such a technique is used in Article 3 (Chapter 11) of ASEAN-Australia-New Zealand:

> 1. This Chapter does not apply to measures adopted or maintained by a Party to the extent that they are covered by Chapter 8 (Trade in Services) or Chapter 9 (Movement of Natural Persons).
> 2. Notwithstanding Paragraph 1, Article 6 (Treatment of Investment), Article 7 (Compensation for Losses), Article 8 (Transfers), Article 9 (Expropriation and Compensation), Article 10 (Subrogation) and Section B (Investment Disputes between a Party and an Investor) shall apply, mutatis mutandis, to any measure affecting the supply of service by a service supplier of a Party

Some agreements clearly establish that all provisions of the trade in services chapter apply to investment in services, while all provisions of the investment chapter apply to investment in all other sectors, the two chapters being therefore mutually exclusive.[84] At times, hybrid agreements are silent on the interaction between the investment provisions in their services and investment chapters, or those contained in separate agreements within an RTA framework.[85]

In post-NAFTA RTAs, NT, MFN, scheduling, PRs and SMNRs applicable to all forms of investment irrespective of the sector are located in the investment chapter. However, the market access obligation, along with the scheduling provisions applicable to it, is borrowed from the CBTS chapter and by virtue of a special clause made applicable to all forms of investment in services.[86] As a result, investments in services are covered not only by all of the investment chapter obligations but also the market access obligation borrowed from its CBTS chapter (together with the reservations scheduled under the CBTS chapter that are applicable to market access).[87] In contrast, investments in all other sectors are covered only by the provisions of the investment chapter.

Our discussion of the investment/services relationship (as relevant for investment liberalisation) can be summarised as follows: while post-NAFTA agreements clearly determine the two different sets of rules applicable, on the one hand, to investment in services and on the other, to all other investment, this is usually less clear in hybrid agreements. The coordination rules, if provided by a hybrid RTA, may eventually determine which obligations from the services and investment chapter apply in a particular case.

In terms of geographical preferences, the majority of hybrid agreements in our survey have an Asian country as one of their parties, with about a quarter of them negotiated by Japan.[88] It also includes seven agreements concluded by EFTA with third states. RTAs negotiated by the US and Canada, on the other hand, account for almost half of post-NAFTA agreements. Among the agreements that represent the other half in the post-NAFTA group, the prevailing majority have at least one country from Latin America as their party.[89]

The interaction between investment chapters and general services chapters also touches upon the issue of the relationship between investment chapters and sectoral services chapters. However, except for a few provisions that relate to ISDS in financial services, investment provisions located

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> through commercial presence in the territory of any one of the other Parties pursuant to Chapter 8 (Trade in Services), but only to the extent that any such measures relate to a covered investment and an obligation under this Chapter, regardless of whether such a service sector is scheduled in a Party's schedule of specific services commitments in Annex 3 (Schedules of Specific Services Commitments).

[84] See for example Article 5.1 of EFTA-Colombia.

[85] See Japan–Singapore; also China-Pakistan.

[86] This is typical for the US and Canadian agreements concluded after the NAFTA. See for example Article 11.2 of Canada-Honduras FTA that in relevant parts provides:

> 4. Article 11.6 applies to a measure of a Party affecting the provision of a service in its territory by an investment of an investor of a Party as defined in Article 10.1 (Investment – Definitions).
> 5. A reservation taken by a Party pursuant to Article 11.7 against Article 11.6 applies to an investment of an investor of that Party covered under paragraph 4.
> 6. An allegation that a Party has breached Article 11.6 [market access provision for CBTS Chapter 11] as described in paragraph 4 is not subject to investor-State dispute settlement under Section C of Chapter Ten (Investment – Settlement of Disputes between a Party and an Investor of the Other Party).

[87] Domestic regulation and transparency provisions are often borrowed from the CBTS chapter and in a similar manner made applicable to investment in services. See for instance Article 8.2.2 of US-Singapore. The discussion in this sub-section is limited to investment liberalisation provisions.

[88] To the best of our knowledge, Colombia-Mexico (entry into force in 1995) was the first hybrid agreement. Among the Asian countries, Singapore was the first to conclude this type of agreement with New Zealand in 2001.

[89] Note the variations in the type of agreement across RTAs between a Latin American and an Asian partner: Chile-Japan and Japan-Mexico provide for investment provisions only in the investment chapter; Peru-China and Hong Kong, China-Chile are hybrid RTAs; Costa Rica-Singapore and Japan-Peru belong to the post-NAFTA category.

in the sectoral services chapters are beyond the scope of our study.[90] All references in this paper to services chapters are to be understood as references to general services chapters.

6.2 Analysis of investment liberalization provisions

6.2.1 Liberalization disciplines in investment chapters

Given their structural similarity to BITs, investment chapters of RTAs aim first of all to protect investment once it has taken place. Most BITs except those signed by the US and Canada post-2004 rarely contain any obligations to grant market access to foreign investors, focusing solely on the protection of the already established investment. The parties to the majority of BITs thus remain entirely free to decide whether and in which sectors/activities they admit foreign investment.

Investment chapters of RTAs, however, deviate from the investment-protection-only logic of BITs and provide for several liberalization disciplines. The most important of them is the NT obligation that covers the pre-establishment or entry stage of investment, requiring host states to remove all discriminatory market access barriers for foreign investment.[91] Many RTAs also contain an MFN provision that covers the entry stage of foreign investment. The two additional disciplines of liberalization typically found in investment chapters are those relating to PRs[92] and SMNRs. These two provisions are routinely included in the agreements concluded by Canada and the US and other countries that follow their templates.

The NT obligation covers the entry stage of foreign investment in almost 90% of substantive investment chapters. Comparatively fewer investment chapters contain an MFN obligation covering the entry of foreign investment – about 70% of all substantive investment chapters. The application of NT and MFN at the entry stage of foreign investment is typically based on the drafting style of Articles 1102 and 1103 of the NAFTA that explicitly state that they apply to "the establishment and acquisition of investment". About a dozen agreements leave the admission of foreign investment to the discretion of the host state's domestic legislation.[93]

Broadly speaking, PRs are measures of host countries that require investors to behave in a particular way or to meet prescribed goals.[94] Provisions on PRs in RTAs do not define the concept, instead listing those PRs that the parties are not allowed to impose. PRs usually cover not only compulsory requirements but also non-mandatory prescriptions the compliance with which is necessary in order to receive a certain benefit. The same types of requirements may function as compulsory prescriptions or as conditions for receiving investment incentives. For example a local content requirement, i.e. a requirement to purchase or use goods or services produced in the territory of host state, is prohibited by Article 1106 of the NAFTA, regardless of whether it is a mandatory prescription or a condition to receive a benefit.

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[90] Sectoral services chapters may include chapters on financial services, telecommunications, e-commerce or other regulated sectors. Hybrid and post-NAFTA agreements appear to deal with the interaction between the provisions of investment and sectoral services chapters differently. For example, in post-NAFTA agreements, investments in financial services are dealt with in a separate chapter that borrows certain provisions from the investment chapter and the CBTS chapter. Hybrid agreements usually provide for a separate annex containing rules on financial services that supplement those of a general services chapter. The relationship between the rules of investment chapters and those of the financial services annex applicable to investment in financial services via mode 3 in hybrid agreements is covered by the investment-services coordination clause, if the treaty provides for it.

[91] An alternative approach to investment liberalization is providing for a comprehensive right of establishment. See the EC Treaty; the EEA Agreement; and the EFTA Convention.

[92] Although we discuss PRs in this Sub-section as barriers that affect the establishment of investment, they may also affect investment after it has been established.

[93] Among them are several intra-Latin American RTAs. An example of NT that does not cover the establishment stage is Article 48(2) of Pakistan-China that requires the parties to accord to investments of the other party treatment not less favourable than that accorded to the investments of its own investors, stipulating however that this obligation is without prejudice to its laws and regulations. In Peru-China, Article 129 limits the scope of the NT obligation to "the management, conduct, operation, and sale or other disposition of investments", implicitly excluding the establishment stage.

[94] S. H. Nikièma, Performance Requirements in Investment Treaties (IISD Best Practices Series – December 2014), 1.

About 60% of agreements with substantive investment chapters contain PRs obligations, more than two-thirds of which are modelled on the PRs provision (Article 1106) of the NAFTA, with some degree of variation in drafting.[95] These provisions tend to be complex, with multiple carve-outs and exceptions. Among the RTAs without substantive investment chapters, only one agreement has a PRs provision in the goods chapter.[96]

PRs provisions, when they are provided for in the investment chapters of RTAs, are likely to be broader in scope than the WTO TRIMs Agreement disciplines. To the extent that they apply to investment in services, they will achieve a wider coverage in comparison to the TRIMs Agreement, which applies only to trade in goods. PRs provisions modelled on the NAFTA have a wider coverage in comparison to TRIMs Agreement: while there are no IP-related provisions in the TRIMs Agreement, NAFTA-type PRs provisions generally prohibit mandatory technology transfer. They also add an additional obligation of the host state – not to require an investor to act as the exclusive supplier of the goods it provides to a specific region or world market.

A SMNRs provision is another feature of the NAFTA that has been taken up in a little less than half of all RTAs with substantive investment chapters. This provision prohibits RTA parties from requiring that an enterprise owned or controlled by the investor appoint to senior management positions individuals of any particular nationality. EU RTAs approach the issue differently, by requiring host states to allow the employment of key personnel. This obligation might provide a similar level of security to the one sought through the SMNRs provision.[97]

6.2.2 Comparison of liberalization disciplines in investment and services chapters

As has been discussed above, investment and services chapters tend to contain somewhat different sets of investment liberalization provisions. In the sub-section below we look across all RTAs with investment liberalization provisions and compare the characteristics of such provisions, as contained in the investment and services chapters.

6.2.2.1 Non-discrimination disciplines and market access

About 80% of NT provisions applicable to investment in services via mode 3 follow the drafting of Article XVII of the GATS.[98] In contrast, almost three-quarters of the provisions applicable to all (other) investment are modelled on Article 1102 of the NAFTA.[99] The difference between the two provisions is in the comparator: Article XVII of the GATS requires a WTO Member to treat foreign services and service suppliers not less favourably than its own *like services* and *service suppliers*; Article 1102 of the NAFTA operates with a textually different benchmark requiring treatment of foreign investors no less favourable than the treatment accorded to domestic investors and their investments in *like circumstances*.

It appears that despite the difference in wording, the two types of provisions were not intended to create different tests for the assessment of compliance with the NT obligation.[100] Broadly speaking, the likeness of the circumstances, interpreted as the likeness of economic activity, could also render services or service suppliers like.[101]

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[95] PRs provisions that do not follow the drafting of Article 1106 of the NAFTA in the majority of cases copy or incorporate the WTO TRIMs Agreement or its Annex. The remaining agreements formulate their PRs provisions combining the elements of different drafting techniques.

[96] See US-Israel.

[97] See for example Article 7.18 of EU-Republic of Korea; Article 81 of EU-CARIFORUM; Article 89 of EU-Georgia.

[98] About 10% of services chapters that cover mode 3 provide for a NT provision modelled on Article 1102 of the NAFTA. Among them are Australia–New Zealand, Colombia–Mexico, and Republic of Korea–India.

[99] Among those RTAs whose NT provisions in investment chapters cannot be classified as either GATS-type or NAFTA-type, the EC Treaty, EEA Agreement, EFTA Convention and the EU and EFTA agreements with third countries account for 60%. There are some variations among them, ranging from the obligation to provide treatment no less favourable than the treatment accorded to domestic "juridical and natural persons performing a like economic activity" (Article 34 of EFTA-Chile) to a concise formulation requiring "treatment no less favourable than that accorded to its own companies" (Article 50 of EU-Albania).

[100] M. Molinuevo, Protecting investment in services: Investor-State Arbitration Versus WTO Dispute Settlement (Kluwer Law International 2012), pp. 118 – 119.

[101] Ibid, at 121.

Approximately half of RTAs that regulate investment in services via mode 3 contain an MFN provision.[102] In contrast, about two-thirds of RTAs with substantive investment chapters provide for MFN applicable to the entry of foreign investment.[103] However, this could be counterbalanced by a high number of exceptions to and carve-outs from the MFN obligation.[104] The carve-outs and exceptions, in particular regional integration exceptions, included into the MFN provisions of both investment and services chapters significantly limit the effect of the MFN obligation.

A market access provision in RTAs is typically modelled on Article XVI of the GATS and prohibits listed restrictions. In post-NAFTA agreements, the market access provision borrowed from the CBTS chapter and made applicable to investment in services usually omits the restriction mentioned in Article XVI.2 para. (f) of the GATS: limitations on the participation of foreign capital in terms of maximum percentage limit on foreign shareholding or the total value of individual or aggregate foreign investment. This omission is not crucial since discrimination towards foreign capital or investors will typically be captured by the investment chapter's NT obligation if it covers the pre-establishment phase.

In more than 90% of cases, a market access obligation is limited to investment in services (i.e. it does not apply to any other sector of the economy). This means that investment chapters usually do not provide for this obligation.[105] RTAs that have a market access obligation in their investment chapters are mostly agreements concluded by the EU that define investment as establishment and contain no ISDS. As mentioned above, discriminatory market access barriers should be caught by the investment chapter's NT obligation that covers the establishment phase. Nonetheless, a case could be made for market access to be applicable to all investment and not only investment in services.

6.2.2.2 Scheduling

RTA parties schedule commitments or reservations in order to give practical effect to certain treaty obligations, i.e. their scope and conditions of application. All investment liberalization obligations discussed in this section are subject to schedules. Three techniques of scheduling may be distinguished: positive list, negative list and the mixed approach.

A positive list approach implies that the obligations subject to scheduling apply only to those sectors that are specifically mentioned in the schedule and subject to any limitations and conditions recorded therein. A negative list approach is based on the opposite logic – the obligations subject to scheduling apply to all sectors, except those that are listed in the schedule, and subject to any specific reservations recorded therein. When the mixed approach is employed, a negative list usually applies to an MFN obligation and a positive list is used for other liberalization disciplines.

A scheduling approach is often apparent from the formulation of liberalization provisions. In the majority of cases, however, the text of the agreement will provide a scheduling provision that contains rules for scheduling, which may include standstill and ratchet obligations.[106] A standstill obligation requires the parties to list reservations or non-conforming measures that exist at the time of scheduling.[107] A ratchet obligation locks in any future liberalization of an existing non-

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[102] Investment in services via mode 3: out of 60 RTAs, 32 provide for MFN.

[103] Within those that do not have MFN in investment chapters, the prevailing majority are RTAs concluded by EFTA with Costa Rica and Panama; Chile; Colombia; Hong Kong, China; and Mexico.

[104] Although this particular element is not measured in our survey, other studies show that MFN obligations tend to feature the economic integration exception and other types of exceptions that limit their effect. Limitations on the scope of MFN are inserted either in the text of the agreement or in the schedules of commitments or reservations. See Molinuevo, *supra*, fn 100, pp. 110–115; Latrille and Lee, *supra*, fn 7, pp. 22–24.

[105] The seven agreements where MA applies to all investment include: EU RTAs with CARIFORUM States, Central America, Colombia and Peru, and the Republic of Korea; the EAEU and the CEZ.

[106] The numbers, shares and percentages in this section that relate to scheduling are based on the information provided in the scheduling provision found in the text of the agreement. In the absence of a scheduling provision, the agreement was marked as containing no scheduling provision. No analysis of the schedules themselves has been undertaken and no attempt has been made to verify the existence of schedules. Conversely, the absence of a scheduling provision in the text of the agreement should not be taken to imply the absence of schedules.

[107] An example of a standstill provision is Article 1108(1)(a) of NAFTA, which in relevant part provides:

1. Articles 1102, 1103, 1106 and 1107 do not apply to:

conforming measure by requiring that any subsequent amendment of the measure does not decrease the conformity of the measure as it existed immediately prior to the amendment.[108]

Positive and mixed approaches to scheduling, without standstill or ratchet obligations, prevail in the services chapters covering commercial presence (including hybrid RTA) – found in roughly two-thirds of chapters that provide for scheduling provisions.[109] In contrast, negative listing is employed in 90% of investment chapters that have scheduling provisions.[110] In two-thirds of cases, negative list schedules in the investment chapter are combined with standstill and ratchet obligations.[111] In the post-NAFTA agreements (where a market access provision from the CBTS chapter applies to investment in services), the CBTS schedules use negative lists accompanied by standstill and ratchet obligations.

The relevant policy question is whether the negative list approach with standstill and ratchet obligations is more investment liberalizing than a positive or mixed list without any standstill or ratchet mechanisms. In this regard, a comparison of the schedules of commitments or reservations with the regulatory framework before and after the agreement was concluded is necessary to determine which type of agreement leads to greater liberalization. Consequently, it is not possible to determine *a priori* which of the techniques is more liberalizing.[112] However, the negative list approach accompanied by a standstill obligation is often perceived as more transparent in comparison to a mixed or positive listing.[113]

(a) any existing non-conforming measure that is maintained by

(i) a Party at the federal level, as set out in its Schedule to Annex I or III

…

[108] For example Article 1108(1)(c) of NAFTA that in relevant part provides as follows:

1. Articles 1102, 1103, 1106 and 1107 do not apply to:

…

(c) an amendment to any non-conforming measure referred to in subparagraph (a) to the extent that the amendment does not decrease the conformity of the measure, as it existed immediately before the amendment, with Articles 1102, 1103, 1106 and 1107.

Some provisions look textually very similar to a ratchet provision but in fact do not achieve the same effect as they would allow a roll-back after a non-conforming measure has been liberalized. An example of such a provision is Article 12(1)(c), Chapter 11, of ASEAN-Australia-New Zealand providing in relevant part:

1. Article 4 (National Treatment), and in the case of Lao PDR Article 5 (Prohibition of Performance Requirements), do not apply to:

…

(c) an amendment to any measure referred to in Subparagraph (a) to the extent that the amendment does not decrease the conformity of the measure as it existed *at the date of entry into force* (emphasis added) of the Party's Schedule to List I, with Article 4 (National Treatment), and, in the case of Lao PDR Article 5 (Prohibition of Performance Requirements).

[109] For investment in services via mode 3 schedules apply to the NT, MFN and MA obligations of the services chapter. For the 44 RTAs that schedule commitments in accordance with a positive or mixed list, standstill and ratchet provisions are very rare. We identified four agreements concluded by Japan (with Indonesia, Malaysia, Philippines and Thailand) that use mixed or positive scheduling and contain standstill obligations in their services chapters. See for example Article 81(3) of Japan-Indonesia that provides as follows:

3. With respect to sectors or sub-sectors where specific commitments are undertaken in Annex 8 and which are indicated with "SS", any terms, limitations, conditions and qualifications, referred to in subparagraphs 1(a) and (b), shall be limited to those based on non-conforming measures, which are in effect on the date of entry into force of this Agreement.

Pakistan-Malaysia is the only agreement in our study that uses a positive approach to scheduling commitments in services and provides for a ratchet mechanism. See Article 73(4) providing that:

4. With respect to sectors or sub-sectors as set out in Annex 5, any change or modification in the conditions by a Party shall not result in the decrease of benefits in relation to the prevailing conditions applied to service suppliers of the other Party present in the territory of the country of the Party, compared to the benefits immediately before such change or modification comes into effect.

[110] In investment chapters, scheduling applies to NT, MFN, PRs and SMNRs obligations. Among the 11 RTAs that follow a positive or mixed approach to scheduling in their investment chapters, five are EU RTAs with third states; another five have an Asian country as their party. The EAEU also belongs in this group.

[111] RTAs with negative list schedules and no ratchet mechanism include ASEAN's FTAs, India-Malaysia, Singapore-Australia, EU-Ukraine and EFTA-Central America.

[112] M. Houde, A. Kolse-Patil and S. Miroudot (2007), "The Interaction between Investment and Services Chapters in Selected Regional trade Agreements", OECD Trade Policy Papers, No. 55, OECD Publishing. http://dx.doi.org/10.1787/054761108710

[113] Ibid, at 9.

6.3 Conclusions

From the regulatory perspective, investment and trade in services via mode 3 are two sides of the same coin. It is no surprise that the majority of RTAs with substantive investment obligations deal with both. However, hybrid and post-NAFTA agreements differ markedly in the way they deal with such regulation. The former group approaches this dichotomy from two distinct perspectives – trade in services and investment. The latter group tends to achieve greater coherence by locking the main investment provisions in the investment chapter with clear indications as to which provisions are borrowed from the CBTS chapter for investment in services.

Our analysis reveals striking differences between the liberalization techniques used in the services chapters covering commercial presence and investment chapters of hybrid agreements. Their trade in services chapters tend to be reminiscent of the GATS, while their investment chapters often follow the NAFTA. The two may be said to be on the opposite sides of the spectrum: on the one hand, mostly GATS-type services chapters that tend to use positive or mixed scheduling, unaccompanied by standstill or ratchet obligations, with NT provisions modelled on Article XVII of the GATS; on the other, predominantly NAFTA-type investment chapters that often adopt negative-list schedules accompanied by standstill and ratchet obligations, and a NT obligation modelled upon Article 1102 of the NAFTA.

In post-NAFTA agreements, the market access obligation borrowed from the CBTS chapter adds an additional discipline to the liberalization obligations of the investment chapter. Scheduling for both market access in services and other obligations in the investment chapter tends to be based on a negative list. Ratchet and standstill obligations are also found in both the CBTS and investment chapters.

The investment liberalization feature that transcends this distinction between post-NAFTA and hybrid agreements is a market access obligation, which in most cases is applicable only to investment in services, regardless of the type of agreement. A handful of RTAs (mostly RTAs concluded in recent years by the EU) that confine their investment chapters to the concept of establishment make market access applicable beyond investment in services. Arguably, if a market access obligation serves a useful liberalisation purpose, its application should be extended to all investment sectors, beyond services. The prevailing treaty practice, however, does not support this argument. Beyond this study, it is interesting to note that the EU and Canada may set a new trend in this respect. The investment chapter of the CETA based on a broad definition of investment contains a market access obligation applicable to investment across all sectors.[114]

7 INVESTMENT PROTECTION PROVISIONS

In the previous section we discussed investment liberalization provisions designed to grant investors access to foreign markets. Using the investment law terminology, they are aimed at allowing a foreign investor to establish an investment in another country. In contrast, the investment protection provisions examined below apply only after foreign investment has been established. While we recognise that at times it may not be possible to draw a clear line between pre- and post-establishment provisions, this distinction is a useful analytical tool.

7.1 Post-establishment non-discrimination obligations

Aside from being an important element of investment liberalization (if applicable to the entry stage of investment), non-discrimination obligations also form part of investment protection. Just as in the case of liberalization, post-establishment NT and MFN may be found in investment chapters and services chapters that cover mode 3. In this sub-section we limit our discussion to the post-establishment NT and MFN provided for in substantive investment chapters.

Some of the main characteristics of these two obligations have already been discussed in the previous section. To re-cap, we found that the prevailing majority of substantive investment chapters provide for NT and almost three-quarters of those are modelled on Article 1102 of the NAFTA.[115] Similarly, we found that about 70% of investment chapters contain an MFN obligation,

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[114] Article 8.4 of the CETA. Final CETA text (February 2016) accessed at http://www.international.gc.ca (last visited 11 April 2016).

[115] See Sub-section 6.2.1.

slightly more than two-thirds of which use the drafting style of Article 1103 of the NAFTA.[116] The consequence of drafting NT or MFN provisions on the basis of the NAFTA is the use of the "like circumstances" comparator to determine the scope of these obligations. This sub-section will focus on the two additional aspects not covered previously: the procedural use of MFN and the subnational application of NT.

By the procedural use of MFN we mean the practice whereby an investor of a party to an investment agreement relies on an MFN provision of this agreement in order to benefit from more favourable conditions of access to ISDS provided under another investment agreement (usually an agreement of a host state with a third country).[117] In such a scenario, an investor will initiate arbitration proceedings on the basis of the procedural provisions of the other agreement, while claiming the violation of substantive obligations of the former agreement.

Needless to say, the procedural use of MFN has not been well received by host states. In response to the increased attempts by investors to use MFN for these purposes, the US, and many other countries that followed suit, add clarifications to MFN clauses that exclude ISDS provisions from their scope. Currently, out of 93 RTAs with substantive investment chapters that contain an MFN clause, 30 stipulate that it does not cover dispute settlement mechanisms.[118]

The second aspect we focus on in this sub-section is the subnational application of NT. In our database, about one-third of NT obligations apply at the sub-national level. In all of these cases (except for EFTA-Singapore) investment chapters tend to be modelled on the NAFTA. The sub-national application of NT allows parties to the agreement to maintain different regional NT standards, as long as investors of the other party are not discriminated against within a particular region.[119]

A typical provision on the subnational application of NT requires that a regional government of a party treat investors of the other party no less favourably than it treats domestic investors from other regions.[120] At the same time, the subnational application of NT does not oblige regional governments to treat domestic investors from other regions the same way it treats domestic investors from within its region. This is a useful clarification for federal states and supra-national treaty parties (like the EU) that have regional (constituent) governments with a great degree of autonomy.

It should be noted that among investment protection guarantees, non-discrimination obligations have received much less interpretation from ISDS tribunals as compared to absolute standards of treatment and expropriation (discussed below). The non-discrimination obligation that has perhaps received the most attention is MFN. Somewhat counterintuitively, the debates about MFN concern its procedural use by investors rather than its substantive application. The relatively low number of disputes does not mean these obligations are redundant, however, as they remain an important guarantee of investment protection and liberalisation.

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[116] See Sub-section 6.2.1. 18 out of 93 MFN provisions in investment chapters do not follow either the NAFTA or GATS drafting of the MFN provision. The use of the GATS style is limited to three agreements: Dominican Republic-Central America; EU-CARIFORUM; and EU-Republic of Korea. Among those that have an atypical MFN provision eight are agreements concluded by the EU with third states. See for example Article 30 of EU-Jordan that contains MFN obligations applicable to the EU and Jordan drafted slightly differently: the obligation applicable to the EU requires "treatment no less favourable than that accorded to like companies of any third country", while the obligation addressed to Jordan omits the "likeness" criterion stipulating that the treatment must be "no less favourable than that accorded to… companies of any third country". Article 53 of EU-Serbia does not refer to "likeness" or any other comparator.

[117] See Section 12 for issues that fall within the scope of ISDS procedural provisions. For a discussion of this issue and relevant case law see R. Dolzer and C. Schreuer, Principles of International Investment Law 2nd eds (Oxford University Press 2012), 270 – 275.

[118] Almost all were concluded since 2008 and include RTAs of Canada, Costa Rica, Japan, New Zealand, Peru and the United States.

[119] See UNCTAD Series on issues in international investment agreements, National Treatment (New York and Geneva 1999), 26.

[120] For example see Article 10.3 of India-Republic of Korea, which provides as follows:

> The treatment to be accorded by a Party under paragraphs 1 and 2 means, with respect to a regional or local government, treatment no less favourable than the most favourable treatment accorded, in like circumstances, by that regional or local government to investors, and to investments of investors, of the Party of which it forms a part.

7.2 Disciplines on the standard of treatment and domestic regulation

Unlike NT and MFN, which set relative standards of treatment of foreign investors – either in comparison to the treatment accorded to domestic investors or to that received by investors of third countries – the obligations discussed in this sub-section are absolute. They set a minimum threshold that a host state must fulfil in its treatment of investors of the other party, regardless of the regime provided to domestic or third country investors.

Although there are some insignificant discrepancies in identifying which obligations form part of this absolute standard, most commonly it is fair and equitable treatment (FET) and full protection and security (FPS). The reference to the standard may vary too: minimum standard of treatment[121]; general treatment[122]; treatment of investment.[123] Some agreements simply refer to FET and FPS.[124] Throughout this paper we refer to these provisions collectively as standard of treatment.

Very few agreements provide additional standard of treatment obligations that go beyond FET and FPS. These include provisions that prohibit arbitrary or discriminatory measures and the so-called umbrella clauses.[125]

7.2.1 Standard of treatment

The standard of treatment provision as understood in this survey covers two main obligations: FET and FPS. The former has emerged as an overarching investment protection guarantee encompassing the basic rule of law and good governance obligations.[126] The latter is linked to the physical security of the investor, prohibiting physical violence and harassment.

Standard of treatment features prominently in the surveyed RTAs. Out of 116 agreements with substantive investment chapters, 85 provide for both FET and FPS. There are also five RTAs with limited scope investment chapters that feature these obligations, providing no ISDS mechanism for their enforcement by the investor.[127]

Due to the brevity of standard of treatment provisions in investment agreements, the refining of their content, especially FET, has been largely left to ISDS tribunals. As the interpretations of various *ad hoc* tribunals have been plagued by inconsistencies, the precise content of FET remains difficult to establish. The positions among investment tribunals and commentators appear to be divided between two opposing interpretations, one holding that FET is limited to customary law and the other viewing it as a broad standard the scope of which is not exhausted by customary law.[128]

The point of reference in customary law to which the FET obligation can be "pegged" is not easy to identify. One of the earliest pronouncements on the issue came from the Mexico-United States General Claims Commission in the *Neer* case. The context of the case was the alleged

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[121] Article 1104 of the NAFTA.
[122] Article 60 of Japan-Mexico.
[123] Article 7 of ASEAN-China Investment Agreement.
[124] Article 132 of Peru-China.
[125] See Article 143(4) of China-New Zealand that provides:

> Neither Party shall take any unreasonable or discriminatory measures against the management, maintenance, use, enjoyment and disposal of the investments by the investors of the other Party.

For an umbrella clause see Article 87 of India-Japan that reads as follows:

> Each Party shall observe any obligation it may have entered into with regard to investment activities in its Area of investors of the other Party.

Umbrella clauses are very scarce in RTAs, but are found in several RTAs to which Japan and EFTA are parties. In response to rather contradictory case law on the interpretation of umbrella clauses, a number of RTAs (concluded predominantly by the US and Canada), prefer to include investment contracts and authorizations as an additional basis of an ISDS claim among its ISDS provisions (see Sub-section 12.1).

[126] However, see the discussion below on the difference between FET as an autonomous standard and FET linked to customary law.

[127] CEFTA, COMESA, ECOWAS, EFTA-Egypt and EFTA-Tunisia.

[128] For a more extensive discussion see Dolzer and Schreuer, *supra* fn 117, pp. 134 – 139; also M. Jacob and S. W. Schill, Fair and Equitable Treatment: Content, Practice, Method in Bungenberg et al (eds), International Investment Law: A Handbook, 704 – 713.

mistreatment by Mexico of a US national. The often-cited passage from the decision of the Commission holds that "…the treatment of an alien, in order to constitute an international delinquency, should amount to an outrage, to bad faith, to wilful neglect of duty, or to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency".[129] However, contemporary arbitral tribunals have not found themselves bound by the *Neer* standard (dating back to 1927) on account of the evolution of customary law.[130]

The debate about the relationship between standard of treatment and customary law has also found its way into treaty practice. Out of 85 standard of treatment provisions: 60 explicitly limit FET and FPS to customary international law, while 25 provide for FET and FPS as an autonomous standard that is not limited to customary international law.[131] A typical technique of drafting a limited standard of treatment provision is to include language expressly stating that the prescribed treatment is limited to and does not go beyond the customary international law minimum standard (of treatment of aliens).[132] A standard of treatment provision not limited to customary law omits such a qualification.[133]

In two-thirds of agreements, a limited standard of treatment provision refines FET by further specifying the obligations it encompasses, which in all such cases include the obligation not to deny justice in domestic judicial proceedings.[134] There is thus an articulation of a clear link between FET and the obligation to ensure a foreign investor receives a fair trial. Such a link has always existed under customary international law. Whether the content of the FET obligation expressly limited to customary international law includes only the obligation not to deny justice or whether it may include other obligations depends on the wording of the provision in each particular case.

In the 25 RTAs that contain a standard of treatment provision not limited to customary law the content of the obligation is less apparent from its text. This situation results in reduced certainty regarding host state obligations toward investors, as well as unpredictability in case of a dispute. On the face of it, an unqualified FET obligation could be very broad in scope, ranging from providing a stable regulatory framework to keeping specific promises to investors.[135] An obligation not to deny justice is covered by it too.

As our study shows, one way of circumscribing the scope of FET is explicitly linking it to customary international law in the text of an investment chapter. Another step towards achieving greater legal certainty, undertaken in the majority of the surveyed agreements with limited standard of treatment obligations, is to further state that FET includes denial of justice.[136] Among the

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[129] *LFH Neer and Pauline Neer v Mexico* (US v Mexico) (1926) 4 RIAA 60, 61-62.
[130] See for instance *ADF Group Inc. v USA*, Award, 9 January 2003, ICSID Case No. ARB (AF)/00/1, para. 179.
[131] 13 of such agreements have an Asian country among their parties and ten are agreements concluded by Chile and Panama with Central American countries.
[132] For instance, Article 91 of Japan-Philippines, which in relevant part provides:

> Each Party shall accord to investments of investors of the other Party treatment in accordance with international law, including fair and equitable treatment and full protection and security.
>
> Note: This Article prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to investments of investors of the other Party. The concepts of "fair and equitable treatment" and "full protection and security" do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens.

[133] See for example Article 48 of Pakistan-China that in relevant part provides:

1. Investments of investors of each Party shall all the time be accorded fair and equitable treatment in the territory of the other Party.

Note that the NAFTA's reference to international law in its Article 1105 was interpreted by the Free Trade Commission as resulting in a standard limited to customary law. See NAFTA Free Trade Commission, Notes of Interpretation of Certain Chapter 11 Provisions of 31 July 2001, Section B.

[134] The ASEAN Investment Agreement, ASEAN-China and China-Singapore are the only three agreements with the unlimited standard of treatment provision that specify elements of FET.

[135] See for example *Occidental v Ecuador*, Award of the 1 July 2004, para. 191; also *Eureko v Poland*, Partial Award of 19 August 2005, paras. 231 – 234. For an illustrative list of governmental actions considered by arbitral tribunals to violate FET see UNCTAD, Series on Issues in International Investment Agreements II, Fair and Equitable Treatment: A Sequel (New York and Geneva, 2012), pp.39-43.

[136] For instance, Article 10.5.2 of Korea-Singapore in relevant part provides as follows:

agreements beyond the scope of our study we note that a more comprehensive approach to drafting a standard of treatment provision is reflected in the CETA. Article 8.10 of the CETA provides a list of actions that would be considered a breach of FET and a bilateral mechanism to further refine its content by the CETA parties.

7.2.2 Hybrid obligations

Some RTAs mix the elements of absolute and relative standards in the text of the provision, which results in hybrid obligations. One such obligation, represented by agreements concluded by several Asian countries, particularly India and Japan, is the obligation to provide access to domestic courts. This provision requires a party not to discriminate against the investors of the other party in favour of its domestic investors or investors of third parties in granting access to courts of justice.[137]

While the nature of the obligation – access to courts – is reminiscent of the obligation not to deny justice (a component of the absolute standard of treatment), it appears to be drafted as a relative non-discrimination standard. As these agreements tend to also provide FET, the additional access to courts provision appears at first glance to reinforce it. Not only is there a minimum standard of treatment in providing access to courts required by FET; any improved access to courts granted to domestic investors or investors of a third country must be extended to investors of the other party.

On the other hand, one may argue that discrimination in granting access to courts is of itself a violation of the minimum standard required by FET. On this reading, the additional access to courts obligation may seem redundant. Whether any discrimination in granting access to courts to the detriment of a foreign investor is a violation of FET would of course depend on how broadly or narrowly it is interpreted. The relationship between these two provisions thus remains somewhat obscure.[138]

7.2.3 Domestic regulation

In this sub-section we discuss domestic regulation (DR) provisions, which in our study refer to RTA provisions that prescribe the obligations similar to those of Article VI of the GATS. As DR disciplines have been developed in the services context, they are most often found in services chapters.[139] However, we examine these provisions here due to their relevance in the assessment of obligations placed on domestic regulators in connection with investment in services.

With respect to investment protection, we focus particularly on the obligations to administer measures of general application in a reasonable, objective and impartial manner, and to have in place tribunals or procedures for the review of administrative decisions. Functionally, these two DR obligations are comparable to the FET obligation in investment chapters. There are however important differences between the two sets of rules.[140]

First of all, while FET applies to investment across all sectors, DR is limited to investment in services. Second, while the substantive coverage of the two mentioned DR obligations largely coincides with the FET provision formulated as a broad autonomous standard, a narrowly drafted

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> (a) The obligation to provide "fair and equitable treatment" includes the obligation not to deny justice in criminal, civil or administrative adjudicatory proceedings.

[137] Note 3 to Article 59 ("Most-Favoured-Nation Treatment") of Japan-Mexico prohibits discrimination in favour of investors of any third county requiring the parties to:

> accord to investors of the other Party treatment no less favourable than the treatment which it accords, in like circumstances, to its own investors or investors of a non-Party with respect to access to the courts of justice and administrative tribunals and agencies in all degrees of jurisdiction, both in pursuit and in defense of such investor's rights.

[138] In a similar vein, see Article 6 of Annex 1 of the SADC Protocol on Finance and Investment that links MFN to FET:

> 1. Investments and investors shall enjoy fair and equitable treatment in the territory of any State Party.
> 2. Treatment referred to in paragraph 1 shall be no less favourable than that granted to investors of the third State.

[139] Overall, there are 94 RTAs in our survey that contain DR provisions. Only 8 of them (6 of which are concluded by the EU) provide for a domestic regulation obligation applicable to all investment.

[140] For a comparison between the domestic regulation obligations of the GATS and FET see Molinuevo, *supra*, fn 100, pp. 135 – 189.

FET is likely to cover only the second DR obligation (to have procedures and tribunals for review of administrative decisions).[141] Third, the obligation to administer measures in a reasonable, objective and impartial manner is procedural in nature, requiring that the *administration* of the measures meets this standard and not that the measures themselves are objective and impartial.[142]

Thus, while the discussed DR obligations (found mainly in services chapters) are functionally comparable to the FET obligation (found in investment chapters), there are also some differences between these two sets of disciplines. The differences, however, do not appear fundamental, which over time may lead to the merger of these obligations into one provision.

7.3 Protection of investors in war and civil strife

An additional element of protection offered by 85 substantive investment chapters of the surveyed RTAs is the treatment of investors in the case of war or civil strife. The obligation that such provisions seek to impose is non-discriminatory treatment of the investors of the other party who have suffered a loss or damage as a result of armed conflict, civil strife, national emergency, riots and similar events. An example of such a provision is Article 9.11.1 of Peru-Republic of Korea:

> Each Party shall accord to investors of the other Party, and to covered investments, non-discriminatory treatment with respect to measures it adopts or maintains related to losses suffered by investments in its territory owing to armed conflict or civil strife

Some RTAs, such as Australia-Republic of Korea, go beyond the non-discrimination obligation and require that in case of a requisitioning or an unnecessary destruction of property by the host party's forces, it is obliged to offer compensation or restitution to investors of the other party, regardless of whether it compensates its own investors or investors of any third party.[143]

In normal circumstances, the discussed provision remains dormant, as only the extraordinary events referred to in its text trigger its operation. In those circumstances, it provides an additional element of investment protection. Although most such clauses do not impose any obligations beyond non-discrimination, those that additionally require compensation result in the strongest protection for investors.

7.4 Expropriation

Expropriation provisions are included in investment chapters of RTAs, and investment agreements generally, in order to protect against one of the most severe forms of state interference with investment – the taking of property. Expropriation provisions typically prohibit a host state from expropriating or nationalizing investment, either directly or indirectly through measures equivalent to expropriation or nationalization, unless it complies with certain conditions.

In our study we measure the key elements of an expropriation provision: its coverage of both direct and indirect forms of taking; the conditions under which expropriation is allowed; the standard of compensation to be provided in case expropriation occurs; and the scope of the language that limits the effect of expropriation in relation to measures of general application.

87 out of 116 RTAs with substantive investment chapters contain expropriation provisions that, with the exception of two, explicitly cover both its direct and indirect forms.[144] Most EU and EFTA agreements with third countries that have establishment-based investment chapters omit an expropriation provision.

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[141] Ibid, at 180.

[142] Ibid, at 161 referring to Appellate Body Report, EC – Bananas III, para. 200. However, the distinction between the measure itself and its application might not always be clear in practice.

[143] See Article 11.6 of Australia-Republic of Korea.

[144] The two agreements that do not make a textual reference to indirect expropriation are the SADC Protocol on Finance and Investment (Article 5 of Annex 1) and the EAC (Article 29). The omission of the reference to indirect forms of expropriation does not mean that they are not covered. This is a question of interpretation and it is very well possible that indirect expropriation is covered implicitly.

While expropriation provisions set forth the conditions under which a lawful expropriation may take place, they do not define the concept of expropriation. As can be distilled from the specialised literature on the subject, the direct form of expropriation entails either a formal transfer of the title to an asset from the investor to the state or an immediate seizure of the investor's assets by the state; the indirect form of expropriation is a state interference that is short of the two actions mentioned previously but has the same or similar effect on the investor.[145]

The indirect form of expropriation may be mentioned explicitly in the text of the expropriation provision, as in Article 10.13 of Korea-Chile, paragraph 1 of which provides that "[n]either Party may, directly or *indirectly*, nationalize or expropriate an investment of an investor of the other Party in its territory…" (emphasis added). Often, however, it is captured by formulations such as "measures equivalent to expropriation"[146], measures similar to expropriation,[147] or "measures having an effect equivalent to nationalization or expropriation".[148]

We have observed in the RTAs surveyed that all expropriation provisions provide for the same set of four conditions that have to be met in order for expropriation to be lawful: (i) it must be in the public interest; (ii) non-discriminatory; (iii) carried out in accordance with due process of law; (iv) and accompanied by the payment of compensation. Almost all of them require that the compensation to be paid in case of expropriation be prompt, adequate and effective, that is it should be paid in a timely manner, in a freely convertible currency, and represent the fair market value of the expropriated asset.[149]

Concerns have been voiced about the potential breadth of the concept of indirect expropriation, as interpreted by arbitral tribunals.[150] Interpreted broadly, indirect expropriation may result in an expansive discipline, catching host state regulatory measures of general application that to some degree interfere with investment. Thus in order to limit the breadth of the concept of indirect expropriation and prevent it from blocking normal regulatory activity, states have been including language to neutralise the effect of expropriation clauses on measures of general regulation.

We classify the language that limits the effect of expropriation clauses as broad or narrow. An example of narrow language is found in Article 1110(8) of the NAFTA, which clarifies that "a non-discriminatory measure of general application shall not be considered a measure tantamount to an expropriation of a debt security or loan covered by this Chapter solely on the ground that the measure imposes costs on the debtor that cause it to default on the debt". This qualification is narrow because it concerns only the measures of general application that affect a debt security or loan.

Following the 2004 review of the US Model BIT and the analogous process in Canada, these two countries began inserting into their investment chapters interpretative annexes with broader limitation language for expropriation. For instance, para. 4(b) of Annex 10-D to US-Chile (concluded in 2004) provides that "[e]xcept in rare circumstances, nondiscriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety, and the environment, do not constitute indirect expropriations." Many other countries negotiating investment chapters in their RTAs followed suit.

In total, about 60% of all expropriation provisions contain some sort of qualification on the scope of indirect expropriation.[151] In the prevailing majority of them the qualification is of the broader kind, formulated along the lines of Annex 10-D to US-Chile referred to above.[152] The prevailing

[145] See UNCTAD Series on International Investment Agreements II, Expropriation: A sequel (New York and Geneva 2012), 6-7.

[146] Article 82 of Chile-Japan.

[147] Article 8 of ASEAN-China.

[148] Article 812 of Canada-Peru.

[149] The two RTAs that deviate are EFTA-Singapore and the EAC. Article 42 of EFTA-Singapore only requires that the amount of compensation be settled in a freely convertible currency and paid without delay to the person entitled thereto without regard to its residence or domicile. Article 29 of the EAC requires the "prompt payment of reasonable and effective compensation".

[150] A comprehensive treatment of this issue may be found in UNCTAD Series on International Investment Agreements II, Expropriation (New York and Geneva 2012), 57 – 94.

[151] RTAs that do not provide for any limitation on the scope of indirect expropriation are predominantly those concluded by Asian countries, with almost a half of them intra-Asian agreements.

[152] Among the agreements that contain the narrow limitation clause are the following: five RTAs concluded by Panama with central American countries, the first of which (with El Salvador) predates the 2004

majority of investment chapters that contain such qualifications are modelled on Chapter 11 of the NAFTA.

Regarding the scope of expropriation, it is also interesting to note that approximately two-thirds of all expropriation provisions exclude certain IP-related measures from their scope.[153] A case in hand is Article 10.7 (Expropriation and Compensation) of US-Colombia, which states that it does not apply to "the issuance of compulsory licences granted in relation to intellectual property rights in accordance with the TRIPS Agreement, or to the revocation, limitation, or creation of intellectual property rights …". This exclusion is conditional on the consistency of "such issuance, revocation, limitation, or creation" with chapter sixteen (Intellectual Property Rights) of the agreement. Alternatively, the exclusion could also be made conditional on the consistency of the "issuance, revocation, limitation or creation" with the TRIPS Agreement, as for instance provided in Article 10.12 of Republic of Korea-India.

From the discussion above we have learnt that about three-quarters of RTAs provide for an expropriation provision in their investment chapters. With respect to the coverage of direct and indirect forms of expropriation, the conditions of lawfulness and the standard of expropriation, the provisions appear quite uniform. On this evidence, the standard of expropriation as described above seems to have received a high level of acceptance. The discussion has now shifted to finding ways for its coexistence with the regulatory needs of states.[154] The interpretative annexes, such as Annex 10-D to US-Chile, seek to reinvent the necessary balance between investment protection and state sovereignty.

7.5 Subrogation

In recognition of the risks a private company or an individual run when they invest in a foreign market, some states establish insurance programmes designed to protect their investors abroad.[155] In addition to state-run or state-supported schemes, private insurance operators also offer their services to potential investors. In the event an insurance event is triggered and an insurance company pays out, it legally acquires the investor's rights and obligations against the host state. In order to make such transfer of legal rights an automatic process for all practical purposes, about 50% of substantive investment chapters contain a subrogation clause.

The subrogation clause obliges the host state to recognize the transfer of rights and claims to the state of the investor’s nationality or its designated agency following the payment under an insurance contract or guarantee. In any dispute settlement proceedings, the insurer will thus substitute the investor with respect to a claim against the host state.[156]

Government supported insurance schemes have usually been designed to cover political risks. Thus, approximately half of all subrogation provisions limit their coverage only to insurance schemes that cover non-commercial risks.[157] It is unclear whether this limitation is significant in

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review of the US Model BIT; the NAFTA, Canada-Chile and Chile-Mexico – all concluded before the 2004 review; two agreements between Chinese Taipei and two central American countries.

[153] The majority of RTAs that do not exclude IP-related measures from the scope of expropriation have an Asian party, most often Japan.

[154] It is interesting to note in this respect that a push for more balanced investment protection provisions comes from both developed and developing countries. See UNCTAD IIA Issues Note, Taking Stock of IIA Reform, No. 1 (March 2016), 5-8.

[155] One of the most well-known of state-run insurance agencies is the United States Overseas Private Investment Corporation (OPIC).

[156] An example of a subrogation provision is Article 9.14.1 of Canada-Panama, which provides as follows:

> If a Party or an agency of a Party makes a payment to one of its investors under a guarantee or a contract of insurance it has entered into in respect of an investment, the other Party shall recognize the validity of the subrogation in favour of that Party or agency to a right or title held by the investor. The subrogated right or claim may not be greater than the original right or claim of the investor.

[157] An example of a limited subrogation clause is Article 10.15 of Republic of Korea-Singapore:

> Where a Party or an agency authorised by that Party has granted a contract of insurance or any form of financial guarantee against *non-commercial risks* with regard to an investment by one of its investors in the territory of the other Party and when payment has been made under this contract or financial guarantee by the former Party or the agency authorised by it, the latter

practice, as most events that may lead to a violation of an investment chapter and thus require subrogation are likely to be classified as non-commercial risks.

7.6 Conclusions

In this section we have discussed investment protection provisions. The most important of them are non-discrimination, minimum standard of treatment, domestic regulation and expropriation. We have also examined two additional investment protection elements – protection of investors in war, civil strife and similar events, and subrogation.

The non-discrimination obligations, represented by NT and MFN, have been relied upon by investors challenging host state measures less frequently than expropriation and minimum standard of treatment. Despite this fact, they constitute a significant part of the investment framework in most RTAs, ensuring that no discrimination to the detriment of treaty investors occurs. With respect to the procedural use of MFN, we have found that about a third of substantive investment chapters seek to eliminate such a possibility as an undesirable practice.

Disciplines on domestic regulation, akin to those found in Article VI of the GATS, are a typical feature of services chapters and are therefore applicable to investment in services. While the first two obligations of Article VI (as provided for in an RTA) arguably overlap with a broad FET obligation, a limited standard of treatment provision may at most cover only the obligation to set up tribunals or procedures for the review of administrative decisions. The functional similarity between the two sets of obligations may lead to their merger in one provision applicable to investment in all sectors.

Turning to some of the recently concluded agreements with investment chapters, we observe that some countries may be moving in this direction. For instance, Article 8.10 of the CETA provides *inter alia* the following elements of FET: denial of justice in criminal, civil or administrative proceedings; fundamental breach of due process, including a fundamental breach of transparency, in judicial and administrative proceedings; manifest arbitrariness; targeted discrimination on manifestly wrongful grounds, such as gender, race or religious belief; abusive treatment of investors, such as coercion, duress and harassment. The prohibition of arbitrariness, abusive treatment of investors and their targeted discrimination are reminiscent of the obligation to administer measures of domestic regulation in a reasonable, objective and impartial manner.

Regarding both standard of treatment and expropriation, states appear to be refining the content of these two provisions, seeking a greater balance between investment protection and state sovereignty. In the pursuit of this objective, more than two-thirds of standard of treatment provisions are limited to customary law, precluding its overly broad interpretation. The concept of denial of justice has crystallized into a key element of this standard. At the same time, about a third of standard of treatment provisions reflect a broad drafting.

It is also significant that about three-quarters of substantive investment chapters contain an expropriation provision. There is also a great degree of uniformity among them in setting the conditions of lawfulness and the standard of compensation. The area in which many states, led by the US and Canada, have been active since 2004 is making an expropriation provision compatible with the host states' regulatory space. Approximately a half of all expropriation provisions are supplemented by interpretative annexes that seek to carve out from the scope of indirect expropriation general non-discriminatory regulation pursuing legitimate objectives, even if it may interfere with investment.

8 PROVISIONS SUPPORTING THE INVESTMENT FRAMEWORK

We have classified several provisions as those that support the investment framework within an RTA. The distinction we maintain is not meant to denote the importance of the provisions and is used solely for analytical purposes. Thus, in this section we focus on transfers provisions, transparency and provisions on the temporary entry of natural persons.

Party shall recognise the rights of the former Party or the agency authorised by the Party by virtue of the principle of subrogation to the rights of the investor. (emphasis added)

8.1 Transfers

Provisions granting the free transfer of funds are a necessary component of RTAs seeking to establish an investment framework conducive to the liberalization of investment flows and the subsequent protection of the established investments. Almost all substantive investment chapters in our survey contain a transfer provision.[158] Although this has not been part of our study, we note that services chapters may also contain transfer provisions.[159] The relationship between transfer provisions in those cases is not always clear.[160]

Most transfer provisions in the investment chapters of RTAs appear to be quite uniform in permitting transfers into and out of the country, providing a list of the types of transfers (either exhaustively or illustratively) that are covered by the provision, and listing the permitted exceptions. About three-quarters of substantive investment chapters contain such a standardized transfer provision.

The transfers that must be permitted by the host state in accordance with a typical transfer provision in an investment chapter include *inter alia* the following: contributions to capital; profits, dividends, capital gains, and proceeds from the sale of an investment or its liquidation; compensation paid by the host state if it expropriates the investor's assets. Contributions to capital are made into a host state, while the rest of the mentioned transfers are out-of-country transfers.

The RTAs whose investment chapters provide for a transfer provision that is drafted differently include all the EU's and the majority of EFTA's RTAs with third countries that contain substantive investment chapters, as well as the EU Treaty, the EEA Agreement and the EFTA Convention.[161] The EU Treaty, the EEA Agreement and EFTA Convention provide for the freedom of movement of capital and payment, which functionally replaces a transfer provision.[162] The EU's RTAs with third countries follow a similar logic, containing provisions obliging the parties to allow capital movements.[163] EFTA agreements that belong to this group use the same technique.[164]

In case of a worsening of the macroeconomic situation, governments may resort to restrictions on transfers. Usually, such measures target out-of-country transfers, preventing capital flight that often accompanies acute financial crises. In order to preserve the ability of the host state to take such measures, the prevailing majority of RTAs that contain transfers provisions explicitly provide among others for a balance of payments exception to the obligation to allow transfers.[165]

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[158] Provisions that may structurally be located in other parts of an RTA but that are made explicitly applicable to transfers in relation to investment are included in the analysis here. Hong Kong, China-Chile; EFTA-Peru and SADC do not have a transfers provision.

[159] For instance, EFTA-Central America has a provision in the trade in services chapter (Article 4.14) stating that a Party shall not apply restrictions on international transfers and payments for current transactions with another Party, while in the investment chapter there is a provision stating that a Party shall not apply restrictions on current payments and capital movements relating to commercial presence activities in non-services sectors (Article 5.7).

[160] This is the case for instance in Pakistan-China where both the FTA's investment chapter (Article 51) and the Agreement on Trade in Services between Pakistan and China that covers mode 3 (Article 19) contain a transfer provision, and none of the agreements provides for a coordination clause. In some other agreements that have a transfer provision in both investment and services chapters that covers mode 3, the coordination clause determines their application (see for example Article 73 of Japan-Malaysia).

[161] In addition, this group includes several other agreements: EAC, New Zealand-Singapore, Pakistan-China, CEZ and West African Economic and Monetary Union. The notable exceptions among the EFTA agreements are EFTA-Republic of Korea and EFTA-Singapore.

[162] See Article 63 of the TFEU; Article 28 of the EFTA Convention; and Arts. 40 and 41 of the EEA Agreement.

[163] See for instance Article 123 of EU-CARIFORUM, which in the relevant part provides as follows:

> 1. With regard to transactions on the capital account of balance of payments, the Signatory CARIFORUM States and the EC Party undertake to impose no restrictions on the free movement of capital relating to direct investments made in accordance with the laws of the host country and investments established in accordance with the provisions of Title II, and the liquidation and repatriation of these capitals and of any profit stemming therefrom.

[164] See for example Article 4.7 of EFTA-Hong Kong, China:

> 1. Except under the circumstances envisaged in Article 4.8, a Party shall not apply restrictions on current payments and capital movements relating to commercial presence activities in non-services sectors.

[165] 86 RTAs out of 114 RTAs that contain transfers provisions.

8.2 Transparency

A commitment to transparency is a common feature of RTAs.[166] Almost all RTAs with substantive investment provisions contain transparency provisions applicable to state measures that affect investment. Interestingly enough, transparency obligations are located in only about one-quarter of substantive investment chapters. The majority of the agreements with substantive investment chapters locate transparency obligations in a separate chapter that applies across the entire agreement.

The scope of transparency obligations varies, ranging from the minimum requirements to publish or make all relevant measures publicly available and fulfil specific information requests from other parties to a more comprehensive set of obligations that *inter alia* impose requirements on the treatment of investors in administrative proceedings.[167]

For instance in US-Chile, a dedicated chapter on transparency contains rules on the publication of laws, regulations, procedures and administrative rulings of general application; the notification of any proposed and actual measures, and the provision of information pertaining to such measures; a provision on treatment in administrative proceedings; and a provision on reviews and appeals (maintenance of judicial or administrative tribunals or procedures for the prompt, objective and impartial review of administrative actions).[168]

Similarly in EU-Ukraine, the parties agree to prompt publication of all measures of general application in a non-discriminatory manner; advance publication of any proposed amendment together with a comment period; establishment of enquiry and contact points; and transparency with regard to administrative proceedings.[169]

An example of a relatively narrow transparency provision is Article 19 of the ASEAN-China Investment Agreement, requiring the parties to publish their regulations that affect investment; promptly and periodically notify the other parties about changes in their legislation applicable to investment; establish an information enquiry point; and notify the other parties of any future investment-related agreements or arrangements that result in preferential treatment of investment.

The wide presence of transparency provisions that cover investment matters demonstrates the importance that the negotiating partners place on transparency and its role in fostering a favourable investment environment.

8.3 Temporary entry of natural persons

Barriers to the entry of business visitors may hinder the operation of investment. Thus around 80% of RTAs with substantive investment chapters contain disciplines that require the parties to an agreement to allow temporary entry of natural persons in connection with an investment.[170] In about two-thirds of cases, such provisions are found in a separate chapter or annex.

A typical example of such disciplines is Chapter 12 of Canada-Colombia FTA entitled "Temporary Entry of Business Persons". Pursuant to this chapter, the parties are obliged to grant temporary entry to business persons of the other party engaged in the conduct of investment activities, subject to the relevant immigration measures. In RTAs where investment covers commercial presence, the movement of natural persons is often limited to those sectors in which the parties have made commitments.[171]

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[166] Note that this section does not discuss transparency in ISDS, which is covered in Sub-section 12.6.

[167] For an example of a comprehensive transparency obligation in an investment chapter see Article 13 Chapter 11 of ASEAN-Australia-New Zealand.

[168] Chapter Twenty of US-Chile.

[169] Chapter 12 of EU-Ukraine.

[170] In many cases these are designated chapters and annexes that may deal with a broader range of issues in addition to temporary entry of business visitors, such as access to employment. This study is limited to only those provisions that relate to temporary entry of natural persons.

[171] For instance see Article 4.9 of EFTA-Colombia.

8.4 Conclusions

In this section, we have reviewed the provisions that, while not being at the core of investment regulation, provide the necessary support for the investment framework set up by an RTA. Such provisions include transfers, transparency and movement of natural persons.

It is hardly surprising that all substantive investment chapters contain a transfer provision. The presence of transfer obligations serves as an additional guarantee that investors will be able to transfer capital necessary for the establishment and operation of investment in and out of the host country. Likewise, a high number of transparency obligations demonstrate the negotiating partners' belief that transparently administered rules help attract foreign investment. In a similar vein, provisions on the movement of natural persons – to facilitate temporary entry of business visitors in connection with investment – significantly contribute to an effective investment framework.

9 HOST STATE FLEXIBILITIES PROVISIONS

The obligations the parties undertake in their RTAs, especially in services and investment, tend to be quite far-reaching in terms of constraining the parties' regulatory policies. In order not to preclude regulatory interventions to address negative externalities, RTAs ensure that their parties retain a degree of regulatory flexibility. Below we review the provisions designed to allow for such flexibility: exceptions, special formalities and information requirements.

9.1 Exceptions

The common technique of allowing regulatory flexibility is the inclusion of exceptions, by which we mean provisions that may justify host state measures otherwise inconsistent with an obligation under an RTA. We focus on exceptions that may justify the non-compliance specifically with the investment obligations located in investment and services chapters.

Two categories of exceptions are reviewed here. First, RTAs usually contain general exceptions that apply across all chapters of the agreement. The catalogue of such exceptions is often identical or similar to the exceptions enumerated in Article XX of the GATT or Article XIV of the GATS. Second, RTAs typically provide for a national security exception akin to Article XXI of the GATT or Article XIV *bis* of the GATS applicable horizontally to all chapters of the RTA.

Out of 116 RTAs with substantive investment chapters, 83 contain some sort of general exception provision applicable to investment.[172] Almost a dozen RTAs carve out certain investment obligations from the general exceptions provision applicable to the investment chapter, most notably obligations concerning treatment in case of civil strife or armed conflict.[173] In the prevailing majority of RTAs where general exceptions apply to the investment chapter, all of its obligations are subject to such exceptions. In all RTAs with services chapters that cover mode 3, general exceptions apply to all the provisions of the services chapter.

It is worth noting that in RTAs that do not contain a broad limitation on the scope of indirect expropriation (as discussed in Sub-section 7.4), general exceptions may be an alternative way for the host state to regain regulatory space – which is of relevance in about half of substantive investment chapters. The availability of general exceptions also has an impact on the interpretation of other investment protection provisions aside from expropriation, in particular the standard of treatment. However, in terms of material scope, annexes on expropriation seem to encompass a broader spectrum of measures in comparison to general exceptions formulated along the lines of Article XX of the GATT or Article XIV of the GATS.

[172] Among them there is no RTA to which the US or Mexico is a party. However, their NAFTA partner Canada has five agreements where general exceptions apply to investment chapters. See the RTAs Canada concluded with Colombia, Honduras, Panama, Peru and Republic of Korea.

[173] Almost all of these agreements have Japan as a party. See for example Japan–Switzerland, where the general exceptions incorporating Article XIV of the GATS may not justify the violation of the expropriation provision, treatment in case of civil strife provision and the obligation to provide FET and not to impair investment by unreasonable or arbitrary measures (Article 95). In Japan-Philippines and Japan-Thailand, as well as Japan-Peru BIT incorporated into Japan-Peru, only the obligation relating to the protection of investment in case of strife or armed conflict is exempted from the general exceptions provision.

As for national security exceptions, they typically apply horizontally across the entire agreement, including its investment and services chapters.[174] National security exceptions are often drafted in a broad manner, leaving room for the host state to take measures *it considers* necessary to safeguard its essential security interests. Examples of such self-judging national security exceptions include Article 2102.1 of NAFTA or provisions incorporating Article XXI of the GATT 1994 or Article XIV bis of the GATS.[175] While the text of the mentioned articles limits the scope of the exception[176], some agreements adopt wording that allows a party to take measures for "the protection of its own essential security interests", with no explicit limitations on the range of potential measures.[177]

9.2 Special formalities and information requirements

About half of substantive investment chapters contain provisions that allow host states to maintain measures that fall into the categories of special formalities or information requirements. Often the two are grouped in one article. Special formalities may include residency requirements for investors or a requirement that investments be legally constituted under the laws or regulations of the host state.[178] The application of host state formalities is usually permitted on condition that they do not materially impair the investment protections afforded by the RTA in question. The permitted information requirements may include the requirement of the host state that the investment or investor provide routine information for informational or statistical purposes. In collecting such information, the host state must guarantee the protection of sensitive business information.

9.3 Conclusions

As the disciplines on investment and services undertaken by the parties to an RTA are far-reaching by their very nature in imposing constraints on the domestic policies of host states, RTAs tend to carve out regulatory flexibilities. These typically include exceptions, special formalities and information requirements. The extent to which investors are affected by such flexibilities varies.

The strongest type of flexibility in its impact on the investor is an exceptions provision. If a state measure falls within the scope of such a provision and meets the prescribed conditions it will not lead to a breach of an RTA, despite its detrimental impact on investment. At the same time, exceptions provisions are drafted to address only a limited number of negative externalities, which means they cannot be used as blanket defences for any measure with an adverse impact on investment. The requirements for a measure to be justified by an exception vary, with national security exceptions usually providing the broadest scope of discretion to the host state.

The two other forms of flexibility – provisions on special formalities and information requirements – add certainty regarding the permitted level of regulation. While most such formalities and information requirements are not likely to have any substantive detrimental impact on investment, a rigorous application of some of them might in some cases result in unnecessary barriers, for example an overly formalistic application of domestic legislation regarding a particular form in which investment must be made.[179]

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[174] EFTA-Colombia, EFTA-Republic of Korea, EFTA-Peru, EFTA-Ukraine, Pakistan-China and SADC appear not to contain a national security exception applicable to the investment chapter.

[175] See for instance Japan-Peru, in which Article XXI of the GATT 1994 and Article XIV bis of the GATS are incorporated mutatis mutandis in the text of the agreement.

[176] Similar to Article XXI of GATT and Article XIV bis of GATS, the scope of Article 2102.1 of the NAFTA is limited to measures protecting international peace or relating to traffic in arms, wartime, emergencies in international relations or directed at the non-proliferation of nuclear weapons.

[177] As exemplified by the US 2004 Model BIT as well as US-Chile and US-Singapore, which entered into force the same year.

[178] In connection with the requirement that an investment be legally constituted under the law of the host state, it is interesting to note that in case of a dispute, it may become a jurisdictional issue determining whether the investor is entitled to benefit from the treaty. See for example Incyesa Vallisoletana S.L. v El Salvador, ICSID Case No. ARB/03/26, Award of 2 August 2006, paras. 145–161; also Fraport AG Frankfurt Airport Worldwide v Philippines, ICSID Case No. ARB/03/25, Award of 16 August 2007, paras. 401-404.

[179] For an example of the host state relying on the formalistic application of its domestic legislation requirements to the name of a locally incorporated company (ultimately rejected by the tribunal) see *Tokios Tokeles v Ukraine*, Decision on Jurisdiction of 29 April 2004, paras. 84-84.

10 INVESTMENT PROMOTION AND INSTITUTIONAL COOPERATION PROVISIONS

About a third of all RTAs in our study contain provisions on investment promotion.[180] This number includes RTAs that contain no substantive investment chapter; in fact, about half of such clauses were found in RTAs with coverage of trade in goods only.[181] Typical promotion clauses may require a party to "promote investments in its territory"[182], adopt programmes for the promotion of cross-border investment[183] and "endeavour to … maintain favourable and transparent" [184] investment conditions for investors of the other party.

Specific examples of promotion activities may include exchanges of information on investment opportunities between the parties[185] and the establishment of linkages between the parties' investment agencies.[186] More elaborate provisions on cooperation may foresee setting up of joint ventures, technology transfers and the exchange of expertise, technical assistance and capacity building, amongst others.[187] Investment promotion may moreover extend to any field of investment or be limited to specific sectors only.[188] Moreover, for RTAs that contain no substantive investment provisions, investment promotion may be a way for parties to pave the way for prospective liberalization in this area.

Investment promotion obligations are often formulated in a broad manner, leaving states with ample discretion as to their implementation. Their efficiency almost entirely depends on the good faith efforts of the parties to an RTA.

Agreements with investment chapters sometimes provide for the establishment of a standing institutional body specific to international investment. This mechanism, most often established in the form of a sub-committee instituted under the framework of the RTA and under the supervision of an RTA Committee, can serve as a useful platform for monitoring the effective implementation of investment promotion goals and overseeing further liberalization efforts undertaken by the parties.[189] 40 RTAs with investment chapters set forth such an institutional mechanism.

11 PROVISIONS ON SUSTAINABLE AND SOCIALLY RESPONSIBLE INVESTMENT

In this section we examine the way in which RTAs integrate sustainable development and corporate social responsibility into the investment framework. In particular, we checked for provisions in the text of agreements beyond preambular language that refer to issues such as the environment, public health, labour standards or corporate social responsibility.[190] Overall, we

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[180] References to investment promotion in the preamble of the RTA or amid the list of cooperation goals set forth by the parties do not constitute investment promotion provisions for the purpose of this survey.

[181] See for instance the COMESA, SAFTA and SADC, as well as a large number of RTAs concluded by the EU, EFTA and Turkey that were notified to the WTO as covering trade in goods only.

[182] See for instance Annex 1, Article 2 of SADC.

[183] See for instance Article 159 of COMESA.

[184] See for instance Article 51 of ASEAN-Japan.

[185] See for instance Article 26 of EFTA-Lebanon, as well as Articles 25 of EFTA-Egypt and 39 of Tunisia-Turkey. The two latter RTAs foresee commitments undertaken by the *home* state regarding the provision of information on technical assistance, financial support or investment insurance in view of promoting investments by its nationals abroad.

[186] See for instance Article 151 of China-New Zealand.

[187] UNCTAD, Investment promotion provisions in international investment agreements, UNCTAD Series on Issues in International Investment Agreements I (Geneva, 2008), p.5.

[188] The fields in question may concern the energy and natural resources sector or the food supply sector, as in Japan-Indonesia and Japan-Australia respectively.

[189] Sub-committees on investment are typically charged with reviewing and monitoring the implementation of the investment chapter, identifying measures for promoting investment flows and contributing to greater transparency, reviewing the specific reservations negotiated between the parties as well as discussing or carrying out any other function delegated to it by the Joint Committee in the framework of the RTA. For examples, see Article 150 of China-New Zealand or Article 75 of Japan-Indonesia.

[190] While we did not look for provisions on sustainable investment contained beyond the RTA text itself, side-agreements on environmental or labour issues are a relatively frequent supplement to trade and investment agreements. For examples of side agreements, see the North American Agreement on Labor Cooperation (NAALC) and the North American Agreement on Environmental Cooperation (NAAEC), which are both side-agreements to the NAFTA; see also Article 18.9 of Republic of Korea-Singapore or Article 108 of Chile-China, which foresee cooperation on various issues of social concern through freestanding memoranda of understanding.

found that about two-thirds of the RTAs that contain investment chapters provide for provisions of this kind.

We found that a number of RTAs adopt provisions that affirm the host state's "right to regulate" in favour of public interests through measures *otherwise consistent* with its investment obligations under the treaty.[191] The language of such clauses seems to be aimed at preserving policy space but comes short of an exception, as it does not allow the parties to derogate from the RTA's substantive obligations. Concerns of this nature may also be addressed through clauses that prohibit or discourage the parties from lowering certain standards in order to attract foreign investment. To prevent the erosion of existing health, environmental or labour standards, the parties to an RTA may adopt provisions that seek to uphold such standards in the context of their investment framework.[192]

A number of RTAs also contain provisions on maintaining or implementing a set of internationally recognized standards. Thus, for instance, some RTAs include references to the fundamental labour principles elaborated by the International Labour Organization (ILO)[193] or encourage compliance with social corporate responsibility standards.[194] Finally, numerous RTAs include commitments to cooperate on matters of social concern and enumerate in particular in which areas cooperation should take place. Thus, the parties may agree to cooperate on labour issues and the environment or against bribery and corruption[195], taking into account "their national priorities and available resources".[196]

The provisions discussed above remain largely aspirational and rarely contain concrete policies and mechanisms for their implementation. They may nevertheless provide useful guidance for ISDS tribunals in case of investment-related disputes. More recent RTAs tend to contain sustainability provisions in both the investment chapter and a specifically dedicated chapter, and spell out in greater detail the relevance of various international standards and their commitments to them, as well as deeper cooperation in these areas.[197] This is certainly a welcome development from the perspective of promoting sustainable investment.

12 INVESTOR-STATE DISPUTE SETTLEMENT

In order to strengthen their commitment to investment protection, states include investor-to-State dispute settlement in their RTAs. In our survey, 85 of 116 RTAs (almost 75%) with substantive

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Moreover, references to non-commercial concerns in the preambles, general exceptions, the prohibition of performance requirements or expropriation provisions and corresponding annexes are not included in our analysis here. Examples of references to sustainable development, environment, living standards and other issues of social concern in the preambles of RTAs are ample and have been accepted as valid inputs to the interpretative process of treaty provisions in case-law, namely under NAFTA arbitrations. See in particular S.D. Myers, Inc. v. Canada, UNICTRAL (NAFTA), Partial Award, 13 Nov. 2000, para. 220.

[191] See for instance Article 1114.1 of NAFTA, Article 9-15.1 of Chile-Mexico, Article 4.8 of EFTA-Ukraine, and many others.

[192] See for instance Article 1114.2 of NAFTA, Article G-14.2 of Canada-Chile, Article 9-15.2 of Chile-Mexico, Article 73 of EU-CARIFORUM, Article 101 of Japan-Switzerland, amongst many others

[193] See for instance Article 19.2 of US-Republic of Korea, Article 16.1 of US-CAFTA-DR, amongst others.

[194] See for instance Articles 810 of Canada-Peru or 816 of Canada-Colombia, which encourage but do not compel the adoption of international standards. Reference to concrete standards in the text of the agreement, for instance the OECD Guidelines for Multinational Enterprises, remains rather infrequent: for figures on this and other types of sustainable clauses, see K. Gordon, J. Pohl and M. Bouchard (2014), Investment Treaty Law, Sustainable Development and Responsible Business Conduct: A Fact Finding Survey (OECD Working Papers on International Investment, OECD Publishing, 2014/01), p.18.

For an example of a provision on corporate social responsibility see Article 8.16 of Canada-Republic of Korea, which provides as follows:

> Each Party should encourage enterprises operating within its territory or subject to its jurisdiction to voluntarily incorporate internationally recognised standards of corporate social responsibility in their practices and their internal policies, including statements of principle that are endorsed or supported by the Parties. These principles address issues such as labour, environment, human rights, community relations, and anti-corruption.

[195] See for instance Japan-Philippines, Japan-India, EU-CARIFORUM, US-Oman, US-Morocco, US-Singapore, Chile-Colombia, Canada-Peru, amongst others.

[196] Article 14.9 of Costa Rica-Singapore; see also Article 20.8 of US-Republic of Korea, Article 103 of Japan-Philippines, and others.

[197] See for instance chapters on labour and environment in US-Singapore, Australia-Republic of Korea or Canada-Peru.

investment chapters provide for ISDS; the remaining agreements[198] leave the resolution of investment-related disputes to their inter-state dispute settlement procedures.[199] The extent of detail in ISDS provisions negotiated between the parties varies from one RTA to another, at times encompassed in one succinct provision and in others extending to highly comprehensive sections with additional annexes and clarifications.[200] Nevertheless, a general trend is towards more detailed procedural rules. This section focuses on variations in the drafting of the main ISDS provisions.

12.1 The material scope of ISDS

In the sub-sections below we examine the material scope of ISDS, that is the range of issues that may be considered by an arbitral tribunal. In the RTAs that provide for ISDS, the material scope to which the ISDS mechanism extends varies considerably.

12.1.1 Investment chapter provisions

ISDS is the mechanism designed for the resolution of disputes about investment chapter obligations. Investment liberalization provisions found in services chapters are thus not subject to ISDS. Where certain provisions from the CBTS chapter are made applicable to investment – such as market access or domestic regulation provisions – they will also by implication fall outside the material scope of ISDS.

About three-quarters of RTAs that provide for ISDS subject the entirety of their investment chapter obligations to ISDS. The remaining RTAs list the provisions for which ISDS is made available or explicitly exclude specific investment provisions from ISDS.[201]

16 RTAs exclude access to ISDS for claims relating to investment liberalization provisions of the investment chapter.[202] Most of these RTAs do so by allowing a claim to be based on a breach that relates to "the management, conduct, operation or sale or other disposition of an investment"[203], thereby implicitly excluding obligations concerning the establishment and acquisition of investment (i.e. investment liberalization disciplines) from ISDS coverage. In such instances, the investor is prevented from seeking arbitral review of the compliance by the host state with its liberalization obligations, which may undermine the liberalization commitments negotiated in the RTA.

12.1.2 Investment contracts

A number of RTAs (particularly those concluded by the US and Canada[204]) extends ISDS beyond the provisions of the investment chapter to obligations contained in contracts concluded by the investor with the host state or in authorizations granted by its authorities, on which the investor relied in establishing the investment.[205] Investment contracts may by definition be limited to

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[198] These are principally EU and EFTA RTAs, but see also COMESA, ECOWAS, CARICOM and the EAC.

[199] This section discusses only ISDS, as a mechanism specific to the resolution of investment disputes. State-to-State dispute settlement mechanisms provided by RTAs are generally available for any matter covered by the agreement, including investment. For a full discussion of the latter mechanism See C. Chase, A. Yanovich, J. Crawford, and P. Ugaz, Mapping of Dispute Settlement Mechanisms in Regional Trade Agreements – Innovative or Variations on a Theme?, WTO Staff Working Paper (Geneva 2013).

[200] Contrast for instance Article 54 of Pakistan-China, where ISDS provisions extend to a total of one article comprised of four paragraphs, with US-CAFTA-DR, where the ISDS Section extends to twelve pages and four separate annexes.

[201] See for instance Article 85 para. 17 of Japan-Malaysia, which excludes from ISDS disputes on national treatment and the prohibition of performance requirements.

[202] These are agreements concluded predominantly by ASEAN countries. Apart from several RTAs to which ASEAN is a contracting party, RTAs that exclude establishment from ISDS include Republic of Korea-New Zealand, Brunei Darussalam-Japan, Japan-Thailand and Chile-Central America. For a discussion of investment liberalization provisions see Section 6. This number does not include RTAs that do not contain investment liberalisation provisions.

[203] See Article 20 (Chapter 11) of ASEAN-Australia-New Zealand.

[204] Apart from RTAs to which the US and Canada are parties, investment contracts are included in Australia-Republic of Korea and Nicaragua-Chinese Taipei.

[205] See for instance Article 11.28 of US-Republic of Korea, which defines an 'investment agreement' as "a written agreement between a national authority of a Party and a covered investment or an investor of the other Party, on which the covered investment or the investor relies in establishing or acquiring a covered

specific sectors, such as the exploitation of natural resources, the development of infrastructure projects or the supply of services to the public on behalf of a state.[206] A particularity inherent to Canadian RTAs is the extension of ISDS to so-called legal stability agreements that accord certain benefits including, but not limited to, stabilizing tax regimes in favour of foreign investors and their investments during a specified period of time.[207] Recall our discussion in Sub-section 5.2 on the exclusions from the scope of investment chapters concerning taxation measures. While the investment chapter of an RTA may have limited coverage of taxation issues, the taxation measures falling within the scope of a stabilization contract will thus become arbitrable by virtue of the inclusion of these contracts within the ambit of ISDS.

Overall, 14 RTAs expressly provide an additional cause of action on the basis of a breach of such investment contracts or authorisations. As a relatively new (post-2004) feature found primarily in US and Canadian agreements[208], it presents a straightforward solution to the ambiguity traditionally surrounding the arbitrability of investment contracts under investment agreements, and allows the claimant to invoke any breach of the relevant contract in arbitration proceedings.[209]

It is interesting to note that certain agreements do so implicitly by encompassing various types of contracts, such as "turnkey, construction, management, production, concession, revenue-sharing, and other similar contracts", within their definition of investment.[210] Furthermore, as seen in Sub-section 7.2, RTAs may also include umbrella clauses that arguably elevate a breach of an investment contract to the treaty level in a similar manner. However, the enforceability of investment contracts through ISDS in the latter two cases is less foreseeable and their impact may depend entirely on the interpretation adopted by an arbitral tribunal in a particular case.

12.1.3 Exclusions and limitations on the material scope of ISDS

12.1.3.1 Exclusion of screening decisions

Through provisions permitting states to screen investment, RTA parties retain their discretion to regulate the entry and establishment of foreign investors. Screening may entail a formal review process prior to the establishment of an investment and take the form of restrictions on the acquisition of stakes in local enterprises or limitations on foreign ownership and control, particularly when fixed thresholds are exceeded. These are often unilateral measures, reserved by parties with specific reference to applicable domestic legislation in the text of the agreement or in the schedules of reservations.[211]

Some RTAs, in particular those involving Canada and Mexico, tend to unilaterally exclude screening decisions from ISDS in the text of the agreement.[212] Screening decisions may also be excluded

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investment other than the written agreement itself, that grants rights to the covered investment or investor" with regard to certain activities and sectors.

Furthermore, it defines an investment authorization as "an authorization that the foreign investment authority of a Party grants to a covered investment or an investor of the other Party".

[206] See for instance Article 10.28 of US-Colombia or Article 11.28 of Australia-Republic of Korea.

[207] See for instance Article 847 of Canada-Peru; see also Canada-Colombia and Canada-Honduras.

[208] See also Australia-Republic of Korea and Nicaragua-Chinese Taipei. Recall our discussion in Sub-section 5.2 that taxation itself may be fully or partially excluded from the coverage of an investment chapter.

[209] For a discussion of the inconsistencies of case-law with regard to umbrella clauses, see K. Yannaca-Small, *Interpretation of the Umbrella Clause in Investment Agreements,* OECD Working Papers on International Investment (2006); S. Alexandrov, *Breach of Treaty Claims and Breach of Contract Claims: Is It Still Unknown Territory?* in Arbitration Under International Investment Agreements: A Guide to the Key Issues, ed. K. Yannaca-Small (Oxford: Oxford University Press, 2010).

[210] Article 10.1 para. 6 Peru-Singapore; see also Article 9-01 of Chile-Mexico, Article 135 of China-New Zealand, Article 126 of Peru-China, Article 46 of Pakistan-China, Article 10.39 of Panama-Chinese Taipei, amongst others.

[211] See for instance Canadian RTAs, which very often contain such a clause, as exemplified by Annex 844.1 para. 1 of Canada-Peru:

> 1. A decision by Canada following a review under the Investment Canada Act (1985, ch. 28, 1st supp.), with respect to whether or not permit an acquisition that is subject to review, shall not be subject to the dispute settlement provisions of Section B of this Chapter or of Chapter Twenty-One (Dispute Settlement).

[212] Besides Canadian and Mexican RTAs, similar clauses excluding screening measures from ISDS were found in Thailand-Australia and Thailand-New Zealand. Chile's RTAs tend to contain annexes with a similar

from the arbitral tribunal's review if taken for national security reasons, even in cases where no specific reference to the relevant legislation of a state is made.[213]

12.1.3.2 National security measures

As seen in Sub-section 9.1, a large number of RTAs provide for exceptions that allow states to protect their national security interests. The extent to which national security measures are subject to review in ISDS varies. Nonetheless, the trend in treaty practice seems to be moving towards restricting the arbitral review of such measures. Broadly formulated or self-judging national security exceptions (as discussed in Sub-section 9.1) implicitly limit the scope of arbitral review, allowing the parties to take measures that they consider necessary for the protection of their security interests.[214]

Another method of limiting arbitral review of national security measures is to explicitly affirm the non-justiciable character of any measure for which a party invokes a security exception: a trend recurrent in several post-2005 Indian RTAs.[215] Furthermore, some recent US RTAs tend to contain a clarification applicable to the essential security exception that obliges the arbitral tribunal to "find that the exception applies" if a measure for which a party is invoking the exception is challenged in ISDS proceedings.[216] As these formulations leave the discretion of choosing the appropriate measure to the parties, they too leave little room for arbitral review.

While the extent to which the different techniques used by states limit, or remove entirely, the review of national security measures under ISDS remains unclear, all of them reflect a general trend towards limiting the exposure of national security measures to ISDS review.[217]

12.1.3.3 Disputes relating to public debt

Perhaps drawing on the experience following the Argentine crisis of 2001, certain states have developed provisions addressing situations of sovereign debt default and debt restructuring. Nine post-2004 RTAs concluded by Latin American countries limit state consent to ISDS with regard to disputes concerning public debt.[218] These limitations restrict disputes only to non-negotiated public debt restructurings or to claims of breaches of NT and MFN obligations, or impose longer waiting periods on bondholders prior to the submission of their claim to arbitration.

The increasing presence of specific annexes or provisions on public debt suggests a relatively new trend towards greater protection of host state interests.[219] Such provisions can offer states the

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reservation in favour of its Foreign Investment Statute and any future investment screening regime, albeit without an explicit exclusion from ISDS.

[213] See for instance Article 9-39 of Mexico-Chile or Annex 10.44 of Canada-Honduras; examples of provisions are largely based on Article 1138.1 of the NAFTA.

[214] M. Sornarajah, *The International Law on Foreign Investment* (Cambridge University Press, New York, 2010), p.458. The self-judging nature of an exception came under much scrutiny in a string of ISDS cases opposing investors to Argentina. In this respect, the tribunal in CMS v. Argentina (*CMS Gas Transmission Company v. The Republic of Argentina*, ICSID Case No. ARB/01/8, Decision of the *Ad Hoc* Committee on the Application for Annulment of the Argentine Republic, 25 September 2007, para. 370) and Sempra v. Argentina (*Sempra Energy International v. The Argentine Republic*, ICSID Case No. ARB/02/16, Decision on the Argentine Republic's Application for Annulment of the Award, 9 June 2010, para. 379) namely found that if States wish to reserve a right to determine unilaterally the legitimacy of extraordinary measures, they have to make the applicable exceptions "expressly" self-judging.

[215] India-Japan, India-Malaysia, India-Singapore, India-Republic of Korea. However, see Article 96 para. 18 of India-Japan, which excludes any review of the merits, except for claims arising from provisions on the protection of investors in cases of civil strife or armed conflict.

[216] US-Colombia, US-Panama, US-Peru.

[217] It is not impossible, albeit rather infrequent, for states to go as far as to exclude measures limiting investments in their territory "for reasons of public order or national security" from the scope of the investment chapter altogether. Such exclusions remain extremely rare; examples may be found in RTAs concluded by Chinese Taipei (El Salvador-Honduras-Chinese Taipei, Panama-Chinese Taipei, Guatemala-Chinese Taipei).

[218] Peru appears to be the predominant user of these provisions; such limitations were also found in US-CAFTA-DR, Nicaragua-Chinese Taipei, US-Chile and US-Colombia.

[219] Note also that the TPP and CETA, which are not included in our study, both contain similar annexes on public debt.

adequate flexibility during times of economic and financial crises or sovereign debt default, and even facilitate the gradual economic recovery of the debtor state.[220]

The low incidence of such provisions or annexes does not necessarily mean that public debt disputes will be arbitrable under all other RTAs. For instance, under RTAs that exclude sovereign debt or "public debt operations" from their definitions of investment, an arbitral tribunal will not be able to review claims relating to public debt as an issue falling outside the RTA's subject matter.[221]

12.2 Temporal elements and limitations

12.2.1 Limitation periods for the submission of claims

The vast majority of RTAs limit the exposure of states to investment disputes by setting forth time limits within which investors must submit their claims. These specified time periods are calculated from the date on which an investor first acquired, or should have first acquired, knowledge of the alleged breach and incurred loss or damage. Three-quarters of RTAs that contain ISDS provide for a limitation period of three years.[222]

12.2.2 Cooling off / waiting periods

All the RTAs that provide for ISDS include a cooling-off or waiting period that must lapse before the initiation of ISDS proceedings and during which the disputing parties may turn to consultations or negotiations as a means of resolving the dispute. A six-month or 180-day cooling off period is prevalent, with 85% of RTAs with ISDS prescribing it.[223]

The mandatory nature of preliminary consultations varies. While some RTAs stipulate that the disputing parties "shall" or "must" hold consultations[224] for a specified period prior to arbitral proceedings, others state that the parties "should" initially seek to resolve the dispute amicably[225] or indicate that this should be done "as far as possible"[226]; other RTAs do not explicitly require the disputing parties to engage in consultations at all. While the inclusion of cooling-off periods as a procedural requirement provides the disputing parties with an opportunity and an adequate timeframe for settling disputes amicably, its excessively rigorous application may unnecessarily hinder the investor's access to ISDS.[227]

12.3 Preliminary referral mechanisms

In cases where taxation is not excluded from the expropriation obligations of the investment chapter, numerous RTAs contain a preliminary referral mechanism for taxation measures. Such mechanisms submit the question of whether the taxation measure has an effect equivalent to expropriation for the consideration by the parties' tax authorities, before its review under ISDS. Pioneered by the NAFTA, this mechanism is present in about 60% of the RTAs that provide for ISDS.

A similar mechanism for financial services measures is found in slightly more than a third of RTAs with ISDS.[228] This mechanism obliges the disputing parties to refer to a competent committee the

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[220] For a more thorough discussion on the treatment of Sovereign Debt in International Investment Agreements, see UNCTAD, IIA Issues Note No. 2 of July 2011, *Sovereign Debt Restructuring and International Investment Agreements.*

[221] See our analysis in Sub-section 5.1.

[222] Other periods are possible too: two years for Japan-Thailand; 39 months for Canada-Colombia, Canada-Peru, Chile-Colombia; five years for EFTA-Republic of Korea, Japan-Switzerland; and three and a half years for Republic of Korea-New Zealand. 8 RTAs do not contain limitation periods, potentially exposing the parties to claims unlimited in time.

[223] However these periods may also be shorter: five months as in Japanese RTAs or three months as in Thailand-Australia.

[224] See for instance Canada-Panama, El-Salvador-Honduras-Chinese Taipei, Thailand-New Zealand, amongst others.

[225] See for instance Canada-Chile, US-Morocco, Japan-Mexico, amongst others.

[226] See for instance Japan-Singapore, Peru-China, ASEAN-Australia-New Zealand, amongst others.

[227] For example, in the situations where there is no prospect of amicable settlement of a dispute.

[228] Such RTAs explicitly make ISDS available for investment disputes in financial services.

question of whether the challenged measure is justified by prudential reasons, thus better acknowledging the regulatory sensitivities of financial markets.

12.4 Interaction with other dispute settlement proceedings

The prevailing majority of RTAs regulate the interaction of ISDS with other proceedings, be it domestic or international. Almost all RTAs that provide for ISDS contain at least one provision with regard to this interaction, with great diversity between the types of provisions negotiated. Most of the clauses mentioned below are in one way or another geared toward mitigating the risks associated with multiple or parallel claims which may include conflicting decisions, double recovery obtained by investors, as well as the increased costs of responding to multiple claims.

A significant number of RTAs requires the claimant to submit a waiver of the "right to initiate or continue" any proceeding concerning a breach of the investment chapter before the domestic courts or any other dispute settlement procedures.[229] Often instituted in the form of a condition precedent, the waiver must be attached to the notice of arbitration. In principle, therefore, the investor is free to pursue any and all remedies prior to ISDS; however, once international arbitration has been selected, the claimant must formally forsake his right to resort to or pursue any other form of dispute resolution.[230]

Under some RTAs, so-called 'fork-in-the-road' clauses require the claimant to choose one of the fora available under the RTA to the exclusion of all others.[231] Unlike the waiver requirement, this choice must been made at the outset, as the selection of a particular forum will be final. Thus, by initiating proceedings before the domestic courts of the host state, investors lose their right of recourse to arbitration (and vice versa).[232] Some RTAs do not exclude recourse to certain fora at the outset, but rather require the claimant to withdraw from any pending domestic proceedings before a final (domestic) judgment has been rendered or within a certain period of time from the submission of the claim to arbitration.[233]

The aforementioned provisions do not preclude the investor from seeking injunctive relief in front of domestic courts and tribunals, if such relief does not include the payment of monetary damages or the resolution of the substance of the matter in dispute.

The vast majority of RTAs also foresees the consolidation of related proceedings arising from the same circumstances or sharing a question of law or fact. Such provisions may be a useful tool of procedural economy. They are particularly relevant for managing claims emanating from different entities (including claims brought by different subsidiaries or shareholders of the same investor). However, their efficiency in practice often depends on the procedural requirements, as often consolidation is subject to the consent of the disputing parties.[234]

From a policy perspective, the requirement that an investor waives its right to initiate or continue other dispute settlement proceedings before submitting a claim to ISDS seems like the most balanced solution. It significantly reduces the risk of multiple or consecutive proceedings, without

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[229] See Article 11.18 para. 2 Australia-Republic of Korea; for a different formulation see for instance Article 10.21 para. 7 of New Zealand-Malaysia.

[230] C. McLachlan / L. Shore / M. Weiniger, *International Investment Arbitration: Substantive Principles* (Oxford: Oxford University Press, 2008), 4.52.

[231] See for instance ASEAN-India, ASEAN-Republic of Korea, Panama-Singapore, Japan-Peru, New-Zealand-Malaysia, amongst others.

[232] Even though not included in our survey, we note that certain RTAs also contain annexes applicable unilaterally to one or more parties of the RTA in situations where the domestic courts or tribunals of one of the parties are seized for the settlement of the dispute; in such cases, the investor is barred from subsequently submitting the dispute to international arbitration. See for instance Annex 10.23 of Canada-Honduras, which provides that once a Canadian investor has submitted the dispute to the competent courts or administrative tribunals of Honduras, the investor is barred from seeking relief through arbitration in the fora available under the RTA's investment chapter. See also Annex 10-E of US-Morocco, according to which a US investor may not initiate arbitration against Morocco unless at least one year has elapsed from the date on which proceedings in Moroccan courts or tribunals were initiated.

[233] See for instance ASEAN-China, China-New Zealand, India-Japan.

[234] As an alternative to consolidation, the disputing parties may be invited to appoint the same arbitrators all the while maintaining two separate proceedings.

eliminating prior recourse to the domestic courts and tribunals of the host State.[235] Fork-in-the-road type provisions seem more restrictive and may operate to discourage recourse to domestic courts, even in situations where these courts may be in a better position to provide effective redress.

In contrast to the provisions that are primarily aimed at the coordination of different dispute settlement mechanisms, some RTAs require prior recourse to, or the exhaustion of, domestic procedures.[236] Thus, although quite rare, it is possible for RTA partners to agree on the exhaustion of local judicial remedies as a condition for the submission of a claim to ISDS, thereby potentially limiting the investor's right to effective redress.[237] More frequent are requirements of domestic administrative review procedures or the exhaustion of 'local administrative remedies' prior to the submission of the dispute to international fora.[238]

12.5 Other procedural elements of ISDS

12.5.1 Provisions relating to claims without merit

In order to discourage unsubstantiated claims and minimize the expenses states incur in responding to them, about a third of RTAs that contain substantive investment chapters include provisions relating to so-called claims without merit (or, in some cases, claims "manifestly" without merit).[239] A provision to this effect may include an expedited, preliminary procedure for reviewing unmeritorious claims and allow the tribunal to award to the prevailing disputing party reasonable costs and attorney's fees incurred in submitting or opposing the objection.[240] Plausible examples of such claims may include time-barred claims, claims arising from conduct that is not attributable to the host state or based on investments falling outside the scope of the definition of investment provided by the RTA.[241]

12.5.2 Provisional measures

Approximately half of the RTAs that provide for ISDS contain an explicit provision enabling an arbitral tribunal to order interim measures of protection. Such measures may be ordered to prevent a general aggravation of the situation through unilateral action, to preserve the rights of a disputing party, or "to ensure that the tribunal's jurisdiction is made fully effective, including an order to preserve evidence in the possession or control of a disputing party or to protect the tribunal's jurisdiction".[242] Interim measures of protection may also be available under the applicable arbitration rules.[243]

12.5.3 Binding interpretations and non-disputing party interventions

The RTA parties that wish to retain a certain degree of control over their treaty rights and obligations establish mechanisms that allow them to intervene throughout the ISDS proceedings. Two such mechanisms were found in the RTAs we surveyed: provisions that allow the parties to issue joint interpretations of the RTA that are binding on the arbitral tribunal and provisions that

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[235] Such clauses may not always prevent parallel proceedings in the domestic courts of the host state. For instance, it is doubtful that these clauses cover situations where the investor's claims in a domestic court stem from the same factual matrix as the claims submitted to an ISDS tribunal but are based on a different applicable law.

[236] See for instance Annex 1, Article 28 of the SADC Protocol on Investment. Also El Salvador-Honduras-Chinese Taipei, Guatemala-Chinese Taipei, Panama-Chinese Taipei, China-New Zealand, Peru-China, and Pakistan-China.

[237] See for instance Annex 1, Article 28 of the SADC Protocol on Investment.

[238] See for instance China-New Zealand, Peru-China, Pakistan-China, as well as El Salvador-Honduras-Chinese Taipei, Guatemala-Chinese Taipei, Panama-Chinese Taipei.

[239] See for instance Article 10.20 of Australia-Chile; see also Rule 41 of ICSID Arbitration Rules or Article 45.6 of ICSID Additional Facility Arbitration Rules.

[240] See for instance Article 10.20 para. 4 of US-Panama.

[241] UNCTAD, *Investor-State Dispute Settlement: A Sequel, UNCTAD Series on Issues in International Investment Agreements II* (Geneva, 2014), p.102.

[242] R. Dolzer and C. Schreuer, Principles of International Investment Law, p.281. See for instance Article 9-35 of Chile-Mexico.

[243] ICSID Arbitration Rules Rule 39; Article 46 of the ICSID Additional Facility Arbitration Rules; Article 26 of the UNCITRAL Arbitration Rules (2010).

allow non-disputing RTA parties to intervene in the ongoing ISDS proceedings through submissions regarding the interpretation of the RTA's provisions.

Almost 60% of RTAs with an ISDS module provide for the former mechanism, at times institutionalised through the delegation of interpretative powers to the RTA Committee (or a specialised sub-committee on investment).[244] NAFTA's Free Trade Commission's Notes of Interpretation of Certain Chapter 11 Provisions of 31 July 2001 is perhaps the most well-known instance of its use. A similar number of RTAs provide for the latter mechanism by explicitly allowing the unilateral non-binding intervention in ISDS proceedings by a non-disputing party; in a bilateral RTA, the non-disputing party will be the state of the investor's nationality. This mechanism may further be complemented by the non-disputing party's right to receive dispute-related documents (often at its own cost) or to attend hearings.

Overall, just over half of RTAs that contain ISDS allow for both mechanisms, providing the RTA parties with an opportunity to refine the provisions of their agreement. Arguably, joint binding interpretations are a more effective way for the RTA parties to be in control of their rights and obligations, but as a matter of fact these powers are much under-used in practice. In a domain where the interpretative process is essentially the prerogative of the arbitral tribunal, both mechanisms are capable of contributing to the predictability of ISDS by preventing inconsistent treaty interpretation by arbitral tribunals.

12.6 Transparency in ISDS

In response to widespread criticism of the prevailing confidentiality of ISDS proceedings, 33 RTAs have introduced transparency obligations of varying breadth. Pioneered by the NAFTA Parties, particularly the US and Canada after the 2004 review of their model BITs, recent US, Canada, Australia and New Zealand RTAs contain the most far reaching transparency obligations applicable to ISDS proceedings.[245] These provide for mandatory public disclosure of the key documents submitted to the tribunal by the disputing parties as well as the tribunal's transcripts, awards and other decisions.[246] Moreover, a number of RTAs require hearings to be publicly accessible, namely via means of technological and "logistical arrangements" agreed between the disputing parties.[247] Most of these RTAs also contain provisions on the admissibility of amicus curiae submissions throughout the ISDS proceedings.[248]

In other instances, transparency obligations are minimal, with optional disclosure, at times limited to arbitral awards only.[249] For instance, Article 20 of the ASEAN-India Investment Agreement only contains a provision that permits the Parties to render public the final award and decisions of the tribunal, subject to the protection of confidential information specifically designated as such. In a

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[244] Alternatively, it may be exercised in the course of proceedings upon the initiative of the tribunal or at the request of the parties through a preliminary referral mechanism, when the interpretation concerns the parties' schedules of reservations. See for instance Article G-33 of Canada-Chile.

[245] See Article 29 of the 2004 US Model BIT and Article 38 of the 2004 of the Canadian Investment Protection and Promotion Model Agreement (FIPA). See also NAFTA's Free Trade Commission's Notes of Interpretation of Certain Chapter 11 Provisions of 31 July 2001 in which the NAFTA Parties agreed on transparency rules for ISDS proceedings.

[246] See for instance Article 27 (Chapter 12) of New Zealand-Chinese Taipei, according to which the Parties shall make publicly available the following documents: the notice of intent and the notice of arbitration; pleadings, memorials, and briefs submitted to the tribunal by a disputing party and any written submissions; minutes or transcripts of hearings of the tribunal, where available; as well as orders, awards, and decisions of the tribunal.

[247] See for instance Article 10.21 of US-CAFTA-DR. On the basis of the latter article, tribunals have arranged for the broadcasting of hearings in *Pac Rim Cayman LLC v. The Republic of El Salvador* and *Railroad Development Corporation (RDC) v. Republic of Guatemala, Commerce Group Corp.* as well as *San Sebastian Gold Mines, and Inc. v. The Republic of El Salvador.*

[248] See for instance Article 10.36 of Canada-Honduras and its respective Annex 10.36, which detail the admissibility conditions of non-disputing party submissions according to its form and potential of impact on issues under review by the tribunal; these submissions may emanate from entities or persons with a significant presence in the territory of a Party to the RTA.

[249] See for instance ASEAN-India (Article 20 paras. 17-18), where the Parties are permitted to render public the final award and decisions of the tribunal, subject to the protection of confidential information specifically designated as such.

See also Article 94.4 of Japan-Mexico, which allows either disputing party to make available to the public in a timely manner "all documents", subject to redaction of certain confidential information.

similar vein, Article 94.4 of Japan-Mexico only contains a provision allowing either disputing party to make available to the public in a timely manner "all documents", subject to redaction of certain confidential information.

As can be seen from some of the provisions quoted above, in all the above-mentioned instances, RTAs require confidential or privileged information to be protected from public disclosure and at times spell out in great detail the procedures to follow in order to protect confidential information submitted to the tribunal.[250] Far-reaching transparency obligations are also often accompanied by reservations of sensitive information in the interest of national security.[251]

Despite the fact that more than half of the RTAs that provide for ISDS do not contain provisions on ISDS transparency, the application of specific arbitration rules to the proceedings will entail the application of certain transparency provisions within those rules. The ICSID Arbitration Rules and more recently the UNCITRAL Arbitration Rules have both undergone reforms with the aim of enhancing transparency provisions and striking a balance between public concerns and the private interests of the disputing parties.[252]

12.7 Conclusions

Our analysis in this section has focused on the major procedural features of ISDS in the 85 RTAs that provide for this dispute settlement mechanism. While the depth of detail in the ISDS provisions varies across agreements, the current trend is to include a rather comprehensive set of procedural rules. The types of ISDS-related procedural provisions vary too.

Some of these variations are a result of a constant evolution of treaty practice over time. For instance, several post-2002 RTAs concluded predominantly by ASEAN and a handful of other countries do not provide access to ISDS in respect of their investment liberalization obligations.[253] A number of recent RTAs concluded mainly by South American countries also limit the exposure to ISDS for disputes relating to public debt restructuring, suggesting a trend towards greater protection of host state interests in cases of sovereign debt default. Moreover, some post-2004 agreements seek to limit arbitral review over national security measures or render them non-justiciable under ISDS.

The temporal evolution is also significant in the area of transparency obligations in ISDS proceedings. In an attempt to reconcile the privacy of arbitration with a public interest in a more transparent investment arbitration system, countries have recently begun adopting elaborate provisions on the publication of key ISDS documents and arbitral awards, as well as public access to hearings and the admissibility of amicus curiae submissions.

Several other procedural innovations may be traced back to their first inclusion in the 2004 US Model BIT or the 2004 Canadian FIPA. One of such innovations adopted by a group of post-2004 RTAs concluded primarily by the US and Canada is the provision allowing foreign investors to initiate ISDS proceedings for a breach of investment contracts, in addition to the provisions of the investment chapter of an RTA. Another similarly recent development is the inclusion of provisions on the avoidance of frivolous or unmeritorious claims through expedited procedures and additional rules on the allocation of costs. Although a large number of different states adopt such clauses in their agreements today, the first RTAs reflecting this practice seem to have appeared in 2004.

In contrast, some provisions have been a constant presence in the RTAs with ISDS that we surveyed. This, for instance, is the case for preliminary referral mechanisms in disputes relating to

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[250] See for instance Article 10.27 of Republic of Korea-New Zealand.

[251] See for instance Article 10.20 para. 3 of US-Chile in line with its essential security exception (Article 23.2) and Article 23.5, which allows access restrictions on confidential information, the disclosure of which "would impede law enforcement, or otherwise be contrary to the public interest, or which would prejudice the legitimate commercial interests of particular enterprises, public or private".

[252] See Articles 32 and 37 of ICSID Arbitration Rules. See also the UNCITRAL Rules on Transparency, which entered into force on 1 April 2014, as well as the Convention on Transparency in Treaty-based Investor-State Arbitration adopted by the United Nations General Assembly on 10 December 2014.

[253] For instance, China-Singapore, India-Malaysia, India-Singapore, Japan-Thailand and Chile-Central America, amongst others.

taxation and financial services. Provisions on binding joint interpretations of an RTA by its parties and the participation of non-disputing RTA parties in ISDS proceedings also belong to this group.

While most RTAs contain provisions on the interaction of ISDS with domestic or international proceedings, we have observed a relatively high degree of heterogeneity among them. The range of techniques explored by different agreements includes *inter alia* waiver requirements, fork-in-the-road clauses and mandatory recourse to domestic administrative review procedures. Besides their immediate function – the coordination of dispute settlement proceedings – they also have different implications for the use of domestic courts by investors.

Overall, it seems that an increasing number of countries include ISDS in their investment chapters.[254] For instance, our study shows that Australia[255] and China, who at different stages opposed this form of dispute resolution, have gradually embraced it.[256] Beyond the scope of this paper, we also note that the trend of ISDS acceptance applies to the EU. Its current template, based on the freedom of establishment, is being progressively superseded by a new generation of NAFTA-like investment chapters with a detailed set of ISDS provisions.[257]

The absence of ISDS in approximately one-fourth of RTAs with substantive investment chapters is often remedied by its inclusion in BITs negotiated between the same parties.[258] Thus, a large proportion of RTAs that do not provide for ISDS are agreements concluded by the EU and EFTA[259], whose Member States are parties to numerous BITs negotiated with third countries (and for the EU, individually amongst the Member States).[260] This also holds true for several of the plurilateral regional agreements that contain minimal provisions on investment (such as CARICOM, East African Community, CEFTA, COMESA and ECOWAS, amongst others), but whose contracting parties are signatories to a number of BITs.

In terms of potential future developments in respect of ISDS, we can observe efforts to reform ISDS from the classic arbitration model towards a more judicialised form of dispute resolution, which recognises the public nature of interests that investment disputes touch upon. In this vein, certain countries attempt to remedy the deficiencies of an *ad hoc*, autonomous and self-organising nature of this mechanism. The EU and Canada, for instance, included provisions on an investment tribunal consisting of 15 members elected for a five-year term, an appellate tribunal, and a

[254] Beyond the scope of the present study, we also note opposition to ISDS in the context of BITs. For instance, South Africa's review of its investment policy resulted in the termination of a number of its BITs and the adoption of a national investment statute that does not provide for ISDS, conferring jurisdiction over investment disputes on domestic courts (See the Protection of Investment Act of 15 December 2015 No. 39514). Brazil, currently not a party to any BIT with ISDS, also omits this form of dispute settlement in its recently launched template of Investment Cooperation and Facilitation Agreement. Some Latin American countries, including Bolivia, Ecuador and Venezuela, denounced the ICSID Convention in addition to terminating BITs. See S. Woolfrey, The Emergence of a New Approach to Investment Protection in South Africa, and M. J. L. Macías, Reliance on Alternative Methods for Investment Protection through National Laws, Investment Contracts and Regional Institutions in Latin America, both in S. Hindelang and M. Krajewski (eds.), Shifting Paradigms in International Investment Law: More Balanced, Less Isolated, Increasingly Diversified (Oxford University Press 2016).

[255] L. E. Trakman and K. Sharma, Jumping Back and Forth between Domestic Courts and ISDS: Mixed Signals from the Asia-Pacific Region in S. Hindelang / M. Krajewski, *supra* fn 254.

[256] See for instance Australia-Chile, Singapore-Australia, Thailand-Australia, ASEAN-Australia-New Zealand, ASEAN-China, China-New Zealand, Pakistan-China and Peru-China, which all provide for ISDS. Moreover, both countries provide consent to ISDS in their bilateral FTA (China-Australia) of 2015.

[257] See Chapter Eight of the CETA, Chapter 9 of EU-Singapore and Chapter 8 of EU-Vietnam. Note that while in the CETA and EU-Vietnam investment chapters combine investment protection and liberalization disciplines and thus are closest to the NAFTA-type chapter in our survey, the investment chapter of EU-Singapore deals only with investment protection. Investment liberalization disciplines in EU-Singapore are found in its chapter 8, the section entitled "Establishment". All texts have been accessed on http://trade.ec.europa.eu/ (last visited 8 April 2016).

[258] See table in Annex 1.

[259] Except for EFTA-Singapore and EFTA-Republic of Korea; however, the latter does not have a stand-alone investment chapter and instead incorporates the Agreement on Investment between the Republic of Korea and the Republic of Iceland, the Principality of Liechtenstein and the Swiss Confederation.

[260] Some EU states, such as Germany, are currently party to over a hundred BITs in force. See the UNCTAD International Investment Agreements Navigator for more figures:
http://investmentpolicyhub.unctad.org/IIA/CountryBits/78#iiaInnerMenu (last visited: 24 February 2016).

commitment to cooperate towards a permanent multilateral investment court in the future[261]; the proposal for a standing investment tribunal and a permanent appellate review tribunal has also been submitted by the EU in the recent round of TTIP negotiations.[262]

13 GENERAL CONCLUSIONS

In this study we have surveyed the investment provisions contained in 260 RTAs notified to the WTO by 31 December 2015 and in force on that date. The major elements of the investment framework established by RTAs are reminiscent of BITs. However, as RTAs tend to be broader in their coverage of investment-related issues, our analysis focused not only on typical BIT-like provisions, such as definitions of investment and investor, investment protection and ISDS. Aside from investment liberalisation disciplines and regulatory flexibilities, provisions supporting the investment framework, investment promotion and provisions on sustainable and socially responsible investment also featured in our study, as did several others. Below is a recap of our main findings in each section of the survey.

The **definition of investment and investor** are the key provisions in determining the scope of the investment framework established by an RTA. The majority of investment chapters (except those that are based on commercial presence) define investment broadly, covering a wide range of tangible and intangible assets, including intellectual property rights and portfolio investment. However, many post-2004 agreements seek to refine the concept of investment by including an illustrative set of characteristics an asset or a transaction must possess in order to qualify as an investment. The most commonly used characteristics of investment are the commitment of capital, the assumption of risk and the expectation of profit.

Most definitions of investor cover both natural persons and legal entities. While the majority of RTAs require a legal entity to be incorporated or otherwise constituted under the law of a party to an RTA in order to qualify as an investor, many impose additional requirements, such as substantive business operations in an RTA party.

Denial of benefits provisions and exclusions from the scope of an investment chapter constitute additional means of delimiting the coverage of the investment framework. Most denial of benefits clauses operate to prevent companies owned or controlled by third-party nationals and without substantive business operations in an RTA party (often referred to as "mailbox companies") from taking advantage of the agreement. In most cases, these clauses do not apply automatically but leave the discretion of denying of benefits with the RTA party concerned. Full or partial exclusions from the investment chapter often include subsidies, government procurement, services supplied in the exercise of governmental authority and taxation.

As shown by our survey, RTAs distinguish themselves from most BITs by including **investment liberalization** provisions. They can be found in both the investment and services chapters, though the relationship between the two is often complex. A number of surveyed agreements (prevalent among Asian countries, particularly Japan) follow a hybrid structure where a substantive investment chapter is combined with a services chapter that covers commercial presence; both chapters providing for a distinct set of liberalisation provisions applicable to investment. Fewer RTAs are based on a relatively straightforward post-NAFTA model with regard to the relationship between investment and services chapters. This group of agreements is represented mainly by RTAs negotiated by the US, Canada and Latin American countries.

National treatment and MFN treatment disciplines guaranteeing non-discriminatory entry of foreign investment are an important feature of the investment chapters of RTAs. Provisions on the prohibition of certain performance requirements included in the investment chapters of RTAs usually impose additional obligations and are broader in scope than the TRIMs Agreement. In particular, they are often applicable to investment in services aside from goods, and prohibit mandatory technology transfer. However, in the prevailing majority of RTAs, the market access obligation is applicable only to investment in services; its use beyond investment in services is not (yet) established treaty practice.

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[261] See Articles 8.28 and 8.29 of CETA, available at http://trade.ec.europa.eu/doclib/docs/2016/february/tradoc_154329.pdf (last visited: 11 April 2016). Similar provisions are also found in the publicly available text of EU-Vietnam.

[262] The text of the proposal can be accessed on http://trade.ec.europa.eu/

The **scheduling** of investment-related commitments or reservations in RTAs is subject to varying techniques such as a positive list, negative list or mixed approach. Services chapters covering commercial presence (including hybrid RTAs) tend to use positive or mixed approaches to scheduling, without standstill or ratchet obligations. In contrast, negative listing with standstill and ratchet obligations is employed in the majority of investment chapters. The determination of which approach is more liberalizing is outside the scope of this study. Nonetheless, a negative list approach accompanied by standstill and ratchet mechanisms is often perceived as more transparent.

Investment chapters of RTAs usually contain a set of BIT-like **investment protection** guarantees, including non-discrimination, standard of treatment and protection against expropriation. The latter two disciplines are the strongest obligations of investment protection. MFN and national treatment represent the non-discrimination element of investment protection.

The standard of treatment provision includes two obligations: fair and equitable treatment and full protection and security. Although many agreements tend to refine the concept of standard of treatment in order to prevent its overly broad interpretation, the issue of whether or not this obligation is limited in scope to customary international law continues to divide RTA negotiators. More than two-thirds of standard of treatment provisions are explicitly limited in scope to customary international law, with the obligation not to deny justice emerging as a key element of fair and equitable treatment.

A typical feature of services chapters in the surveyed agreements is the domestic regulation provision, akin to Article VI of the GATS. Two specific obligations covered by this provision – to administer measures of general application in a reasonable, objective and impartial manner, and to have in place tribunals or procedures for the review of administrative decisions – are functionally similar to fair and equitable treatment. However, like market access, domestic regulation does not normally apply beyond investment in services.

Expropriation provisions are found in the majority of RTAs with substantive investment chapters (except most EU and EFTA RTAs with third countries). The thrust of such provisions is to protect the investor from a state's expropriatory actions not accompanied by compensation. While the conditions of lawfulness of expropriation and the standard of compensation appear to be widely accepted, the language contained in expropriation provisions is increasingly being qualified in order not to prevent regulation in the public interest. Overall, our findings indicate that fair and equitable treatment and expropriation provisions are becoming more precisely drafted, as states seek a greater balance between investment protection and sovereignty.

A number of RTAs also curtail the procedural use of MFN in investor-state dispute settlement, limiting treaty shopping among investors. Some investment chapters of RTAs provide for flexibility in the application of national treatment by allowing the host state to maintain different regional standards, provided no discrimination to the detriment of a foreign investor occurs.

Obligations on transfers, transparency and movement of natural persons were classified in our study as **provisions supporting investment framework**. Transfer provisions make the investment framework operational by requiring RTA parties to permit investment-related transfers, such as contributions to capital and repatriation of profits. At the same time, balance of payments exceptions, found in most of the surveyed RTAs, allow RTA parties to restrict capital flight in case of financial crises.

A routine inclusion of transparency provisions in the observed RTAs demonstrates the negotiating partners' belief that transparently administered rules help attract foreign investment. In a similar vein, provisions on the movement of natural persons – to facilitate temporary entry of business visitors in connection with an investment – significantly contribute to an effective investment framework.

As the obligations of investment and services chapters tend to be far-reaching in their impact on the domestic policies of RTA parties, we examined the provisions on **regulatory flexibilities**, represented in our study by exceptions and special formalities and information requirements. Two types of exceptions provisions are most common in RTAs – general exceptions and national security exceptions. General exceptions provisions allow state interventions in narrowly defined

circumstances, for example to protect human, animal or plant life or health. Security exceptions provisions tend to leave a broader margin of discretion to the host state. Special formalities and information requirements permit states to ensure compliance with their regulations, provided they do not significantly impair the operation of an investment.

Investment promotion clauses feature in about one third of surveyed RTAs including those whose coverage is limited to trade in goods. Although such clauses tend to be packaged in non-binding language they may signal a liberalizing intention in RTAs that contain no substantive investment provisions. A number of surveyed agreements provide for an institutional mechanism for cooperation on investment matters, which may be responsible for the monitoring of the implementation of the objectives of the agreement, including investment promotion.

Provisions on **sustainable and socially responsible investment** were found in the majority of RTAs included in our study. Such provisions encourage compliance with international labour, environment, anti-bribery and anti-corruption standards and policies; some encourage the use of voluntary corporate social responsibility standards. However, with few exceptions, these provisions remain largely aspirational.

The majority of the surveyed RTAs with investment chapters provide for **investor-state dispute settlement** as an *ad hoc* arbitration mechanism premised on the ability of private investors to bring claims against states and obtain monetary compensation. The more recent agreements tend to include more detailed ISDS provisions. They also often feature provisions on transparency of ISDS proceedings that enhance public access to ISDS documents and the tribunal's hearings. Many of the surveyed RTAs contain provisions that limit ISDS review of sensitive state policies, such as screening decisions, national security measures, investment liberalisation obligations and measures concerning public debt. Quite a few agreements contain provisions allowing the RTA parties to issue joint interpretations of the agreement that are binding on ISDS tribunals or make unilateral written submissions to the tribunal on the interpretation of the agreement.

14 POLICY IMPLICATIONS

A number of policy implications can be drawn from our analysis. In comparison to BITs, RTAs take a step further towards investment liberalisation and link investment with other issues (such as investment promotion, sustainable development, the environment, and labour standards), while at the same time retaining traditional investment protection guarantees. From this perspective, the investment provisions of RTAs can be seen as indicators of emerging trends in international investment regulation. Several such trends were detected.

First, we observed a high degree of uniformity in investment provisions across a range of RTAs, stemming from the consistent use by Canada and the US of their own templates (that undergo periodic review) for the negotiation of investment chapters. However, few other states have adopted a single template for the design of the investment chapters of their RTAs. Rather, the choice of template appears to be a function of the negotiating partner. In the case of EU RTAs, the design of investment chapters has undergone a number of permutations as highlighted in the paper.

Second, from the surveyed RTAs we could discern a move towards a more balanced approach to international investment regulation. In comparison to earlier efforts in BITs, the current emphasis of treaty negotiators in the RTA context has shifted from the primary purpose of protecting the investor to taking greater account of regulatory concerns. As demonstrated throughout the study, the fair and equitable treatment obligation is increasingly drafted with more precision, while many RTAs contain interpretative annexes to expropriation provisions clarifying that general non-discriminatory regulation should not be interpreted as expropriation.

The idea of “recalibrating” international investment agreements with a view to striking an acceptable balance between investment protection and regulatory autonomy has been debated for some time in academic and policy making circles. The driving force behind this transformation is the blurring of the line between the traditional roles of net capital-exporters and importers as many countries now fall into both camps. In terms of investment treaty design, many countries have an interest in both strong investment protection and the preservation of regulatory autonomy. This idea will most likely continue to influence international investment policy making.

Third, in the area of investment liberalisation, we found significant differences in the way that hybrid and post-NAFTA agreements deal with investment liberalisation disciplines. The difficulty in combining investment liberalisation and liberalisation of mode 3 in services is most noticeable in the hybrid agreements. Arguably, greater coherence would be achieved by aligning the liberalisation of investment and mode 3 in services.

Another issue related to investment liberalisation is the market access obligation (usually modelled on Article XVI of the GATS). Bar a few exceptions, in the surveyed RTAs this obligation applies only to investment in the services sector. Consequently, market access restrictions on the entry of investments in the services sector are prohibited; however, unless captured by other obligations, they are allowed in other sectors, for instance investments in manufacturing. The goal of liberalising investment and services may better attained if the market access obligation applied to investment across all sectors, i.e. covering not only investment in services but investment in other sectors too.

Fourth, we observed considerable heterogeneity in the design of certain investment provisions, notably the definitions of investment and investor and denial of benefits clauses. However, not all variations in the drafting of investment provisions are equally significant in their impact on the treaty parties. Some differences appear to amount to no more than a technique preferred by the negotiators from a particular country; at other times, a nuance in the wording may reflect an intention to achieve a different regulatory outcome. Often, this becomes apparent only after the provision is interpreted in ISDS.

Fifth, we found a number of RTAs that contain investment promotion clauses. While their inclusion may signal a liberalizing intention in RTAs that contain no substantive investment provisions, the presence of an institutional mechanism for cooperation in investment is likely to make them more efficient. Likewise, combining the provisions on sustainable and socially responsible investment with concrete mechanisms of their implementation will strengthen their impact.

Sixth, our study shows a lot of activity among the negotiating partners in adjusting ISDS to evolving demands. This is evidenced for instance by the emergence of ISDS transparency provisions and the increasing number of limitations placed on the mandate of ISDS tribunals with respect to certain state policies. The "fine-tuning" of investor-state dispute resolution mechanisms is likely to continue in the future, as can be seen from the recently negotiated CETA and EU-Vietnam agreements.

To sum up, our survey shows a degree of convergence in the design of some investment provisions but considerable heterogeneity in others. Some major trends are evident, notably the efforts to rebalance investment protection. Our findings however present a snapshot of the investment landscape of RTAs at a given moment in time. Due to its dynamic nature, our knowledge and perceptions of the investment regime need to be constantly updated to reflect new developments. Some of the agreements still in the process of negotiation or that have been recently concluded but are not yet in force, such as the CETA, EU-Singapore, EU-Vietnam, TPP and TTIP, are likely to shape further the international investment landscape (if and) when they enter into force.

ANNEX 1

Table: RTAs included in the study, coverage, BITs and investment chapters

RTA Name	Coverage	BIT in force	Investment chapter
ASEAN - Australia - New Zealand	Goods & Services	Some	Yes
ASEAN - China	Goods & Services	Some	Yes
ASEAN - India	Goods & Services	Some	Yes
ASEAN - Korea, Republic of	Goods & Services	Some	Yes
Australia - Chile	Goods & Services	No	Yes
Australia - New Zealand (ANZCERTA)	Goods & Services	No	Yes
Brunei Darussalam - Japan	Goods & Services	No	Yes
Canada - Chile	Goods & Services	No	Yes
Canada - Colombia	Goods & Services	No	Yes
Canada - Honduras	Goods & Services	No	Yes
Canada - Panama	Goods & Services	Yes	Yes
Canada - Peru	Goods & Services	Yes	Yes
Canada - Rep. of Korea	Goods & Services	No	Yes
Caribbean Community and Common Market (CARICOM)	Goods & Services	Some	Yes
Chile - China	Goods & Services	Yes	No
Chile - Colombia	Goods & Services	No	yes
Chile - Costa Rica (Chile - Central America)	Goods & Services	Yes	Yes*
Chile - El Salvador (Chile - Central America)	Goods & Services	Yes	Yes*
Chile - Guatemala (Chile - Central America)	Goods & Services	Yes	Yes*
Chile - Honduras (Chile - Central America)	Goods & Services	Yes	Yes*
Chile - Japan	Goods & Services	No	Yes
Chile - Mexico	Goods & Services	No	Yes
Chile - Nicaragua (Chile - Central America)	Goods & Services	Yes	Yes*
China - Costa Rica	Goods & Services	Yes	No
China - Hong Kong, China	Goods & Services	No	No
China - Macao, China	Goods & Services	No	No
China - New Zealand	Goods & Services	Yes	Yes
China - Singapore	Goods & Services	Yes	Yes
Colombia - Mexico	Goods & Services	No	yes
Colombia - Northern Triangle (El Salvador, Guatemala, Honduras)	Goods & Services	No	yes
Costa Rica - Peru	Goods & Services	No	yes
Costa Rica - Singapore	Goods & Services	No	Yes
Dominican Republic - Central America	Goods & Services	No	yes
Dominican Republic - Central America - United States Free Trade Agreement (US-CAFTA-DR)	Goods & Services	Some	Yes
East African Community (EAC)	Goods & Services	No	Yes
EC Treaty	Goods & Services	Some	Yes
EFTA - Central America (Costa Rica and Panama)	Goods & Services	Some	Yes
EFTA - Chile	Goods & Services	Some	Yes
EFTA - Colombia	Goods & Services	Some	Yes
EFTA - Hong Kong, China	Goods & Services	Some	Yes
EFTA - Korea, Republic of	Goods & Services	Some	Yes
EFTA - Mexico	Goods & Services	Some	Yes
EFTA - Singapore	Goods & Services	Some	Yes
EFTA - Ukraine	Goods & Services	Some	Yes
El Salvador- Honduras - Chinese Taipei	Goods & Services	Some	Yes
EU - Albania	Goods & Services	Some	Yes
EU - CARIFORUM States EPA	Goods & Services	Some	Yes
EU - Central America	Goods & Services	Some	Yes
EU - Chile	Goods & Services	Some	Yes
EU - Colombia and Peru	Goods & Services	Some	Yes
EU - Former Yugoslav Republic of Macedonia	Goods & Services	Some	Yes
EU - Georgia	Goods & Services	Some	Yes

RTA Name	Coverage	BIT in force	Investment chapter
EU - Korea, Republic of	Goods & Services	Some	Yes
EU - Mexico	Goods & Services	Some	Yes
EU - Montenegro	Goods & Services	Some	Yes
EU - Rep. of Moldova	Goods & Services	Some	Yes
EU - Serbia	Goods & Services	Some	Yes
EU - Ukraine	Goods & Services	Some	Yes
European Economic Area (EEA)	Services	No	Yes
Eurasian Economic Union (EAEU)	Goods & Services	Some	Yes
European Free Trade Association (EFTA)	Goods & Services	No	Yes
Guatemala - Chinese Taipei	Goods & Services	Yes	Yes
Gulf Cooperation Council (GCC) - Singapore	Goods & Services	Some	No
Hong Kong, China - Chile	Goods & Services	No	Yes
Hong Kong, China - New Zealand	Goods & Services	Yes	No
Iceland - China	Goods & Services	Yes	Yes
Iceland - Faroe Islands	Goods & Services	No	Yes
India - Japan	Goods & Services	No	Yes
India - Malaysia	Goods & Services	Yes	Yes
India - Singapore	Goods & Services	No	Yes
Japan - Australia	Goods & Services	No	Yes
Japan - Indonesia	Goods & Services	No	Yes
Japan - Malaysia	Goods & Services	No	Yes
Japan - Mexico	Goods & Services	No	Yes
Japan - Peru	Goods & Services	Yes	Yes*
Japan - Philippines	Goods & Services	No	Yes
Japan - Singapore	Goods & Services	No	Yes
Japan - Switzerland	Goods & Services	No	Yes
Japan - Thailand	Goods & Services	No	Yes
Japan - Viet Nam	Goods & Services	Yes	Yes*
Jordan - Singapore	Goods & Services	Yes	No
Korea, Republic of - Australia	Goods & Services	No	Yes
Korea, Republic of - Chile	Goods & Services	No	Yes
Korea, Republic of - India	Goods & Services	Yes	Yes
Korea, Republic of - New Zealand	Goods & Services	No	Yes
Korea, Republic of - Singapore	Goods & Services	No	Yes
Korea, Republic of - US	Goods & Services	No	Yes
Malaysia - Australia	Goods & Services	No	Yes
Mexico - Central America	Goods & Services	No	yes
Mexico - Uruguay	Goods & Services	Yes	yes
New Zealand - Chinese Taipei	Goods & Services	No	Yes
New Zealand - Malaysia	Goods & Services	No	Yes
New Zealand - Singapore	Goods & Services	No	Yes
Nicaragua - Chinese Taipei	Goods & Services	No	Yes
North American Free Trade Agreement (NAFTA)	Goods & Services	No	Yes
Pakistan - China	Goods & Services	Yes	Yes
Pakistan - Malaysia	Goods & Services	Yes	Yes
Panama - Chile	Goods & Services	Yes	no
Panama - Chinese Taipei	Goods & Services	Yes	Yes
Panama - Costa Rica (Panama - Central America)	Goods & Services	No	yes
Panama - El Salvador (Panama - Central America)	Goods & Services	No	yes
Panama - Guatemala (Panama - Central America)	Goods & Services	No	yes
Panama - Honduras (Panama - Central America)	Goods & Services	No	yes
Panama - Nicaragua (Panama - Central America)	Goods & Services	No	yes
Panama - Peru	Goods & Services	No	yes
Panama - Singapore	Goods & Services	No	Yes
Peru - Chile	Goods & Services	No	yes

RTA Name	Coverage	BIT in force	Investment chapter
Peru - China	Goods & Services	Yes	Yes
Peru - Korea, Republic of	Goods & Services	No	Yes
Peru - Mexico	Goods & Services	No	yes
Peru - Singapore	Goods & Services	No	Yes
Singapore - Australia	Goods & Services	No	Yes
Singapore - Chinese Taipei	Goods & Services	Yes	Yes
Southern Common Market (MERCOSUR)	Goods & Services	Some	no
Switzerland - China	Goods & Services	No	Yes
Thailand - Australia	Goods & Services	No	Yes
Thailand - New Zealand	Goods & Services	No	Yes
Trans-Pacific Strategic Economic Partnership	Goods & Services	Yes	No
Ukraine - Montenegro	Goods & Services	No	No
US - Australia	Goods & Services	No	Yes
US - Bahrain	Goods & Services	Yes	No
US - Chile	Goods & Services	No	Yes
US - Colombia	Goods & Services	No	Yes
US - Jordan	Goods & Services	Yes	No
US - Morocco	Goods & Services	Yes	Yes
US - Oman	Goods & Services	No	Yes
US - Panama	Goods & Services	Yes	Yes
US - Peru	Goods & Services	No	Yes
US - Singapore	Goods & Services	No	Yes
Andean Community (CAN)	Goods	Some	No
Armenia - Kazakhstan	Goods	No	No
Armenia - Moldova	Goods	No	No
Armenia - Russian Federation	Goods	Yes	No
Armenia - Turkmenistan	Goods	No	No
Armenia - Ukraine	Goods	Yes	No
ASEAN - Japan	Goods	Some	No
ASEAN Free Trade Area (AFTA)	Goods	Some	Yes
Asia Pacific Trade Agreement (APTA)	Goods	Some	No
Australia - Papua New Guinea (PATCRA)	Goods	Yes	No
Canada - Costa Rica	Goods	Yes	No
Canada - Israel	Goods	No	No
Canada - Jordan	Goods	Yes	No
Central American Common Market (CACM)	Goods	No	No
Central European Free Trade Agreement (CEFTA) 2006	Goods	Some	Yes
Chile - India	Goods	No	No
Chile - Malaysia	Goods	Yes	No
Chile - Viet Nam	Goods	No	No
Common Economic Zone (CEZ)	Goods	Some	Yes
Common Market for Eastern and Southern Africa (COMESA)	Goods	Some	Yes
Commonwealth of Independent States (CIS)	Goods	Some	No
Economic and Monetary Community of Central Africa (CEMAC)	Goods	No	No
Economic Community of West African States (ECOWAS)	Goods	Some	Yes
Economic Cooperation Organization (ECO)	Goods	Some	No
EFTA - Albania	Goods	Some	Yes
EFTA - Bosnia and Herzegovina	Goods	Some	Yes
EFTA - Canada	Goods	No	No
EFTA - Egypt	Goods	Some	Yes
EFTA - Former Yugoslav Republic of Macedonia	Goods	Some	No
EFTA - Israel	Goods	No	No
EFTA - Jordan	Goods	Some	No
EFTA - Lebanon	Goods	Some	No
EFTA - Montenegro	Goods	Some	Yes

RTA Name	Coverage	BIT in force	Investment chapter
EFTA - Morocco	Goods	Some	No
EFTA - Palestinian Authority	Goods	No	No
EFTA - Peru	Goods	Some	Yes
EFTA - SACU	Goods	Some	Yes
EFTA - Serbia	Goods	Some	Yes
EFTA - Tunisia	Goods	Some	Yes
EFTA - Turkey	Goods	Some	No
Egypt - Turkey	Goods	Yes	No
El Salvador - Cuba	Goods	No	No
EU - Algeria	Goods	Some	No
EU - Andorra	Goods	No	No
EU - Bosnia and Herzegovina	Goods	Some	Yes
EU - Cameroon	Goods	Some	No
EU - Côte d'Ivoire	Goods	Some	No
EU - Eastern and Southern Africa States Interim EPA	Goods	Some	No
EU - Egypt	Goods	Some	No
EU - Faroe Islands	Goods	No	No
EU - Iceland	Goods	Some	No
EU - Israel	Goods	Some	No
EU - Jordan	Goods	Some	Yes
EU - Lebanon	Goods	Some	No
EU - Morocco	Goods	Some	No
EU - Norway	Goods	Some	No
EU - Palestinian Authority	Goods	Some	No
EU - Papua New Guinea / Fiji	Goods	Some	No
EU - San Marino	Goods	Some	No
EU - South Africa	Goods	Some	No
EU - Switzerland - Liechtenstein	Goods	Some	No
EU - Syria	Goods	Some	No
EU - Tunisia	Goods	Some	No
EU - Turkey	Goods	Some	No
Eurasian Economic Community (EAEC)	Goods	Some	No
Faroe Islands - Norway	Goods	No	No
Faroe Islands - Switzerland	Goods	No	No
Georgia - Armenia	Goods	Yes	No
Georgia - Azerbaijan	Goods	Yes	No
Georgia - Kazakhstan	Goods	Yes	No
Georgia - Russian Federation	Goods	No	No
Georgia - Turkmenistan	Goods	Yes	No
Georgia - Ukraine	Goods	Yes	No
Gulf Cooperation Council (GCC)	Goods	No	No
India - Afghanistan	Goods	No	No
India - Bhutan	Goods	No	No
India - Nepal	Goods	No	No
India - Sri Lanka	Goods	Yes	No
Israel - Mexico	Goods	No	No
Korea, Republic of - Turkey	Goods	Yes	No
Kyrgyz Republic - Armenia	Goods	Yes	No
Kyrgyz Republic - Kazakhstan	Goods	No	No
Kyrgyz Republic - Moldova	Goods	Yes	No
Kyrgyz Republic - Russian Federation	Goods	No	No
Kyrgyz Republic - Ukraine	Goods	No	No
Kyrgyz Republic - Uzbekistan	Goods	Yes	No
Lao People's Democratic Republic - Thailand	Goods	Yes	No
Latin American Integration Association (LAIA)	Goods	Some	No

RTA Name	Coverage	BIT in force	Investment chapter
Mauritius - Pakistan	Goods	Yes	No
MERCOSUR - India	Goods	No	No
Pacific Island Countries Trade Agreement (PICTA)	Goods	No	No
Pakistan - Sri Lanka	Goods	Yes	No
Russian Federation - Azerbaijan	Goods	No	No
Russian Federation - Belarus	Goods	No	No
Russian Federation - Belarus - Kazakhstan	Goods	Some	No
Russian Federation - Kazakhstan	Goods	Yes	No
Russian Federation - Republic of Moldova	Goods	Yes	No
Russian Federation - Serbia	Goods	Yes	No
Russian Federation - Tajikistan	Goods	No	No
Russian Federation - Turkmenistan	Goods	Yes	No
Russian Federation - Uzbekistan	Goods	No	No
South Asian Free Trade Agreement (SAFTA)	Goods	Some	No
South Asian Preferential Trade Arrangement (SAPTA)	Goods	Some	No
Southern African Customs Union (SACU)	Goods	Some	No
Southern African Development Community (SADC)	Goods	Some	Yes
Treaty on a Free Trade Area between members of the Commonwealth of Independent States (CIS)	Goods	Some	No
Turkey - Albania	Goods	Yes	No
Turkey - Bosnia and Herzegovina	Goods	Yes	No
Turkey - Chile	Goods	No	No
Turkey - Former Yugoslav Republic of Macedonia	Goods	Yes	No
Turkey - Georgia	Goods	Yes	No
Turkey - Israel	Goods	Yes	No
Turkey - Jordan	Goods	Yes	No
Turkey - Mauritius	Goods	No	No
Turkey - Montenegro	Goods	No	No
Turkey - Morocco	Goods	Yes	No
Turkey - Palestinian Authority	Goods	No	No
Turkey - Serbia	Goods	Yes	No
Turkey - Syria	Goods	Yes	No
Turkey - Tunisia	Goods	Yes	No
Ukraine - Azerbaijan	Goods	Yes	No
Ukraine - Belarus	Goods	Yes	No
Ukraine - Former Yugoslav Republic of Macedonia	Goods	Yes	No
Ukraine - Kazakhstan	Goods	Yes	No
Ukraine - Moldova	Goods	Yes	No
Ukraine - Russian Federation	Goods	Yes	No
Ukraine - Tajikistan	Goods	No	No
Ukraine - Uzbekistan	Goods	Yes	No
Ukraine -Turkmenistan	Goods	No	No
US - Israel	Goods	No	No
West African Economic and Monetary Union (WAEMU)	Goods	No	Yes

Note: "*" means BIT incorporated into the RTA