Staff Working Paper ERSD-2018-14 **14 December 2018**

World Trade Organization

Economic Research and Statistics Division

INVESTMENT PROVISIONS IN PREFERENTIAL TRADE AGREEMENTS: EVOLUTION AND CURRENT TRENDS

by

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Manuscript date: December 2018

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Investment Provisions in Preferential Trade Agreements: Evolution and Current Trends

Jo-Ann Crawford and Barbara Kotschwar[1]

Abstract:

Our analysis covers 230 PTAs of which 111 contain substantive provisions on investment. Over the past 60 years or so, States have created an extensive network of Bilateral Investment Treaties (BITs) that govern and protect international investment. The number of BITs concluded annually continues to increase, although this rate has tapered off over the past decade. The rise in the number of BITs has been accompanied by an increasing trend among States to include investment provisions in preferential trade agreements (PTAs). In order to capture this trend we constructed a matrix of 57 investment provisions located in the investment chapter. The analysis covers provisions on scope and definition of the investment framework, investment liberalization and protection, social and regulatory goals, institutional framework, and dispute settlement. We find that the scope and depth of investment provisions has increased over time though at a modest rate. Regional groupings of PTAs demonstrate a number of common characteristics particularly with regard to the scope and definitions of the investment framework and the provisions relating to investment liberalization and protection. Host-state flexibilities are ensured in a majority of PTAs through the inclusion of a broad "right to regulate" provision. Provisions aimed at the protection of the environment occur in more than three quarters of PTAs.

Key Words: Regional Trade Agreements, investment

JEL classification numbers: F15, F21

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1. Introduction

Over the past sixty years or so, States have created an extensive network of Bilateral Investment Treaties or BITs that govern and protect international investment. The number of BITs concluded annually continues to increase, although this rate has tapered off over the past decade. The rise in the number of BITs has been accompanied – and may be in the process of being overtaken - by an increasing trend among States to include investment provisions in preferential trade agreements (PTAs). The negotiation of the investment chapter of the North American Free Trade Agreement (NAFTA) in the early 1990s provided a template for this new approach to the negotiation of investment disciplines in PTAs, extending the scope of investment protection provisions of a typical BIT to investment liberalization and regulation.[2] The entry into force of the NAFTA coincided with the establishment of the World Trade Organization (WTO), which for the first time incorporated trade in services and limited investment measures that may impede trade into the international trade regime through the General Agreement on Trade in Services (GATS) and the Agreement on Trade-Related Investment Measures (TRIMS). The GATS provides the legal framework for WTO members to engage in the preferential liberalization of trade in services in particular through the establishment of commercial presence in the partner country (mode 3) with the objective of providing services. The TRIMS does not regulate investment, but rather addresses investment measures that may distort trade.

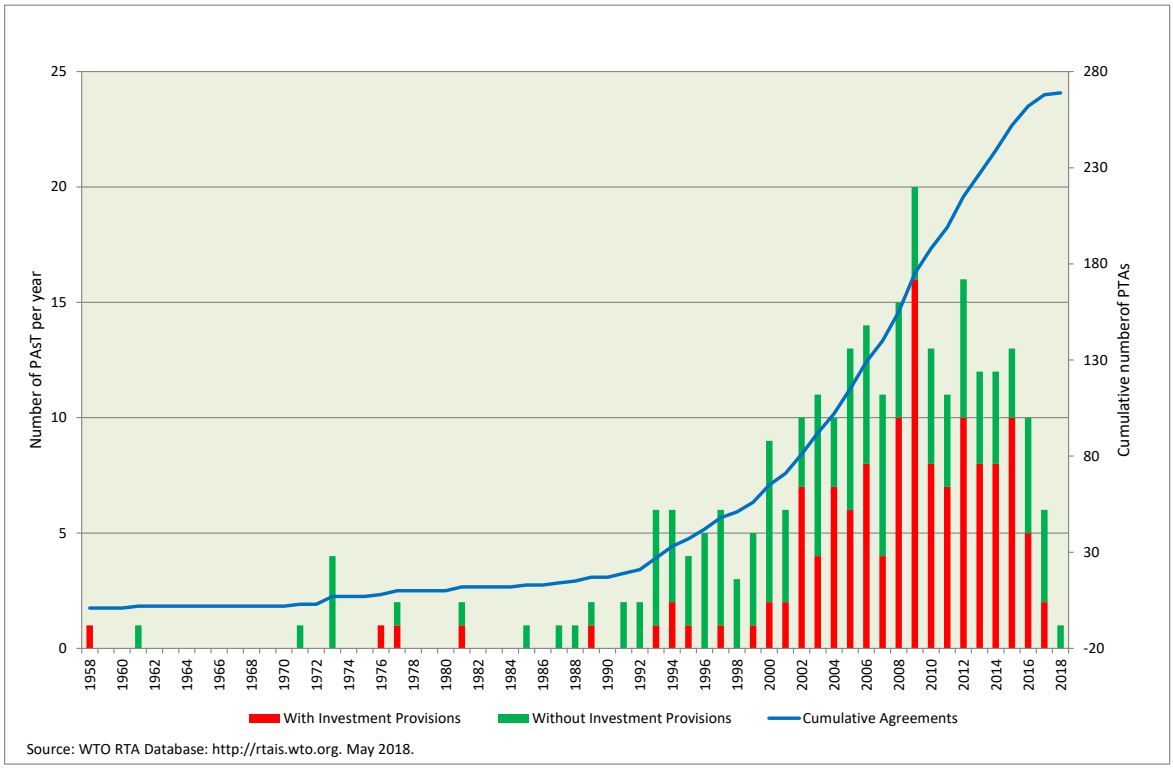
Following the negotiation of the NAFTA and the entry into force of the GATS, trade negotiators increasingly began incorporating in their PTAs a broad set of investment provisions that liberalize, protect and regulate investments. Many PTAs that liberalize trade in services have a distinct investment chapter that extends coverage of investment beyond the mode 3 services provision of the GATS and regulates a broader investment framework that applies to goods, intellectual property and, depending on how investment is defined, portfolio investment. The scope of investment chapters and the characteristics of States that negotiate them has been evolving. This has resulted in the combination of the investment protection elements traditionally found in BITs being merged with the trade protection elements found in PTAs. The goal of this chapter is to explore the evolution of trends and patterns in PTAs' investment disciplines.

[2] Given that BITs are by nature bilateral and often time-limited, the negotiation of investment provisions in PTAs provided efficiencies, particularly in the case of a PTA involving three or more partners.

The United Nations Conference on Trade and Development (UNCTAD) has carried out an extensive mapping project of international investment agreements (IIAs) that include both BITs and the investment chapters of PTAs.[3] Data on these agreements are available through an on-line database. The scope of our research is narrower in that we focus on PTAs rather than BITs. However, our study is more comprehensive in that this universe of agreements is thoroughly covered, while UNCTAD has coded a relatively small percentage of the agreements included in its database. Studies categorizing the investment provisions in PTAs have been conducted by Kotschwar (2009) who developed a framework for the analysis a sample of 52 PTAs and Chornyi et al (2016) whose study focuses on the analysis of around 130 PTAs. The template we use draws on both these studies and adds additional elements. The methodology used and the template devised are described in detail in Section 2.

For the paper we analysed the legal texts of 230 PTAs in force of which 111 contain substantive provisions on investment. The number of PTAs in force that includes investment provisions has been steadily increasing (Figure 1).

Figure 1: Number of PTAs that include investment provisions



[3] http://investmentpolicyhub.unctad.org/IIA/mappedContent

We constructed a matrix of 57 investment provisions to which we mapped 111 PTAs with substantive provisions on investment.[4] Our analysis focuses primarily on provisions found within the investment chapter of the PTA, though we acknowledge that certain investment-related provisions may be found elsewhere, for instance in the services chapter (in relation to mode 3, establishment of commercial presence) or in other chapters that address broad social and regulatory provisions such as labour, environment or sustainable development. Future work within the scope of this project may allow for greater joint analysis of these provisions.

The rest of the paper is organized as follows. Section 2 describes the criteria used to map the investment provisions contained in PTAs' investment chapters. In Section 3 we present the results of the mapping exercise and provide a global overview of the evolution of investment provisions in PTAs as well as a regional perspective offering insights into common characteristics shared by families of PTAs. Section 4 concludes.

2. Mapping of Investment Provisions

The aim of this exercise is to identify the main elements generally present in investment chapters in order to facilitate the analysis of trends and patterns in countries' approach to regulating investment through PTAs. This paper and its associated coding exercise strive to help researchers identify current trends and analyze the impact of this approach to investment protection and liberalization. In the template we distinguish six main categories of investment provisions and analyse a number of provisions within each. The categories are: (i) scope and definitions; (ii) investment liberalization (iii) investment protection; (iv) social and regulatory goals; (v) institutional framework; and (vi) dispute settlement.

The coders examined 111 PTAs that contain substantive provisions on investment within the universe of FTAs included in the deep PTAs project. In keeping with the overall approach of the project, we have formulated a series of questions that can be answered with a Yes/No and coded with a value of 1 for a 'yes' response and a value of 0 for a 'no' response.

[4] This includes PTAs that specifically incorporate a Bilateral Investment Treaty (BIT) in the text of the PTA. For example, see Article 10.01 of Chile-Central America. If however the Parties only reaffirm their commitments under a BIT without specifically incorporating it we do not analyse its provisions. For example, see Article 89 of China-Costa Rica. Given its sui generis form, the EU Treaty was not mapped in our analysis.

While other papers produced as part of this project also included the coding of provisions as going beyond or below WTO commitments, we found that to be less straightforward for this topic due to the nature of the WTO agreements on investment. The TRIMS Agreement recognizes that certain investment measures can restrict and distort trade. Unlike Bilateral Investment Treaties, which have focused on investor protection, however, the TRIMs Agreement does not cover the regulation of foreign investment. The disciplines of the TRIMs Agreement focus specifically on investment measures in trade in goods that infringe GATT Articles III and XI; in other words, those that discriminate between imported and exported products and/or create import or export restrictions. The Agreement includes a list of prohibited TRIMS, such as local content requirements, which discriminate between local and imported goods. Several other WTO Agreements address investment issues. The GATS, for example, governs trade in services, the majority of which takes place through mode 3, or foreign direct investment (FDI). However, given the limited scope of comparable investment provisions in WTO rules with those in investment chapters of PTAs the authors feel that a comparison of them is not currently expedient.

We have organized the questions according to the basic structure of most investment agreements, as detailed below.

Scope and definitions

This section stipulates which Parties are subject to the protections granted in the chapter and sets the parameters for that coverage. Countries have, over time, modified the application of their IIAs through shifts in key definitions and the scope of application in response to dispute settlement cases and other evolving dynamics.

One trend has been the tightening of the definitions of "investor" and "investment" to narrow the scope of interpretation of agreements; applying the provisions of the chapter only to investments made in accordance with host country law; introducing certain objective factors to determine when an asset should be protected under the treaty; and excluding particular types of assets such as certain commercial contracts, certain loans and debt securities and assets used for non-business purposes. In addition to the key terms of “investor” and “investment”, which define the coverage of protected persons and assets under the IIA, there are at least two further dimensions to the scope of an investment agreement, namely, the geographical and temporal scope. These elements are identified as described below.

Definition of Investment:

How an investment is defined determines which assets receive the protection granted in the investment chapter and may shape investors' access to each other's markets. BITs were traditionally aimed at protecting existing and future investments, and tended to use a broad definition of investment. The 1960 Germany- Malaysia BIT set the standard for the wide, "asset-based" definition and coverage of investment used in most subsequent IIAs, whether BITs or chapters in PTAs. Such open-ended definition of investment covers "every kind of asset" including both FDI and portfolio.

Over time, the definition of investment used in IIAs has been modified, particularly as this coverage has featured in investor-state dispute settlement (ISDS) cases. In some cases, a panel's interpretation under a particular treaty is in conflict with the definition of "foreign investment" under States' domestic laws.[5] Such cases have caused some Parties to modify and narrow the parameters of what constitutes an investment in their later treaties. Parties have explicitly set out exceptions, clarified conditions or used specific language detailing the form of investment covered under their agreements. Some IIAs contain additional provisions, for instance on the admission of foreign investments. The Costa Rica-Mexico FTA Investment chapter, for one, makes specifications regarding coverage: "...does not include capital movements that are mere financial transactions for speculative purposes, commercial contracts for the sale of goods or services, credits granted to a State, or loans that are not directly related to an investment..."[6] The recent European Union (EU)-Korea FTA, which was concluded after the Lisbon Treaty came into force, includes specific definitions affecting the scope of each set of rules.[7]

They may also opt for a narrower "enterprise-based" definition of investment, such as that utilized in the US-Canada FTA, which comprises the establishment or acquisition of a business enterprise, as well as a share that provides the investor control over an enterprise. The NAFTA, which superseded the US-CFTA, also uses an enterprise-based definition, but a broader, more open-ended one.

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[5] Malik (2009), for example, cites a case in which claimants and respondents differed as to whether a contract for the performance of certain pre-inspection services was held to constitute an investment: under the respondent's domestic law this activity would not have qualified. The panel found that it did.

[6] See WT/WGTI/W/60

[7] Before the entry into force of this Treaty, EU Member States negotiated commitments on treatment of investors, for example, through BITs. The EU, with the permission of Member States, negotiated market access and pre-establishment provisions. Article 207 of the Lisbon Treaty shifts FDI to the exclusive competence of the European Community, bringing it under the umbrella of the common commercial policy.

Parties have increasingly sought to strike a balance between having a comprehensive definition of investment and avoiding covering assets not intended to be covered by the Parties (Echandi 2009). Such techniques include: applying protection of the treaty only to investments made in accordance with host country law; using a closed-list definition instead of an open-ended one; excluding portfolio shares by restricting the asset-based approach to direct investment only; introducing investment risk and other objective factors to determine when an asset should be protected under the treaty; excluding certain types of assets such as certain commercial contracts, certain loans and debt securities and assets used for non-business purposes; using a more selective approach to intellectual property rights as protected assets; and dealing with the special problems of defining the investment in the case of complex group enterprises as investors (UNCTAD 2011).

Questions for definition of investment:

Does the agreement use a broad, asset-based definition of investment (i.e. the type of definition found in most BITs, in which investment is described as “every kind of asset,” or “any kind of asset” with the listed categories only serving as examples of the types of assets covered)?
Does the agreement use an "enterprise-based" definition of investment, that applies only to business or professional establishment in which the investor has majority ownership or exercises control (direct investment)?
Does the Agreement use a definition of investment that combines elements of both the "asset based" and "enterprise based" definitions (mixed definition)?
Does the Agreement use a definition of investment based on "commercial presence"?
Does the definition of investment exclude portfolio investment?

Definition of investor

How an investor is defined determines who has access to the rights and protections accorded in the Chapter. In some cases, countries will explicitly exclude or include citizens with dual nationality or those who have given up citizenship from the definition of investor, preventing or allowing such citizens from having recourse to the agreement’s investor-state dispute settlement mechanism, for example.

Questions for definition of investor:

Does the agreement include a definition of "investor"?
Rather than defining "investor", does the agreement define "juridical" and "natural persons"?
Does the definition of investor cover permanent residents or those who have a “right of abode” (or other similar rights)?
Does the definition of investor limit those of dual nationality to be exclusively a national of his or her dominant and effective nationality?
Does the definition limit the scope of the term "investor" or "juridical/natural persons" to entities engaging in 'substantial business activities' or similar terms such as 'real economic activity'.

Scope of Treaty

The geographical scope of an investment agreement is determined, to begin with, by the number and identity of the States that are party to it. It is also determined by the territorial limits of the States concerned. The definition of the term "territory" is important in this respect. A very limited number of IIAs address the issue of an investment changing form, generally stipulating whether this would fall within the definition of investment.

Another trend in the evolution of investment provisions is the inclusion of denial of benefits clauses. These clauses generally have two functions: either denying treaty protection to investors whose home State does not maintain diplomatic relations with the host State or preventing third country nationals who own or control the investor from gaining access to protection from a treaty to which they are not Party.

Questions defining the scope of a treaty:

Does the agreement contain a denial of benefits provision?
Does the agreement cover both national and subnational levels?
Does the agreement contain provisions in case investment changes form?

Investment Liberalization

A significant change in the scope of IIAs is the inclusion of market access provisions, or obligations to liberalize parties' regulatory regime with respect to foreign investment. A growing number of investment treaties include liberalization commitments and extend investor protections to the "pre-establishment" phase. Parties commit, in these agreements, to remove restrictions on foreign investment in their respective economies and/or to provide protections for foreign investors seeking to enter their markets. Issues raised by these decisions relate, for example, to the challenges of accurately assessing the costs and benefits of liberalizing different sectors and activities, and the extent to which governments can continue to use tools such as investment screens for national security and other reasons.

Another evolving trend that conditions coverage of the treaty is the inclusion of obligations on performance requirements (PRs). While many existing IIAs do not mention PRs, the NAFTA started a trend of including prohibitions on performance requirements. Some IIAs simply incorporate by reference the TRIMs Agreement, which prohibits local content requirements, trade-balancing requirements, foreign exchange restrictions related to foreign exchange inflows attributable to an enterprise, and export controls. Others, such as the FTAs concluded by the United States, Canada and

Japan explicitly prohibit these. Canada and US FTAs extend this prohibition to the pre-establishment phase. Some IIAs contain special provisions prohibiting nationality requirements for senior management but allowing nationality requirements for a majority of the investment's board of directors.

Pre-establishment commitments may be taken only with respect to sectors/industries specifically mentioned (positive list) or to all sectors/industries except those specifically excluded (negative list) or combining the two ("hybrid").

Questions relating to investment liberalization commitments:

National Treatment (NT)	Does the agreement provide national treatment in the pre-establishment/acquisition phase of the investment?
Most-Favored Nation (MFN)	Does the agreement provide MFN treatment in the pre-establishment/acquisition phase of the agreement?
	Does the agreement grant exceptions to the MFN clause?
Performance Requirements	Does the investment chapter prohibit or limit the use of performance requirements?
Senior Management/ Boards	Does the investment chapter contain a provision that entitles covered investors to make appointments to senior management positions and/or and members of the board of directors without regard to nationality?
Non-derogation	Does the investment chapter guarantee that if another international treaty, to which the Contracting States are parties, or national legislation of the host State, provides for more favorable treatment of investors/investments, that other treaty (or national legislation) shall prevail in the relevant part over the provisions of the IIA?
Scheduling and Reservations	Does the investment chapter take a positive list approach to commitments?
	Does the investment chapter take a negative list approach to commitments?

Investment Protection

Traditionally the core motivation for investment agreements, the trade protection disciplines in IIAs aim to afford investors explicit protection of their investments and recourse in the case that such investments are expropriated or otherwise compromised by the host state. Investment chapters in PTAs continue to emphasize investment protection, setting conditions for the expropriation of assets and the transfer of payments and profits. More recent IIAs also clarify the meaning of provisions dealing with absolute standards of protection, in particular, the international minimum standard of treatment in accordance with international law and indirect expropriation.

Expropriation and Compensation

One of the basic objectives of an IIA is to protect the assets of the investor from uncompensated seizure or in the case of armed conflict and strife in the host country. Modern IIAs typically ban host

states from expropriating foreign investment unless the state meets four conditions. The taking must be (a) for a public purpose; (b) carried out in a nondiscriminatory manner; (c) in accordance with some kind of legal process; and (d) accompanied by payment of (usually) full compensation for the value of the expropriated asset, usually specified as of the date of the expropriation, often with more details regarding acceptable valuation techniques and interest. Recent IIAs have also introduced clarifying language. The lack of clarity concerning the degree of interference with the rights of ownership that is required for an act or series of acts to constitute an indirect expropriation, has been a controversial issue during the last decades. Within this context, recent IIAs contain provisions clarifying two specific aspects. Some texts make explicit that obligations regarding expropriation are intended to reflect the level of protection granted by customary international law. Such clarification has been complemented by guidelines and criteria in order to determine whether, in a particular situation, an indirect expropriation has in fact taken place.

Most treaties require that the host state provide foreign investors with a minimum standard of treatment (MST) in accordance with customary international law. According to these IIAs, the latter includes the notions of fair and equitable treatment in addition to full protection and security.
The obligation to accord fair and equitable treatment (FET) to investors and their property is one of the standards that has been most invoked in ISDS. It is an "absolute", "non-contingent" standard of treatment, i.e. a standard that states the treatment to be accorded in terms whose exact meaning has to be determined, by reference to specific circumstances of application, as opposed to the "relative" standards embodied in "national treatment" and "most favored nation" principles which define the required treatment by reference to the treatment accorded to other investment. Inclusion of FET aims to protect investors from arbitrary or discriminatory treatment by the host state. The meaning of the "fair and equitable treatment" standard may not necessarily be the same in all the treaties in which it appears. The proper interpretation may be influenced by the specific wording of a particular treaty, its context, negotiating history or other indications of the parties' intent.

IIAs tend to apply FET either through an unqualified obligation to accord FET; linking the FET obligation to international law; linking the FET obligation to the minimum standard of treatment of aliens under customary international law; or including additional substantive content such as the denial of justice. The latter approach includes the obligation not to deny justice in legal or administrative provisions.

Another element affecting the scope and coverage of an IIA is the use of the so-called "umbrella clause" which brings investor-state contracts under the umbrella of the treaty. The umbrella clause

has been used since the 1950s but gained prominence during the twenty-first century as a result of several high-profile disputes. UNCTAD (2015) notes that use of the umbrella clause in more recent treaties has been dropping off.

Questions relating to investor protection:

National treatment	Does the agreement cover the post-establishment phase of the investment?
	Does the agreement provide MFN treatment in the post-establishment phase of the investment?
Minimum Standard of Treatment	Does the agreement grant Fair and Equitable Treatment (FET)?
	Does the FET clause expressly include a reference to a denial of justice?
	Does the FET clause prohibit arbitrary, unreasonable or discriminatory measures?
	Does the FET clause include an explicit clarification that the breach of another provision in the IIA or a breach of another international agreement by a contracting party will not by itself constitute a breach of the FET standard?
	Does the FET clause provide that the finding of an FET violation must take into account the level of development of the host country?
	Does the FET clause reference customary international law?
Expropriation and Compensation	Does the investment chapter cover direct expropriation?
	Does the investment chapter cover indirect expropriation?
	Does the provision on expropriation and compensation allow for a carve-out for compulsory licenses?
	Does the provision on expropriation and compensation allow for a carve-out for subsidies?
	Does the provision on expropriation and compensation allow for a carve-out for general regulatory measures to protect legitimate public welfare goals?
Protection in case of Armed Conflict or Strife	Does the clause on protection in case of armed conflict or strife provide for national treatment?
	Does the clause on protection in case of armed conflict or strife provide for MFN treatment?
	Does the clause on protection in case of armed conflict or strife provide for compensation?
Transfers	Does the clause on protection in case of armed conflict or strife provide for the transfer of funds?
Umbrella Clause	Does the chapter include the so-called "umbrella" clause requiring the Parties to respect or observe any obligation assumed by it with regard to a specific investment, thereby bringing contractual and other obligations under the "umbrella" of the IIA?
Subrogation	Does the investment chapter provide for a mechanism of subrogation, such that if an insurer covers the losses suffered by an investor in the host State, it acquires the investor's right to bring a claim and may exercise it to the same extent as, previously, the investor?

Social and Regulatory Goals

"New generation" IIAs, particularly chapters in PTAs, are aimed at liberalizing and promoting investment, while also incorporating flexibilities for public policy. Some PTAs include provisions on the protection of the environment, references to fundamental labor principles and human rights, encourage compliance with social corporate responsibility standards, or seek to facilitate the

participation of PTA parties in relevant organizations. A number of recent PTAs include an obligation to prohibit corrupt practices.

Many investment chapters also recognize different circumstances and levels of development among Parties by including provisions on cooperation and technical assistance.

Questions relating to social and regulatory goals:

Social and regulatory goals	Does the investment chapter reference the "right to regulate"?
	Does the investment chapter refer to protection of the environment?
	Does the investment chapter refer to protection of human rights?
	Does the investment chapter contain a reference to labor?
	Does the investment chapter refer to corporate social responsibility?
	Does the investment chapter refer to sustainable development?
	Does the investment chapter refer to corruption?
Technical cooperation/capacity building	Does the investment chapter include a commitment on technical cooperation?
	Does the investment chapter include a commitment on capacity building?

Institutional aspects and dispute settlement provisions

The final set of coding questions aims to identify what type of measures to ensure transparency in the administration of the investment provisions are put in place and whether the dispute settlement mechanism includes a mechanism for investors to take recourse against State actions, an investor-state dispute settlement mechanism (ISDS) as well as a mechanism for state-to-state disputes.

Questions relating to institutional aspects and dispute settlement provisions:

Institutional framework/Committee	Does the investment chapter establish a committee or another type of institutional framework?
Transparency	Does the investment chapter include commitments for prior comment?
	Does the investment chapter include agreements to publish?
	Does the investment chapter establish national inquiry points?
Dispute Settlement	
State to State Dispute Settlement	Does the investment chapter include a state to state mechanism for dispute settlement (e.g. arbitration) between the contracting parties
Investor-State Dispute Settlement (ISDS)	Does the investment chapter include a mechanism for the settlement of disputes between covered investors and the host State (ISDS)?
Mechanism for consultations	Does the investment chapter include a consultation mechanism?

Enforceability

Finally, a cross-cutting category that aims to capture the level of enforceability of the investment chapter is included. Four categories of enforceability are identified: (1) no dispute settlement, i.e. the parties do not have recourse to the PTA's dispute resolution for issues falling under the investment chapter; (2) diplomatic dispute resolution (where parties refer a dispute to the PTA's joint committee or other institutional body rather than to an arbitral mechanism); (3) state-to-state arbitral mechanism only; and (4) state-to-state arbitral mechanism plus investor-state dispute settlement (ISDS).

3. The Results

This section provides the results of the mapping and is divided into three sub-sections. The first sub-section provides a global overview of provisions in the investment chapter. The second sub-section analyses the content of investment provisions in PTAs over time. The third sub-section explores whether families of PTAs share common characteristics across regions.

IIAs, generally in the form of BITs, have focused on the protection of investors and their investments made in accordance with the laws and regulations of the host country. Host countries have granted national and MFN treatment to investors and investments once established. Increasingly investment chapters in PTAs innovate in this space by providing for the liberalization of investment flows by granting NT and MFN to foreign investors in the *pre-establishment* phase of the investment. This grants investors the right to make an investment under conditions no less favourable than those that apply to nationals of the host country or of any third country. Thus, new generation IIAs make commitments to reduce barriers and remove restrictions to the entry of foreign investments, thereby fostering liberalization. PTAs are also on the forefront of a trend to clarify policy space through the incorporation of sustainability goals in investment provisions.

1. Global Overview

Scope and Definitions

The definitions used in the investment chapter of a PTA are key to delineating the scope of the investment framework as they determine what types of investors and investment are covered and therefore benefit from the PTA's provisions.[8] The scope of the investment framework can thereafter

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

be tailored by using sector-specific commitments or lists of reservations that exempt certain investments or activities from coverage.

With respect to the definition of investment, we find that a broad asset-based definition that includes both FDI and portfolio investment accounts for around 25 percent of all PTAs surveyed with an investment chapter (Figure 2). For instance, Article 135 of China-New Zealand states that investment means "every kind of asset invested, directly or indirectly, by the investors of a Party in the territory of the other Party including, but not limited to, the following: (a) movable and immovable property and other property rights such as mortgages and pledges; (b) shares, debentures, stock and any other kind of participation in companies;…". This type of definition is used mostly by by the Association of Southeast Asian Nations (ASEAN) and China in their PTAs.

The enterprise definition of investment which was pioneered in the NAFTA[9] accounts for less than 10 percent of PTAs, primarily those involving Canada. Almost half of the PTAs we surveyed use a definition of investment that combines elements of both the asset-based and enterprise-based definitions of investment. We classify this as a "mixed" definition of investment. For example, Article 10.27 of US-Chile defines investment as "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; …" The mixed definition of investment had its genesis in the United States' 2004 Model BIT and has been used by the United States in all its PTAs negotiated subsequently. Its use has been adopted by a number of Latin American countries and has spread to Asia with Japan and Korea among others adopting it.

Finally, a definition of investment based on commercial presence that is inspired by the services liberalization provision of the GATS is used exclusively by the EU and the European Free Trade Association (EFTA) with third parties.[10] This type of definition accounts for less than 20 percent of PTAs with an investment chapter. It is narrower in scope than others, typically having disciplines that govern

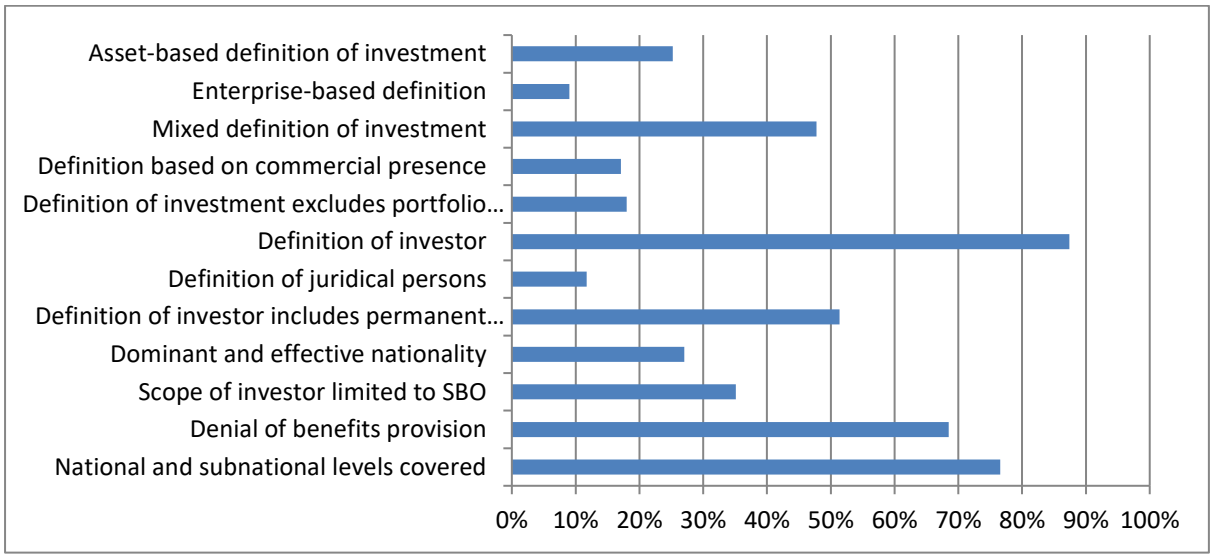
[9] See Article 1139 of the NAFTA that defines investment as "(a) an enterprise; (b) an equity security of an enterprise; (c) a debt security of an enterprise …."

[10] For example Article 5.2 of EFTA-Colombia defines "commercial presence" 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 a representative office, within the territory of another Party for the purpose of performing an economic activity".

market access but not investment protection. In addition, portfolio investment and intangible assets like intellectual property rights are excluded.[11]

Slightly less than a third of PTAs with an investment chapter have a provision in the event the investment changes form. This is the case for instance for most of the PTAs of ASEAN, Japan and China. Only PTAs using an asset-based or mixed definition contain such a provision.

Figure 2: Scope and Definitions Provisions of the Investment Chapter: share of PTAs



Source: Authors' calculations
Note: Agreements without an investment chapter are excluded.

The majority of PTAs (88 percent) include a definition of "investor" in their investment chapter while the remainder do not define "investor" as such but rather the "juridical" and "natural persons" that are to benefit from the agreement (12 percent).[12] More than half of all PTAs with an investment chapter include in their definition of investor permanent residents and those having the right of abode, for instance most of the PTAs involving Canada, Chile, EFTA, Japan, New Zealand and Panama. About 25 percent of the PTAs surveyed address the issue of investors of dual nationality by limiting such investors to be exclusively a national or his or her dominant and effective nationality.[13]

[11] Rather than specifically excluding portfolio investment from the definition of investment, some PTAs provide instead that the application of national treatment does not apply to portfolio investment. See for instance Article 75.2 of Japan-Malaysia.

[12] The PTAs that define juridical and natural persons rather than the investor have either the EU or EFTA as one of their parties.

[13] For instance, many of the PTAs of the United States, Canada and Australia have such a provision as well as some of the PTAs among Latin American countries.

A host State can restrict the definition of investor or enterprise of a party by stipulating that only those engaging in substantive (or substantial) business operations (SBO) or with a real and continuous link may benefit from the Agreement, thus preventing mailbox companies from benefiting from the agreement.[14] 35 percent of PTAs with an investment chapter contain such a provision. For the most part these are PTAs of the EU and EFTA, but also some involving other countries such as Japan, India and Peru.

A denial of benefits clause provides another means for a host State to exclude certain entities from the scope of the agreement. The denial of benefits can be based on various grounds including to enterprises having no substantive business operations in its territory;[15] if persons of a non-Party own or control an enterprise and the denying Party either does not maintain diplomatic relations with the non-Party; or if prohibited transactions with a non-Party would be circumvented.[16] More than two thirds of PTAs have a provision permitting the host state to deny the benefits of the investment chapter. Although both provisions – placing limitations on the scope of the investor or enterprise by requiring that they engage in substantive business operations and a denial of benefits clause – work in similar ways, the scope of the former is broader as the range of entities to which it applies is potentially greater. A denial of benefits clause on the other hand is drafted to operate in narrowly defined circumstances and the host state retains discretion as to whether or not to exercise it.[17] A handful of PTAs contain both a limitation restricting investors to those engaging in SBO and a denial of benefits clause. These include ASEAN-China, China-Singapore, Panama-Peru, Korea-India and Japan-Philippines.

Particularly in the case of federal States, the investment chapter specifies to which levels of government the provisions apply. More than three quarters of PTAs with an investment chapter contain a provision stating that a party's obligations apply at the national and sub-national levels. Exceptions include some of the PTAs of Japan, Chile and China.

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[14] For example, see Article 4.2(p) of Chapter 4 of EFTA-Colombia where a "juridical person of another Party" is constituted or otherwise organised under the laws of that other Party and is engaged in substantive business operations … Also, Article 10.1 of India-Republic of Korea where an enterprise of a party is defined as " an enterprise constituted or organised under the law of a Party, and its branch located in the territory of a Party and carrying out substantial business activities there".

[15] See Article 11.14 of Costa Rica-Singapore.

[16] See Article 10.12 of US-Peru.

[17] See Chornyi et al 2016), pp. 15.

Investment Liberalization

The majority of BITs protect investment once it has been admitted reserving admission to the discretion of the host state. In this respect PTAs differ from most BITs in that they provide for investment liberalization as well as investment protection.[18] In this section we discuss the application of national and MFN treatment in the pre-establishment or entry phase of investment, whether the investment chapter prohibits or limits the use of performance requirements, and if investors are permitted to make appointments to senior management positions and/or members of the board of directors without regard to nationality. We also analyse whether the agreement grants exceptions to the MFN clause (other than in the lists of non-conforming measures). Other provisions examined under this category include the approach taken to scheduling commitments and reservations.

We find that 88 percent of the PTAs surveyed with an investment chapter provide for national treatment in the pre-establishment/acquisition phase of the investment, thus requiring the host state to remove all discriminatory market access barriers and allow foreign investors to invest on the same terms as domestic investors (Figure 3).[19]

The provision of MFN treatment to PTA parties in the pre-establishment/acquisition phase extends non-discriminatory treatment enjoyed by any other non-party to the PTA partner. Such treatment is less common than national treatment and is applied in 72 percent of PTAs surveyed.[20] However, more than half the PTAs which grant MFN treatment in the pre-establishment/acquisition phase of investment include a general exception to the MFN clause that can take different forms. Some PTAs take an MFN exception for regional integration such that any preference extended as a result of engaging in another PTA is not automatically accorded to the first party.[21] Another form of MFN exception occurs when the parties reserve the right to adopt or maintain any measure according differential treatment to third parties for certain sectors such as fisheries or maritime matters.[22] A number of PTAs that grant an exception to the MFN clause do so to prevent the practice whereby an

[18] The BITs of the United States and Canada are exceptions.

[19] Exceptions include Chile-Central America, China's PTAs with Peru, New Zealand, Pakistan and Singapore, Colombia-Mexico and Dominican Republic-Central America.

[20] Exceptions include a number of EFTA's and India's PTAs.

[21] For example, see Article 96.3 of Japan-Thailand. For a full description of the effects of the regional economic integration organization (REIO) clause in investment agreements see UNCTAD (2004), The REIO Exception in MFN Treatment Clauses, (New York and Geneva, 2004)

[22] For example, see Article 139 of China-New Zealand.

investor of a party to a PTA uses the MFN provision of that agreement 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).[23] A less common MFN exception is where the Parties reserve the right to adopt or maintain any measure that accords differential treatment: (a) to socially or economically disadvantaged minorities and ethnic groups; or (b) involving cultural industries related to the production of books, magazines, periodical publications, or printed or electronic newspapers and music scores.[24] In addition to scheduling general exceptions to NT and MFN treatment, States can schedule sector-specific exceptions in lists of non-conforming measures which provide exceptions for measures currently applied and those that might be taken in the future.[25]

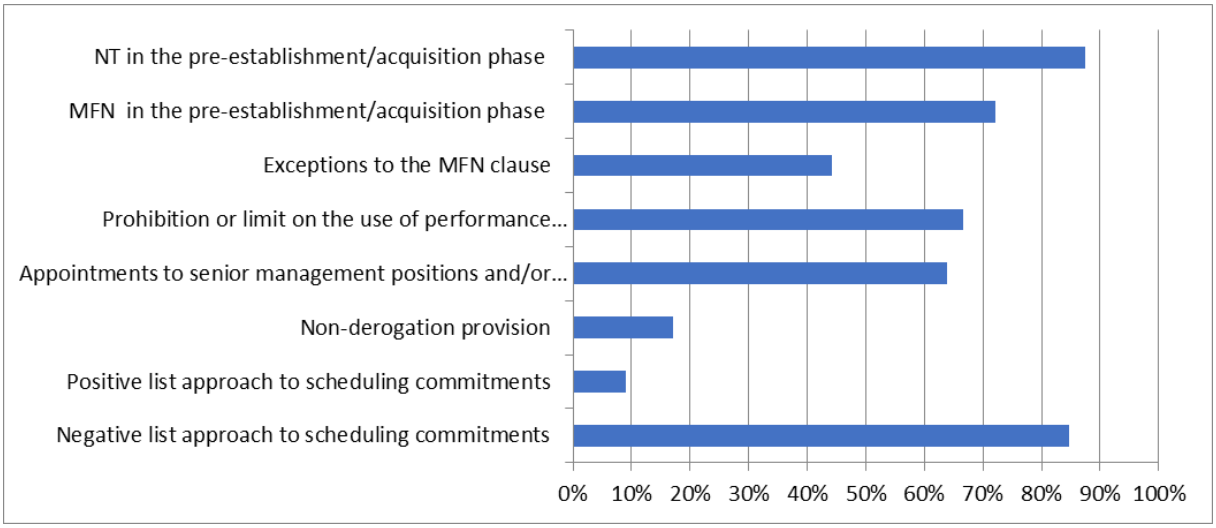
Performance requirements (PRs) are conditions or measures that host states impose on investors in order to operate a business or benefit from an incentive offered by the host state. The WTO TRIMS Agreement (which applies only to trade-related investment measures in goods) prohibits the use of domestic content requirements, restrictions on imports and exports related to local production and foreign exchange restrictions. Some PTAs echo the prescriptions of the TRIMS Agreement by incorporation or reference. Others include PRs that go beyond the TRIMS Agreement by applying disciplines to both goods and services and adding additional limitations, e.g. on forced technology transfer, the hiring of a certain number or percentage of nationals, or acting as the exclusive supplier of the goods or services produced. Two thirds of PTAs with investment chapters contain disciplines on performance requirements (see Figure 3). Those of the United States and Canada systematically do, as do those of Japan, Korea and Panama. PTAs without performance requirements include all the EU and EFTA PTAs with third parties, ASEAN's PTAs with China and India, and China's PTAs with Peru, Pakistan and Singapore.

[23] For instance see Article 14.4 of Australia-Japan that reads "Each Party shall accord to investors of the other Party and to covered investments treatment no less favourable than that it accords, in like circumstances, to investors of a non-Party and to their investments with respect to investment activities in its Area. Note: For greater certainty, this Article does not apply to dispute settlement procedures or mechanisms under any international agreement."

[24] See Article 131 of Peru-China.

[25] Our analysis did not extend to the examination of lists of non-conforming measures or reservations.

Figure 3: Investment Liberalization Provisions: Share of PTAs



Source: Authors' calculations
Note: Agreements without an investment chapter are excluded.

Provisions that entitle covered investors to make appointments to senior management positions and/or members of the board of directors (SMBD) without regard to nationality were found in 67 percent of PTAs surveyed. The PTAs of the United States, Canada, Panama and Australia systematically include such a provision. PTAs without such a SMBD provision include those of Japan, the EU, China and ASEAN.

Non-derogation clauses which guarantee (or do not prevent) investors from taking advantage of another investment treaty between the parties that results in more favourable treatment are present in 17 per cent of PTAs including some involving the EU, ASEAN and India. For instance, Article 90 of EU-Ukraine states that "Nothing in this Chapter shall be taken to limit the rights of investors of the Parties to benefit from any more favourable treatment provided for in any existing or future international agreement relating to investment to which a Member State of the European Union and Ukraine are parties". A different formulation is found in India-Singapore which states that if the legislation of either Party or international obligations existing at present or established thereafter between the Parties results in more favourable treatment to investors than the India-Singapore FTA, such position shall not be affected by the Agreement.[26]

Different techniques are used to schedule commitments or reservations in the investment chapters of PTAs. A positive list approach (similar to that used in the GATS for the scheduling of services

[26] See Article 6.22 of India-Singapore.

commitments) implies that only the sectors listed in the schedule are subject to the agreement's disciplines on investment, subject to any qualifications contained therein. A negative list approach provides that the obligations in the investment chapter subject to scheduling are applied to all sectors except the exceptions appearing in the list (or lists) of non-conforming measures. A negative list approach is more common and is used in 85 percent of PTAs surveyed, while the positive list approach applies in 9 percent. In a few PTAs one Party uses a positive list to schedule commitments while the other uses a negative list for its non-conforming measures.[27]

Investment Protection

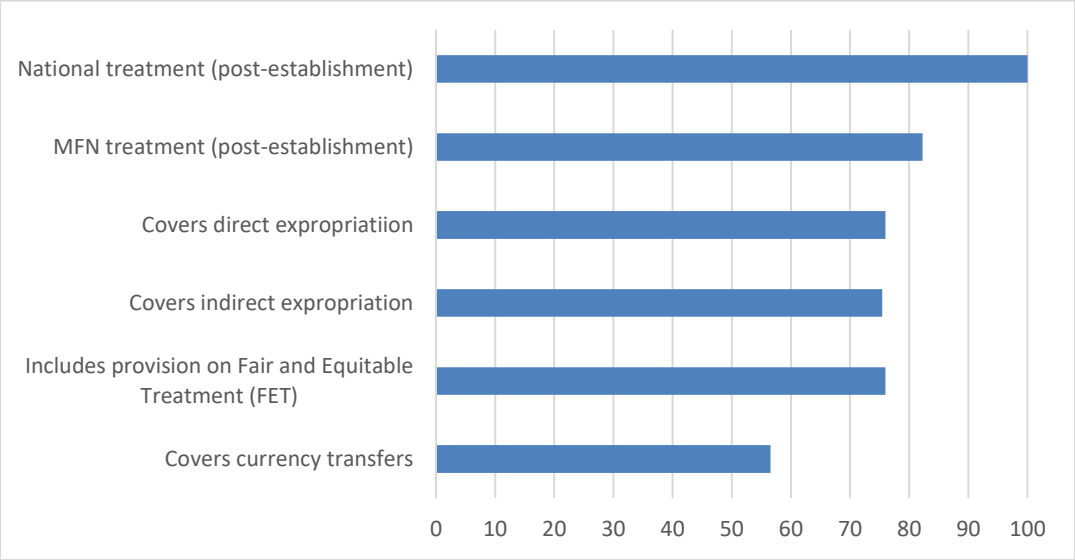
All agreements assessed in this exercise grant national treatment to investors from partner countries. While MFN treatment has generally gone hand-in-hand with NT (it was included in the first BIT, in 1959, between Germany and Pakistan) a number of investment chapters have included NT, but not MFN in their investment chapters. While some investment chapters fully embrace MFN treatment, others exclude or modify its application. As mentioned earlier in the text, this exclusion is often done with the intention of avoiding that claimants invoke treaties with third treaties that include potentially more favourable provisions relating to protection standards or ISDS and having them apply to the treaty under which the claim is being brought. [28] Of our sample, those agreements that exclude MFN tend to be between the EU or EFTA and Latin American countries or between Asian countries. The 2009 Economic Partnership Agreement (EPA) between Japan and Switzerland is one such example, in which Parties pledge to make best efforts to accord each other any more favourable treatment granted to other Parties under other agreements but explicitly exclude this as an obligation.[29] In the ASEAN-Australia-New Zealand FTA, the applicability of MFN is an item on the work program (Article 16 (2)(a)) of the Investment chapter).

[27] See for example India-Korea and India-Singapore.

[28] This is sometimes called "treaty shopping."

[29] Article 88 of the Japan-Switzerland EPA states that "If a Party accords more favourable treatment to investors of a non-Party and their investments by concluding or amending a free trade agreement, customs union or similar agreement that provides for substantial liberalisation of investment, it shall not be obliged to accord such treatment to investors of the other Party and their investments. Any such treatment accorded by a party shall be notified to the other Party without delay and the former Party shall endeavour to accord to investors of the latter Party and their investments treatment no less favourable than that accorded under the concluded or amended agreement. The former Party, upon request by the latter Party, shall enter into negotiations with a view to incorporating into this Agreement treatment no less favourable than that accorded under such concluded or amended agreement".

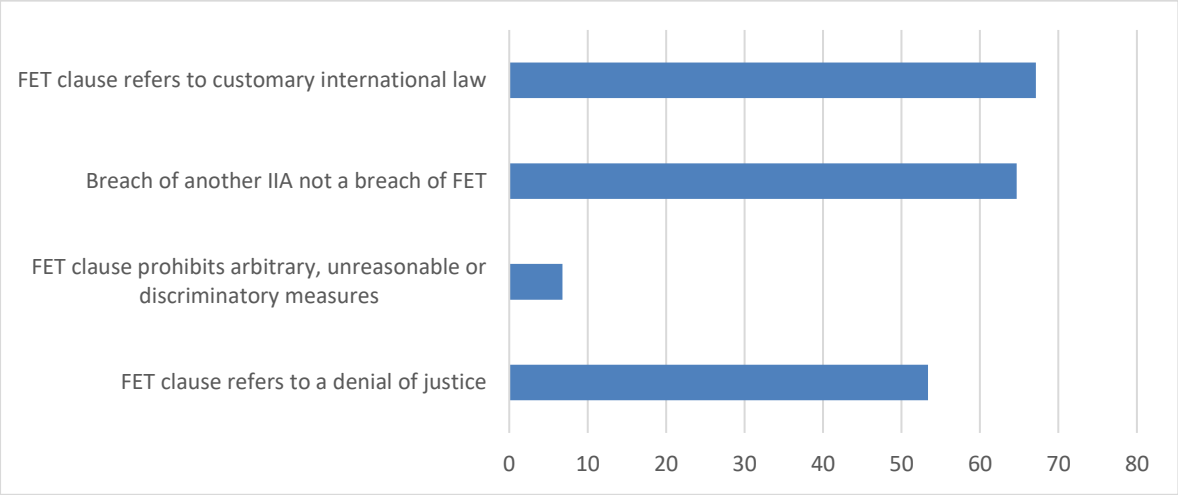
Figure 4: Investment Protection Provisions: Share of PTAs



Source: Authors' calculations
Note: Agreements without an investment chapter are excluded.

In addition to the relative standards of NT and MFN, in which investors are guaranteed treatment as favourable as that accorded to others, most IIAs include provisions establishing an absolute minimum standard of treatment (MST). MST or Fair and Equitable Treatment (FET) is incorporated into investment agreements in different ways, each with implications regarding its scope and content. The most important distinction arises between FET provisions that are explicitly linked to the minimum standard of treatment under customary international law, and those that include an unqualified formulation of the obligation. More recent treaties have started to include some additional language clarifying the meaning of the obligation. About one quarter of the agreements in the sample include no FET provision. Of the 76 percent of agreements that do include FET, as illustrated in Figure 5, about two thirds (66 percent) reference international law. Just over half (53 percent) explicitly reference denial of justice; unreasonable/discriminatory measures (7 percent) or breach of other treaty obligations (65 percent).

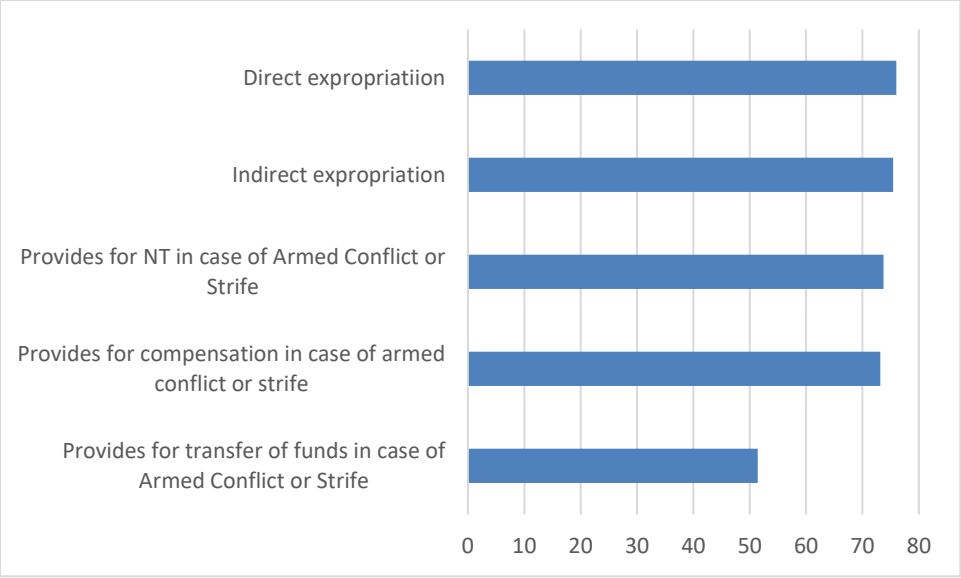
Figure 5: FET provisions: Share of PTAs that reference FET



Source: Authors' calculations
Note: Agreements without an investment chapter are excluded.

One main motivation for constructing international investment agreements has been the desire to protect investor assets. The bulk of the agreements provide for compensation and promise national treatment in case of armed conflict or strife in the host country. A smaller percentage, about half, guarantee the transfer of foreign investors funds in such cases. Most of the agreements in the sample include provisions against direct (75 percent) or indirect (74 percent) expropriation. Agreements by Central European countries and a majority of the EFTA agreements, that group investment together with services, exhorting further liberalization but making few current commitments, do not include such provisions.

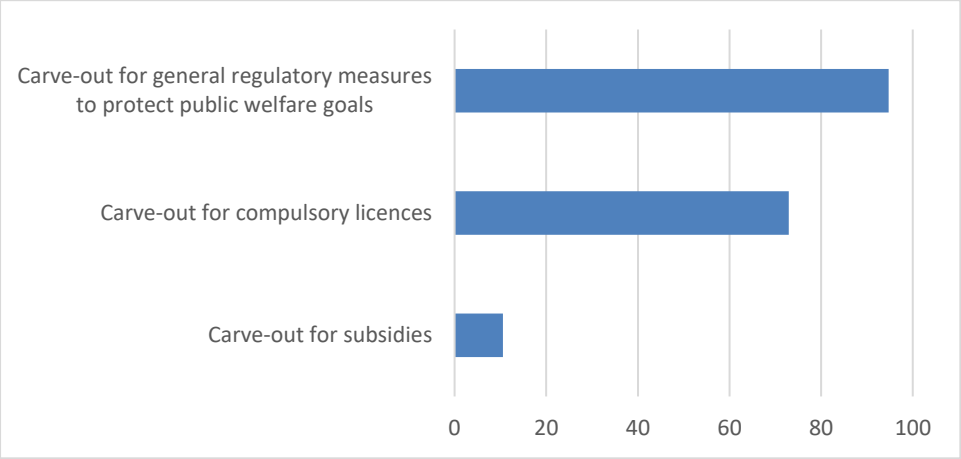
Figure 6: Provisions regarding protection of assets: Share of PTAs



Source: Authors' calculations
Note: Agreements without an investment chapter are excluded.

Within the agreements containing provisions on direct expropriations, about 95 percent include carve-outs to protect public welfare goals, about 72 percent include carve-outs for compulsory licenses and 8 percent include carve-outs for subsidies.

Figure 7: Provisions regarding protection of assets: Share of PTAs



Source: Authors' calculations
Note: Agreements without an investment chapter are excluded.

An important protection for investors is the ability to transfer funds freely and under reasonable conditions. This topic is discussed in depth in the chapter on capital. Just over half (56 percent) of the agreements in the sample provide protection for transfer of funds.

Only 7 percent – half of these agreements by countries in the East Asia/Pacific region - contain an umbrella clause.

Social and Regulatory Goals

A number of provisions are examined under this heading. The "right to regulate" refers to the balance between investor protection and the State's right to regulate to protect legitimate policy interests such as national security, public health and safety or the environment.[30] In PTAs the right to regulate provision takes different forms. Sometimes it is connected with a specific provision such as

[30] For a discussion of the right to regulate debate, see Gaukrodger, D. (2017), "The balance between investor protection and the right to regulate in investment treaties: A scoping paper", OECD Working Papers on International Investment, 2017/02, OECD Publishing, Paris. http://dx.doi.org/10.1787/82786801-en. Also see UNCTAD (2012) Series on Issues in International Investment Agreements II, *Expropriation* (New York and Geneva 2012).

performance requirements. For instance, in US-Panama the Parties provide for certain exceptions from the general proscription on performance requirements to permit the adoption or maintenance of measures: "necessary to secure compliance with laws and regulations that are not inconsistent with this Agreement; necessary to protect human, animal or plant life or health; or related to the conservation of living or non-living exhaustible natural resources."[31] The right to regulate is also associated with provisions on expropriation. For instance in Japan's PTAs a Party shall not expropriate or nationalise investments of the other Party (or measures tantamount to expropriation) except "for public purpose".[32]

Sometimes the Parties incorporate elements of Article XIV of the GATS (either directly in the investment chapter or through a general exception that is linked to the investment chapter) in order to avail themselves of the right to regulate in the public interest.[33] In other PTAs there is a provision in the investment chapter that allows the parties the right to regulate in case of environmental concerns.[34] In other PTAs the exception is broader. For instance in EU-Ukraine, the Parties "retain the right to regulate and to introduce new regulations to meet legitimate policy objectives provided they are compatible with this Chapter".[35] Another example is found in the India-Singapore PTA which allows the Parties to adopt, maintain or enforce any measure, on a non-discriminatory basis that is consistent with the investment chapter and is "in the public interest, including measures to meet health, safety or environmental concerns."[36] In our analysis we looked for a right to regulate provision (beyond those linked specifically to performance requirements or expropriation) either in the investment chapter itself or linked to it. 73 per cent of PTAs contain such a provision (Figure 8). In the PTAs of the United States the provision on performance requirements contains a right to regulate exception, but there is no broad right to regulate provision in the investment chapter.

[31] See Article 10.9 of US-Panama.

[32] We capture the carve-out for general regulatory measures to protect legitimate public welfare goals in the Section on investment protection.

[33] See Article 11 of Japan-Indonesia where for the purposes of the investment chapter "Articles XIV and XIV bis of the GATS are incorporated into and form part of this Agreement, mutatis mutandis."

[34] See for instance Article 10.11 of Nicaragua-Chinese Taipei that reads "Nothing in this Chapter shall be construed to prevent a Party from adopting, maintain, or enforcing any measure otherwise consistent with this Chapter that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental concerns".

[35] See Article 85.4 of EU-Ukraine.

[36] See Article 6.10 of India-Singapore.

85 percent of PTAs make a reference to protection of the environment in their investment chapter. A common formulation is that the Parties recognize that it is inappropriate to encourage investment by relaxing their environmental measures. For instance in Chile-Japan the Parties agree not to waive or otherwise derogate from environmental measures as an encouragement for establishment, acquisition or expansion of investments.[37] In EU-Colombia/Peru, subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between the Parties, the Parties may adopt measures, inter alia, "necessary to protect human, animal or plant life or health, including those environmental measures necessary to this effect; relating to the conservation of living and non-living exhaustible natural resources, if such measures are applied in conjunction with restrictions on domestic investors or on the domestic supply or consumption of services".[38]

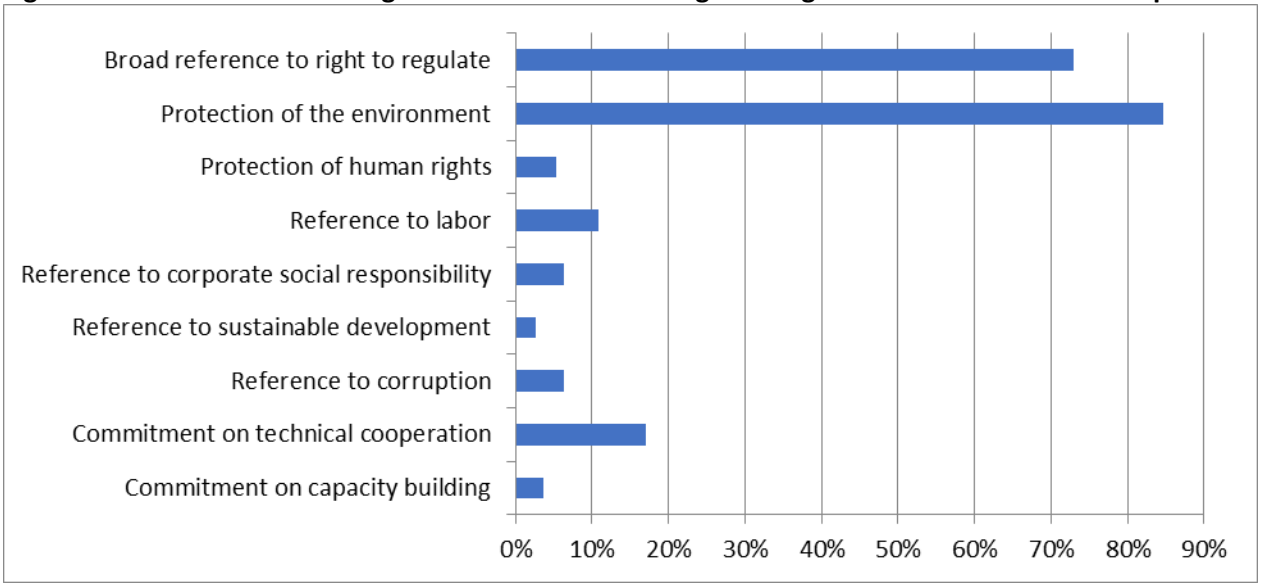
References in the investment chapter to issues of human rights, labour, corporate social responsibility, sustainable development and corruption appear in less than 20 percent of PTAs surveyed.[39] We acknowledge, however, that such provisions may appear in other parts of the Agreement or in another chapter and were not coded during this exercise. Likewise we found few direct references to provisions on technical cooperation and capacity building in the investment chapter itself.

[37] See Article 87 of Chile-Japan.

[38] See Article 167 of EU-Colombia/Peru.

[39] Provisions on labour may be contained in a separate chapter. For details, see the chapter in this volume, Mapping Labor Provisions in Preferential Trade Agreements: Concepts, Approach and (Some) Empirics.

Figure 8: Share of PTAs referring to selected social and regulators goals in their investment chapter



Source: Authors' calculations
Note: Agreements without an investment chapter are excluded.

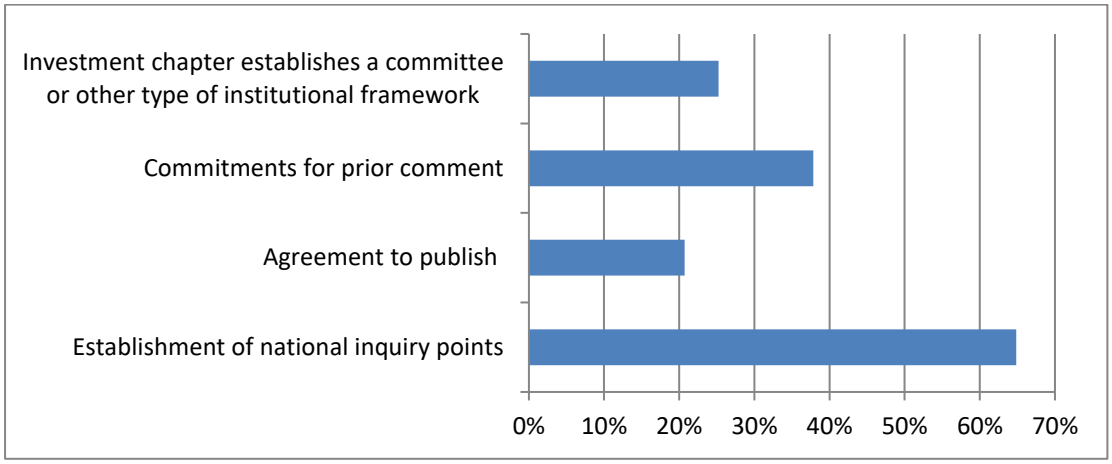
Institutional Framework and Transparency

All PTAs generally establish some sort of administrative body charged with monitoring and implementing the agreement. Our interest here lies in determining whether the investment chapter establishes a committee or other type of institutional framework responsible specifically for investment matters. For instance, the Parties in ASEAN-Australia-New Zealand establish a committee on investment to review the implementation of the investment chapter, consider any matters referred to it and report to the Agreement's Joint Committee as required.[40] About a quarter of PTAs establish a specific committee responsible for investment matters (Figure 9). Japan's PTAs typically establish such a committee, while those of the EU, the United States and Canada do not.

As regards transparency provisions, we analysed whether the investment chapter includes commitments for prior comment, agreements to publish or whether it establishes national inquiry points. The establishment of national inquiry points was the most frequent occurring in about two thirds of PTAs with an investment chapter, while commitments for prior comment occurs in 38 percent of PTAs and agreement to publish in just over 20 percent.

[40] See Article 11.17 of ASEAN-Australia-New Zealand.

Figure 9: Share of PTAs with selected transparency provisions

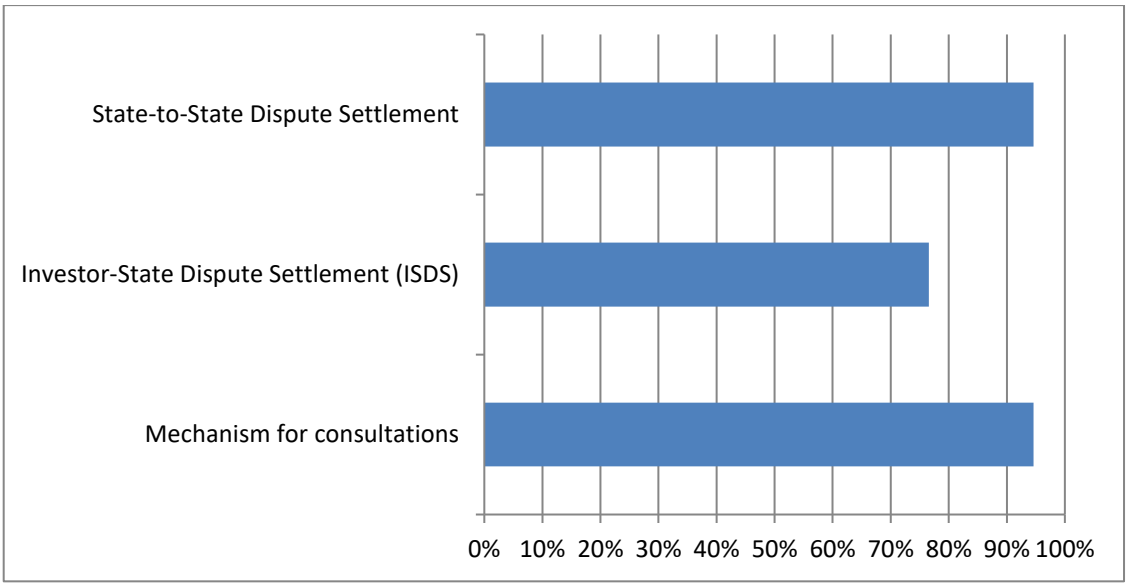


Source: Authors' calculations
Note: Agreements without an investment chapter are excluded.

Dispute Settlement

Dispute settlement is a key provision in investment chapters, particularly investor-state dispute settlement provisions, which allow investors to bring disputes regarding the treaty's substantive provisions. Almost all PTAs provide for a mechanism for consultations and state-to-state dispute settlement and 77 per cent provide for ISDS.

Figure 10: Share of PTAs with mechanism to solve disputes



Source: Authors' calculations
Note: Agreements without an investment chapter are excluded.

Enforceability

All PTAs identified as having an investment chapter in the study have enforceable provisions. Therefore the relevant question regarding the enforceability of investment provisions is not whether

the provisions are enforceable but rather in what forum and by whom. In one PTA (ANZCERTA) the Parties do not have access to the Agreement's state-to-state arbitral mechanism (and no ISDS is established under the Agreement) but investors would have recourse to domestic courts in case of an investment dispute.[41] Of the remaining 110 PTAs, the majority (77%) have access to both a state-to-state arbitral mechanism and ISDS, 19% have access to a state-to-state arbitral mechanism (without ISDS), while in the remaining 3% of PTAs the parties have access to dispute resolution using diplomatic channels under the Agreement.

The EU and EFTA for the most part rely upon a state-to-state arbitral mechanism only (though EFTA's PTAs with Singapore and Korea have ISDS) while Australia's position on ISDS has shifted over the years.[42]

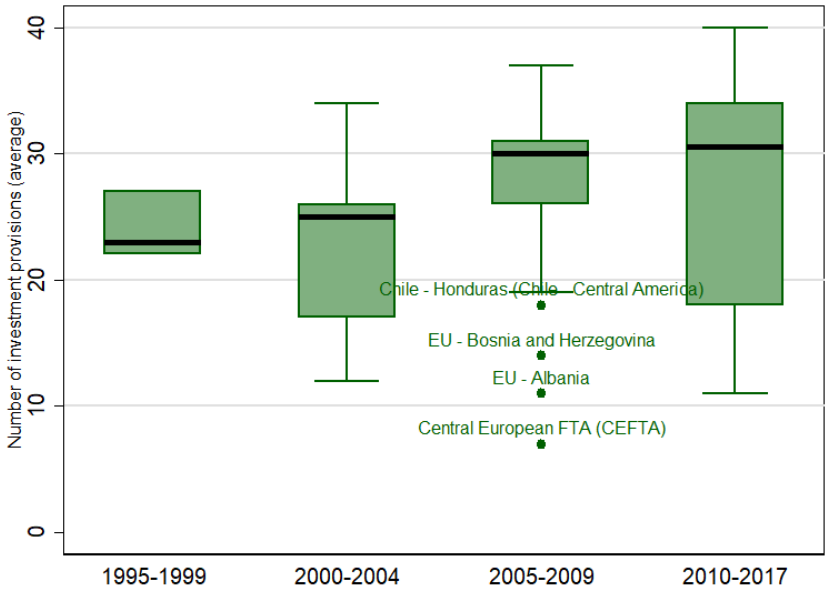
2. Content of Investment Provisions in PTAs over time and PTA families

The investment chapters of PTAs increasingly cover a larger set of provisions. To assess the evolution of investment provisions in PTAs a variable that captures the coverage of provisions, i.e. the share of questions included in the template developed in Section 2 is generated. The average number of investment provisions in PTAs has increased since 1995. While agreements entering into force between 1995 and 1999 included on average 24 provisions, those entering into force in the period 2010-2017 averaged 27.1 (Figure 11).

[41] See Leon Trakman, Resolving Investor-State Disputes: Australia's Dilemma and Choices, in Nye Perram, International Commercial Law and Arbitration: Perspectives, Chapter 1

[42] In Australia's PTAs with Japan, Malaysia, the United States the parties have access to a state-to-state arbitral mechanism, while in those with ASEAN-New Zealand, Chile, CPTPP, Korea, Singapore, Thailand an ISDS mechanism is also available.

Figure 11: Boxplot of average number of Investment provisions in new PTAs over time

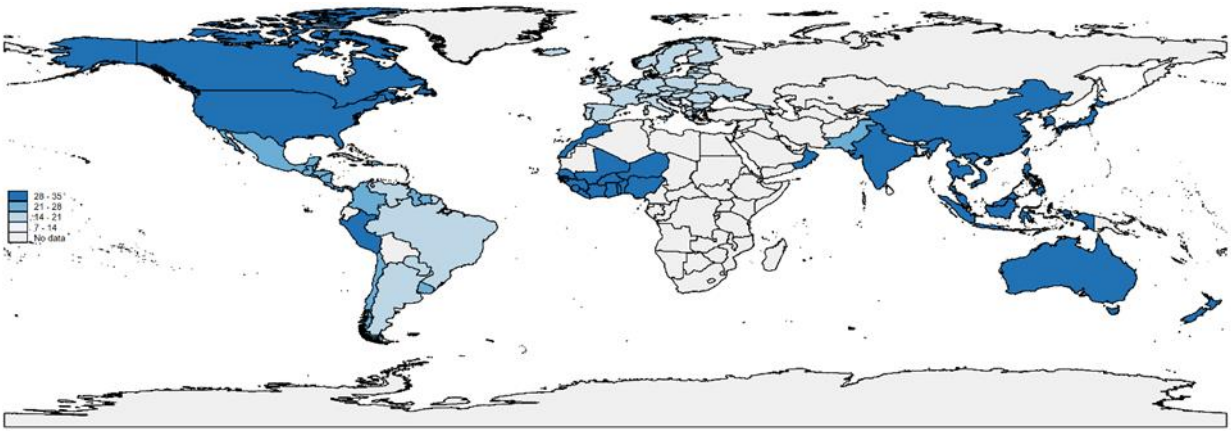


Source: Authors' calculations.

Notes: (1) Agreements with no Investment provisions are excluded. (2) Boxplot is a standardized way of displaying the distribution of data based on the five-number summary: minimum, first quartile, median, third quartile, and maximum. The central rectangle spans the first quartile to the third quartile, bold segment inside the rectangle shows the median and "whiskers" above and below the box show the locations of the minimum and maximum. Outliers are plotted as individual points

In the western hemisphere the United States, Canada and Peru are party to PTAs with the most investment provisions (Figure 12), averaging 28-35 provisions across their PTAs. Those of Mexico, Central American countries, Colombia and Chile have PTAs averaging 21-28 provisions. In European PTAs the average number of investment provisions is smaller (14-21 provisions), reflecting the absence of investment protection provisions. Although some of EFTA's PTAs have investment protection provisions those of the EU do not. In Africa the ECOWAS states and Morocco have a high average number of investment provisions (based on a single PTA). Most Asian countries have PTAs averaging 28-35 provisions.

Figure 12: Average number of Investment provisions by country



Source: Authors' calculations.

Notes: (1) Agreements with no investment provisions are excluded.

The fact that the number of investment provisions has increased over time does not necessarily reflect that they have become deeper in terms of their content.[43] In order to provide an insight into the evolution of core (or deep) investment provisions over time we build a simple index of 12 provisions of investment liberalization and protection.[44] The value of the index varies between 0 and 11 (as PTAs have only one definition of investment). Broad definitions of investment and investor and liberalization disciplines that apply in the pre-establishment phase are indicative of provisions that enhance investors' market access. Likewise, strong investor protection in the form of post-establishment national and MFN treatment, disciplines on fair and equitable treatment, expropriation and investor-state dispute settlement are key provisions.

Figure 13 shows the share of core liberalization and protection provisions for different income groups.[45] In South-South PTAs the incidence of core investment liberalization provisions is low (17

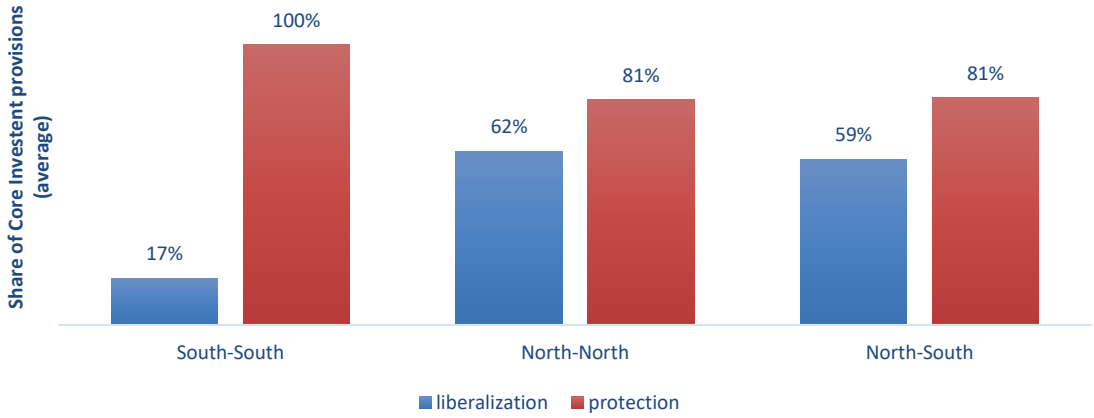
[43] Indeed some of the provisions we capture indicate exceptions or carve-outs (e.g. to MFN and FET provisions) rather than liberalization efforts.

[44] The core provisions in investment liberalization are: broad asset-based definition of investment; elements of both the asset based and enterprise based (mixed definition of investment); definition of investors covers permanent residents or right of abode; NT in pre-establishment/acquisition phase; MFN treatment in pre-establishment/acquisition phase; and senior management positions and boards of directors. For investment protection the core provisions are: NT in the post-establishment phase; MFN in the post-establishment phase; fair and equitable treatment (FET); direct expropriation; indirect expropriation; and ISDS.

[45] For Figures 13-15 North and South countries are defined following the World Bank country classification for 2017. South countries are composed of low-income and lower middle-income economies, whereas upper middle-income and high-income countries are considered North. Low-income economies are defined as those with a GNI per capita, calculated using the World Bank Atlas method, of $1,005 or less in 2016; lower middle-

percent) while protection provisions are high (100 per cent).[46] For North-North and North-South PTAs the shares are roughly equal with investment protection provisions on average more prevalent than those liberalizing investment.[47]

Figure 13: Share of Core Investment provisions (average)



Source: Authors' calculations.

Note: (i) Agreements with no Investment provisions are excluded. (ii) Average over agreements in force during 2017.

The share of core investment liberalization provisions in South-South PTAs is constant over time (reflecting the single PTA in the sample), while that of North-North PTAs has increased slightly (Figure 14). Since 2000, the share of investment liberalization provisions in North-South PTAs has increased slightly.[48]

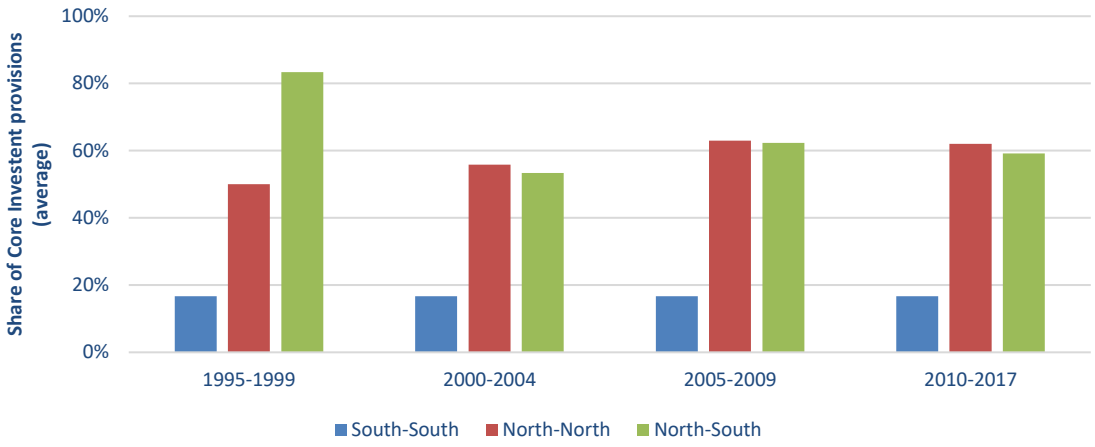
income economies are those with a GNI per capita between $1,006 and $3,955; upper middle-income economies are those with a GNI per capita between $3,956 and $12,235; high-income economies are those with a GNI per capita of $12,236 or more.

[46] In the South-South category there is one PTA in the sample.

[47] In the North-North category there are 72 PTAs and in North-South 38 PTAs.

[48] The period 1995-1999 has only a single PTA falling in the North-South category.

Figure 14: Evolution of share of Investment liberalization provisions over time, by level of development

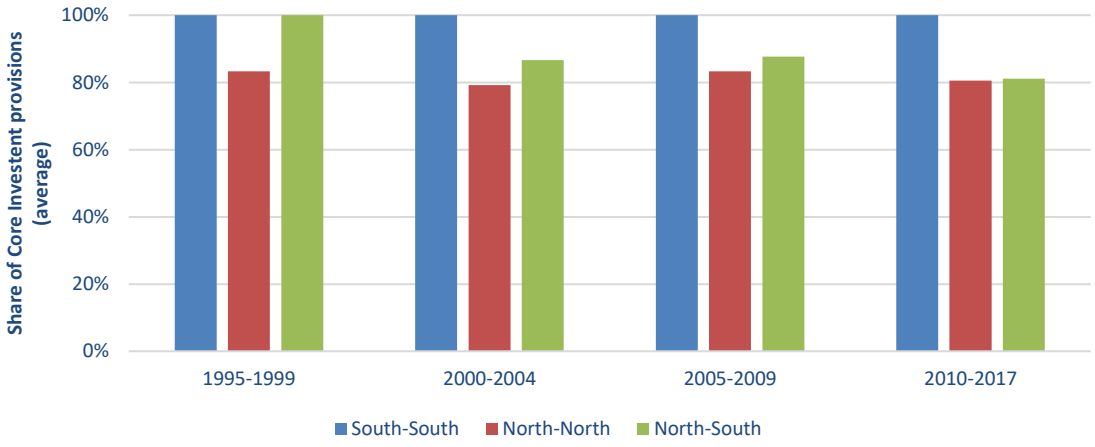


Source: Authors' calculations.

Note: (i) Agreements with no Investment provisions are excluded. (ii) Average over agreements in force during 2017.

The share of core investment protection provisions in South-South PTAs is constant while for North-North PTAs there is little fluctuation (Figure 15). Since 2000, the share of investment protection provisions in North-South PTAs is more or less constant.[49]

Figure 15: Evolution of share of Investment protection provisions over time, by level of development



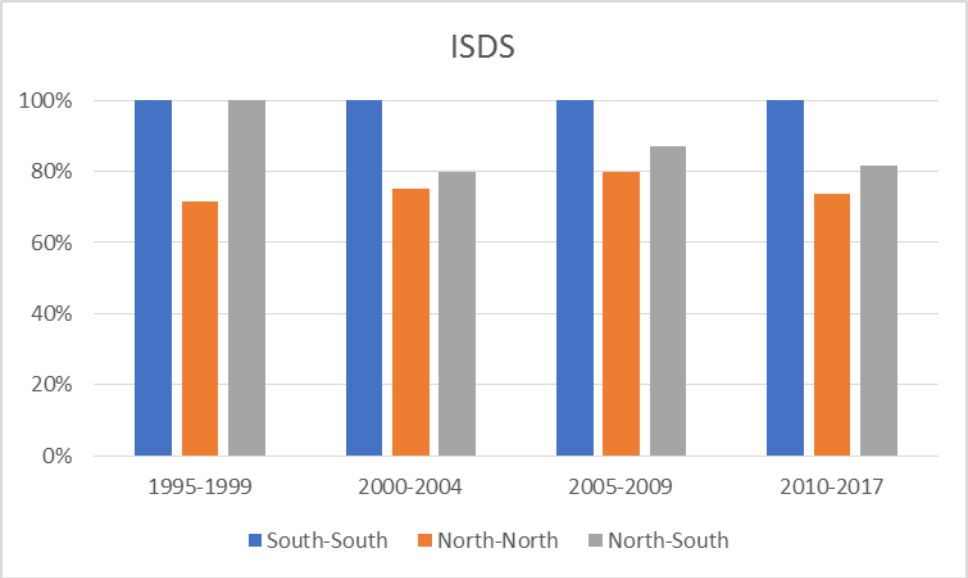
Source: Authors' calculations.

Note: (i) Agreements with no Investment provisions are excluded. (ii) Average over agreements in force during 2017.

[49] Only one PTA falls in the North-South category in the period 1995-2000.

Figure 16 shows the evolution of ISDS provisions over time. The share of ISDS provisions in South-South PTAs has remained constant (reflecting the single PTA in the sample). Since 2000 the shares of North-South and North-North PTAs with ISDS provisions has fluctuated slightly.

Figure 16: Evolution of share of ISDS provisions over time, by level of development



Source: Authors' calculations.

Note: (i) Agreements with no Investment provisions are excluded. (ii) Average over agreements in force during 2017.

3. Patterns of investment provisions across PTA families

Tables 1-6 show patterns of investment provisions across PTA families for selected issue areas. The sample size varies considerably with a single PTA in sub-Saharan Africa to 57 PTAs involving Latin American and Caribbean countries. Inter-regional PTAs are repeated in two (or more) groupings. The most common provisions (those that occurred in over 60 percent of the cases) are shaded in dark blue, the least common (those occurring in less than 40 percent of cases) are shaded in light blue, and the rest (occurring between 40 and 60 percent of the cases) are shaded in blue.

In North America and East Asia and the Pacific the mixed definition of investment is the most common while in South Asia the broad asset-based definition accounts for 71 per cent of PTAs (Table 1). In the EU and Central Asia a definition of investment based on commercial presence accounts is the norm. The exclusion of portfolio investment occurs in more than half of all PTAs involving the EU, Sub-Sahara Africa, EFTA and Central Asia. The PTAs of the EU, EFTA and Central Asia define juridical persons rather than the investor in their PTAs, while a majority of PTAs involving East Asia and the Pacific, North America and EFTA include permanent residents in their definition of investor. A denial of benefits

clause is found in more than 70 per cent of PTAs involving East Asia and Pacific, North America, Latin America and the Caribbean and South Asia, while a provisions limiting investors to SBO predominates in the PTAs of the EU, EFTA, Central Asia and Sub-Sahara Africa.

Table 1: Patterns of investment provisions across regions (%) – Scope and Definitions

1. SCOPE AND DEFINITIONS	European Union	Sub-Saharan Africa	East Asia & Pacific	North America	Latin America & Caribbean	South Asia	Middle East & North Africa	EFTA	Central Asia
Number of agreements with investment	(14)	(1)	(55)	(18)	(57)	(7)	(4)	(10)	(9)
Broad asset-based definition	0	0	33	0	18	71	0	20	11
Enterprise-based definition	0	100	2	33	16	0	0	0	0
Mixed definition of investment	0	0	62	67	53	29	50	20	0
Commercial presence definition	93	0	4	0	14	0	50	60	78
Portfolio investment excluded	93	100	4	0	14	0	50	60	78
Definition of Investor	43	100	98	100	91	100	75	40	33
Definition of juridical persons	57	0	2	0	9	0	25	50	67
Permanent residents included	0	0	65	56	49	29	0	70	11
Dual nationals/dominant	0	0	25	78	35	14	50	0	0
Investors limited to SBO	93	100	20	0	30	43	50	100	89
Denial of benefits	0	0	84	100	75	71	50	0	0
National & subnational levels	50	0	85	100	79	86	75	70	44
Investment changes form	0	0		0	18		0	10	0
Prudential carve-out	93	0	31	0	16	29	50	50	89

Source: Authors' calculations.

Notes: Share of agreements is calculated over the number of agreements in force with investment provisions during 2017

Granting national treatment in the pre-establishment phase of investment is the norm across all regions except sub-Saharan Africa (Table 2).[50] The extension of MFN treatment in the pre-establishment phase is the norm in PTAs involving countries in North America and Middle East/North Africa (MENA) (for which there are 4 PTAs in the sample). PTAs involving South Asian countries show the greatest variation with only 14 percent granting MFN treatment in the pre-establishment phase (compared to 86 percent offering NT). The sole Sub-Saharan African PTA in the sample (ECOWAS) offers neither NT nor MFN treatment in the pre-establishment phase. Exceptions to the MFN clause (in the form of a general exception rather than in the lists of non-conforming measures) occur in most PTAs except those of MENA. PTAs involving the EU and Central Asian countries do not provide for performance requirements in contrast to regions such as North America where such provisions are the norm. Likewise provisions on senior management and boards of directors are prevalent in North American PTAs, but with the exception of ECOWAS and to a lesser extent Latin America, are less common in other regions.

[50] Our sample contains only one PTA in Sub-Sahara Africa.

Table 2: Patterns of investment liberalization (percentage of PTAs by provision and region)

2. INVESTMENT LIBERALIZATION	European Union	Sub-Saharan Africa	East Asia & Pacific	North America	Latin America & Caribbean	South Asia	Middle East & North Africa	EFTA	Central Asia
Number of agreements with provisions	(14)	(1)	(55)	(18)	(57)	(7)	(4)	(10)	(9)
NT pre-establishment	100	0	91	100	84	86	100	100	100
MFN pre-establishment	79	0	75	100	74	14	100	40	100
Exceptions to MFN clause	29	100	45	44	46	29	0	40	33
Performance Requirements	0	100	76	100	75	57	50	10	0
Senior Management/Boards	43	100	55	100	81	29	75	60	56
Non-derogation	50	0	16	0	14	43	25	20	33
Positive list scheduling	43	0	9	0	7	14	0	0	11
Negative list scheduling	36	100	91	100	88	86	100	100	44

Source: Authors' calculations.

Notes: Share of agreements is calculated over the number of agreements in force with investment provisions during 2017

Table 3 shows a significant variation between the European-type agreements, signed by the EU and EFTA countries and the North American model. Latin America and Caribbean (LAC) and East Asia/Pacific (EAP) protection provisions tend to follow the North American model. Asian agreements are more likely to include umbrella clauses. The Central Asian PTAs offer FET, but otherwise are similar to the European chapters.

All agreements offer NT; North American, MENA and Central Asia also all offer MFN protection. This latter category varies across region, however, with 88 percent of LAC; about 80 percent of EU and EAP and only around 40 percent of South Asia and EFTA agreements providing MFN treatment.

Most of the chapters provide for NT in the case of armed conflict or strife and for compensation in this case. The sole SSA agreement does not include a provision for compensation nor for protection of transfers in the case of armed conflict or strife; on the other side of the spectrum, 100 percent of South Asia, 90 percent of EAP and 84 percent of LAC agreements provide for compensation.

Over 80 percent of EAP, North America and South Asian agreements – and 100 percent of SSA - protect companies' ability to transfer funds, but just under 50 percent of agreements in LAC do so in the investment chapter.

Both direct and indirect expropriation is covered in nearly all non-European agreements, although it is covered in only half of the 4 MENA agreements.

Table 3: Patterns of investment protection (percentage of PTAs by provision and region)

3. INVESTMENT PROTECTION	EU	Sub-Saharan Africa	East Asia & Pacific	North America	Latin America & Caribbean	South Asia	Middle East & North Africa	EFTA	Central Asia
Number of agreements with investment	(14)	(1)	(55)	(18)	(57)	(7)	(4)	(10)	(9)
NT post-establishment	100	100	100	100	100	100	100	100	100
MFN post-establishment	79	100	82	100	88	43	100	40	100
Fair and equitable treatment	7	100	93	100	84	86	50	40	22
FET clause refers to denial of justice	0	100	55	72	40	29	50	0	0
FET clause prohibits arbitrary measures	7	0	5	0	4	0	0	20	11
Breach of another IIA not a breach of FET	0	0	64	89	53	43	50	0	0
FET violation development aspects	0	0	0	0	0	0	0	0	0
FET refers to customary intl law	0	100	64	89	53	57	50	0	0
Direct expropriation	0	100	96	100	86	100	50	30	0
Indirect expropriation	0	100	95	100	86	100	50	30	0
Expropriation c/o compulsory licences	0	100	65	94	61	86	50	0	0
Expropriation c/o for subsidies	0	0	20	0	0	43	0	0	0
Expropriation c/o regulatory measures	0	100	93	100	86	86	50	30	0
Armed conflict provides for NT	0	100	89	100	86	100	50	30	0
Armed conflict provides for compensation	0	0	91	100	84	100	50	30	0
Armed conflict provides for transfer of funds	0	0	76	61	44	100	50	30	0
Transfers	0	100	80	89	49	86	50	20	0
Umbrella Clause	7	100	11	0	0	14	0	30	11
Subrogation	0	0	85	39	47	100	0	30	0

Source: Authors' calculations.

Notes: Share of agreements is calculated over the number of agreements in force with investment provisions during 2017

Table 4 shows the considerable regional variation regarding the treatment of social and regulatory goals in investment chapters. A general right to regulate provision (out with those linked to performance requirements or expropriation provisions) are the norm in EFTA and EU PTAs and common in East and South Asia PTAs. North America and Sub-Saharan Africa are outliers. Sub-Saharan Africa scores highly on other social and regulatory goals. Apart from reference to protection of the environment the PTAs of South and Central Asia and MENA do not include other social and regulatory goals.

Table 2: Patterns of investment provisions across regions (%) – Social and Regulatory Goals

4. SOCIAL AND REGULATORY GOALS	European Union	Sub-Saharan Africa	East Asia & Pacific	North America	Latin America & Caribbean	South Asia	Middle East & North Africa	EFTA	Central Asia
Number of agreements with investment	(14)	(1)	(55)	(18)	(57)	(7)	(4)	(10)	(9)
General right to regulate provision	86	0	84	39	65	86	50	100	78
Protection of the environment	50	100	93	100	84	86	75	100	44
Protection of human rights	0	100	2	28	7	0	0	0	0
Reference to labor	7	100	11	28	11	0	0	10	0
Reference to corporate social resp.	0	100	4	33	9	0	0	0	0
Reference to sustainable development	14	100	0	0	4	0	0	0	0
Reference to corruption	0	100	4	28	9	0	0	0	0
Technical cooperation	50	100	15	0	14	14	25	0	22
Capacity building	7	100	4	0	2	14	0	0	0

Source: Authors' calculations.

Notes: Share of agreements is calculated over the number of agreements in force with investment provisions during 2017

Table 5 shows patterns related to institutional framework and transparency across regions. The tendency for a specific committee to be established by the investment chapter is most common in East Asia and the Pacific and South Asia with almost half of PTAs in this region doing so. The establishment of national enquiry points is the most common type of transparency provision, though less common in EU, EFTA and Central Asian PTAs.

Table 5: Patterns of institutional framework (percentage of PTAs by provision and region)

	European Union	Sub-Saharan Africa	East Asia & Pacific	North America	Latin America & Caribbean	South Asia	Middle East & North Africa	EFTA	Central Asia
No.of PTAs with substantive provisions	(14)	(1)	(55)	(18)	(57)	(7)	(4)	(10)	(9)
Does the investment chapter establish a committee	7	0	40	11	18	43	0	10	0
Commitments for prior comment	0	0	51	6	47	43	0	0	0
Does the investment chapter include agreements to publish	0	100	29	6	7	57	0	40	11
Does the investment chapter establish national enquiry points	43	100	69	83	72	71	75	20	33

Source: Authors' calculations.

Notes: Share of agreements is calculated over the number of agreements in force with investment provisions during 2017

Finally, as seen in Table 6, nearly all agreements provide for state to state dispute settlement provisions, but investor-state dispute settlement (ISDS) is incorporated in no EU agreement, only 30 percent of EFTA agreements and half of MENA agreements. Most North America, LAC and EAP and all South Asia and SSA agreements include such a provision.

Table 6: Dispute settlement provisions (percentage of PTAs by provision and region)

6. DISPUTE SETTLEMENT	European Union	Sub-Saharan Africa	East Asia & Pacific	North America	Latin America & Caribbean	South Asia	Middle East & North Africa	EFTA	Central Asia
Number of agreements with investment	(14)	(1)	(55)	(18)	(57)	(7)	(4)	(10)	(9)
State to State Dispute Settlement	79	100	96	100	98	100	100	100	67
Investor-State Dispute Settlement (ISDS)	0	100	87	94	82	100	50	30	0
Mechanism for consultations	64	100	96	100	100	100	75	90	67

Source: Authors' calculations.

Notes: Share of agreements is calculated over the number of agreements in force with investment provisions during 2017

4. Conclusions

This paper presents a new dataset on the content of investment provisions in PTAs and covers a total of 111 PTAs with substantive provisions in investment that entered into force between 1960 and 2017. The analysis of this dataset reveals the following patterns of investment provisions:

- The scope and depth of investment provisions has increased over time though at a modest rate.
- Most PTAs extend national and MFN treatment in the pre-establishment phase while all provide for national treatment (and to a lesser extent MFN treatment) in the post establishment phase.
- Likewise a majority of PTAs offer investment protections in the form of provisions on expropriation and fair and equitable treatment.
- Host-state flexibilities are ensured in the majority of PTAs through the inclusion of a broad "right to regulate" provision.
- Provisions aimed at protection of the environment occur in more than three quarters of PTAs.
- More than three quarters of PTAs provide for investor-state dispute settlement.
- PTA families demonstrate a number of common characteristics particularly in regard to provisions on scope and definitions and investment liberalization and protection.

Further research could be conducted to analyse the schedules of investment commitments and to further develop the indicators of deep liberalization.

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