



# Regionalism and the Multilateral Trading System

Industry Services Trade  
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# **Regionalism and the Multilateral Trading System**



ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT

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## FOREWORD

This study on the relationship between regional trade agreements (RTAs) and the multilateral trading system was mandated by the Trade Committee at its meeting of 13-14 February 2001. A principal frame of reference is provided by the OECD 2001 Ministerial Communiqué which observed that "WTO-consistent preferential trade agreements can complement but cannot substitute for coherent multilateral rules and progressive multilateral liberalisation". In exploring the nature of that complementarity, the study compares rule-making provisions in RTAs with those in the WTO in ten issue areas: services, labour mobility, investment, competition, trade facilitation, government procurement, intellectual property rights, contingency protection, environment and rules of origin.

It was felt to be particularly appropriate to focus, as this study does, on the rule-making dimension of regional trade agreements. This for two reasons. First, in recognition of the fact that the ten issues covered in this study, and the rule-making dimension inherent in them, are receiving increased attention in regional trade initiatives. Second, as a complement to the more established – though by no means complete – work on the assessment of the welfare effects of preferential regional trade agreements.

The ten chapters of this study have benefited from extensive discussion within the Working Party of the OECD Trade Committee. The chapters on Competition Policy and on Environment were also discussed, respectively, in the Joint Group on Trade and Competition and the Joint Working Party on Trade and Environment.

In preparing each of the issue papers of this study a very wide range of agreements has been examined. The decision as to whether or not to mention any particular agreement has rested on the extent to which that agreement offers useful insights about the nature of the relationship between regional trade initiatives and the multilateral trading system. The focus therefore is not so much on RTAs themselves as on the issues central to, or bearing on, the multilateral trading system, drawing on experience in different RTAs to the extent that it is relevant for the analysis. While this approach has widened the range of experience on which to draw, it has also called for care in acknowledging the different circumstances in which that experience has been, or is being, forged.

This study is intended to provide an analytical backdrop for WTO Members' ongoing consideration of how best to manage the relationship – and foster greater complementarity – between RTAs and the multilateral trading system.

This book is published under the responsibility of the Secretary-General.

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## GLOSSARY AND ABBREVIATIONS

**ABT** (GATS Agreement on Basic Telecommunications)

**ACP** (African, Caribbean and Pacific States): Angola, Antigua and Barbuda, Bahamas, Barbados, Belize, Benin, Bissau, Botswana, Burkina Faso, Burundi, Cameroon, Cape Verde, Central African Republic, Chad, Comoros, Congo (Brazzaville), Congo Democratic Republic, Cook Islands, Côte d'Ivoire, Djibouti, Dominica, Dominican Republic, Equatorial Guinea, Eritrea, Ethiopia, Federated States of Micronesia, Fiji, Gabon, Gambia, Ghana, Grenada, Guinea, Guyana, Haiti, Jamaica, Kenya, Kiribati, Lesotho, Liberia, Madagascar, Malawi, Mali, Marshall Islands, Mauritania, Mauritius, Mozambique, Namibia, Niger, Nigeria, Niue, Papua New Guinea, Republic of Nauru, Republic of Palau, Rwanda, Samoa, Sao, Senegal, Seychelles, Sierra Leone, Solomon Islands, Somalia, South Africa, St Christopher and Nevis, St Lucia, St Vincent and the Grenadines, Sudan, Suriname, Swaziland, Tanzania, Togo, Tomé and Príncipe, Tonga, Trinidad and Tobago, Tuvalu, Uganda, Vanuatu, Zambia, Zimbabwe

**AFAS** (ASEAN Framework Agreement on Services)

**AFTA** (ASEAN Free Trade Area): Brunei Darussalam, Indonesia, Laos, Malaysia, Myanmar, Philippines, Singapore, Thailand and Vietnam

**ANDEAN COMMUNITY**: Bolivia, Colombia, Ecuador, Peru and Venezuela

**ANZCERTA** (Australia-New Zealand Closer Economic Relations Trade Agreement): Australia and New Zealand

**ANZGPA** (Australia-New Zealand Government Procurement Agreement)

**AoA** (Agreement on Agriculture)

**APEC** (Asia Pacific Economic Co-operation forum): Australia, Brunei Darussalam, Canada, Chile, China, Hong Kong, China, Indonesia, Japan, Korea, Malaysia, Mexico, New Zealand, Papua New Guinea, Peru, the Philippines, Russia, Singapore, Chinese Taipei, Thailand, United States, Vietnam

**ASCM** (Agreement on Subsidies and Countervailing Measures)

**ASEAN** (Association of Southeast Asian Nations): Brunei Darussalam, Cambodia, Indonesia, Laos, Malaysia, Myanmar, Philippines, Singapore, Thailand and Vietnam

**BITs** (Bilateral Investment Treaties)

**CACM** (Central American Common Market): Guatemala, El Salvador and Nicaragua

**CARICOM** (Caribbean Community): Antigua and Barbuda, the Bahamas, Barbados, Belize, Dominica, Grenada, Guyana, Haiti, Jamaica, St Kitts and Nevis, St Lucia, St Vincent and the Grenadines, Republic of Suriname and Trinidad and Tobago

**CCAEC** (Canada-Chile Agreement on Environmental Co-operation)

**CCFTA** (Canada-Chile Free Trade Agreement)

**CCRFTA** (Canada-Costa Rica Free Trade Agreement)

**CEFTA** (Central European Free Trade Agreement): Bulgaria, Czech Republic, Hungary, Poland, Romania, Slovakia, Slovenia

**CEP** (Closer Economic Partnership): New Zealand and Singapore

**CIFTA** (Canada-Israel Free Trade Agreement)

**COMESA** (Common Market for Eastern and Southern Africa): Angola, Burundi, Comoros, Democratic Republic of Congo, Djibouti, Egypt, Eritrea, Ethiopia, Kenya, Madagascar, Malawi, Mauritius, Namibia, Rwanda, Seychelles, Sudan, Swaziland, Zambia, Zimbabwe

**CTE** (WTO Committee on Trade and Environment)

**CTH** (Change of Tariff Heading)

**CUSFTA** (Canada-US Free Trade Agreement)

**ECOWAS** (Revised Treaty of the Economic Community of West African States): Benin, Burkina Faso, Cape Verde, Côte d'Ivoire, Gambia, Ghana, Guinea, Guinea-Bissau, Liberia, Mali, Mauritania, Niger, Nigeria, Senegal, Sierra Leone and Togo

**EDI** (Electronic Data Interchange)

**EEA** (Agreement on the European Economic Area): Austria, Belgium, Denmark, Finland, France, Germany, Greece, Iceland, Ireland, Italy, Liechtenstein, Luxembourg, the Netherlands, Norway, Portugal, Spain, Sweden, United Kingdom

**EFTA** (European Free Trade Association): Iceland, Liechtenstein, Norway and Switzerland

**ESM** (Emergency Safeguard Mechanism)

**EU** (European Union) : Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain, Sweden, United Kingdom

**Europe Agreements**: The EU has concluded these with Bulgaria, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Romania, Slovak Republic, Slovenia

**Euro-Med** (Euro-Mediterranean Association Agreements) (First-generation): The EU has concluded these with Cyprus, Malta, Turkey

**Euro-Med** (Euro-Mediterranean Association Agreements): The EU has concluded these with Israel, Morocco and the Palestinian Authority and Tunisia

**Euro-Med** (Euro-Mediterranean Co-operation Agreements): The EU has concluded these with Algeria, Egypt, Jordan, Lebanon and Syria

**ECJ** (European Court of Justice)

**EUROPRO** (Association of committees of simplified procedures for international trade within the European Union and the European Free Trade Association)

**FSA** (Financial Services Agreement)

**FTA** (Free-trade agreement) (generic term)

**FTAA** (Free Trade Area of the Americas): Antigua and Barbuda, Argentina, Bahamas, Barbados, Belize, Bolivia, Brazil, Canada, Chile, Colombia, Costa Rica, Dominica, Dominican Republic, Ecuador, El Salvador, Grenada, Guatemala, Guyana, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, St Lucia, St Kitts and Nevis, St Vincent and Grenadines, Suriname, Trinidad and Tobago, Uruguay, United States, Venezuela

**GATS** (General Agreement on Trade in Services)

**GATT** (General Agreement on Tariffs and Trade)

**GPA** (WTO Government Procurement Agreement)

**Group of Three:** Colombia, Mexico and Venezuela

**GSP** (Generalised System of Preferences)

**ICSID** (International Centre for Settlement of Investment Disputes)

**IPR** (Intellectual property rights)

**JSEPA** (Japan-Singapore Economic Partnership Agreement)

**MERCOSUR** (Mercado Común del Sur/*Southern Common Market Agreement*): Argentina, Brazil, Paraguay and Uruguay

**MRA** (Mutual Recognition Agreement)

**NAAEC** (North American Agreement on Environmental Co-operation)

**NACEC** (the North American Commission for Environmental Co-operation)

**NAFTA** (North American Free Trade Agreement): Canada, Mexico, United States

**NATAP** (North American Trade Automation Prototype)

**OAS** (Organisation of American States)

**OAU** (Organization of African Unity): Algeria, Angola, Benin, Botswana, Burkina Faso, Burundi, Cameroon, Cape Verde, Central African Republic, Chad, Comoros, Cote d'Ivoire, Democratic Republic of Congo, Djibouti, Egypt, Equatorial Guinea, Eritrea, Ethiopia, Gabon, Gambia, Ghana, Guinea, Guinea-Bissau, Kenya, Lesotho, Liberia, Libya, Madagascar, Malawi, Mali, Mauritania, Mauritius, Mozambique, Namibia, Niger, Nigeria, Rwanda, Saharawi Arab Democratic Republic, Sao Tome and Principe, Seychelles, Senegal, Sierra Leone, Somalia, South Africa, Sudan, Swaziland, Tanzania, Togo, Tunisia, Uganda, Zambia, Zimbabwe

**RTA** (Regional Trade Agreement)

**SAARC** (South Asian Association for Regional Co-operation): Bangladesh, Bhutan, India, Maldives, Nepal, Pakistan, Sri Lanka

**SADC** (Southern African Development Community): Angola, Botswana, Democratic Republic of Congo, Lesotho, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Swaziland, Tanzania, Zambia, Zimbabwe

**SP** (Specified Manufacturing Process)

**SPS** (WTO Agreement on the Application of Sanitary and Phytosanitary Measures)

**SSG** (Special Safeguards)

**TBT** (WTO Agreement on Technical Barriers to Trade)

**Treaty Establishing the African Economic Community:** Algeria, Angola, Benin, Botswana, Burkina Faso, Burundi, Cameroon, Cape Verde, Central African Republic, Chad, Comoros, Cote d'Ivoire, Democratic Republic Of Congo, Djibouti, Egypt, Equatorial Guinea, Eritrea, Ethiopia, Gabon, Gambia, Ghana, Guinea, Guinea-Bissau, Kenya, Lesotho, Liberia, Libya, Madagascar, Malawi, Mali, Mauritania, Mauritius, Mozambique, Namibia, Niger, Nigeria, Rwanda, Saharawi Arab Democratic Republic, Sao Tome And Principe, Seychelles, Senegal, Sierra Leone, Somalia, South Africa, Sudan, Swaziland, Tanzania, Togo, Tunisia, Uganda, Zambia, Zimbabwe

**Treaty Establishing the Economic and Monetary Union of West Africa:** Benin, Burkina Faso, Côte d'Ivoire, Mali, Niger, Senegal and Togo

**TRIMS Agreement** (WTO Agreement on Trade-Related Investment Measures)

**TRIPS Agreement** (WTO Agreement on Trade-Related Aspects of Intellectual Property Rights)

**UN/CEFACT** (United Nations Centre for Trade Facilitation and Electronic Business)

**UNCITRAL** (United Nations Commission on International Trade Law)

**UN/EDIFACT** (United Nations Directories for Electronic Data Interchange for Administration, Commerce and Transport)

**VA** (Value Added)

**WCO** (World Customs Organisation)

**WIPO** (World Intellectual Property Organization)

**WTO** (World Trade Organisation)

## KEY FINDINGS

### REGIONALISM: A COMPLEMENT, NOT A SUBSTITUTE

*by*

**Ken Heydon**

**Abstract:** Two broad policy lessons can be drawn from this study. The first lesson is that many consequences of RTA activity bolster the case for a strengthened multilateral framework. This applies particularly to the contribution of regionalism to divergence from the rules of the multilateral system, to the effects which the patchwork of regional agreements can have on non-members of those agreements and to the role of regionalism in raising transaction costs for business. These elements are compounded by the fact that regionalism has often failed to crack the hardest nuts. In some particularly sensitive areas, regional initiatives have been no more successful – and in some cases less successful – than activity at the multilateral level. It needs to be acknowledged, however, that even were multilateral disciplines to be strengthened, RTAs, and the provisions embodied in them, would not disappear. The question then arising is how regional arrangements might impinge upon, or co-exist with, any multilateral disciplines.

The second lesson we can draw from experience with regionalism is that while some consequences of RTA activity contribute to the case for strengthening the multilateral framework, there are features of regional approaches that may nevertheless *complement* such strengthening or even be *drawn upon* in designing strengthened multilateral rules. The scope for complementarity arises from the contribution which regional initiatives can make towards harmonisation of rule-making; the scope for drawing upon arises from the extent to which RTAs go beyond the WTO. Together, these two elements have yielded highly effective synergies between approaches at the regional and the multilateral levels.

## Introduction

This study on the relationship between regional trade agreements (RTAs) and the multilateral trading system was mandated by the OECD Trade Committee at its meeting of 13-14 February 2001. There are three main frames of reference. The first is provided by the OECD 2001 Ministerial Communiqué which observed that “WTO-consistent preferential trade agreements can complement but cannot substitute for coherent multilateral rules and progressive multilateral liberalisation”. The second is the Declaration from the WTO Ministerial Conference in Doha, which highlights the importance of regionalism:

- through its recognition that regional trade agreements can play an important role in promoting the liberalisation and expansion of trade and in fostering development;
- through agreement to negotiations aimed at clarifying and improving disciplines and procedures under the existing WTO provisions applying to regional trade agreements;
- through agreement that in the work of the WTO Working Group on the Relationship between Trade and Investment account should be taken, as appropriate, of existing bilateral and regional arrangements on investment.

The third frame of reference is the evolution of regionalism itself. While the renewed momentum to multilateral trade liberalisation and rule making achieved at Doha will help reduce the risks of regionalism being pursued as a preferred course with attendant costs to third parties, RTAs will proceed, as they have in the past, to be negotiated in response to a range of economic, geo-political and security interests. Indeed, the percentage of world trade accounted for by preferential regional trade agreements is expected to grow from 43% at present to 55% by 2005 if all expected RTAs are realised. The pursuit of RTAs in Asia, among countries that had previously eschewed preferential arrangements, is further evidence of the spread of regionalism. Moreover, the momentum from Doha is not totally assured and should it falter many WTO Members are ready to place even greater emphasis on regional initiatives.

Against this backdrop, it is timely to explore the nature of the complementarity between the multilateral trading system and RTAs. In doing so, it is particularly appropriate to focus, as this study does, on the rule-making dimension of regional trade agreements. This is for two reasons. First, in recognition of the fact that the ten issues covered in this study (services, labour mobility, investment, competition, trade facilitation, government procurement, intellectual property rights, contingency protection, environment and rules of origin), and the rule-making dimension inherent in them, are receiving increased attention in regional trade initiatives. Second, as a complement to the more established – though by no means complete – work on the assessment of the welfare effects of preferential regional trade agreements – i.e. the traditional Vinerian study of trade creation and trade diversion.<sup>1</sup>

Consideration in this study of the relationship between RTAs and the multilateral trading system involves several elements:

- examination of the extent to which RTAs – in covering the ten issues addressed in this study - go beyond existing multilateral trade rules in the WTO;
- examination of the systemic effects of RTAs. Do the provisions of RTAs present a divergence from or a convergence with the multilateral system?
- examination of the effects of RTAs on non-members.

The span of “regional trade agreements” considered here is deliberately wide, both in terms of the type of arrangements discussed and their status. RTAs covered take in: APEC, a forum based essentially on peer pressure rather than binding rules; traditional free trade areas, such as NAFTA, necessitating preferential rules of origin to prevent third parties shipping to the free-trade agreement (FTA) entry point with the lowest external tariff; customs unions, such as MERCOSUR, with a common external tariff; and the EU, an economic and monetary union entailing supra-national authority and deep integration going well beyond trade. Agreements that have not been notified to the WTO and which, in some cases, are still being negotiated have also been included.

In preparing each of the issue papers of this study a very wide range of agreements has therefore been examined. The decision as to whether or not to mention any particular agreement has rested on the extent to which that agreement offers useful insights about one or more of the three elements of investigation mentioned above. The determining factor is the extent to which the experience associated with an agreement might shed light on the nature of the relationship between regional trade initiatives and the multilateral trading system. The focus therefore is not so much on RTAs themselves as on the issues central to, or bearing on, the multilateral trading system, drawing on experience in different RTAs to the extent that it is relevant for the analysis.

While this approach has widened the range of experience on which to draw, it has also called for care in acknowledging the different circumstances in which that experience has been, or is being, forged. In particular, care has been taken to distinguish between the characteristics of free trade areas and customs unions (for example in the chapters dealing with trade facilitation and rules of origin) and to acknowledge RTA features that are exhortatory rather than binding, and those that are still essentially work in progress.

The ten papers of this study are relatively self-contained and can – and no doubt will – be read individually in their own right. It would nevertheless be a missed opportunity not to seek to draw out some cross-cutting elements in the ten issue areas. It is hoped that by doing so it will be possible to clarify some of the implications of regionalism for the functioning of the multilateral trading system. This in turn would provide an analytical backdrop for WTO Members' ongoing consideration of how best to manage the relationship – and foster greater complementarity – between RTAs and the multilateral system.

It emerges clearly from the ten papers that precisely because they are both a sub-set of liberalisation and an exception to the MFN principle, RTAs have both positive and negative impacts. How these positive and negative elements play out is, accordingly, a central sub-theme of the study

### **Going beyond the WTO**

In almost all of the areas considered here there are examples of provisions in RTAs that differ from or go beyond those in the WTO. This is not to suggest, however, that such RTA provisions are necessarily “better” than provisions at the multilateral level, or that they are necessarily more

conducive to trade and investment liberalisation. It is for this reason that the term “going beyond” is preferred to the more value-laden expression “WTO-plus”.

Moreover, there are features of RTAs which, while they may appear to represent examples of going beyond the WTO, are rather examples of ways of doing things differently. For example, the provision in some RTAs prohibiting the use of antidumping measures in light of cooperation on competition policy matters can be said to differ from, rather than expand upon, WTO provisions. The detailed preferential rules of origin contained in RTAs do not go beyond, but are on the contrary subject to the WTO provisions, which are cast in terms of general principles and aimed at ensuring that the inherent RTA departure from MFN does not defeat the central purposes of the multilateral trading system. And provisions in RTAs covering the mobility of people in general (including permanent migration) are not so much going beyond GATS provisions (on temporary movement of service suppliers) as dealing with different, and wider, terms of reference.

Nevertheless, RTAs frequently do go beyond the WTO. They do so essentially by containing provisions that are more far-reaching. Almost all of the chapters of this study describe ways in which provisions in RTAs are more ambitious than those in the WTO. The diversity of the examples is as rich as the underlying diversity of the issues themselves.

- In the area of **services**, many RTAs, unlike the General Agreement on Trade in Services (GATS), adopt a “top down” or negative list approach, whereby all sectors and non-conforming measures are to be liberalised unless otherwise specified. While negative- and positive-list approaches can in theory generate broadly equivalent outcomes in liberalisation terms and negative-listing is not without pitfalls, a negative list approach can be more effective and ambitious in producing liberalisation. Negative listing can generate a standstill by locking-in the regulatory status quo while also promoting increased transparency and a commitment to an overarching set of obligations.
- In the area of **labour mobility**, several RTAs contain provisions that go beyond the (mode 4) provisions of the GATS by providing for full national treatment and market access for service suppliers or special market access or facilitated access for certain groups.
- RTAs containing rules on **investment** usually go beyond provisions found in the WTO in that they contain provisions on the right of establishment, an obligation that does not exist in any WTO agreement. And many RTAs reach beyond the question of establishment and the free flow of capital by building on treatment and protection principles of bilateral investment treaties.
- Given the embryonic nature of **competition**-related disciplines in the WTO, most RTAs almost by definition go beyond WTO disciplines, whether by containing general obligations to take action against anti-competitive business conduct or by calling for co-ordination of specific competition standards and rules.
- RTA provisions dealing with **trade facilitation** increasingly acknowledge that technological developments may render established procedures inefficient. Hence calls at the regional level for the regular updating of applicable rules and requirements to match changed circumstances, and for maintaining the efficiency of procedures through the introduction of modern techniques and new technology. Examples of such technology are advanced risk management and systematic cargo-profiling techniques that obviate the need for physical examination of shipments; or the use of computers, electronic data

interchange (EDI) and internet technology to provide an environment for paperless trading, including the use of secure on-line technology to facilitate certification procedures.

- In dealing with **government procurement**, some RTAs have gone beyond the WTO Agreement on Government Procurement (GPA) by enlarging the scope of commitments or by allowing for the provision of additional information. Some have widened the scope by covering more entities; others have reduced the thresholds of procurement contracts covered.
- Most RTAs dealing with **intellectual property rights** have more far-reaching provisions than those found in the WTO Agreement on Trade-Related Aspects of Intellectual Property (TRIPS Agreement) in the manner in which they address transition periods (defining periods shorter than those under the TRIPS Agreement) and enforcement. Moreover, RTAs that mandate adherence to international accords (such as the Patent Cooperation Treaty) indirectly embody features of those agreements, such as procedural requirements, which are not contained in the TRIPS Agreement.
- In the area of **contingency protection**, a number of RTAs have gone beyond WTO disciplines by, for example, eliminating in internal trade all subsidies affecting trade flows or by adopting disciplines on subsidies that are stronger than those contained in the WTO.
- RTAs containing provisions, or side agreements, on the **environment** go beyond the WTO in a variety of ways: by requiring Parties to prepare periodic reports on the state of the environment; by providing that in case of conflict, Parties' obligations under certain multilateral environmental agreements shall prevail over those under the RTA; and by admonishing Parties against relaxing environmental laws for the purpose of encouraging trade or investment. Some agreements go beyond discouraging relaxation of standards and include language on the enforcement of domestic environmental laws.

Without necessarily having provisions that are more far-reaching than those of the WTO, RTAs may also be seen as going beyond the WTO by engaging a wider range of countries. Government procurement provides a graphic illustration of this point. A number of RTAs have adopted obligations substantially similar to the GPA, but included countries that are not parties to the GPA. Developing countries, together with developed country partners, are increasingly entering into bilateral or regional procurement agreements whether or not they are parties to the GPA, showing that it is possible to bring countries at different levels of economic development together in a liberalising agreement on public procurement.

In other cases, RTAs engage countries that are not yet WTO Members. This occurs, for example, in respect of regional disciplines dealing with labour mobility and with intellectual property rights.

### **Divergence or convergence?**

What are the systemic effects of regional trade agreements? At Doha, former WTO Director General, Mike Moore, referred to the risk of an *à la carte* approach in RTAs in areas such as investment and competition being a recipe for confusion. What emerges from this study is a more nuanced picture. Regional trade agreements create both divergence and convergence. The degree of depth of such divergence or convergence is often hard to generalize, as it depends on the geographic proximity of members, the degree of economic, political and regulatory homogeneity among them, the

length of time the agreement has been in operation, and the strength of the underlying political and strategic motivations for co-operation among the RTA partners.

### *Convergence*

RTAs can have a harmonising role in three ways: by drawing on or replicating underlying WTO approaches; by drawing on other existing international agreements; and, in some cases, by helping to forge model approaches, for possible subsequent adoption in a WTO setting. RTAs can also complement the goals of the multilateral trading system by fostering cooperation and technical assistance among regional partners.

While RTAs can have more far-reaching provisions than those found in the WTO, they are nevertheless most commonly rooted in underlying WTO approaches and principles.

- RTAs tend to show broad commonality, both among each other and in relation to the GATS, as regards the shared range of disciplines promoting the progressive opening of services markets, albeit with differing burdens of obligation.
- And those agreements that do not provide for full labour or service supplier mobility tend to use GATS-type carve outs, often using GATS language verbatim.
- In the area of government procurement, RTAs, while on occasion going beyond the GPA, are broadly speaking modelled upon the GPA, in many cases replicating what can be found in the WTO Agreement.
- Similarly, RTAs generally affirm provisions of the TRIPS and TRIMS Agreements, either by explicit reference or implicitly by echoing at least some of their content.
- Provisions in RTAs relating to the environment to a large extent reflect the approach taken in the WTO Agreements. Many contain language in their preambles recognising the need for environmental protection and achievement of sustainable development objectives. Many contain general exception clauses similar to those found in Article XX of the GATT, and the trend is to include language (often borrowed from other RTAs) affirming that the measures referred to in Article XX(b) of the GATT 1994 include environmental measures necessary to protect human, animal or plant life or health.<sup>2</sup>

To the extent that they draw on international agreements, regional initiatives also serve to foster moves towards wider harmonisation. This is illustrated, for example, in the field of trade facilitation, given the frequent reference in RTAs to the Arusha Declaration of the World Customs Organisation and to the Kyoto Convention on the simplification and harmonisation of customs procedures.

Regional initiatives in certain areas may also, in themselves, help forge common approaches. While there is, for example, a marked proliferation of investment agreements, at the bilateral and regional level, with associated concerns about treaty congestion, there is an apparent convergence of investment provisions towards what might be described as an implicit international standard. There are two channels for this. The first is through bilateral investment treaties (BITs), which as 'side-BITs' are often associated with RTAs and often based upon model BITs. The second channel is through RTAs that closely resemble or build upon the North American Free Trade Agreement (NAFTA) investment provisions. Indeed, just as most BITs are based on model BITs, the NAFTA investment provisions have in many cases become a sort of model RTA investment chapter.

Similarly, with respect to rules of origin, it appears that the same basic mechanisms or criteria are used by all RTAs, although in varying combinations. As RTAs proliferate, a small number of models, initially formulated by major traders such as the United States or the European Union, are replicated in new agreements concluded between them and third countries. Cumulation initiatives also promote harmonisation among participants by further expanding the coverage of these models.

The individual chapters of this study document a number of ways in which RTAs foster cooperation and technical assistance among the Parties. To this extent they can be seen as being complementary to the technical assistance and capacity building goals of the Doha Development Agenda. For example, consultation and cooperation mechanisms concerning the application of measures against anti-competitive conduct are provided for in most RTAs; a number of RTAs have provisions for technical cooperation or for improvements in internal harmonisation and levels of intellectual property rights (IPR) protection; and there are many environmental cooperation agreements at the regional level which facilitate the exchange of information and technical cooperation on matters related to the environment.

Consistent with their provision for technical assistance and capacity building, many RTAs – like the WTO itself - allow for considerable flexibility of application of disciplines, according to the level of development of their members. This is evident in respect of the “Singapore” issues, for example:<sup>3</sup>

- One of the attractive features of negotiating investment rules at the sub-multilateral level is the flexibility that countries with historically similar approaches to investment issues can bring to the process of negotiation - allowing them to scale their regional ambitions according to particular development objectives and local circumstances and sensitivities.
- Flexibility is also a feature of the treatment of competition at the regional level, as witnessed for example by the decentralised application of EC competition law.
- Although harmonisation is high on the agenda in some RTAs, trade facilitation mostly rests on common principles that are then tailored to the specific circumstances of each participating country.

### ***Divergence***

The proliferation of regional trade agreements is nevertheless also a source of divergence. Convergence at the regional level will not always translate into a harmonised approach internationally. In the discussion of intellectual property rights, for example, it is observed that while increasing the degree of harmonisation of approaches to IPR protection within a regional grouping, IPR-related provisions may diverge in their content between RTAs. Among regional agreements in the Americas, there are presently two distinct approaches to the relationship between competition policy and anti-dumping action. In one case, there is provision for the reciprocal elimination of anti-dumping actions in the context of competition policy; in the other, a party's right to apply anti-dumping measures is maintained.

A serious practical consequence of divergent approaches among RTAs is an increase in transaction costs for business. This is particularly evident in the area of rules of origin. It is not uncommon for a single country to have to apply several different sets of rules, depending on the RTAs to which it belongs. This complicates both the production and sourcing decisions of companies established, or considering establishment, in that country.

The patchwork of regional initiatives may also give rise to systemic frictions. For example, the pursuit of strengthened multilateral disciplines on contingency protection may not be aided by the plethora of approaches at the regional level, where

- some RTAs have eliminated the possibility of using anti-dumping and countervailing duties, while allowing the use of safeguard measures in relations between members;
- others have eliminated the possibility of using anti-dumping and safeguards but have retained the possibility of using countervailing duties; and
- still others have kept the possibility of using both anti-dumping and countervailing duties, but have eliminated the use of safeguard measures.

In other areas, regional approaches may lead not so much to systemic friction – because there is no direct tension with WTO rule-making – but rather to systemic overload. An example arises in the area of investment, where the proliferation of agreements has given rise to a considerable increase in the case load of various dispute-settlement mechanisms. With the rapid growth of BITs for example, the number of disputes brought to the International Centre for Settlement of Investment Disputes (ICSID) (one of the most commonly referred to dispute settlement facilities in BITs and RTAs) has increased significantly. Given concerns over the existing dispute settlement mechanisms at the WTO and the accelerated use of the various dispute settlement mechanisms for investment, this is an area where considerable work is needed in any eventual investment disciplines at the WTO.

### **Effects on third parties**

Like the question of convergence or divergence, examination of the effects of RTAs on non-members needs to be addressed with care. As the different sections of this study make clear, there is ample evidence of provisions in RTAs that seek to protect the interests of third parties. RTAs covering services typically feature a liberal “rule of origin” (or denial of benefits clause). That is to say, they extend equivalent treatment to all legal persons conducting substantial business operations in a member country. This means that, in practice, the post-establishment treatment of investment – in many instances the most important mode of supplying services in foreign markets – tends to be non-preferential as concerns third-country investors. Moreover, a number of governments participating in regional agreements, particularly those adopting a negative list approach to liberalisation, have shown a preparedness to extend regional preferences on an MFN basis under the GATS.

In the area of competition, as with investment, there is provision for RTAs to adopt the principle of non-discrimination – containing commitments that measures taken to proscribe anti-competitive activities should be applied on a non-discriminatory basis.

Measures taken to promote trade facilitation, with a few exceptions, rarely have a preferential effect. It is impracticable to apply streamlined procedures for RTA-originating goods and more burdensome procedures for third-party goods. And even where provisions in RTAs are preferential, to the extent that they encourage the practice of transparency more widely, as in the case of government procurement, they may, eventually, yield more far-reaching benefits.

Notwithstanding these positive or benign third-party elements in regional trade agreements, there is a clear potential for RTAs to have a prejudicial effect, though measuring this effect is difficult.

Regional initiatives can affect investment patterns – in part because of investment protection provisions within RTAs but perhaps more importantly because of perceived growth opportunities in an

expanded regional market. Regional agreements can also distort investment patterns via the effects of sector-specific rules of origin.

If rules of origin are not sufficiently transparent or predictable, or if their discretionary character makes them vulnerable to protectionist capture, they can represent a trade barrier in their own right. This is a particular risk in sensitive sectors, like textiles and clothing, agricultural or automotive products. These sectors are often left out of agreements altogether. In other cases, the stringency of special sectoral rules ensures that third-country inputs have very restricted market access, especially inputs of a higher value or level of processing.

In a number of other areas in this study, the potential for prejudicial effects is discussed: for example in the use of competition policy in lieu of anti-dumping measures in intra-regional trade, where anti-dumping measures would still apply to third parties; or in the provision for lower or no customs fees, or for simplified or cheaper marking requirements in favour of preferential partners. It is important, however, that these points be considered carefully, in the overall context of the chapter in which they are raised.

Issues pertaining to the treatment of third parties have also arisen in the context of a separate project on mutual recognition agreements (MRAs).<sup>4</sup> A number of recognition agreements or arrangements concluded as part of broader RTAs have been notified under GATS Article V (Regional Integration), rather than GATS Article VII (Recognition). It has been queried whether these agreements or arrangements would still be subject to the disciplines of Article VII which include, *inter alia*, that the parties must provide other WTO Members with adequate opportunity to negotiate their accession to such agreements or arrangements or to negotiate comparable ones. Indeed, some have argued that such notifications under Article V could reflect a desire to avoid the obligations of Article VII. Others have argued that such agreements remain subject to Article VII disciplines regardless of the Article under which they were notified.

It should be stressed that the extent of any distortion arising in each of the areas identified here is an empirical question and in each case there is surprisingly little research.

## **Drawing lessons**

Two broad policy lessons can be drawn from the above observations. Each has a cautionary note. And each brings us back to the proposition from OECD Ministers stated at the beginning of this overview: that regional trade agreements can complement but cannot substitute for coherent multilateral rules and progressive multilateral liberalisation.

The first lesson is that many consequences of RTA activity bolster the case for a strengthened multilateral framework. This applies particularly to the contribution of regionalism to divergence from the rules of the multilateral system, to the effects which the patchwork of regional agreements can have on non-members of those agreements and to the role of regionalism in raising transaction costs for business.

These elements are compounded by the fact that regionalism has often failed to crack the hardest nuts. In some particularly sensitive areas, regional initiatives have been no more successful – and in some cases less successful – than activity at the multilateral level. As an illustration of this point, and as developed in the chapter concerned, RTAs have generally made little progress in tackling the rule-making interface between domestic regulation and trade in services, and in some instances have narrower provisions than found in the GATS. In the area of contingency protection, the persistence of different combinations of measures among RTAs is evidence of the intractable nature of this issue –

highlighted by the fact that some RTAs add new opportunities to use safeguard measures, with disciplines less stringent than those in the WTO.

It needs to be acknowledged, however, that even were multilateral disciplines to be strengthened, RTAs, and the provisions embodied in them, would not disappear. The question then arising is how regional arrangements might impinge upon, or co-exist with, any multilateral disciplines. This in turn bears upon the question of the implementation of GATT Article XXIV and GATS Article V, as well as on the activities of the Trade Policy Review Body and the Committee on Regional Trade Agreements.

The second lesson we can draw from experience with regionalism is that while some consequences of RTA activity contribute to the case for strengthening the multilateral framework, there are features of regional approaches that may nevertheless *complement* such strengthening or even be *drawn upon* in designing strengthened multilateral rules. The scope for complementarity arises from the contribution which regional initiatives can make towards harmonisation of rule-making; the scope for drawing upon arises from the extent to which RTAs go beyond the WTO. Together, these two elements have yielded highly effective synergies between approaches at the regional and the multilateral levels. Recent history provides some concrete examples of such synergies – or reverse engineering. For example, while the GATS has achieved a higher level of bound liberalisation in financial services than that found in most RTAs, the development of the GATS Understanding on Commitments in Financial Services took advantage of insights gained in financial market opening at the regional level.

Nevertheless, while RTA experience might be drawn upon for careful and selective application multilaterally, particularly where RTAs are tackling issues specifically referred to in the Doha Declaration, it is unlikely that analysis of RTA provisions and practices will lead to overarching conclusions about best practice. This is the case for two reasons.

First, neither the WTO nor the RTAs are standing still. RTAs are expanding and evolving, including in response to other RTAs, and multilateral rules and market access continue to develop and expand. And second, in many cases agreements reached at the regional level are made possible by the close affinities among the members. The circumstances in which regional agreements are reached differ significantly from those applying in the WTO, as well as differing from one agreement to another. The ability, and motivation, of RTAs to design and implement provisions that go beyond what might be possible, or desired, in the WTO depend on a complex set of factors including the number of members, and the nature of the linkages between them. The diversity of the institutional arrangements being considered in this study does not mean that comparisons cannot be made but any comparison needs to take full account of differing contexts.

Implicit in much of the above is the fact that all RTAs are driven in large measure by geo-political considerations. Their role in the trading system, though important for trade policy, will always be seen by the participating governments in the broader context of the political and strategic objectives that the agreements seek to serve.

## NOTES

1. For a discussion of that aspect of regionalism see OECD, “Regional Integration: Observed Trade and Other Economic Effects”, TD/TC/WP(2001)19/FINAL.
2. It should be noted that the NAFTA, and other agreements modelled on the NAFTA, are accompanied by an extensive environmental side agreement that is considered integral to the Agreement and provides for a significant number of additional environmental commitments.
3. See Heydon (2002), “Regulatory Provisions in Regional Trade Agreements: The ‘Singapore’ Issues”, paper presented at an OECD workshop on the Development Dimensions of the Singapore Issues, Hong Kong, China, 19-20 June 2002 - <http://www.oecd.org/pdf/M00036000/M00036456.pdf>.
4. See “Service providers on the move: mutual recognition agreements”, TD/TC/WP(2002)48/FINAL

## *Chapter 1*

### **SERVICES**

*by*

**Pierre Sauvé**

**Abstract:** This chapter compares the treatment of services trade in regional trade agreements (RTAs) with that in the General Agreement on Trade in Services (GATS). Regional initiatives have generated useful experiments with various approaches to rule making and market opening in the area of services trade, while the GATS itself remains incomplete, with negotiations pending in a number of key areas. An increasing number of regional trade agreements (RTAs) have in recent years sought to complement disciplines on cross-border trade in services (modes 1 and 2 of the GATS) with a more comprehensive set of parallel disciplines on investment and the temporary movement of business people. As regards the modalities of services trade and investment liberalization within RTAs, both a positive list or hybrid approach to market opening (found in GATS) and a negative-list approach were adopted. In a number of cases, governments participating in RTAs have shown a readiness to subsequently extend regional preferences on an MFN basis under the GATS. RTAs tend also to be viewed as offering a greater scope for making speedier headway on matters relating to regulatory co-operation in services trade, notably in areas such as services-related standards and the recognition of licences and professional or educational qualifications. On the other hand, RTAs have generally made little progress in tackling the rule-making interface between domestic regulation and trade in services or the key “unfinished” rule-making items on the GATS agenda (*e.g.* emergency safeguards and subsidies). RTAs have also made little progress, with the notable exception of land transportation issues, in opening up those services sectors that have to date proven particularly difficult to address at the multilateral level (*e.g.* air and maritime transport; audio-visual services; energy services).

## Key points

The last decade and a half witnessed strong growth in the number of regional trade agreements featuring disciplines on trade and investment in services. Such agreements offer tangible proof of heightened policy interest in the contribution of efficient service sectors to economic growth and development and a growing appreciation of the gains from trade and investment in services.

Such developments have paralleled efforts at framing services disciplines in the World Trade Organisation (WTO) under the aegis of the General Agreement on Trade in Services (GATS). Because they have typically been negotiated in a concurrent fashion, regional and multilateral efforts at services rule-making have tended to be closely intertwined processes, with much iterative learning by doing, imitation, or reverse engineering. Experience gained in developing the services provisions of RTAs has built up significant negotiating capacity in participating countries, providing expertise available for deployment in a multilateral setting.

The proliferation of regional initiatives has provided governments with significant policy space in which to experiment with various approaches to rule making and market opening in the area of services trade. In particular, the regional route has afforded governments the ability to pursue policy approaches differing from those emerging from the incipient multilateral framework under the GATS. Because the GATS itself remains incomplete, with negotiations pending in a number of key areas (*e.g.* emergency safeguards, subsidies, government procurement, domestic regulation), such regional experimentation has generated a number of useful policy lessons in comparative negotiating and rule-making dynamics.

This section addresses a range of issues arising from the treatment of services trade in selected regional agreements and their possible relevance to multilateral rule making. While the paper makes a number of comments about the results achieved by some of the RTAs reviewed in it, its immediate purpose, as with all the other chapters of the overall RTA study, is to compare provisions found in the RTAs with those in the WTO. The following key points arise from the analysis.<sup>1</sup>

- RTAs tend to show broad commonality, both among each other and vis-à-vis the GATS, as regards the standard panoply of disciplines directed towards the progressive opening of services markets. In some instances, however (*e.g.* non-discriminatory quantitative restrictions, domestic regulation), GATS disciplines go further than those found in a number of RTAs.
- Starting with the NAFTA in 1994, an increasing number of RTAs have in recent years sought to complement disciplines on cross-border trade in services (modes 1 and 2 of the GATS) with a more comprehensive set of parallel disciplines on investment (both investment protection and liberalisation of investment in goods- and services-producing activities) and the temporary movement of business people (related to goods and services trade and investment in a generic manner).<sup>2</sup>
- RTAs featuring comprehensive or generic investment disciplines typically provide for a right of non-establishment (*i.e.* no local presence requirement as a pre-condition to supply

services) as a means of encouraging cross-border trade in services. Such a provision, for which no GATS equivalent exists, might prove particularly well suited to promoting e-commerce.

- With very few exceptions (of a mainly sectoral nature), RTAs covering services typically feature a liberal “rule of origin”/denial of benefits clause, *i.e.* extend preferential treatment to all legal persons conducting substantial business operations in a member country. In practice, the adoption of a liberal stance in this regard implies that the post-establishment treatment of what in many instances represents the most important mode of supplying services in foreign markets - investment - is non-preferential as regards third country investors.
- RTAs covering services tend to follow two broad approaches as regards the modalities of services trade and investment liberalisation. A number of RTAs tend to replicate the use, found in GATS, of a positive list or hybrid approach to market opening, whereas others pursue a negative-list approach. While both approaches can in theory generate broadly equivalent outcomes in liberalisation terms, as a practical matter the negative list approach can be more effective and ambitious in producing liberalisation. As well, the process of “getting there” tends to differ, with a number of good governance-enhancing features associated with negative listing, most notably in transparency terms.
- A number of governments participating in RTAs, particularly those adopting a negative list approach to liberalisation, have shown a readiness to subsequently extend regional preferences on an MFN basis under the GATS. This may reflect both a realisation that preferential treatment may be harder to confer in services trade (and is indeed perhaps economically undesirable with regard to investment) and that multilateral liberalisation may offer greater opportunities of securing access to the most efficient suppliers, particularly of infrastructural services likely to exert significant effects on economy-wide performance.
- RTAs have generally made little progress in tackling the rule-making interface between domestic regulation and trade in services. Indeed, many RTAs feature provisions in this area that are no more fleshed out and, in some instances, weaker or more narrowly drawn (*i.e.* focusing solely on professional services) than those arising under Article VI of the GATS (including the Article VI:4 work programme).
- RTAs tend to be viewed as offering greater scope for making speedier headway on matters relating to regulatory co-operation in services trade, notably in areas such as services-related standards and the recognition of licences and professional or educational qualifications. Despite the greater initial similarities in approaches to regulation and greater cross-border contact between regulators that geographical proximity can afford, progress in the area of domestic regulation has been slow and generally disappointing even at the regional level.
- With a few exceptions, RTAs have similarly made little headway in tackling the key “unfinished” rule-making items on the GATS agenda. This is most notably the case of disciplines on emergency safeguards and subsidies for services, where governments confront the same technical challenges or political sensitivities at the regional level as they do on the multilateral front. More progress has however been made at the regional level in opening up procurement markets for services, though such advances have tended to be made in procurement negotiations rather than in the services field.
- With the notable exception of land transportation issues, where physical proximity stands out as a determinative facilitating feature, RTAs have generally made little progress in opening

up those service sectors that have to date proven particularly difficult to address at the multilateral level (e.g. air and maritime transport; audio-visual services<sup>3</sup>; energy services). In the key infrastructural areas of basic telecommunications and financial services, the GATS has in fact achieved a higher level of bound liberalisation than that on offer in most RTAs. The latter result suggests that, in some sectors, the political economy of multilateral bargaining, with its attendant gains in critical mass, may help overcome the resistance to liberalisation arising in the narrower or asymmetrical confines of regional compacts.

### **Key features of the General Agreement on Trade in Services (GATS)<sup>4</sup>**

The General Agreement on Trade in Services (GATS) for the first time extends internationally agreed rules and commitments, broadly comparable with those of the GATT, into a huge and still rapidly growing area of international trade. All WTO Members are subject to the disciplines of the GATS and have assumed specific commitments in individual services sectors.

The GATS applies in principle to all services, except those relating to air traffic rights and services supplied in the exercise of governmental authority. Article I:3(c) of the GATS defines the latter as services not provided on a commercial basis or in competition with other suppliers. This carve-out includes the activities of central banks and other monetary authorities, statutory social security and public retirement plans, and public entities using government financial resources. The GATS distinguishes between four modes of supplying services: cross-border trade, consumption abroad, commercial presence, and presence of natural persons<sup>5</sup>

GATS obligations contained may be categorised into two groups: general obligations which apply directly and automatically to all Members, regardless of the existence of sectoral commitments; and specific commitments whose scope is limited to the sectors, sub-sectors and/or modes of supply where a Member has undertaken market access and/or national treatment obligations.

#### ***General obligations***

**MFN treatment:** Under Article II, Members are held to extend immediately and unconditionally to services or services suppliers of all other Members “treatment no less favourable than that accorded to like services and services suppliers of any other country”. Derogations are possible in the form of so-called Article II-Exemptions. Members were allowed to list such exemptions before the Agreement entered into force. New exemptions can be granted only to new Members at the time of accession or, to current Members, by way of a waiver under Article IX:3 of the WTO Agreement. All exemptions are subject to review; they should in principle not last longer than ten years.

**Transparency:** GATS Members are required, *inter alia*, to publish all measures of general application and establish national enquiry points mandated to respond to other Members’ information requests.

#### ***Specific commitments***

**Market access:** The granting of market access is a negotiated commitment undertaken by individual Members in specified sectors. It may be made subject to one or more of six types of limitations enumerated in Article XVI(2). For example, limitations may be imposed on the number of service suppliers, service operations or employees in a sector, the value of transactions, the legal form of the service supplier, or the participation of foreign capital.

**National treatment:** In any sector included in its schedule of specific commitments, a WTO Member is obliged to grant foreign services and service suppliers treatment no less favourable than that extended to its own like services and service suppliers, subject to the terms and conditions specified in its schedule. In this context, the key requirement is to abstain from measures which are liable to tilt the conditions of competition in favour of a Member's own services or service suppliers.

The GATS does not impose the obligation to assume market access or national treatment commitments in a particular sector. In scheduling commitments, Members are free to tailor the extent of the commitments they schedule in accordance with national policy objectives.<sup>6</sup> The scheduling of specific commitments triggers further (conditional) obligations concerning, *inter alia*, the objective administration of domestic regulations and the avoidance of restrictions on international payments and transfers.

Each WTO Member is required to have a *schedule of specific commitments*, which identifies in a positive manner those service sectors, sub-sectors, or modes of supply subject to market access, national treatment, and additional commitments. Under the GATS' hybrid approach to liberalisation, in areas subject to commitments, WTO Members must list negatively any non-conforming measures they wish to maintain. Most schedules consist of both sectoral and horizontal sections.<sup>7</sup> In sectors where WTO members voluntarily undertake specific commitments, measures are subject to the disciplines of Article VI on *domestic regulation*. Members thus need to ensure, *inter alia*, that they are administered in a reasonable, objective and impartial way and do not constitute unnecessary barriers to trade.

Recognising the great diversity of service sectors, the GATS features several *sectoral annexes* that complement the framework provisions and/or specify its scope of application in particular sectors. The two most prominent areas where sectoral rules have been developed lie in the area of basic telecommunications, where negotiations were successfully concluded in February 1997, and financial services, where talks were successfully completed in mid-December 1997. In both sets of negotiations, Members achieved significantly improved commitments with a broader level of participation than that on offer at the end of the Uruguay Round.

The GATS sets out a work programme normally referred to as the "*built-in*" agenda.<sup>8</sup> On the rule-making front, various GATS Articles provide for issue-specific negotiations intended to define possible rules and disciplines for domestic regulation (Article VI), emergency safeguards (Article X), government procurement (Article XIII), and subsidies (Article XV). These negotiations have been under way since 1995.

In looking at the GATS agreement, as well as at the significance of the specific services commitments undertaken by WTO members, it is worth pointing out how the evolution of multilateral disciplines can coexist with, be informed by, and at times supersede (as is most evidently the case in basic telecommunications) disciplines or liberalisation outcomes obtaining at the regional level. As with many RTAs covering trade and investment in services, the GATS is still incomplete. The process of filling the gaps will likely require several more years of negotiations, and experience will no doubt show a need to improve or modify some of the existing rules. Each WTO Members' schedule of commitments for trade in services is also only a first step, comparable not so much with its GATT schedule of 1994, but rather with the initial limited tariff cutting undertaken when the GATT was launched in 1948. Among the most important elements in the GATS package is that successive further rounds of negotiations will be undertaken to continue to open up world trade in services in a progressive manner.

## Provisions in Regional Trade Agreements

### *Key disciplines: convergence and divergence*

While RTAs covering services come in many different shapes and sizes, they tend to feature a common set of key disciplines governing trade and investment in services that are also found in the GATS, albeit with differing burdens of obligation (see Table 1.1). Areas of greatest rule-making convergence between the multilateral and regional levels relate to the agreements' scope of coverage (where carve-outs in respect of air traffic rights and public services tend to define the norm); disciplines on transparency, national treatment, most-favoured nation treatment, as well as disciplines on payments and transfers, monopolies and exclusive service providers, and general exceptions. Considerable similarities also exist between the multilateral and regional levels as regards the need for sectoral specificity (*i.e.* sectors requiring special treatment in annexes). Lesser convergence (and more limited regional progress) can be observed in areas of rule-making that have posed difficulties in a GATS setting. This includes issues such as non-discriminatory quantitative restrictions (market access in GATS-speak), domestic regulation, emergency safeguards and subsidies.

The principles of *most-favoured nation* and *national treatment* constitute two of the most basic building blocks to any agreement on services, just as they do in the goods area. As with the GATS, very few RTAs set out such principles in unqualified form,<sup>9</sup> regardless of whether they are framed as general obligations (which is the case for MFN in virtually all agreements and for national treatment in agreements pursuing a negative list approach to liberalisation) or as obligations that apply solely in sectors where liberalisation commitments are positively undertaken.

As may be expected given the regulatory intensity of services trade, *transparency* disciplines are common to all RTAs covering services. These typically stipulate, as is the case under GATS, an obligation to publish relevant measures and notify new (or changes to existing) measures affecting trade in services and to establish national enquiry points to provide information on measures affecting services trade upon request. One innovation over the GATS is the provision that some RTAs, particularly in the Western Hemisphere, make for members to afford the opportunity (to the extent possible) for prior comment on proposed changes to services regulations.

While RTAs covering services typically address *non-discriminatory quantitative restrictions* that impede access to services markets (addressed under Article XVI of the GATS), many agreements, particularly those concluded in the Western Hemisphere and modelled on the NAFTA, are weaker than the GATS, committing parties solely to making such measures fully transparent in annexes listing non-conforming measures and to a best endeavours approach as regards their progressive dismantling in future. In contrast, under GATS, WTO members undertake policy bindings in sectors, sub-sectors and modes of supply against which market access commitments are scheduled. Many other RTAs, such as MERCOSUR and the various RTAs to which EU Members are party, introduce a prohibition on the introduction of new non-discriminatory QRs on any scheduled commitment and sector, mirroring a similar requirement under the GATS.

The argument has been made that RTAs in the services field provide scope for creating "optimum harmonisation areas", the presumption being that the aggregate adjustment costs of regulatory convergence and policy harmonisation are likely to be smaller when foreign regulatory preferences are similar and regulatory institutions broadly compatible. Both sets of conditions are likelier on balance to obtain among countries that are "closer" in physical and/or cultural/historical terms.<sup>10</sup> In practice, however, it is notable how the broad intersect between *domestic regulation* and services trade has tended to prove intractable (just as it has under the GATS) even among the smaller subset of countries engaging in RTAs.

Table 1.1 Key disciplines in RTAs covering services

Agreements	MFN Treatment	National Treatment	Market Access (N-D QRS)	Domestic Regulation	Emergency Safeguards	Subsidy Disciplines	Government Procurement	Rule of Origin (denial of benefits)
<b>GATS</b>	Yes	Yes	Yes	Yes	Future	Future negotiations	Future negotiations	Yes
<b>NAFTA</b>	Yes	Yes	Yes	Yes*	No	No	Separate chapter	Yes
<b>Canada – Chile</b>	Yes	Yes	Yes	Yes*	No	No	No	Yes
<b>Chile – Mexico</b>	Yes	Yes	Yes	Yes*	No	No	No	Yes
<b>Bolivia-Mexico</b>	Yes	Yes	Yes	Yes*	Future	No	Separate chapter	Yes
<b>Costa Rica – Mexico</b>	Yes	Yes	Yes	Yes*	Future	No	Separate chapter	Yes
<b>Mexico – Nicaragua</b>	Yes	Yes	Yes	Yes*	No	No	Future negotiations	Yes
<b>Mexico – Northern Triangle<sup>1</sup></b>	Yes	Yes	Yes	Yes*	Future	No	No	Yes
<b>Central America – Dominican Republic</b>	Yes	Yes	Yes	Yes*	Future	Future negotiations	Separate chapter	Yes
<b>Central America - Chile</b>	Yes	Yes	Yes	Yes*	No	No	Separate chapter	Yes
<b>Group of Three</b>	Yes	Yes	Yes	Yes*	No	No	Separate chapter	Yes
<b>MERCOSUR</b>	Yes	Yes	Yes	Yes	No	Future negotiations	Future negotiations	Yes
<b>Andean Community</b>	Yes	Yes	Yes	Yes*	No	No	No	Yes
<b>CARICOM</b>	Not specified	Yes	Not specified	Yes*	Yes	No	No	Yes
<b>CARICOM – Dominican Republic</b>	Yes	Yes	Yes	Yes*	Future	No	Separate chapter	Yes
<b>Central American Economic Integration</b>	Not specified	No general article	No	No	No	No	No	Not specified

\* Rules on domestic regulation are set out more narrowly (in most cases they apply only to the licensing and certification of professional services suppliers).

<sup>1</sup> Honduras, Guatemala and El Salvador.

Table 1.1 (continued) Key disciplines in RTAs covering services

Agreements	MFN Treatment	National Treatment	Market Access (N-D QRS)	Domestic Regulation	Emergency Safeguards	Subsidy Disciplines	Government Procurement	Rule of Origin (denial of benefits)
<b>EU</b>	Yes	Yes	Yes	Yes	No	Yes (covered under competition disciplines)	Yes	Yes
<b>Europe Agreements</b>	Yes	Yes	No	Yes	No	Yes (covered under competition disciplines)	No	Beneficiaries specified through definition of "undertakings"
<b>EU-Mexico</b>	Yes	Yes	Yes	No (provisions on regulatory carve-out and recognition)	No	No	Separate chapter	Yes
<b>EFTA – Mexico</b>	Yes	Yes	Yes	Yes	No	No	No	Not specified
<b>EFTA-Singapore</b>	Yes	Yes	Yes	Yes	No	Requests for consultations to be given sympathetic consideration	Separate chapter	Yes
<b>Japan – Singapore</b>	No	Yes	Yes	Yes	No	No	Separate chapter	Yes
<b>ASEAN Framework Agreement on Services</b>	Yes	Yes	Yes	Not specified	Yes	No	No	Yes
<b>Australia – New Zealand Closer Economic Relations trade Agreement</b>	MFN for excluded sectors	Yes	Yes	Yes	No	Export subsidies prohibited Other subsidies excluded	No	Yes
<b>US – Jordan</b>		Yes	Yes	Yes	No	Future negotiations	Yes	Yes

\* Rules on domestic regulation are set out more narrowly (in most cases they apply only to the licensing and certification of professional services suppliers).  
<sup>1</sup> Honduras, Guatemala and El Salvador.

In many instances, RTAs address domestic regulation in a manner analogous to that found in Article VI of the GATS, *i.e.* with a focus on procedural transparency and ensuring that regulatory activity does not lead to disguised restrictions to trade or investment in services. With the exception of the EU itself and of agreements reached between the EU and countries in Central and Eastern Europe in pre-EU accession mode, no RTA has to date made tangible progress in delineating the possible elements of a necessity test aimed at ensuring broad proportionality between regulatory means and objectives (as is potentially foreseen under the GATS' Article VI:4 mandate). Similarly, with few exceptions (*e.g.* in the EU context as well as the ANZCERTA), little significant tangible progress been registered in regulatory harmonisation. It is notable that neither the NAFTA nor the many NAFTA-type agreements reached in the Western Hemisphere contain an article on domestic regulation *per se* in their services chapters. Rather, such agreements feature more narrowly drawn disciplines relating to licensing and certification of professionals.<sup>11</sup> Moreover, even though a number of RTAs, notably those concluded in the Western Hemisphere, call on Members to recognise, at times on the basis of explicit timetables (as in the NAFTA in the case of foreign legal consultants and the temporary licensing of engineers), foreign educational credentials and professional qualifications in selected professions, progress in concluding mutual recognition agreements has proven slow and difficult, particularly when pursued between countries with federal systems.

The experience to date with regulatory convergence and co-operation at the regional level does not provide clear-cut evidence in support of the argument advanced on optimum (regional) harmonisation areas. Given that any attempt at reaching MRAs in the services area (as with goods-related MRAs) is almost by definition likely to involve a limited number of participating countries, it is not altogether clear that RTAs offer a superior alternative to that available to WTO Members under Article VII of the GATS.<sup>12</sup>

With few exceptions, RTAs have similarly made little headway in tackling the key “unfinished” rule-making items on the GATS agenda. This is most notably the case for disciplines on an emergency safeguard mechanism (ESM) and subsidies for services, where governments confront the same technical challenges or political sensitivities at the regional level as they do on the multilateral front. It is interesting to note for instance that the countries of Southeast Asia, which have been amongst the most vocal proponents of an *emergency safeguard mechanism* in the GATS, have not adopted such a provision within the ASEAN Framework Agreement on Services (AFAS). To date, only members of CARICOM (in Protocol II) in the Western Hemisphere, have adopted (but not yet used) such an instrument, and questions remain as to the operational feasibility of an ESM in services trade. Elsewhere, the NAFTA has provided one example of sectoral experimentation (in financial services) with safeguard-type measures.<sup>13</sup> On *subsidies*, with the exception of the EU (including its pre-accession agreements with countries in Central and Eastern Europe) and of ANZCERTA, the adoption of regional disciplines in the services area has proven elusive, particularly in countries with federal political systems given the extent of sub-national policy activism in this area. Whereas a number of RTAs (*e.g.* MERCOSUR) replicate the call, made in GATS, to develop future disciplines on subsidies in services trade, others, notably the NAFTA and numerous NAFTA-type agreements in the Western Hemisphere, specifically exclude subsidy practices from coverage.<sup>14</sup>

More progress has been made at the regional level in opening up *government procurement* markets for services, though this has tended to be achieved through negotiations in the area of government procurement *per se* (as with the WTO's Government Procurement Agreement or GPA) rather than addressed in services negotiations.<sup>15</sup> The approach taken in RTAs is for the most part very similar to that adopted in the WTO, *i.e.* non-discrimination among members within the scope of scheduled commitments and procedures to enhance transparency and due process. RTAs whose members are all parties to the GPA, such as EFTA and the Singapore–Japan FTA, specifically mention that the relevant GPA articles apply and most agreements concluded in the Western Hemisphere basically replicate GPA disciplines at the regional level. However, it bears noting that unlike the GPA,

which applies in principle to purchases by both state and sub-national governments, many RTAs provide for binding government procurement disciplines at the national level only.<sup>16</sup>

### ***The treatment of investment in services: establishment and non-establishment rights***

Starting with the NAFTA in 1994, an increasing number of RTAs have in recent years sought to complement disciplines on cross-border trade in services (modes 1 and 2 of the GATS) with a more comprehensive set of *parallel disciplines on investment* (rules governing both the protection and liberalisation of investors and their investments in goods- and services-producing activities) and the *temporary movement of business people* (related to goods and services trade and investment in a generic manner).<sup>17</sup>

One important difference in approaches to services trade as between (and among) RTAs and the GATS concerns the interplay between cross-border trade and investment in services. At the multilateral level, the GATS (and the WTO more broadly) does not contain a comprehensive body of investment disciplines (the GATS is silent for instance on matters of investment protection) but incorporates investment in services (“commercial presence” in GATS-speak) as one of the four modes of service delivery (see Table 1.2).

A GATS-like approach has been followed in a number of RTAs, notably by MERCOSUR members and many RTAs concluded outside the Western Hemisphere (*e.g.* ASEAN Framework Agreement on Services, US-Jordan FTA). This approach contrasts with that taken by NAFTA and the NAFTA-type RTAs, where investment rules and disciplines covering both matters of investment protection (as typically treated under bilateral investment treaties, or BITs) and liberalisation (typically with respect to both pre- and post-establishment matters), combined with investor-state and state-to-state dispute settlement provisions, apply in a generic manner to goods and services in a separate chapter. The latter agreements thus feature services chapters that focus solely on cross-border delivery (modes 1 and 2 of GATS), complemented by separate chapters governing the movement of capital (investment) on the one hand, and the temporary entry of business people on the other.<sup>18</sup> A number of RTAs, such as the Japan-Singapore Economic Partnership Agreement, CARICOM as well as the EFTA-Mexico and EFTA-Singapore FTAs, address investment in services both under the commercial presence mode of supply (in their services chapters) as well as in separate chapters dealing with investment, the right of establishment or the movement of capital (see Table 1.2).

As Table 1.2 indicates, RTAs featuring generic investment disciplines typically provide for a **right of non-establishment** (*i.e.* no local presence requirement as a pre-condition to supply a service, subject to the right to reserve and list existing non-conforming measures) as a means of encouraging greater volumes of cross-border trade in services. While such an obligation, for which no GATS equivalent exists,<sup>19</sup> were initially crafted (starting with the NAFTA) before the Internet became a tangible commercial reality, they may nonetheless prove particularly well-suited to promoting e-commerce and encouraging countries to adopt less onerous restrictions on cross-border trade whilst achieving legitimate public policy objectives (*e.g.* prudential supervision, consumer protection).

With very few exceptions (of a mainly sectoral nature), RTAs covering services typically adopt a liberal “**rule of origin**” (via a provision on denial of benefits), *i.e.* the benefits of RTA treatment are typically only denied to juridical persons that do not conduct substantial business operations in a member country. In practice, the adoption of a liberal rule of origin implies that the post-establishment treatment of what in many instances represents the most important mode of supplying services in foreign markets – investment – is non-preferential for third country investors as regards liberalisation commitments.<sup>20</sup> Stated differently, under a liberal rule of origin for services and investment, third

country investors can in most instances take full advantage of the expanded market opportunities afforded by the creation of a RTA by establishing within the region.<sup>21</sup>

The above consideration may to some extent explain the observed readiness that a number of governments participating in RTAs have shown to subsequently extend (either immediately or in a progressive manner) regional preferences on an MFN basis under the GATS. This may reflect both a realisation that preferential treatment may be harder to confer in services trade (and may indeed be economically undesirable with regard to investment/mode 3) and that multilateral liberalisation may offer greater opportunities of securing access to the most efficient suppliers, particularly of infrastructural services likely to exert significant effects on economy-wide performance.<sup>22</sup> A readiness to extend RTA preferences on an MFN basis in GATS (or to extend such preferences in RTAs concluded with other countries) is most noticeable amongst countries of the Western hemisphere, the majority of which have tended to lock-in the regulatory *status quo* prevailing in their investment regimes by virtue of adopting a negative list approach to liberalisation in the RTAs to which they are party (see below).

### ***Modalities of liberalisation: negative versus. positive list approaches***

Two major approaches towards the liberalisation of trade and investment in services have been manifest in RTAs and in the WTO: the positive list or “bottom-up” approach (typically a hybrid approach featuring a voluntary, positive, choice of sectors, sub-sectors and/or modes of supply in which governments are willing to make binding commitments together with a negative list of non-conforming measures to be retained in scheduled areas), and the negative list or “top-down/list it or lose it” approach. While both negotiating modalities can produce (and indeed have in some instances produced) broadly equivalent outcomes in liberalisation terms, the two approaches can be argued to generate a number of qualitative differences of potential significance from both a domestic and international governance point of view.<sup>23</sup> While the debate over these competing approaches appears settled in the GATS context, it may still be useful to recall these differences as governments contemplate the scope that may exist in the current negotiations for making possible improvements to the GATS architecture.

Under a GATS-like, *positive (or hybrid) approach to scheduling liberalisation commitments*, countries agree to undertake national treatment and market access commitments specifying (through reservations in scheduled areas) the nature of treatment or access offered to foreign services or foreign service suppliers.<sup>24</sup> Under such an approach, countries retain the full right to undertake no commitments. In such instances, they are under no legal obligation to supply information to their trading partners on the nature of discriminatory or access-impeding regulations maintained at the domestic level. A related feature of the GATS that tends to be replicated in RTAs that espouse a bottom-up approach to liberalisation is to afford countries the possibility of making commitments that do not reflect (*i.e.* are made below) the regulatory or statutory *status quo* (a long-standing practice in tariff negotiations that was replicated in a GATS setting).

**Table 1.2 Key features of RTAs covering services**

<b>Agreements</b>	<b>Scope/ Coverage</b>	<b>Negotiating Modality</b>	<b>Treatment of Investment in Services</b>	<b>Right of non Establishment</b>	<b>Ratchet Mechanism</b>
<b>GATS</b>	Universal*	Positive list approach	Covered as "commercial presence" (mode 3)	No	No
<b>NAFTA</b>	Universal*	Negative list approach	Separate chapter	Yes	Yes
<b>Canada – Chile</b>	Universal*	Negative list approach	Separate chapter	Yes	Yes
<b>Chile – Mexico</b>	Universal*	Negative list approach	Separate chapter	Yes	Yes
<b>Bolivia-Mexico</b>	Universal*	Negative list approach	Separate chapter	Yes	Yes
<b>Costa Rica - Mexico</b>	Universal*	Negative list approach	Separate chapter	Yes	Yes
<b>Mexico – Nicaragua</b>	Universal*	Negative list approach	Separate chapter	Yes	Yes
<b>Mexico – Northern Triangle<sup>1</sup></b>	Universal*	Negative list approach	Separate chapter	Yes	Yes
<b>Central America – Dominican Republic</b>	Universal*	Negative list approach	Separate chapter	Yes	Yes
<b>Central America – Chile</b>	Universal*	Negative list approach	Separate chapter	Yes	Yes
<b>Group of Three</b>	Universal*	Negative list approach	Separate chapter	Yes	Yes
<b>MERCOSUR</b>	Universal*	Positive list approach	Separate Protocols	No	No
<b>Andean Community</b>	Universal*	Negative list approach	Covered as "commercial presence"	No	No
<b>CARICOM</b>	Universal*	Negative list approach	Covered as "commercial presence" and in separate chapters (on right of establishment and movement of capital)	No	No
<b>CARICOM – Dominican Republic</b>	Universal*	Negative list approach	Separate chapter	Yes	No
<b>Central American Common Market</b>	Construction services	Positive list approach	Not specified	No	No

\* Air transport and in certain cases cabotage in maritime services is excluded.

<sup>1</sup> Honduras, Guatemala and El Salvador

**Table 1.2 (continued) Key features of RTAs covering services**

<b>Agreements</b>	<b>Scope/ Coverage</b>	<b>Negotiating modality</b>	<b>Treatment of Investment in Services</b>	<b>Right of non Establishment</b>	<b>Ratchet Mechanism</b>
<b>EU</b>	Universal*	Negative list approach	Treated as freedom to establish	Yes	No
<b>Europe Agreements</b>	Universal*	Negative list approach	Separate chapter	Yes	No
<b>EU-Mexico</b>	Universal* (audio-visual services explicitly excluded)	Standstill (+ future negotiation of commitments à la GATS)	Covered as "commercial presence" and under a separate investment chapter	No	No
<b>EFTA – Mexico</b>	Universal *	Standstill (+ future negotiations of commitments, approach to be decided)	Covered as "commercial presence" and under a separate investment chapter	No	No
<b>EFTA – Singapore</b>	Universal*	Positive list approach	Covered as "commercial presence" and under a separate investment chapter	No	No
<b>Japan - Singapore</b>	Universal *	Positive list approach	Covered as "commercial presence" and under a separate investment chapter	No	No
<b>ASEAN Framework Agreement on Services</b>	Universal*	Positive list approach	Covered as "commercial presence" and under a separate investment chapter	No	No
<b>Australia – New Zealand Closer Economic Relations Trade Agreement</b>	Universal*	Negative list approach	Covered as "commercial presence" but no common disciplines on investment	Yes	No
<b>US - Jordan</b>	Universal*	Positive list approach	Covered as "commercial presence"	No	No

\* Air transport and in certain cases cabotage in maritime services is excluded.

<sup>1</sup> Honduras, Guatemala and El Salvador

The alternative, “top-down” approach to services trade and investment liberalisation is based upon the concept of *negative listing*, whereby all sectors and non-conforming measures are to be liberalised unless otherwise specified in a transparent manner in reservation lists appended to an agreement. Non-conforming measures contained in reservation lists are then usually liberalised through consultations or, as in the GATS, periodic negotiations. It is interesting to note that despite the strong opposition that such an approach generated when first mooted by a few GATT Contracting Parties during the Uruguay Round, the negative list approach to services liberalisation has in recent years been adopted in a large number of RTAs covering services. Canada, Mexico and the United States pioneered this approach in the NAFTA in 1994. Since the NAFTA took effect, Mexico played a pivotal role in extending this liberalisation approach and similar types of disciplines (*i.e.* right of non-establishment) on services to other RTAs it has signed with countries in South and Central America.<sup>25</sup>

A number of distinguishing features of negative listing can be identified. For one, such an approach enshrines and affirms the up-front commitment of signatories (subject to reservations) to an overarching set of general obligations. This is currently the case under the GATS solely with respect to the Agreement’s provisions on MFN treatment (Article II, with scope for one-time exceptions) and transparency (Article III), with all other disciplines applying in an *à la carte* manner to sectors and modes of supply on those terms inscribed in members’ schedules of commitments.<sup>26</sup> A second, and perhaps more immediately operational, defining characteristic of negative listing lies in its ability to generate a standstill, *i.e.* to establish a stronger floor of liberalisation by locking-in the statutory or regulatory *status quo*. Such an approach therefore avoids the GATS pitfall of allowing a wedge to arise between applied and bound regulatory or statutory practices. An important governance-enhancing feature arising from the adoption of a negative list approach is the greater level of transparency it generates. The information contained in reservation lists will be important to prospective investors, who value the one-stop shopping attributes of a comprehensive inventory of potential restrictions in foreign markets. They are also likely to benefit home country negotiators, assisting them in establishing a hierarchy of impediments to tackle in future negotiations. Such information can in turn lend itself more easily to formula-based liberalisation, for instance by encouraging members to agree to reduce or progressively phase out “revealed” non-conforming measures that may be similar across countries (*e.g.* quantitative limitations on foreign ownership in airlines). The production of a negative list may also help to generate a useful domestic policy dialogue between the trade negotiating and regulatory communities, thereby encouraging countries to perform a comprehensive audit of existing trade- and investment-restrictive measures, benchmark domestic regulatory regimes against best international practices, and revisit the rationale for, and most efficient means of satisfying, domestic policy objectives.

A further liberalising feature found in a number of RTAs using a negative list approach to liberalisation consists of a *ratchet mechanism* (see Table 1.2), whereby any autonomous liberalisation measure undertaken by an RTA member between periodic negotiating rounds is automatically reflected in that member’s schedule of commitments or lists of reservations. Such a provision typically aims at preventing countries from backsliding with respect to autonomously decreed policy changes. It may also facilitate the provision of negotiating credit for autonomous liberalisation, an issue currently under discussion in the GATS context. A provision of this type has been argued to exert positive effects on the investment climate of host countries by signalling to foreign suppliers the latter countries’ commitment not to reverse the (liberalising) course of policy change.<sup>27</sup>

Two *potential pitfalls* arising from the use of negative listing have been identified. First, that such an approach may be administratively burdensome, particularly for developing countries. Such a burden may however be mitigated by allowing for progressivity in the completion of members’ negative lists of non-conforming measures.<sup>28</sup> The costs of compliance must also be weighted against

some of the benefits in governance and best regulatory practices described above. A second concern relates to the fact that the adoption of a negative list implies that governments ultimately forgo the right to introduce discriminatory or access-impairing measures in future, including in sectors that do not exist or are not regulated at the time of an agreement's entry into force. To assuage the latter concerns whilst promoting the transparency-enhancing properties associated with the use of negative listing, the suggestion has been made to encourage countries (including possibly in the WTO context) to exchange (as they have in the Andean Community and are considering doing within MERCOSUR) comprehensive, non-binding, lists of non-conforming measures.

### ***Limits to gravity? Assessing the depth of regional vs. multilateral liberalisation in services trade***

With the notable exception of land transportation issues, where physical proximity stands out as a determinative facilitating feature, RTAs have generally made little progress in opening up those service sectors that have to date proven particularly difficult to address at the multilateral level. Most RTAs have tended to exclude the bulk of air transportation services (with the notable exception of the EU for intra-EU traffic) from their coverage. Limited progress has similarly been achieved at the regional level in sectors where particular policy sensitivities arise, such as maritime transport or audio-visual services, or where the scope for meaningful liberalisation was limited at the time of RTA negotiations, such as in the case of energy services until recently.

Similarly, advances in regulatory harmonisation and mutual recognition in services, while a common objective of many RTAs, continue to prove difficult to achieve at the regional level. There have, of course, been a number of instances of tangible forward movement in the RTA context, notably within the E.U. and ANZCERTA (where, however, progress has been slow – for instance with regard to the recognition of professional qualifications- even in the context of common labour market policies or integrated single markets,<sup>29</sup>) as well as in North America (where MRAs have been concluded in a number of professions, notably accountancy, architecture and engineering but with variable degrees of compliance by sub-national licensing bodies). Moreover, while a number of RTAs have gone beyond the GATS as regards the treatment of mode 4 trade (for instance as regards the broader range of professional categories benefiting from temporary entry privileges under the NAFTA as compared to the GATS) and, in the process, drawn much needed policy attention to the essential trade facilitating role that labour mobility provisions can play alongside trade and investment liberalisation, they have nonetheless been prone to encountering many of the political sensitivities on display at the multilateral level in the area of labour mobility.

In some instances, it appears that RTAs may simply have been overtaken by events at the multilateral level. Thus, in the key infrastructural areas of basic telecommunications and financial services, the GATS has achieved a higher level of bound liberalisation than that on offer in most RTAs.<sup>30</sup> In part, this may simply reflect timing issues. For instance, the conditions required to contemplate far-reaching liberalisation in basic telecommunications services were generally not ripe at the time that the NAFTA was completed in 1993,<sup>31</sup> whereas the required constellation of forces - in political, regulatory and technological terms - obtained at the time the GATS Agreement on Basic Telecommunications (ABT) was concluded in 1997.

Experience under both the ABT and the Financial Services Agreement (FSA) also suggests that, in some sectors, the political economy of multilateral bargaining, with its attendant gains in critical mass, may help overcome the resistance to liberalisation arising in the narrower or asymmetrical confines of regional compacts.

## NOTES

1. It bears noting that the stylised facts summarised here depict broad trends. Such trends may obtain even as the treatment of specific rule-making issues and/or the degree of liberalisation achieved in specific sectors or with regard to particular modes of supplying services may show greater variance. The large number of RTAs covering services and the even greater number of individual sectors such agreements encompass obviously complicates attempts at making broad analytical generalisations. For instance, one can note the tendency for NAFTA Members, particularly Canada and the United States, to take on liberalisation commitments broadly in line with what was being contemplated (and would later be bound) under the GATS in a majority of sectors even as particular sectoral liberalisation initiatives, for instance in the fields of land transportation (bus and truck services) or specialty air services, were being pursued exclusively within the regional compact.
2. For a fuller account of the treatment of investment and the movement of labour in RTAs, see following section dealing with those issues.
3. While such a result obtains within the great majority of RTAs, some agreements, notably the Chile-Mexico FTA, the Chile-MERCOSUR FTA or the US-Jordan FTA, did achieve some measure of liberalisation in audio-visual services.
4. For a fuller depiction of how the GATS operates, see OECD (2002), pp. 57-63.
5. The latter two modes of supply recall how factor mobility is an essential defining characteristic of services trade. They are also illustrative of how rule-making initiatives in the sector encompass a significantly wider range of policy domains, including areas, such as the regulation of foreign investment or the treatment of immigration-related matters that can arouse particular sensitivities.
6. However, Article XIX stipulates a common obligation of WTO Members to enter into successive rounds of trade negotiations with a view to achieving a progressively higher level of liberalisation.
7. The “Horizontal Section” contains limitations that apply across all sectors included in the schedule. They often refer to a particular mode of supply, notably commercial presence and the presence of natural persons. The “Sector Specific Section” contains limitations that apply only to the particular sector, sub-sector or mode of supply to which they refer.
8. This programme of work reflects both the fact that not all services-related negotiations could be concluded within the time frame of the Uruguay Round, and that Members have already committed themselves, in Article XIX, to successive rounds aimed at achieving a progressively higher level of liberalisation.
9. Only the MERCOSUR Protocol and Decision 439 of the Andean Community provide that no deviation from MFN and national treatment be allowed among members to the two integration groupings.
10. See Fink and Aadutya. (2002).
11. Whereas similar GATS language states that the measures in question should not be a restriction to the supply of a service under any of the four GATS modes, the NAFTA-type agreements narrow this requirement to the cross-border supply of a service. No comparable provision can be found in these

agreements' investment chapters. Meanwhile, in the Australia-New Zealand Closer Economic Relations Agreement, language on licensing and certification is not legally binding but rather hortatory in nature.

12. Indeed, Article VII of GATS arguably allows greater initial selectivity in the choice of partners in regulatory harmonisation, whereas RTAs allow for convergence between countries whose regulatory fit may not always be optimal. There is, of course, one important difference between RTAs and the GATS insofar as preferential treatment (including in regulatory matters) can be fully protected under Article V of the GATS; whereas WTO Members must be prepared under Article VII to extend recognition privileges to all Members willing and able to satisfy national regulatory requirements.
13. Under the terms of the NAFTA's chapter on financial services, Mexico was allowed to impose market share caps if the specific foreign ownership thresholds agreed to - 25 and 30% respectively for banks and securities firms - are reached before 2004. Mexico may only have recourse to such market share limitations once during the 2000-2004 period and may only impose them for a three-year period. Under no circumstances may such measures be maintained after 2007. It bears noting that Mexico has not to date made use of such provisions even as the aggregate share of foreign participation in its financial system is today significantly higher than the thresholds described above. See Sauvé, (2002), pp. 326-335.
14. The EFTA-Singapore FTA requires that sympathetic consideration be given to requests by a party for consultations in instances where subsidy practices affecting trade in services may be deemed to have injurious effects. The Japan-Singapore New Partnership Agreement features generic provisions on subsidies applicable to both goods and services trade.
15. Still, it bears recalling that despite notable progress in RTAs, government procurement practices continue in most instances to be the province of discriminatory practices. In the case of NAFTA, for instance, despite the fact that the scope of covered purchases was quadrupled when compared to the outcome of the 1987 Canada-United States FTA, covered entities only represented a tenth of North America's civilian procurement market at the time of the Agreement's entry into force. See Hart and Sauvé (1999), pp. 203-221.
16. For a fuller discussion of the treatment of government procurement in RTAs, see Government Procurement section.
17. For a fuller account of the treatment of investment and the movement of labour in RTAs, see Labour Mobility and Investment sections.
18. Such movement is usually defined as comprising four distinct categories to which preferential temporary entry privileges are bestowed: business visitors, traders and investors, intra-company transferees, and professionals.
19. It could be argued that such a provision is somewhat implicit in the GATS insofar as the Agreement only allows Member countries to maintain local presence requirements in scheduled sectors (under modes 1 and 2) to the extent that such non-conforming measures are explicitly inscribed in their schedules. No such discipline, however, applies to sectors that do not appear in Members' GATS schedules or in those modes of supply where WTO Members remain unbound. In contrast, the right to non-establishment is a general obligation under the NAFTA, against which reservations to preserve existing non-conforming measures can be lodged.
20. It bears recalling, however, that a number of economic factors (*e.g.* the scale economies arising from a larger regional market) and policy variables (*e.g.* the maintenance of discriminatory sectoral rules of origin within an RTA), can affect global patterns of investment, as discussed in the section on Investment.

21. Indeed, the aim of attracting greater volumes of FDI, including from third country sources, is often a central objective of RTAs. For this reason, there are generally few instances in which the benefits of an RTA in the investment field are restricted to juridical persons that are owned or controlled by nationals of a member country. Among the RTAs reviewed in this note, only the MERCOSUR and the Andean Pact feature such restrictions.
22. See Sauvé (2000), pp. 72-85.
23. The purpose of the ensuing discussion is to note such differences without advocating any implicit hierarchy of policy desirability. Both approaches have strengths and weaknesses. The governance-enhancing aspects of negative listing have, however, been noted by several observers [see, in particular: Sauvé (1996), pp. 37-56; Snape and Bosworth (1996), pp. 185-203; WTO (2001); and Stephenson (2002), pp. 187-209].
24. Members of MERCOSUR adopted one slightly different version of the positive list approach with a view to liberalising services trade within the region. According to MERCOSUR's Protocol of Montevideo on Trade in Services, annual rounds of negotiations based on the scheduling of increasing numbers of commitments in all sectors (with no exclusions) are to result in the elimination of all restrictions to services trade among the members of the group within ten years of the entry into force of the Protocol. The latter has yet to enter into force. See Stephenson (2001*b*), pp. 163-185. See also Pena (2000), pp. 154-168.
25. The Andean Community has adopted a somewhat different version of the negative list approach. Decision 439 on Trade in Services specifies that the process of liberalisation is to begin when comprehensive (non-binding) national inventories of measures affecting trade in services for all members of the Andean Community are finalised. Discriminatory restrictions listed in these inventories are to be lifted gradually through a series of negotiations, ultimately resulting in a common market free of barriers to services trade within a five-year period set out to conclude in 2005.
26. It bears noting however that most RTAs that employ a negative list approach to liberalisation feature so-called "unbound" reservations, listing sectors in which Members wish to preserve the right to introduce new non-conforming measures in future. In many RTAs, particularly those modelled on the NAFTA, such reservations nonetheless oblige member countries to list existing discriminatory or access-impairing measures whose effect on foreign services or service suppliers might in future be made more burdensome.
27. See Hoekman and Sauvé (1994) and Stephenson (2001*a*).
28. In the NAFTA, for instance, sub-national governments were initially given an extra two years to complete their lists of non-conforming measures pertaining to services and investment. The NAFTA parties subsequently decided not to complete the lists at the sub-national level, opting instead for a standstill on existing non-conforming measures. Compliance with the production of negative lists has similarly been problematic elsewhere in the Western Hemisphere, as a number of agreements were concluded without such lists being finalised and without firm deadlines for doing so. The inability of "users" to access the information contained in the negative lists to such agreements deprives the latter of an important good-governance promoting feature.
29. For a detailed analysis of problems encountered in realising the European Union's single market programme for services, see Commission of the European Communities (2002).
30. Negotiations in the GATS on financial services, and notably the development of the GATS Understanding on Commitments in Financial Services, took advantage of insights gained in addressing financial market opening at the regional level. This was particularly the case under the NAFTA, whose Chapter 14 addressed (in 1993) a range of issues that would feature prominently in

negotiations of the WTO 1997 Financial Services Agreement. See Sauvé and Gonzalez-Hermosillo (1993); see also Leroux (1995).

31. For instance, EU member countries had not yet put in place the pro-competitive regulatory framework required to achieve an integrated market for telecommunication services.

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## *Chapter 2*

### **LABOUR MOBILITY**

*by*

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**Abstract:** This chapter examines the coverage and treatment of movement of natural persons in a range of regional trade agreements (RTAs), and compares this with GATS mode 4. In all, 22 RTAs are examined, covering both developed and developing countries, and encompassing a range of approaches to labour mobility. RTAs take two basic forms - free labour mobility (or close to it) or provision of certain forms of mobility for some categories of persons related to trade. Within each of these forms, the agreements generally contain similar provisions, with differences arguably reflecting the depth and extent of commitments rather than fundamentally different approaches. The symbiotic relationship between the GATS and RTAs is highlighted - while some RTAs were the model for the GATS, others, in turn, use the GATS framework, sometimes simply by reference. RTAs also serve as models for each other.

The RTAs are grouped according to the approach they have taken to labour mobility. Observations in the chapter regarding whether particular RTAs contain additional provisions to the GATS are made on the basis of whether the agreements include elements which are not covered by the general GATS provisions, rather than the specific commitments of WTO Members. For example, additional elements can include: access to the labour market; special market access or visas for certain groups, including beyond service suppliers; and the creation of separate chapters in the RTA dealing with all temporary movement, including that related to investment or to trade in goods or investment.

## Key points

Movement of workers, or labour mobility, is approached in a wide variety of ways in regional trade agreements (RTAs). Some agreements cover the mobility of people in general (i.e. including permanent migration and non-workers); others offer free movement of labour (including entry to the local labour market); others are limited to facilitated movement for certain kinds of trade- or investment-related activities; and others, like the GATS, are confined to temporary movement and only for service suppliers (and explicitly exclude entry to the labour market or permanent migration). Additionally, some cover workers at all skill levels, while others are limited to the higher skilled.

The differing approaches in RTAs to labour mobility reflect a range of factors, including the degree of geographical proximity of the parties and the extent of similarities in their levels of development, as well as other cultural and historical ties. While generally, agreements among countries enjoying geographic proximity and similar levels of development have a more liberal approach to labour mobility [*e.g.* EU, EFTA, EEA (Agreement on the European Economic Area), Trans-Tasman Travel Arrangement] as compared to agreements comprising geographically distant members of differing levels of development [*e.g.* APEC (Asia Pacific Economic Co-operation forum); US-Jordan], this is not always the case [*e.g.* MERCOSUR, SAARC (South Asian Association for Regional Co-operation)].

It can be difficult to estimate whether the RTAs examined offer greater liberalisation than that offered by the countries concerned under WTO Agreements. Labour mobility provisions under the WTO are limited to those related to movement of service suppliers under the GATS, and access under the GATS is determined by Members' individual commitments, *e.g.* while the GATS includes service suppliers of all skill levels, Members' commitments are generally limited to the higher skilled. Indeed, an RTA which provides for general access for certain categories of personnel but which excludes certain sectors may offer additional liberalisation or may simply reflect a country's existing level of GATS commitments (in terms of actual commitments, RTAs amongst WTO Members would not normally offer less access than that accorded under GATS commitments, for obvious reasons). Assessment of whether the access offered by individual parties went beyond their GATS commitments would thus depend on case-by-case analysis.

Observations in this paper regarding whether particular RTAs contain additional provisions to the GATS are thus generally made on the basis of whether the agreements include elements which are not covered by the general GATS provisions, rather than the specific commitments of WTO Members. For example, additional elements can include: access to the labour market (EU, EFTA, EEA, Trans-Tasman Travel Arrangement); full national treatment and market access for service suppliers (ANZCERTA); commitments on visas (NAFTA), including for groups beyond service suppliers (US-Jordan); special market access or facilitated access for certain groups, including beyond service suppliers (CARICOM, NAFTA, Canada-Chile, Europe Agreements, APEC); separate chapters dealing with all temporary movement, including that related to investment (Japan-Singapore) or to trade in goods or investment (Group of Three); specific reference to key personnel in relation to investment [EU-Mexico, Free Trade Area of the Americas (FTAA)]; extension of WTO treatment to non-WTO Members (AFTA); or non-discriminatory conditions for workers, including beyond service suppliers (Euro-Med).

Additionally, for the purposes of assessing the degree of liberalisation offered in an RTA and for comparison with the GATS, provisions related to labour mobility in RTAs should be read in

conjunction with provisions in the same agreements related to supply of services. Facilitated movement of people does not always automatically entail the right to provide specific services; actual opportunities will also depend upon the degree of liberalisation in particular service sectors. This is true not simply of agreements where labour mobility is covered only by mode 4 in the services chapter (*e.g.* MERCOSUR, EU-Mexico, US-Jordan), it is also true of agreements which provide for broad freedom of movement (*e.g.* the EU) or where movement of natural persons related to services and investment is the subject of a separate chapter (Japan-Singapore). Additionally, a number of agreements exclude certain service sectors from coverage (*e.g.* ANZCERTA, EU-Mexico, Europe Agreements) or apply special rules to certain sectors (*e.g.* EU, EU-Mexico). Generally, right of labour mobility does not automatically entail the right to practice a certain profession; national regulations regarding licensing and recognition of qualifications are still applied and candidates must meet all criteria and conditions.<sup>1</sup>

It should also be noted that assessment of the degree of liberalisation offered by different agreements is complicated by the very different approaches taken - it is easy to fall into the trap of comparing apples and oranges. Comparison of the types of exceptions in different agreements reveals little: certain types of restrictions are unnecessary when the agreement doesn't offer a certain kind of access. For example, the EU provides a general right to move and work anywhere in the Union, and thus it is necessary to specify that certain jobs in public services are reserved for nationals. Such provisions are not found in other agreements as they do not offer a level of general access to the labour market that would make such an exception necessary. Similarly, care is needed in comparing the liberalisation offered by agreements offering broad labour mobility, but excluding some sectors, and that offered by agreements including all sectors, but limiting mobility to certain defined groups.

Those agreements which do not provide for full labour or service supplier mobility (*e.g.* EU-Mexico, NAFTA, Canada-Chile, US-Jordan, MERCOSUR, Japan-Singapore, Group of Three) tend to use GATS-type carve outs, often using GATS language verbatim. That is, these agreements generally exclude permanent migration and access to the labour market (although NAFTA and Canada-Chile allow temporary entry to the labour market for some categories); and do not impinge on countries right to regulate entry and stay of individuals (subject to their not nullifying or impairing specific commitments undertaken). Some agreements (*e.g.* EU-Mexico and a proposal in the FTAA) seem to carve out a slightly broader regulatory prerogative for parties, including regulations relating also to work, labour conditions and establishment of natural persons in the general formulation of measures that a Member can apply provided that they do not nullify or impair specific commitments undertaken (per paragraph 4 of the GATS Annex on Movement of Natural Persons).

While some agreements allow for general mobility of people and confer immigration rights (*e.g.* EU), the majority of agreements provide only special access or facilitation of existing access within existing immigration arrangements. In most agreements, labour mobility does not over-ride general migration legislation and parties retain broad discretion to grant, refuse and administer residence permits and visas. Additionally, some agreements (*e.g.* Euro-Med) specify that liberalising provisions of the agreement cannot be used to challenge immigration decisions refusing entry, or that dispute settlement under the agreement can only be invoked in cases where the matter involves a pattern of practice and local remedies have been exhausted (*e.g.* Canada-Chile, NAFTA).

Some agreements (*e.g.* the draft FTAA), while including mode 4 in the services chapter, also include provisions on the ability of companies to bring in key personnel in the investment chapter. Similarly, the ASEAN Investment Framework Agreement calls for the promotion of freer movement of skilled labour and professionals, the US-Jordan agreement includes visa commitments for investors and the EU-Mexico agreement section on financial services includes provisions on the nationality of key personnel. Although these provisions may be more concerned with mode 3 (establishment), they

illustrate the linkages between modes 3 and 4. While such provisions arguably go beyond the GATS in specifying treatment of key personnel, they arguably also simply reflect the reality of WTO Members' GATS commitments, many of which provide better access for mode 4 movement linked to mode 3 (e.g. intra-corporate transferees). Other agreements devote a separate chapter to all types of temporary movement of business persons, covering business movement related to goods, services and investment (e.g. the Group of Three and a number of bilateral agreements in Latin America); or group intra-corporate transferees, service suppliers and investors in a separate chapter on movement of natural persons (e.g. Japan-Singapore).

Finally, the symbiotic relationship between the GATS and RTAs is also evident in the agreements chosen. NAFTA provided the model for language in the GATS on temporary entry (e.g. for the negative definition of "temporary") and, in turn, other RTAs use the GATS model (EU-Mexico, US-Jordan, MERCOSUR), sometimes simply by reference (US-Jordan). RTAs also feed off each other - Canada-Chile draws heavily on the NAFTA model, many of the agreements amongst Latin American countries closely mirror each other and the influence of both NAFTA and EU-Mexico can be seen in some proposals on the table in the FTAA. For labour mobility, RTAs basically take two general forms - free labour mobility (or close to it) or provision of certain forms of mobility for some categories of persons related to trade. Within each of these forms, the agreements generally contain basic types of similar provisions, with differences arguably reflecting the depth and extent of commitments rather than fundamentally different approaches.

## **Provisions in the GATS**

There are no provisions on labour mobility under the WTO Agreements. However, movement of natural persons as service suppliers is covered by mode 4 of the GATS which is defined as "the supply of a service... by a service supplier of one Member, through presence of natural persons of a Member in the territory of another Member". This includes independent service suppliers and the self-employed, as well as foreign employees of foreign companies established in the territory of a Member.<sup>2</sup> The GATS applies to nationals or to permanent residents where a Member does not have nationals or accords substantially the same treatment to permanent residents and nationals (however, in such cases, notification to the Council for Trade in Services is required).

The GATS Annex on Movement of Natural Persons Supplying Services under the Agreement contains two important limits on mode 4. Paragraph 1 of the Annex states that the GATS does not apply to "measures affecting natural persons seeking access to the employment markets of a Member, nor... to measures regarding citizenship, residence or employment on a permanent basis". The GATS is thus limited to temporary movement, although "temporary" is not defined and Members have taken a range of approaches.

Paragraph 4 of the Annex notes that the GATS "shall not prevent a Member from applying measures to regulate the entry of natural persons into, or their temporary stay in, its territory, including those measures necessary to protect the integrity of, and to ensure that orderly movement of natural persons across, its borders, provided that such measures are not applied in such a manner as to nullify or impair the benefits accruing to any Member under the terms of a specific commitment". Discriminatory visa requirements are not *per se* regarded as nullifying or impairing such benefits.

The GATS provides no guaranteed access for mode 4 suppliers; access is determined by the nature of each Member's specific commitments. Generally, mode 4 commitments are quite restrictive, tend to mostly concern intra-corporate transferees and are often subject to economic needs tests. While mode 4 covers service suppliers at all skill levels, Members' commitments tend to be limited to higher skilled categories such as managers, specialists and professionals. Access under mode 4 can also be

affected by MFN exemptions and licensing requirements, including recognition of qualifications, as well as restrictions under mode 3. There are no specific provisions in the GATS for facilitated entry, although individual countries' specific commitments may include measures to facilitate entry.<sup>3</sup>

### **Provisions in Regional Trade Agreements**

The RTAs below have been divided into seven broad groups, according to the approach they take to labour mobility. Groupings are based on the provisions in their text, not on what has actually been implemented as this is beyond the scope of this study and would be difficult to assess accurately or objectively. Hence the Common Market for Eastern and Southern Africa (COMESA) is included under the heading of "full labour mobility" as this is the agreed objective of the agreement, although progress towards that objective appears to have been limited to date. While a number of the agreements have built-in future work (*e.g.* the Euro-Med agreements commit to dialogue to explore ways to achieve progress on the movement of workers, the Group of Three and other Latin American agreements create Working Groups on temporary entry), a separate category ("works in progress") has been used for those agreements still under negotiation (*e.g.* FTAA, SADC). In the first case the parties have clearly agreed to something that they are yet to implement, or have agreed to a process; in the latter, it cannot be stated with any certainty what the parties will agree. Further, the groupings below are indicative only and some similarities exist between agreements in different groupings, *e.g.* NAFTA and US-Jordan both contain visa arrangements.

#### ***Agreements providing full mobility of labour***

##### *European Union*

The EU provides for a broad right to labour mobility. As one of the four fundamental freedoms of the single market, Article 18 of the EC Treaty gives every EU citizen a fundamental, personal right to move and reside freely within the territory of the Member States (subject to some limitations and conditions). Additionally, Treaty provisions apply to movement of workers, the self-employed and to service suppliers (including those posted temporarily to another Member State):

- Freedom of movement of workers (Article 39) includes access to employment in other Member States; residence rights (with family) in other Member States (for those seeking employment, a six month time limit normally applies); and equality of treatment regarding working conditions and employment-related benefits.
- Right of establishment (Article 43) includes the right to work as a self-employed person, either by establishing the main professional centre or a subsidiary, under the same conditions applying to nationals (subject to provisions relating to capital).
- Freedom to provide services (Article 49) covers commercial and industrial activities, craftsmen and the professions on a temporary<sup>4</sup> basis, under the same conditions as for nationals (or, where a service has not been liberalised, restrictions must apply equally to nationals and other EU citizens).

No visas or work permits are required, although residence permits may be<sup>5</sup>. Even within the very liberal EU regime, there are exceptions on the grounds of public policy, public security or public health. However, any measures taken must be: justified by a real and sufficiently serious threat to a fundamental interest of society; in conformity with the European Convention for the Protection of Human Rights and Fundamental Freedoms and the proportionality principle; and not invoked to service economic ends. Limits on the freedom to provide services can also be determined by the

degree of liberalisation in a given service sector. Special conditions also apply for transport, banking and insurance services. Additionally, some public service posts may be reserved for nationals.

The EU Treaty on free movement of persons is expanded, under the EEA, to also include the EFTA-EEA states (see below).

#### *Agreement on the European Economic Area (EEA)*

The Agreement allows EEA nationals to enter any Member State of the EU as workers, self-employed, service providers or recipients.<sup>6</sup> Workers can stay or move freely within EU and EFTA states for the purpose of employment and remain in the territory of EU and EFTA states after having been employed. Discrimination based on nationality as regards employment, remuneration and other conditions of work and employment is forbidden. However, employment in the public service (i.e. the exercise of official governmental authority) is excluded. Rights of establishment are also guaranteed, including for self-employed persons. Exceptions relate to public policy, public security or public health and the exercise of official authority. There are no restrictions on the freedom to provide services and temporary service providers receive national treatment. Exceptions apply for the exercise of official authority and special conditions apply to transport, financial, audio-visual and telecommunications services.

#### *European Free Trade Association (EFTA)*

Similar arrangements are provided under the Agreement Amending the Convention Establishing the EFTA (signed on 21 June 2001, and entered into force on 1 June 2002 in parallel with the Swiss-EU bilateral agreements).<sup>7</sup> These amendments largely extend to the entire EFTA area (i.e. also including Switzerland) the arrangements existing amongst the EFTA-EEA states (Iceland, Liechtenstein, Norway) and between Switzerland and the European Union. The Agreement introduces free movement of persons for workers, the self-employed and persons with no gainful employment who otherwise have sufficient financial means (including under certain conditions, their family members). It confers the right of access to work, entry/exit and establishment (residence), the right to provide services for a period of up to 90 days per year and the right of equal treatment. These rights cover all persons, irrespective of nationality, who are integrated into one of the EFTA state's regular labour market. No visas are required. However, there are some limits and transition periods<sup>8</sup> and special rules govern frontier workers; public service and public authority activities; and the acquisition of real estate in Switzerland.

#### *Common Market for Eastern and Southern Africa (COMESA)*

The COMESA Treaty envisions a community within which goods, services, capital and labour are free to move across national borders. The complete COMESA mandate is regarded as a long-term objective - establishment of a monetary union, free movement of *bona fide* persons, including right of establishment (economic community status) is planned for 2025. In the interim, COMESA is implementing a Protocol on the gradual relaxation and eventual elimination of visa requirements and a Protocol on the free movement of persons, labour, services and the right of establishment and residence.

#### *Australia - New Zealand Closer Economic Relations (ANZCERTA)*

The Services Protocol provides both full market access (Article 4) and full national treatment (Article 5) for all service suppliers.<sup>9</sup> As all service suppliers are covered, the agreement does not feature detailed definitions of types of personnel, nor does it distinguish between different modes of

delivering services. However, certain service sectors<sup>10</sup> are excluded from coverage by the Parties and the agreement is also subject to the foreign investment policies of the Member States (Article 2). ANZCERTA does not cover general labour mobility but, arguably, does not need to as, under the “Trans-Tasman Travel Arrangement”, Australians and New Zealanders are free to live and work in each other's countries for an indefinite period (limited exceptions apply, e.g. people with criminal records). This arrangement is not expressed in the form of any binding bilateral treaty, but rather is a series of immigration procedures applied by each country and underpinned by joint expressions of political support. This arrangement does not form part of ANZCERTA.

***Agreements providing market access for certain groups, including beyond service suppliers and/or grouping all movement of natural persons/temporary business entry in a separate chapter***

*Caribbean Community (CARICOM)*

Protocol II: Establishment, Services and Capital (1998) provides for free movement of university graduates, other professionals and skilled persons, and selected occupations<sup>11</sup>; as well as freedom of travel and exercise of a profession (i.e. elimination of passport requirements, facilitation of entry at immigration points, elimination of work permit requirements for CARICOM nationals). National treatment is guaranteed (although specific reservations can be made), however, there is currently no MFN provision. Exceptions (per the GATS) cover activities involving the exercise of governmental authority and measures to protect public morals, human, animal or plant life or national security; maintain public order and safety; or secure compliance with the laws of a member state. Progress has been solid, but implementation is incomplete.

*North American Free Trade Agreement (NAFTA) and the Canada-Chile Free Trade Agreement*

NAFTA pre-dated and informed the development of the GATS. Chapter 16 of NAFTA facilitates movement of business persons and the corresponding part of the Canada-Chile Free Trade Agreement, Chapter K, is modeled on it. Both agreements are limited to temporary entry, defined negatively as being “without the intent to establish permanent residence” and apply only to citizens of Parties. Access is basically limited to four higher skills categories: traders and investors, intra-company transferees, business visitors and professionals (detailed definitions are provided). However, these groups are not limited to services and may include persons in activities related to agriculture or manufacturing. Labour certification or labour market assessment/tests are removed for all four groups<sup>12</sup> and work permits are required for traders and investors, intra-company transferees and professionals, but not business visitors (see footnote 11). While visas are still required, fees for processing applications are to be limited to the approximate cost of services rendered.

Under both agreements, existing general immigration requirements (e.g. related to public health or national security) still apply. Both agreements also refuse entry if it may adversely affect settlement of a labour dispute in progress at the intended place of employment, or the employment of any person who is involved in such a dispute. Equally, both specify that dispute settlement provisions cannot be invoked regarding a refusal to grant temporary entry, unless the matter involves a pattern of practice and the business person has exhausted the available administrative remedies.

Under NAFTA, the US provides “Trade NAFTA (TN)” visas for professionals<sup>13</sup> which last for one year and are renewable. Canadians can receive TN status at the port of entry on presentation of a letter from a US employer, but Mexicans must currently arrange for their employer to file a labour condition application (although this requirement will expire in January 2004), and then they must apply for a visa at the US Embassy in Mexico. There are no provisions for facilitated entry under the

Canada-Chile agreement (although Chilean business persons can apply for an extension of the employment authorisation while in Canada).

Under NAFTA, the US applies a quota of 5 500 to Mexican professionals, due to expire on 1 January 2004. The Canada-Chile agreement does not permit either Party to impose or maintain any numerical restriction relating to temporary entry of any category.

#### *Europe Agreements*<sup>14</sup>

There is no general freedom of movement for workers; however, Parties are to allow progressively the supply of services by nationals of, or companies established in, the Parties, taking into account the development of the services sectors. Temporary entry is provided for: natural persons providing a service; key personnel<sup>15</sup>; and representatives of an EU or CEEC company or national negotiating for the sale of services or entering into agreements to sell services (provided that they are not engaged in direct sales to the public or supplying services themselves). A horizontal transition period of ten years applies. General exceptions cover public policy, public security or public health, and activities connected to the exercise of official authority. Sectoral exclusions can also apply, varying between countries (*e.g.* transport for Poland). Rights of establishment (including on a self-employed basis) are also extended without discrimination and key personnel can be posted on a long-term basis, provided a real and continuous link with the home country is demonstrated. General exceptions (as above) and sectoral exclusions apply.

#### *Japan-Singapore Economic Partnership Agreement (JSEPA)*

Chapter 9 (Movement of natural persons) applies to measures affecting the movement of natural persons of a Party (nationals of Japan and nationals and permanent residents of Singapore) who enter the territory of the other Party for business purposes (including as investors). Carve-outs are similar to the GATS Annex (*i.e.* regarding nationality, citizenship, residence or employment on a permanent basis). Conditions for entry and stay are governed by specific commitments covering short-term business visitors and intra-corporate transferees (Annex VI, Part A) and investors and independent service suppliers<sup>16</sup> (Annex VI, Part B). Specific commitments apply only to those sectors where commitments have been made under Chapter 7 (Services) and where no specific restrictions have been made under Chapter 8 (Investment).<sup>17</sup> The agreement includes the general exceptions of GATS Article XIV (with the exception of XIV(d) and (e) relating to taxation) and includes the language from the GATS Annex (paragraph 4) regarding measures to regulate the entry and stay.

#### *Group of Three*<sup>18</sup>

Temporary Entry for Business Persons is the subject of a separate chapter (Chapter XIII) which refers to the preferential trading relationship between the Parties, the desirability of facilitating temporary entry on a reciprocal basis and of establishing transparent criteria and procedures for temporary entry, and the need to ensure border security and to protect the domestic labour force and permanent employment in their respective territories. (GATS carve-outs related to access to employment markets or permanent employment are found in Chapter X on services). The agreement requires each Party to apply expeditiously measures relating to such entry so as to avoid unduly impairing or delaying trade in goods or services or conduct of investment activities. The Parties also endeavour to develop and adopt common criteria, definitions and interpretations for the implementation of the Chapter. The agreement creates a Temporary Entry Working Group, including immigration officials, which must meet at least once a year.

Similar provisions are found in the Mexico-Nicaragua Agreement, the Agreement between Central America and the Dominican Republic, the Chile- Mexico Agreement, the Mexico-Bolivia Agreement and the Mexico-Costa Rica Agreement.

### ***Agreements using the GATS model with some additional elements***

#### *US-Jordan Free Trade Agreement*

Labour mobility under the US-Jordan agreement is covered under the section on trade in services (Article 3), which uses the GATS as a frame of reference (unless otherwise stated, all terms in Article 3 and the accompanying schedules have their GATS meanings *mutatis mutandis* (Article 3.4(a)). Treatment of mode 4 is also modelled on the GATS - the GATS Annex on Movement of Natural Persons gives rise to rights and obligations under the US-Jordan agreement (Article 3.2(c)(ii)) and specific commitments appear in Schedules annexed to the agreement.<sup>19</sup> However, the agreement goes further than the GATS in specifying visa commitments (Article 8) for both independent traders (Article 8.1) and persons linked to investment<sup>20</sup> (Article 8.2), beyond service suppliers. Nationals of Jordan are eligible for US treaty-trader (E-1) and treaty-investor (E-2) visas and similar treatment is guaranteed for US nationals seeking entry to Jordan. However, these provisions are subject to the laws relating to entry, sojourn and employment of aliens of the Parties.

#### *EU-Mexico Free Trade Agreement*

The EU-Mexico Agreement addresses labour mobility through trade in services. The agreement provides for the creation of a GATS Article V agreement, based on principles of market access, most favoured nation and national treatment. Negotiations on modalities are to take place within three years of the date of entry into force of the Agreement. The negotiated commitments are to be implemented over a transition period of a maximum of 10 years from that date. The Agreement is not intended to cover movement beyond service suppliers under the GATS. Like the GATS, mode 4 access will not include access to the labour market [Article 3(c)(i)] and Parties maintain their right to regulate the entry and stay of individuals - although, unlike the GATS, EU-Mexico also specifies regulations with regard to “work, labour conditions and establishment of natural persons” [Article 27 (Exceptions)]. Access is limited to nationals of the Parties [Article 3(f)]. Some services sectors are specifically excluded from the scope of the negotiations - audio-visual, those air transport services not currently covered under GATS and maritime cabotage.

Specific mention is made of “Key personnel” under the separate section on financial services (Chapter III). This states that Parties may not require that managerial or key personnel be of a particular nationality, nor that more than simple majorities of boards of directors of financial service suppliers of other Party be nationals and/or residents of a Party (Article 16). However, Parties may maintain measures inconsistent with this provided they are scheduled and subject to review with a view to their modification, suspension or elimination (Article 17). While these are technically requirements related to mode 3 (establishment) rather than mode 4, they illustrate the linkages between these two modes, in particular the impact of mode 3 restrictions on mode 4 (see also FTAA below).

#### *ASEAN Free Trade Area (AFTA)*

AFTA contains no specific provisions on labour mobility, although mode 4 is included under the general coverage of trade in services. The 1995 ASEAN Framework Agreement on Services committed Members to negotiations aimed at achieving commitments beyond those in their existing GATS schedules. Packages of offers were finalized in 1997 and 1998 respectively, covering all modes

of supply and including service sectors not previously included in GATS commitments. The 1998 package also provided for Member States who were WTO Members to extend their GATS specific commitments to ASEAN Member States who were not WTO Members. Indonesia and Laos are yet to ratify this agreement. The Framework Agreement on the ASEAN Investment Area (1998) commits Members to promoting the freer flow of capital, skilled labour and professionals and technology among ASEAN Member States.

#### *Euro-Med Association Agreements (Morocco and Tunisia)*

The Euro-Med Association Agreements with Morocco and Tunisia.<sup>21</sup> (Title III, Right of Establishment and Services) simply reaffirm each Party's obligations under the GATS. However, they provide for future widening to cover rights of establishment and supply of services through the establishment of an "economic integration" type of agreement, with progress to be reviewed no later than five years after the entry into force of the agreement. Additionally, under Title VI "Co-operation in Social and Cultural Matters, Chapter II (Dialogue on Social Matters), Parties agree to conduct regular dialogue to find ways to achieve progress in the field of movement of workers (Article 69.2) (note that this is all workers, and not limited to service suppliers). The same Title (Chapter I Workers) also includes stipulations for non-discriminatory treatment with regard to working conditions, remuneration, dismissal (including for temporary workers) (Article 64)<sup>22</sup> and social security (Article 65). However, non-discrimination obligations with regard to redundancy cannot be invoked to obtain renewal of a residence permit. Granting, renewal and refusal of residence permits remains governed by the legislation of each Party, or any bilateral agreements. Nationals residing or working illegally in another party are excluded (Article 66), and bilateral agreements between individual Member States and Morocco/Tunisia may provide more favourable treatment (Article 68).<sup>23</sup>

#### *New Zealand - Singapore Closer Economic Partnership*

Labour mobility is included in Part 11: General Provisions by Article 72 (Movement of Natural Persons) which mirrors almost exactly the language of the GATS Annex. Movement of service suppliers is covered by the Part 5 (Services) which adopts the GATS framework. Parties undertake to review their schedules of commitments at least every two years (earlier if so agreed) and progressively to expand these initial commitments as well as expand market access and/or national treatment between them on accordance with the APEC objective of free and open trade in services by 2010 (Article 20:4). In specific commitments, both Singapore and New Zealand have scheduled horizontal commitments<sup>24</sup> for mode 4 limited to certain categories.<sup>25</sup>

#### *Agreements which use the GATS model*

##### *Southern Common Market Agreement (MERCOSUR)*

MERCOSUR also directly replicates the GATS model. GATS carve-outs relating to access to the labour market and permanent migration and Members' right to regulate the entry and stay of foreigners in their territory are included verbatim. Market access is based solely on specific commitments, covering the movement of all categories of natural person who provide services within the framework of the protocol. Movement of natural persons is not specified under the Bolivia-MERCOSUR Agreement, or the Chile-MERCOSUR Agreement (see [www.oas.org](http://www.oas.org)).

### ***Agreements providing no market access but facilitated entry***

#### *Asia Pacific Economic Co-operation forum (APEC)*

APEC does not contain any specific market access arrangements on labour mobility, with periods of, and conditions for, temporary entry varying between economies. However, APEC does include arrangements aimed at facilitating labour mobility by: information exchange; dialogue with business; development and implementation of immigration standards; and capacity building to assist streamlining temporary entry, stay and departure processing for business people. In-principle agreements have been reached to improve application processing times for temporary entry permits for executives and senior managers on intra-corporate transfers and for specialists.<sup>26</sup> APEC arrangements exclude the self-employed and un- or semi-skilled labour.

While APEC does not grant any right of entry, it has established a scheme to facilitate the entry of business visitors under the APEC Business Travel Card Scheme. The APEC Business Travel Card is valid for three years and provides multiple short-term business entries, with stays of two or three months on each arrival. Cardholders are required to present their passports, but receive expedited airport processing and are not required to submit separate applications for business visitor visas.<sup>27</sup> Participating economies<sup>28</sup> commit to implement the scheme on a best endeavours basis and are free to maintain existing visa requirements for business visitors. All economies retain the right to refuse an individual without providing reasons or to refuse entry to APEC Business Travel Card-holders at the border.

#### *South Asian Association for Regional Co-operation (SAARC)*

The South Asian Preferential Trading Arrangement does not cover trade in services, although a South Asian Free Trade Area was due to be developed by 2001. However, under a Visa Exemption Scheme (1992) visa requirements are waived for 21 categories of persons. Simplification of visa procedures and requirements is also underway to assist business people to accelerate promotion of trade and tourism within the region.

### ***Agreements without provisions on labour mobility or services***

#### *Central European Free Trade Agreement (CEFTA)*

There are no provisions on labour mobility nor trade in services (and thus mode 4) in CEFTA. There are no plans at this stage to expand the scope of the agreement.

### ***Agreements which are works in progress***

#### *Free Trade Area of the Americas (FTAA)*

The FTAA is very much a negotiation in progress, but proposals on the table seem to reflect provisions in agreements to which putative FTAA members are already party.

At this stage in the FTAA, mode 4 is included in the draft Services Chapter in terms similar to the GATS. Proposed coverage is for citizens/nationals and possibly permanent residents. Proposals for exceptions are also similar to the GATS - e.g. relating to permanent migration or access to the labour market or requiring that the agreement be subject to Members' laws and regulations, including in relation to labour and the entry and stay of foreigners. One proposal also includes the additional elements from the EU-Mexico agreement relating to requirements with respect to "work, labour

conditions and establishment of natural persons”. A further proposal would also exclude government procurement in services and certain public services from the agreement.

Provisions on “Key Personnel” are also found in the draft Chapter on Investment, covering nationality requirements for senior management and boards of directors, and the ability of companies to bring in key personnel (including management and persons with specialised knowledge or skills or considered indispensable to the proper control of an investment). It is also proposed that key personnel be exempted from labour certification tests or numerical restrictions.

#### *Southern African Development Community (SADC)*

The ultimate aim of SADC is to promote the free movement of goods and services within the region; however, there are currently no provisions for free movement of labour or service suppliers. Work is underway on a study of labour market issues, including migrant labour and mobility of high-level personnel. The study will explore the development of sub-regional classification of occupations to facilitate mobility of labour. Recommendations from a tripartite seminar on labour migration held in Zambia in March 2000 are under consideration.

## NOTES

1. Provisions facilitating mutual recognition are included in some agreements (*e.g.* EFTA) and others have complementary arrangements (*e.g.* the ANZCERTA Services Protocol, the Trans Tasman Travel Arrangement and the Trans Tasman Mutual Recognition Arrangement together provide that persons registered to practice an occupation in one country can practice an equivalent profession in the other country).
2. There is some debate within the WTO Secretariat about whether foreign employees of domestic firms are covered by mode 4. The WTO Secretariat Background Note on mode 4 (S/C/W/75, dated 8 December 1998) concludes that foreigners working for host country companies would fall under mode 4 if they worked on a contractual basis, but not if they were employees of those firms. However others have argued that, as many WTO Members' schedules refer to short-term employment, and schedules form part of the GATS, there is a degree of legal uncertainty on this point [see Karsenty (2000)]. Nonetheless, it should be noted that the WTO Secretariat is not the legal interpreter of the GATS.
3. It should also be noted that potential disciplines which may be developed under GATS Article VI:4 may also have implications for regulations affecting mode 4 movement.
4. Like the GATS, this refers to not seeking access to the labour market.
5. Residence permits must be granted for at least five years for workers; for temporary employment of less than one year a temporary residence permit can be issued for the expected duration of employment. Employees working for less than three months, cross-frontier workers and seasonal workers (on specified terms) do not require residence permits. The cost of residence permits cannot exceed that of identity cards for nationals.
6. EEA nationals should have sufficient funds to support themselves without recourse to public funds.
7. The original Stockholm Convention was signed in 1960.
8. Freedom of movement *into* Switzerland from the other EFTA states is subject to transition periods of up to 5 years. Switzerland reserves special quotas for EFTA citizens.
9. Different treatment is permitted provided that it is no greater than necessary for prudential, fiduciary, health and safety or consumer protection reasons and such different treatment is equivalent in effect to the treatment accorded by the Member State to its ordinary residents for such reasons [Article 5.2(a) and (b)]. Both subsidies and government procurement are excluded from the scope of national treatment (Article 5.4).
10. These are: Australia: air services, coastal shipping, broadcasting and television; broadcasting and television (short-wave and satellite broadcasting); third party insurance; and postal services. New Zealand: aviation (airways services) and shipping (coastal shipping). For many of these services, only specific aspects or policies have been excluded.
11. Graduates of universities (several regional universities are named but other are also included), media workers, sports persons, musicians and artists, and workers in the entertainment and tourism industries.

12. Business visitors are exempt from labour market tests as they receive no remuneration in the country they are entering and are therefore not seen to be entering the labour market.
13. Criteria include that: the profession is on the NAFTA list; the candidate meets the specific criteria for that profession; the prospective position requires someone in that capacity; and the candidate is going to work for a United States employer.
14. The Europe Agreements reference and supersede previous bilateral labour agreements between some European Union Member States - in particular Germany and some Central and East European Countries. An important feature of the Europe Agreements is that they have served as a pattern of agreements concluded between associated countries themselves - creating a form of network across all of Central Europe and parts of Eastern Europe.
15. Key personnel are defined as senior employees of an organisation who primarily direct management of the organisation; and persons who possess high or uncommon qualifications referring to a type of work or trade requiring technical knowledge, knowledge essential to the organisation's service, research, equipment, techniques or management. They must have been employed by the organisation for at least one year prior and must be nationals of the country where they work.
16. The term independent service suppliers is not used; the actual terminology is: natural persons who engage in work on the basis of a personal contract with public or private organisations. Specific commitments for investors and independent service suppliers are to be implemented in accordance with each Party's laws and regulations.
17. Singapore's specific commitments provide for entry for the following categories (all defined): business visitors - 1 month upon arrival, extendable up to 3 months on application; intra-corporate transferees who are managers, executives or specialists linked to mode 3 presence (12 month immediate pre-employment requirement applies) - 2 year period extendable for periods of up to 3 additional years each time for a total term not exceeding 8 years (further extensions may be possible); investors - limited to a 2 year period extendable for periods of up to 3 additional years each time for a total not exceeding 8 years (further extensions may be possible); independent service suppliers (see footnote 16) limited to engineers recognised under the domestic laws and regulations of Singapore - 2 year period extendable for periods of up to 3 years each time for a total of not more than 8 years (further extensions may be possible). Japan's specific commitments provide entry for: short term-business visitors (defined) - a period not exceeding 90 days; intra-corporate transferees (subject to an pre-employment requirement of not less than 1 year) - no time limits specified, but the person must be engaged in certain types of activities (basically senior management or involving certain types of specialised skills); investors - for as long as the person continues to meet the criteria and conditions stipulated at the time of entry; independent service suppliers (see footnote 16) limited to those engaged in work which requires technology or knowledge pertinent to engineering - for as long as the person continues to meet the criteria and conditions stipulated at the time of entry.
18. Material on this, and the other agreements mentioned under this heading, is sourced from the web-site of the Organization of American States [www.oas.org](http://www.oas.org).
19. Mode 4 commitments are primarily horizontal, with sectoral commitments "Unbound, except as provided for the horizontal section" but sometimes with additional requirements. Commitments cover: US - services salespersons, intra-corporate transferees (being managers, executives and specialists), personnel engaged in establishment, fashion models and speciality occupations; and Jordan - business visitors, intra-corporate transferees, executives, managers, specialists and professionals.
20. Independent traders must be engaged in substantial trade, including trade in services or trade in technology, principally between the Parties. Persons linked to investment must be establishing, developing, administering or advising on the operation of an investment to which they, or a company

of the other Party that employs them, have committed or are in the process of committing a substantial amount of capital or other resources.

21. Provisions on labour in the various types of Euro-Med agreements vary. There are no specific provisions on Services in the Euro-Med Association Agreement with the Palestinian Authority. The Co-operation Agreement with Algeria does not contain general provisions on services, but does include provisions similar to Articles 64 and 65 on non-discrimination re labour (Articles 38-41 in the Agreement). Co-operation agreements with Egypt, Jordan, Lebanon and Syria contain no provisions on either services or labour/workers. The First Generation Association Agreement with Cyprus similarly contains no provisions on either services or labour/workers.
22. The Joint Declaration relating to Article 64 states that without prejudice to conditions and procedures in each Member State, parties will examine access to a Member State's labour market of spouse and children legally resident under family reunification arrangements for the duration of the worker's authorised stay. This specifically excludes seasonal workers, those on secondment or on placement.
23. Migration issues more generally are raised in Article 69.3 (dialogue on migration issues) and Chapter III "Co-operation in the Social Field" Article 71 (projects aimed at reducing migratory pressure).
24. New Zealand also makes reference to presence of natural persons under "Dental services". National treatment on mode 4 "Dental services" is limited to registered dentists who must satisfy the relevant registration board that they intend to reside and practise in New Zealand.
25. New Zealand has made no commitments other than on certain categories of intra-corporate transferees (defined as natural persons employed by a service supplier of the other Party supplying services through a commercial presence) and business visitors. Intra-corporate transferees are executives and senior managers and specialist and/or senior personnel (all defined and subject to 12 months pre-employment) and receive an initial period of stay of up to 3 years. Installers and servicers (where such installation or servicing is a condition of the purchase of the machinery or equipment) receive periods of stay not exceeding 3 months in any 12 month period. Business visitors receive a period or periods not exceeding 3 months in any calendar year. Singapore has also left presence of natural persons unbound, except for intra-corporate transferees and business visitors. Intra-corporate transferees are limited to managers, executives and specialists (all defined and subject to 1 year minimum pre-employment) and entry is limited to a three year period that may be extended for a further 2 years, but with the total period not exceeding 5 years. Business visitors are granted an initial stay of up to 1 month on arrival, extendable to a maximum of 3 months on request.
26. Guideline definitions have been developed for executives and senior managers. Specialists are defined by each economy and are included in economies' APEC Travel Handbook entry.
27. There is no limit on the number of cards and almost 4000 have been issued to date. Fees vary between participating economies. The scheme is open to citizens of participating APEC economies (or permanent residents of Chinese Taipei and Hong Kong, China), who hold a valid passport (or equivalent), have never been convicted of a criminal offence and are bona fide business persons. The scheme does not include: spouses and children; persons who wish to engage in paid employment or working holidays; or professional athletes, news correspondents, entertainers, musicians, artists or persons engaged in similar occupations.
28. Australia; Brunei Darussalam; Chile; Chinese Taipei; Hong Kong, China; Korea; Malaysia; New Zealand; Peru; the Philippines and Thailand. Neither the US nor Canada are planning to join.

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### *Chapter 3*

## **INVESTMENT**

*by*

**Michael Gestrin**

**Abstract:** This chapter surveys investment provisions in RTAs and highlights how these compare to WTO norms on investment. Several themes emerge. First, the extent to which signatories to an RTA attempt to establish ambitious investment rules, with a broad definition of investment, disciplines on TRIMs that go beyond the WTO's illustrative list and binding dispute settlement mechanisms, would seem to be largely a function of the countries' previous experience with a liberal investment regime. Second, the flexibility of RTAs has allowed developing countries with similar concerns to address particular development issues, *e.g.* the promotion of local firms. Third, investment provisions in RTAs would seem to be converging towards what could be described as an implicit international standard as reflected in recent BITs and the types of protection and liberalisation found in the various NAFTA investment provisions. The chapter also highlights a number of problems associated with the current patchwork of investment provisions in RTAs, including overly complex or restrictive rules of origin and the possibility that the growth of RTAs (and BITs) will give rise to a proliferation of investment disputes.

## Key points

It is generally acknowledged that the Uruguay Round of GATT talks went further than any previous rounds in placing investment issues on the multilateral trade agenda. Concurrently, the pace of developments with respect to the negotiation of rules on investment at the sub-multilateral level also accelerated during the early 1990s.

This dual evolution of the international policy framework for international investment reflects the growing recognition of the role investment has come to play in international economic development and integration. Just as trade was perceived as one of the key drivers of global economic growth during the post-war decades, foreign investment has since the 1980s come to be perceived as an important 'new' mode of global economic linkage. Statistics indicating that flows of foreign direct investment began outstripping both global trade and GDP growth rates in the 1980s only reinforced the perception that it was time for the international policy framework to catch up with the new international economic landscape.

This review of investment provisions in RTAs reveals that one of the attractive features of negotiating investment rules at the sub-multilateral level is the flexibility and selectivity that countries with historically similar approaches to investment issues can bring to the process of negotiation. This is an important point because it suggests that any negotiation of investment rules at the multilateral level would have to take into account the diversity of experience with and practice of international investment policy that has evolved at the regional level.

Several themes emerge from this short survey of investment provisions in RTAs. First, the extent to which signatories to an RTA attempt to establish ambitious investment rules, with a broad definition of investment, disciplines on TRIMs that go beyond the WTO's illustrative list and binding dispute settlement mechanisms, *inter alia*, would seem to be largely a function of the countries' previous experience with a liberal investment regime. Most countries that have entered into agreements containing high-standard rules on investment had either already been liberalising their investment regimes unilaterally or had experimented with investment rules in prior agreements (*e.g.* a number of agreements recently negotiated by the NAFTA signatories contain provisions almost identical to NAFTA's chapter 11). Where countries have only recently begun to liberalise their investment regimes and where these have traditionally been highly restrictive, the preference has been for less encompassing agreements covering limited rights of establishment and the movement of capital. In other words, the negotiation of investment rules in RTAs could be characterised as taking place at the investment policy margin. Countries at similar levels on the investment liberalisation 'trajectory' can scale their investment rule-making ambitions in line with historical local norms on international investment.

A related point concerns the objectives of investment rules. In most cases these are aimed at improving economic efficiency. This is the purpose of investment rules at the WTO and in most RTAs. However, some provisions in RTAs are more oriented towards development issues, especially as concerns the promotion of local firms. This is the case in both agreements that distinguish between the rights of local and third-party investors as well as those agreements that provide incentives and preferences for regional enterprises.

Another theme to emerge from this survey concerns the apparent convergence of investment provisions in RTAs towards what might be described as an implicit international standard. This convergence is taking place through two channels. The first channel is through ‘side-BITs’, separate agreements on investment but nonetheless in the context of wider processes of trade and economic integration and co-operation.<sup>1</sup> What this suggests is that the perceived role of BITs is shifting beyond the protection of FDI from developed to developing countries to complementing broader and deeper liberalisation initiatives.

The second channel is through RTAs that closely resemble or build upon NAFTA investment provisions. Indeed, just as most BITs are based upon model BITs, the NAFTA investment provisions have in many instances become a sort of ‘model RTA investment chapter’. The trend therefore seems to be towards a more consistent treatment of investment in RTAs, *both in terms of the tendency of RTAs to include rules on investment (or side-BITs) and in terms of their content.*

This apparent convergence is especially significant to the extent that most BITs and NAFTA-based RTA investment provisions do not result in the sort of preferences that RTAs give rise to with respect to trade. Third party investors typically enjoy the same rights as investors based in the RTA area when they have a substantial presence in one member and, through this presence, make an investment in another signatory to the RTA. Therefore, for example, a Japanese affiliate based in Canada making an investment in the United States or Mexico enjoys the same rights under the NAFTA as a Canadian-based firm making a similar investment. To the extent that BITs and RTA investment provisions have increasingly come to reflect similar (high) standards, the spread of such agreements results in the de facto plurilateralisation of investment rules as long as these do not discriminate against third party investors.

However, the current patchwork of investment provisions can give rise to certain difficulties. RTAs can affect investment patterns, whether through perceived growth opportunities in an expanded market, investment protection provisions within the RTA or specific rules of origin. Although, the most important factors concerning investment patterns remains the country’s productivity and macro economic policy. Finally, the growth of RTAs (and BITs) has given rise to a number of investment disputes submitted under international tribunals. For example, between 1972 and 1999, 69 disputes were registered with ICSID, for an average of two and a half per year. Between January 2000 and February 2002, 29 disputes have been registered, an average of about 13 per year. The WTO dispute settlement mechanism has likewise experienced heavy traffic. However, the increasing number of disputes may reflect the fact that the international mechanisms for the settlement of disputes are gaining credibility among economic operators by providing a set of clear and predictable rules.

### **Provisions in WTO agreements**

Foreign investment issues are dealt with in several WTO Agreements. The General Agreement on Trade in Services (GATS), the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) and the plurilateral Agreement on Government Procurement include provisions relating to the entry and treatment of foreign enterprises and the protection of certain property rights. The Agreement on Trade-Related Investment Measures (TRIMs) and the Agreement on Subsidies and Countervailing Measures (ASCM) circumscribe the ability of WTO members to apply certain kinds of measures to attract investment or influence the operations of foreign investors. The Understanding on Rules and Procedures Governing the Settlement of Disputes contains clearly-defined rules for addressing conflicts that arise under all of these agreements.

## ***The GATS***

Of all the agreements in the WTO, the GATS deals most directly with investment issues. It does so by defining four modes of supply covered by the agreement, one of which, mode three, consists of the provision of services through an established presence in a foreign territory. General obligations are contained in Parts I and II of the agreement. The most important of these are articles I and II. Article I, on scope and definition, stipulates that the GATS applies to measures by members affecting trade in services, defined as including any service in any sector delivered via any of the four modes, with the exception of those supplied in the exercise of government functions. Article II codifies the unconditional most-favoured-nation treatment principle, making it one of the agreement's core general obligations. Under the MFN rule, members of the GATS are committed to treating services and service providers from one member in the same way as services and service providers from any other member. The basic obligation of national treatment is stated in terms very similar to those of the national treatment rule in GATT's Article III, but in the case of GATS, it is limited to services sectors where commitments have been undertaken in the schedule of the Member concerned.

## ***TRIMs***

The Agreement on Trade-Related Investment Measures recognises that certain investment measures restrict and distort trade. It provides that no WTO Member shall apply any TRIM inconsistent with Articles III (national treatment) and XI (prohibition of quantitative restrictions) of the GATT. To this end, an illustrative list of TRIMs agreed to be inconsistent with these articles is appended to the agreement. The list includes measures which require particular levels of local procurement by an enterprise ("local content requirements") or which restrict the volume or value of imports that an enterprise can purchase or use to an amount related to the level of products it exports ("trade balancing requirements").

## ***TRIPS***

The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) builds upon the existing framework of intellectual property conventions (*i.e.* the Berne Convention, 1971, the Paris Convention, 1967 and the Washington Treaty on Intellectual Property in Respect of Integrated Circuits, 1989, among others). The agreement includes national treatment, MFN and substantive standards for the protection of specific categories of intellectual property, domestic enforcement procedures and international dispute settlement. The importance of the agreement in the context of investment relates to the increasingly important share of MNE assets accounted for by intangible assets, such as brands, patents, trademarks, etc. Furthermore, virtually all modern investment agreements which lay down standards for the promotion and protection of foreign investment include intellectual property within the definition of investment.

## ***Agreement on Government Procurement***

The plurilateral Agreement on Government Procurement requires not only that there be no discrimination against foreign products, but also no discrimination against foreign suppliers and, in particular, no discrimination against locally established suppliers on the basis of their degree of foreign affiliation or ownership. Another investment related aspect of this Agreement is the provision in Article XVI that procuring entities shall not, in the qualification and selection of suppliers, products or services, or in the evaluation of tenders and award of contracts, impose, seek or consider offsets, defined as "...measures used to encourage local development or improve the balance-of-payments accounts by means of domestic content, licensing of technology, investment requirements, counter-trade or similar requirements".

## ***Agreement on Subsidies and Countervailing Measures***

The Agreement on Subsidies and Countervailing Measures (ASCM) defines the concept of “subsidy” and establishes disciplines on the provision of subsidies. The relevance of the ASCM to investment issues is that a number of investment incentives fall under the definition of a subsidy and are either prohibited or are subject to the disciplines of the ASCM if they cause “adverse effects”. Subsidies contingent upon the exportation of goods produced are prohibited. Adverse effects are defined in terms of distortions to the trade flows of subsidised goods.

### **Provisions in Regional Trade Agreements**

At the sub-multilateral level, investment issues have been addressed through RTAs, bilateral investment treaties (BITs) and a range of plurilateral arrangements specifically aimed at dealing with investment issues. Indeed, where investment protection is concerned RTAs are not typically the main vehicle for negotiating international investment rules. Rather, BITs constitute the most popular instrument in this regard. Whereas the number of BITs is estimated to have reached 1941 in 2000, an estimated 172 RTAs are currently in force and only a small (albeit growing) minority of these deal with investment issues.<sup>2</sup> Given the focus of this survey on how RTAs have dealt with investment issues, it is important to keep in perspective that these only represent one of several institutional settings at the sub-multilateral level in which investment-rule making has taken place.

Rules on investment have been linked to wider processes of trade and economic integration and cooperation in various ways. The following sub-sections deal respectively with: i) agreements that focus on the right of establishment and the free movement of capital, ii) agreements that build upon treatment and protection principles typically found in BITs, iii) agreements that distinguish between the rights accorded to local and third-party investors and iv) agreements that include provisions on the status of regional enterprises.

This classification of RTAs according to general characteristics is imperfect insofar as the complexity of many agreements means that they could be included in several categories. Indeed, the only perfectly exclusive categorisation of agreements is at the level of the individual agreements themselves since no two agreements are exactly alike. However, in order to give the discussion some structure and to avoid simply listing agreements and their investment provisions it was felt that a rough characterisation according to broad objectives would render the discussion more reader-friendly.

Finally, all of the agreements discussed below constitute examples of efforts to go beyond existing provisions on investment at the WTO, either in terms of substance or objectives. RTAs containing rules on investment usually go beyond the WTO in that they contain provisions on the right of establishment, an obligation that does not exist in any WTO agreement.

### ***Rules on right of establishment and free movement of capital***

Early efforts at introducing rules on investment at the regional level emphasised the issues of establishment and the free movement of capital. One of the most comprehensive examples of this approach was the *Treaty Establishing the European Community* (1957) (revised by the Treaty of Amsterdam which entered into force on 1 May 1999). The EC Treaty addresses investment primarily through provisions on freedom of establishment and free movement of capital. Article 52 of the original treaty prohibits restrictions on the freedom of establishment of nationals of a member State in the territory of another member State and on the setting up of agencies, branches or subsidiaries by nationals of any member State established in the territory of any member State.<sup>3</sup> Freedom of establishment includes the right to take up and pursue activities as self-employed

persons and to set up and manage undertakings under the conditions laid down for its nationals by the law of the country where such establishment is effected. By virtue of Article 58,<sup>4</sup> this right of establishment applies to companies or firms formed in accordance with the law of a member State and having their registered office, central administration or principal place of business within the Community.

Since the end of the transitional period on 31 December 1969, Article 52<sup>5</sup> has been directly applicable in the sense that it can be invoked by individuals before the national courts of member States. EC Treaty rules on freedom of establishment are not only addressed to the member States but also require the adoption of measures by the Community institutions with respect to a wide range of matters specified in Articles 54 and 57 in order to facilitate the implementation of the freedom of establishment.<sup>6</sup> Pursuant to these provisions, directives have been adopted *inter alia* with respect to standards in specific sectors, company law, government procurement, and the mutual recognition and acceptance of diplomas, certificates and other evidence of formal qualifications.

With respect to movement of capital, Article 73(b) of the EC Treaty, which was added by the 1992 Treaty on European Union, provides for the prohibition as of 1 January 1994 of restrictions on movements of capital and payments between the member States and between the member States and third countries.<sup>7</sup> Capital movements covered by this provision include direct investments, defined as investments of all kinds which serve to establish or to maintain lasting and direct links between the person providing the capital and the undertaking to which the capital is made available in order to carry on an economic activity. This general prohibition is subject to "grandfather" and transition clauses in respect of certain existing restrictions, exceptions (*e.g.* relating to taxation and prudential measures) and a safeguard clause applicable in case of difficulties for the operation of economic and monetary union caused by capital movements to or from third countries.

Agreements involving countries that have historically restricted capital movements have also tended to emphasise establishment and capital movement issues but much less comprehensively than the EC Treaties. For example, the *Europe Agreements* concluded in the early and mid-1990s between the European Community and Central and Eastern European countries, also focus primarily upon establishment issues by providing for national treatment with regard to the establishment and operation of companies and nationals. The term "establishment" is defined in each of these Agreements as meaning the right to take up and pursue economic activities by means of the setting up and management of subsidiaries, branches and agencies.

The *Treaty Establishing the Caribbean Community (CARICOM)* (1973), as amended by a Protocol adopted in July 1997, prohibits the introduction by member States of any new restrictions relating to the right of establishment of nationals of other member States (Article 35b). Member States are also required to remove restrictions on the right of establishment of nationals of other member States, including restrictions on the setting up of agencies, branches or subsidiaries by nationals of a member State in the territory of another member State (Article 35c).

Likewise, the Treaty Establishing the African Economic Community (1991) and the Treaty Establishing the Common Market for Eastern and Southern Africa (COMESA) (1993) include among their objectives the removal of obstacles to the free movement of capital and the right of residence and establishment.<sup>8</sup> Finally, the Revised Treaty of the Economic Community of West African States (ECOWAS) (1993) includes among its objectives the establishment of a common market involving, *inter alia*, the removal of obstacles to the free movement of persons, goods, services and capital and obstacles to the right of residence and establishment [Article 3(2)]. The Treaty Establishing the

Economic and Monetary Union of West Africa (1996) provides for freedom of nationals of one member State to provide services in the territory of another member State and proscribes restrictions on movement of capital.

### ***Rules building on treatment and protection principles of Bilateral Investment Treaties (BITs)***

A number of RTAs have gone beyond issues relating to establishment and the free flow of capital. For example, the *North American Free Trade Agreement* (NAFTA) (1994) contains generic provisions on investment in Chapter 11.<sup>9</sup> "Investment" is defined in Article 1139 through a broad list of assets along with a negative list of certain claims to money, including claims arising from commercial transactions, which are not considered to be investments. Each Party is required to accord the better of national treatment and MFN treatment to investors of another Party, and to investments of investors of another Party, with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments (Articles 1102-1104).<sup>10</sup>

The provisions of the NAFTA concerning performance requirements apply to both investments of investors of a Party and investments of investors of a non-Party. Article 1106(1) proscribes the imposition or enforcement of mandatory requirements and the enforcement of any undertakings or commitments: (1) to export a given level or percentage of goods or services; (2) to achieve a given level or percentage of domestic content; (3) to purchase, use or accord a preference to goods produced or services provided in the territory of a Party or to purchase goods or services from persons in its territory; (4) to relate the volume or value of imports to the volume or value of exports or to the amount of foreign exchange inflows associated with investment; (5) to restrict sales of goods or services produced or provided by an investment in a Party's territory by relating such sales to the volume or value of exports or foreign exchange earnings of the investment; (6) to transfer technology, a production process or other proprietary knowledge; and (7) to act as the exclusive supplier of the goods produced or services provided by an investment to a specific region or world market. With the exception of the first and the last two requirements, these requirements are also prohibited if applied as conditions for the receipt of an advantage [Article 1106(3)].

NAFTA Articles 1115-1138 provide for international arbitration of disputes between a Party and an investor of another Party. An investor may submit to international arbitration a claim that another Party has breached an obligation under Chapter 11 or under certain provisions of the chapter on monopolies and state enterprises and that the investor has incurred loss or damage by reason of, or arising out of, that breach. Article 1122 contains the unconditional consent of the Parties to the submission of a claim to arbitration. The investor can elect to proceed under the International Centre for Settlement of Investment Disputes (ICSID) Convention, the Additional Facility Rules of ICSID or the United Nations Commission of International Trade Law (UNCITRAL) Arbitration Rules. Detailed rules are contained in these provisions on matters such as the constitution of arbitral tribunals, consolidation of claims, applicable law, nature of remedies, and finality and enforcement of arbitral awards.

A number of more recent RTAs (and proposed RTAs), especially those involving NAFTA signatories, have been broadly modelled after the NAFTA with respect to investment rules. This is the case, for example, in the *Canada—Chile Free Trade Agreement* (1997) and in the draft text for the *Free Trade Area of the Americas*. A structure and content broadly similar to that found in the NAFTA investment provisions is also reflected in the *Vaduz Convention*, the revised *Convention establishing the European Free Trade Association*<sup>11</sup> (2001) and the *Japan—Singapore Economic Partnership Agreement*. One interesting point to note is that some recent bilateral RTAs do not cover investment for the stated reason that a BIT already exists between the signatories. This is the case, for example, in the *Canada—Costa Rica Free Trade Agreement* (2000).

Other RTAs have sought to incorporate BIT-like provisions on investment but have eschewed the strict enforcement standards (e.g. binding dispute settlement mechanisms) and the levels of protection and liberalisation found in agreements like the NAFTA. In the context of the Asia—Pacific Economic Cooperation (APEC), norms of a legally non-binding nature relating to the admission, treatment and protection of foreign investment have been adopted in the *APEC Non-Binding Investment Principles* (1994). Principles of a general nature state that Member economies will ensure transparency with respect to laws, regulations and policies affecting foreign investment; extend MFN treatment to investors from any economy with respect to the establishment, expansion and operation of their investments; and accord national treatment to foreign investors in relation to the establishment, expansion, operation and protection of foreign investment, with exceptions as provided for in domestic laws, regulations and policies. More specific Principles provide that Member economies will not relax health, safety and environmental regulations as an incentive to encourage foreign investment; minimise the use of performance requirements that distort or limit expansion of trade and investment; and permit the temporary entry and sojourn of key personnel for the purpose of engaging in activities connected with foreign investment, subject to relevant laws and regulations.

A number of regional and plurilateral agreements exist which, instead of directly incorporating the full range of investment protection and dispute settlement provisions typically found in bilateral investment treaties, envisage the conclusion of such bilateral treaties between the parties. Although not part of the RTAs themselves, these ‘side-BITs’ are explicitly recognised as contributing to the wider process of liberalisation between the parties. An example of this approach is the Cotonou Agreement between the EU and the African, Caribbean and Pacific States (ACP) Countries.<sup>12</sup> This agreement sets forth general principles regarding the treatment of foreign investment, such as the requirement to accord fair and equitable treatment, and envisages that more specific regulation of policies on foreign investment will be dealt with through the negotiation of bilateral agreements between the Contracting Parties. Already in the Lomé Convention VI, which the Cotonou Agreement replaces, a Joint Declaration in Annex LIII of the Convention provided that the Contracting Parties would undertake a study of the main clauses of model bilateral investment agreements. Various recent agreements of the European Union with third countries also refer to the possible conclusion of bilateral investment treaties between member States of the European Union and the third countries in question.<sup>13</sup>

### ***Rules that distinguish between local and third-party investors***

Investment rules on establishment, the free flow of capital and those that build upon issues usually covered in BITs all have as their underlying purpose the promotion of a more efficient international allocation and use of capital. However, not all investment rules in RTAs have economic efficiency as their prime objective. Some agreements contain investment provisions whose aim is more developmental in nature. For example, in August 1994, Member States of the MERCOSUR adopted a *Protocol on Promotion and Protection of Investments from States not Parties to MERCOSUR*. The signatories to the Protocol undertake not to accord to investments of investors of third countries more favourable treatment than that provided for in the Protocol. In respect of the treatment of established investments, the Protocol lays down general standards of treatment which are similar to those contained in the Colonia Protocol,<sup>14</sup> except that the parties to the agreement enjoy discretion to decide whether or not to accord national treatment and MFN treatment to established investments of investors of third countries. The *Protocol on Promotion and Protection of Investments from States not Parties to MERCOSUR* contains no provisions on performance requirements.

Other agreements dealing with investments from third countries have sought to reduce restrictions traditionally aimed at these. For example, in the context of the Andean Community, rules aiming at the harmonisation of investment policies of member countries towards investment from third countries were first adopted in 1970. The currently applicable regime appears in *Decision 291 of the*

*Commission of the Cartagena Agreement -Common Code for the Treatment of Foreign Capital and on Trademarks, Patents, Licences and Royalties* (1991). This Decision provides that foreign investors shall have the same rights and obligations as national investors, except as otherwise provided in the legislation of each member country, and eliminates the previously existing requirement to subject foreign investment to an authorisation procedure. It also removes restrictions contained in the previous rules on the transfer of funds by obligating member countries to permit foreign investors and sub-regional investors to remit abroad in convertible currency the verified net profits derived from foreign direct investment and the proceeds from the sale or liquidation of such investment. A third important change effected by the Decision is the removal of restrictions on access of products produced by foreign enterprises to the benefits from the trade liberalisation under the Cartagena Agreement. Prior to the adoption of this Decision, such products could benefit from this trade liberalisation only if the foreign enterprise undertook to convert into a joint or national enterprise.

### ***Rules on regional enterprises***

Several regional agreements aim at fostering co-operation between firms of member States by establishing a special legal regime for the formation of a regional form of business enterprise. For example, the *Uniform Code on Andean Multinational Enterprises* established by Decision 292 of the Commission of the Cartagena Agreement provides for the formation of Andean Multinational Enterprises. One of the conditions for the creation of such an enterprise is that capital contributions by national investors of two or more member countries must make up more than 60 per cent of the capital of the enterprise. Among the privileges which the Decision requires member countries to grant to such enterprises are national treatment with respect to government procurement, export incentives and taxation, the right to participate in economic sectors reserved for national companies, the right to open branches in any member country, and the right of free transfer of funds related to investments. Likewise, the *Basic Agreement on the ASEAN Industrial Cooperation Scheme* (AICO Scheme) was concluded by members of ASEAN in 1996 to promote joint manufacturing industrial activities between ASEAN-based companies.

## NOTES

1. In the context of a discussion of investment provisions in RTAs, this is an important development insofar as it becomes necessary to look beyond the content of RTAs themselves to determine whether they 'contain' investment provisions.
2. Although, as noted, many of these now have 'side-BITs'.
3. The reference in the original text to the progressive abolition of restrictions on the right of establishment in the course of the transitional period was deleted and replaced by the concept of prohibition in amendments made by the Treaty of Amsterdam, Article 43. *Official Journal of the European Communities*, No. C 340, 10 November 1997, p.61.
4. Treaty of Amsterdam, Article 48.
5. Treaty of Amsterdam, Article 43.
6. Treaty of Amsterdam, Articles 44 and 47 respectively.
7. Treaty of Amsterdam, Article 56.
8. See, respectively, Article 4(2)(i) of the Treaty Establishing the African Economic Community and Article 4(4)(c) and 4(6)(e) of the COMESA Treaty.
9. In addition to Chapter 11, separate provisions dealing with investment issues are contained in Chapter 14 on financial services, Chapter 15 on competition, monopolies and state enterprises, and Chapter 16 on temporary entry for business persons.
10. The NAFTA adopts the negative list approach such that the actual coverage of the agreement's investment provisions is determined by the exceptions and reservations contained in the annexes to the agreement.
11. The original Stockholm Convention was signed in 1960.
12. Signed in June 2000.
13. In addition to the Europe Agreements and the Partnership and Cooperation Agreements, references to the future conclusion of bilateral investment treaties appear in, for example, the Cooperation Agreement between the European Community and the Kingdom of Nepal (1995), Article 10; the Interregional Framework Cooperation Agreement between the European Community and its Member States, of the one part, and the Southern Common Market and its Party States, of the other part (1995), Article 12, and the Framework Cooperation Agreement leading ultimately to the establishment of a political and economic association between the European Community and its Member States, of the one part, and the Republic of Chile, of the other part (1996), Article 15.
14. The Colonia Protocol governs the treatment of regionally based investors and their investments.

*Chapter 4*

**COMPETITION POLICY**

*by*

**Hunter Nottage**

**Abstract:** Competition-related provisions feature in RTAs in all parts of the world and between countries at all stages of development. This chapter examines a number of aspects of such provisions in RTAs, as well as considering the coverage of competition policy in WTO Agreements. In particular, it considers the co-ordination of competition standards and rules in RTAs, mechanisms for co-operation and enforcement and the treatment of monopolies and enterprises with special and exclusive rights. Finally, it explores the relationship of competition policy rules to the application of trade remedies, noting that some RTAs prohibit the use of antidumping measures between signatories due to co-operative arrangements on competition policy matters. By exploring these various themes, the chapter highlights the diversified nature of RTAs in terms of approach to integration on competition law and policy matters.

## **Key points**

One of the immediate observations to come out of this brief survey is the widespread use of competition-related provisions in RTAs. They appear in trade agreements covering all parts of the globe and with memberships varying between, and across, both developed and developing countries. This suggests a broad consensus on the value and appropriateness of having competition-related provisions in trading agreements. An idea that still remains subject to discussion at the multilateral level.

A second key theme to emerge is the disparate nature of these various RTAs and the extent of integration on competition-related matters that they seek. This theme first appears in the examination of the extent to which RTAs seek co-ordination of competition standards and rules. In particular, RTAs calling for close harmonisation of specific competition standards and rules, such as in the EU, contrast with those setting out more general obligations to take action against anti-competitive business conduct, sometimes entailing an obligation to adopt and enforce competition laws, as reflected in the NAFTA. The approach towards co-ordination tends to vary with the degree of economic integration contemplated by the various agreements. This is not, however, exclusively the case as manifested, for example, in certain Euro-Mediterranean Association Agreements which call for co-ordination of substantive competition rules in trading agreements with relatively limited market integration objectives. The extent of co-ordination also tends to be closely associated with the role assigned to supranational institutions for the enforcement of competition rules.

Another more tentative observation relates to RTAs precluding the application of anti-dumping remedies in conjunction with co-operation on competition policy matters. This has traditionally occurred where there has been deep integration on competition-policy matters such as in the EU or ANZCERTA but has also, most recently, appeared in RTAs that discuss competition-policy at a much broader level of generality such as the Canada-Chile FTA. The link between anti-dumping and competition policy continues to be considered in the negotiation of new RTAs and is an area where regional approaches may differ considerably from what is currently contemplated multilaterally and under the disciplines of the WTO.

Finally, when examining both the treatment of monopolies and enterprises with special and exclusive rights, as well as mechanisms for consultation, co-operation and enforcement, it is found that RTAs tend to go beyond existing provisions in the WTO. This is not surprising, given that regulation of the trade and competition interface remains embryonic in the WTO.

## **Provisions in WTO agreements**

The Doha Ministerial Declaration augmented the role of competition policy in the WTO by not only recognising the case for a multilateral framework to enhance the contribution of competition policy to international trade and development but also by agreeing that negotiations to that end will take place after the 5<sup>th</sup> Ministerial Conference.<sup>1</sup> In the two year interim, the WTO Working Group on the Interaction between Trade and Competition Policy has been asked to focus on clarification of certain core principles, including transparency, non-discrimination, procedural fairness and provisions

on hardcore cartels; modalities for voluntary co-operation; and support for the progressive reinforcement of competition institutions in developing countries through capacity building.

While the Doha Ministerial Declaration is an important development, competition-policy is not a *new* issue in the context of the WTO. Nonetheless, it has not yet been systematically developed.

Historically, the 1947 Havana Charter, and the International Trade Organisation that it contemplated, envisaged multilateral regulation and review of restrictive business practices. In particular Chapter V of the Charter, entitled “Restrictive Business Practices”, contained a number of articles “to prevent, on the part of private or commercial public enterprises, business practices affecting international trade which restrain competition, limit access to markets or foster monopolistic control”.<sup>2</sup>

Chapter V was not, however, included in the original GATT (1947). Rather a diluted Decision on Arrangements for Consultations on Restrictive Business Practices was eventually adopted in 1960 by the GATT Contracting Parties.<sup>3</sup> This Decision, recognised “that the activities of international cartels and trusts may hamper the expansion of world trade and... thereby frustrate the benefits of tariff reductions and of the removal of quantitative restrictions or otherwise interfere with the objectives of the General Agreement” and further “that international co-operation is needed to deal effectively with harmful restrictive practices in international trade”. Nonetheless, the Contracting Parties recorded that at the time it would not be practicable to undertake any form of control of such practices, nor to provide for investigations. Thus, the 1960 Decision is limited to recommending that Contracting Parties enter into consultations in the event of harmful restrictive practices in international trade on either a bilateral or multilateral basis.<sup>4</sup>

Beyond the 1960 Decision, competition-related provisions have been incorporated in the GATT and the subsequent WTO Agreements in a piecemeal manner. A number of reviews of these provisions has already been undertaken by the OECD,<sup>5</sup> the WTO<sup>6</sup> and academia.<sup>7</sup> What follows, therefore, is a selective summary highlighting core provisions in the various agreements.

Article XVII of GATT 1994 (State Trading Enterprises), concerning state trading enterprises and other enterprises that benefit from exclusive or special privileges, is significant. The article recognises that such enterprises may be operated in a manner creating serious obstacles to trade and notes the importance of negotiations, on a reciprocal and mutually advantageous basis, to reduce such obstacles.

In the services area, GATS Article VIII (Monopolies and Exclusive Service Suppliers) sets out an obligation for WTO Members to ensure that such monopolies and exclusive service suppliers do not act in a manner which is inconsistent with their obligations under Article II (Most-Favoured-Nation Treatment) and specific scheduled commitments. In addition, Article IX of GATS (Business Practices) recognises that anti-competitive business practices of services suppliers “may restrain competition and thereby trade in services”. As regards basic telecommunications services, an additional Reference Paper on Regulatory Principles contains a commitment to adopt appropriate measures to prevent anti-competitive practices by major suppliers.

In the area of trade-related intellectual property rights, Article 8.2 of the TRIPS Agreement (Principles) allows a Member to take appropriate measures in order to prevent the abuse of IPRs by right-holders or practices which unreasonably restrain trade or adversely affect the transfer of technology, provided that they are consistent with the other provisions of the TRIPS Agreement. Article 40.2 (Control of Anti-Competitive Practices in Contractual Licenses) authorises Members to specify in their legislation licensing practices or conditions that may, in particular cases, constitute an abuse of IPRs having an adverse effect on competition in the relevant market. Finally, Article 31

(Other Use Without Authorization of the Right Holder) recognises anti-competitive practices as one of the grounds for compulsory licensing.

Under the Agreement on Safeguards, Article 11.3 (Prohibition and Elimination of Certain Measures) obliges WTO Members not to encourage or support the adoption of non-governmental measures equivalent to voluntary export restraints, orderly marketing arrangements, or other governmental arrangements prohibited under Article 11.1 of that agreement.

With respect to trade-related investment measures, competition-related provisions are limited to Article 9 of the TRIMs Agreement (Review by the Council for Trade in Goods) which mandates the Council for Trade in Goods to consider whether the agreement should be complemented with provisions on investment and competition policy.

Elements of competition policy are arguably also found in the Agreement on Technical Barriers to Trade, the Agreement on the Application of Sanitary and Phytosanitary Measures, the Agreement on Preshipment Inspection, the Agreement on Government Procurement and the Agreement on Trade in Civil Aircraft. Also of potential relevance, are the more general rules of the WTO relating to non-discrimination and transparency, the consultation and co-operation arrangements under each of the main WTO Agreements and the WTO dispute settlement mechanism.<sup>8</sup>

Another GATT 1994 provision which could be seen to relate to competition policy is Article VI (Anti-dumping and Countervailing Duties) and the accompanying Agreement on the Application of Article VI (Anti-dumping Agreement). These allow for anti-dumping duties in cases where dumping has been determined to occur. Furthermore, the concept of non-violation nullification and impairment, based on Article XXIII of GATT 1994 may provide a basis to challenge denials of market access that fundamentally undermine bargained concessions. It has been argued that it is not precluded that restrictive business practices could be a factor in such situations.<sup>9</sup>

Finally, competition related issues are frequently raised in the context of Trade Policy Reviews and have been studied extensively by the WTO Working Group on the Interaction between Trade and Competition Policy since its establishment at the 1996 Singapore Ministerial Conference. As mentioned, the recent Doha Ministerial Declaration has renewed the WTO Working Group's mandate calling for clarification of various issues at the trade and competition interface between now and the 5<sup>th</sup> Ministerial Conference.

### **Provisions in Regional Trade Agreements**

While the focus of this study is to examine how RTAs have dealt with competition-related matters, it is important to highlight that RTAs represent only one of several institutional settings addressing competition law and policy at the international level. For example, beyond regional and bilateral trade agreements, a plethora of co-operative anti-trust arrangements to facilitate competition law enforcement exist at the multilateral, regional and bilateral levels. These include the United Nations Set of Multilaterally Agreed Principles and Rules for the Control of Restrictive Business Practices,<sup>10</sup> a number of OECD Recommendations<sup>11</sup> and various bilateral arrangements incorporating *inter alia* both traditional and positive comity principles.<sup>12</sup>

In analysing approaches to competition policy in RTAs this study has adopted a thematic approach based on the following headings: (i) the extent of co-ordination of substantive competition standards and rules; (ii) the treatment of monopolies and enterprises with special and exclusive rights; (iii) mechanisms for consultation, co-operation and enforcement; and (iv) the relationship of competition policy rules to the application of trade remedies.<sup>13</sup>

Given the embryonic and somewhat indirect nature of competition-related disciplines in the WTO, the RTAs surveyed here almost by definition expand upon the WTO disciplines. A qualification applies however where RTAs no longer permit the application of anti-dumping remedies where they can only be said to differ from, rather than expand upon, the WTO provisions.

### ***The extent of co-ordination of competition standards and rules***

Amongst the RTAs dealing with competition policy a broad distinction can be drawn on the basis of the *extent* of co-ordination of competition standards and rules that they envisage. In this regard it is possible to distinguish between those trade agreements that contain general obligations to take action against anti-competitive business conduct (such as an obligation to adopt a domestic competition law without setting out specific standards or provisions it should contain) and others that call for more extensive co-ordination of specific competition standards and rules (potentially requiring common competition laws and procedures). Clear categorisation along these lines is limited to the extent that, in reality, RTAs fall along a spectrum of convergence on competition policy. Furthermore, while RTAs which have supranational elements and institutions necessarily entail considerable co-ordination of competition standards and rules, a number of RTAs which are not supranational in character have also achieved similar co-ordination. Despite such difficulties in categorisation, however, this section provides a framework for identifying two broad approaches to competition policy in RTAs.

An example of the former approach entailing general obligations to take action against anti-competitive business conduct is the NAFTA. Its Chapter 15, titled “Competition Policy, Monopolies and State Enterprises”, requires member countries to “adopt or maintain measures to proscribe anticompetitive business conduct and take appropriate action with respect thereto”,<sup>14</sup> without however prescribing specific competition standards or rules. In connection with this obligation, Mexico enacted a comprehensive modern competition law in 1993.<sup>15</sup> A similar provision exists in both the Canada-Chile and Mexico-Chile FTAs. The Japan-Singapore Economic Partnership Agreement (JSEPA) provides that each party shall take measures which it considers appropriate against anti-competitive activities. Similarly, the EU-Mexico FTA, focuses on ensuring the implementation and enforcement of the parties’ *respective* competition laws in a manner recalling the side agreements on environment and labour standards embedded in NAFTA.

The chapter on competition policy (Chapter XI) of the recently signed Canada-Costa Rica FTA (CCRFTA) adopts a comparable approach.<sup>16</sup> It includes an obligation on the Parties to adopt or maintain legal measures to proscribe the carrying out of anti-competitive business activities including, in a non-exhaustive list, cartels, abuse of dominance and anti-competitive mergers [Chapter XI, XI.2, para 3(a)-(c)] The FTA is noteworthy as it is a concrete embodiment of many of the concepts that the WTO Working Group on the Interaction between Trade and Competition Policy has been mandated to focus on following the Doha Ministerial Declaration. For example, the framework includes a commitment to the principle of *transparency*, with each Party to ensure that measures adopted or maintained to proscribe anticompetitive activities “are published or otherwise publicly available” [Chapter XI, XI.2, para 4(a)].<sup>17</sup> Furthermore any exclusions or special authorizations from competition disciplines that a Party may have established shall also “be transparent and should be periodically assessed by each Party to determine if they are necessary” (Chapter XI, XI.2, para 3). The FTA also contains commitments to *non-discrimination*, as measures taken to proscribe anti-competitive activities should be applied in a non-discriminatory basis (Chapter XI, XI.2, para 2); and *procedural fairness*, as judicial and quasi-judicial proceedings should be fair and equitable with an appeal or review process to any final decision (Chapter XI, XI.2, para 6). Finally, the Chapter also includes explicit agreement that it is in the Parties “common interest to work together in technical assistance initiatives related to competition policy” (Chapter XI, XI.5).

In contrast to these broad initiatives containing general obligations to take action against anti-competitive business conduct, co-ordination of specific competition standards and rules has occurred in a variety of other RTAs. This is particularly the case with respect to the highly advanced regional system of competition rules found in the EU, a majority of EU trading agreements with third countries and a variety of sub-regional groupings in Africa and Latin America.

The EU has supra-national competition rules which are linked by the *Treaty Establishing the European Community (1957)* (EC Treaty)<sup>18</sup> to the fundamental objective of establishing a common market.<sup>19</sup> The EC Treaty rules in the field of competition cover *inter alia* agreements or concerted practices between undertakings (Article 81<sup>20</sup>), abuses of dominance by undertakings (Article 82<sup>21</sup>) as well as competition distorting state aid under the guise of subsidies (Article 87<sup>22</sup>). The EU has also adopted associated rules, since 1989, regarding concentrations which meet certain sales thresholds, designed to cover transactions that may affect trade between EU Member States. Notably, co-ordination of these specific rules is ensured by the principle of primacy of EC competition law over national competition law.<sup>23</sup> At the same time, however, its Member States still have separate and distinct national competition laws and national competition authorities which may differ substantially from one another.<sup>24</sup>

The EU is also at the centre of a web of trade agreements with non-member countries which call for adoption and co-ordination of specific competition standards and rules, although the extent of such co-ordination varies with the degree of economic integration contemplated by the various agreements. A prominent example is the Agreement on the European Economic Area (EEA), concluded by the EU with most EFTA countries<sup>25</sup>, whereby all practices liable to impinge on trade and competition among the EEA participants are subject to rules that are closely related to the EC competition law. Thus, competition rules applicable to undertakings in Articles 53 and 54 of the EEA are virtually identical to Articles 81 and 82 of the EC Treaty. Similarly, the EEA extends to the control of mergers which are declared incompatible with the agreement where they create or strengthen a dominant position which would significantly impede effective competition in the territory covered by the EEA.<sup>26</sup> Somewhat analogous are the Europe Agreements, concluded with countries in Central and Eastern Europe, as well as the Central European Free Trade Agreement (CEFTA), where competition standards are closely aligned with those of the EC Treaty in the event that trade between the EU and another signatory is affected.<sup>27</sup> While the Stabilisation and Association Agreements which the EU has concluded with certain countries in South East Europe also include provisions closely related to those of the Europe Agreements, they go beyond them in two important respects. Firstly, in addition to requiring the approximation of signatories' existing and future competition legislation with EC competition laws, they explicitly refer to law enforcement; and secondly, they set strict temporal deadlines for progress in both approximation and enforcement.<sup>28</sup>

The recent Euro-Mediterranean Association Agreements also introduce a number of specific competition provisions similar to those in the EC Treaty relating to collusive behaviour, the abuse of a dominant market position and competition-distorting state aid. While these provisions have yet to be implemented, they are significant to the extent that they involve trading relations with a number of Middle-Eastern and North African countries at considerably different levels of development, with different motivations and incentives compared to those of the Central and Eastern European or EFTA states.<sup>29</sup>

Co-ordination of competition standards and rules within RTAs is not confined to those concluded by the EU. Notably, competition law and policy is starting to be addressed more extensively in African sub-regional agreements with the Treaty Establishing the Common Market for Eastern and Southern Africa (COMESA) prohibiting, in Article 55, "any agreement between undertakings or concerted practices which has as its objective or effect the prevention, restriction or distortion of competition

within the Common Market” (subject to a proviso for the granting of exemptions by the COMESA Council). Furthermore, COMESA contemplates formulating and implementing a regional competition policy which will harmonise existing national competition policies, or introduce them where they were absent, in the context of a transition to a full customs union.<sup>30</sup> Other examples of RTAs which have adopted or are developing specific co-ordinated competition rules are the MERCOSUR,<sup>31</sup> the Andean Community<sup>32</sup> and EFTA.<sup>33</sup>

ANZCERTA provides another example of a RTA co-ordinating specific competition laws. Both Australia and New Zealand have committed themselves to harmonising their business laws, including their competition statutes. In addition, in conjunction with eliminating anti-dumping actions in Trans-Tasman trade, both countries amended their competition laws so that their misuse of substantial market power prohibitions apply not just to their own markets but also to the "Trans-Tasman" market. In particular, this means that both Australian and New Zealand prohibitions of predatory pricing and of anti-competitive price discrimination can be directly applied to businesses located in either country. This also means that an abuse of dominance case arising anywhere in the trans-Tasman market can be prosecuted by either country's competition authority.<sup>34</sup>

### ***The treatment of monopolies and enterprises with special and exclusive rights***

The impact that state trading enterprises, monopolies, and enterprises with special or exclusive rights can have on market access for imports has been a matter of longstanding concern in international trade relations. As a result, and in contrast to the relative dearth of provisions on substantive competition rules elsewhere in the WTO Agreements, the WTO includes a number of competition-related provisions regarding monopolies, state enterprises and enterprises with exclusive or special privileges. Similarly, many RTAs provide for extensive obligations regarding the conduct of such enterprises.

The Free Trade Agreement between Mexico, Colombia and Venezuela (the “Group of Three Agreement”) is illustrative as its competition component *only* applies to state-owned monopolies and enterprises, requiring them to act on the basis of commercial considerations in operations in their own territories and not to use their monopoly positions to engage in anti-competitive practices in a non-monopolised market in such a way as to affect enterprises in other member States.

Article 1502 of NAFTA affirms the right of a Member to designate both privately-owned and public monopolies, subject to the constraints that they must: (a) act in accordance with the obligations under NAFTA law; (b) act solely in accordance with commercial considerations in their purchase or sale of the monopoly good or service; (c) provide non-discriminatory treatment to NAFTA investors and investments, and to NAFTA goods and service providers in the purchase or sale of the monopoly good or service in the relevant market; and (d) must not use their monopoly position to engage in anti-competitive behaviour in a non-monopolised market. With respect to state enterprises, pursuant to Article 1503, these must act in a manner consistent with the NAFTA obligations on investment and financial services and must maintain non-discriminatory treatment in their sales to NAFTA investors or investments.

The EC Treaty is perhaps the most far-reaching example where regional laws have been enacted, in this area, with the objective of removing obstacles to trade. Notably, Articles 28 and 31<sup>35</sup> have been employed with respect to state monopolies of a commercial character to ensure the elimination of measures having the effect of quantitative restrictions and the avoidance of discrimination between EU member States.<sup>36</sup> In particular, Article 31 has been interpreted to require the elimination of a commercial monopoly's exclusive import rights.<sup>37</sup> With respect to state enterprises or enterprises with special or exclusive rights, Article 86<sup>38</sup> of the EC Treaty, makes it explicitly clear that these are bound

by the other rules in the EC Treaty, notably those on competition. Similar provisions can be found in the Europe Agreements and the EEA.

### ***Mechanisms for consultation, co-operation and enforcement***

Consultation and co-operation mechanisms concerning the application of measures against anti-competitive conduct, such as procedures for notification, exchange of information and enforcement of competition rules, are provided for in most RTAs. This is one area, in particular, where RTAs should be read in conjunction with other co-operative anti-trust arrangements that the parties may have in place. It is also an area where lessons learnt from such co-operative arrangements have been incorporated into subsequent RTAs.<sup>39</sup>

There is a significant difference, however, between RTAs which are limited to consultation and co-operation between national competition authorities and those that provide for elements of supranationality. The latter often assign a key role to supranational institutions in the enforcement of competition rules while the former rely primarily on non-institutionalised procedures. The EC Treaty provides the most far reaching example where enforcement of international competition rules has been assigned to a supranational institution as the application of EC competition law is primarily the responsibility of the EC Commission. Nonetheless, it should be noted that certain EC competition laws and rules can be applied by national courts and by national competition authorities – an aspect that has gained increasing importance in recent years as the EC Commission is encouraging a more decentralised application of EC competition law.<sup>40</sup> The “two pillars system” of the EEA also allows for supranational enforcement powers, allocated between the EU Commission and the EFTA Surveillance Authority respectively.<sup>41</sup> The Andean Community institutions also have supranational powers, as the Board of the Cartagena Agreement is assigned the responsibility to investigate alleged anti-competitive infringements, and its subsequent orders have direct legal effect in member countries. On a lesser scale, the MERCOSUR Technical Committee on Competition Policy and the Commerce Commission may issue orders for the enforcement of its provisions which must then be implemented by national agencies of the member countries.

Reliance on international institutions does not, however, preclude co-operation between national competition authorities. By way of illustration, the EC Commission co-operates with the competition authorities of member States during investigations, with respect to the exchange of documents, at oral hearings (by allowing for member State representation) and by allowing the opportunity for comments on draft decisions. The EEA also includes a number of additional provisions to ensure co-operation not only with national competition authorities but also between the EC Commission and the EFTA Surveillance Authority.

An example of a RTA with considerable jurisdictional reach yet which is not reliant upon independent supranational institutions is the ANZCERTA. Under this RTA, each country’s competition authority and courts have a unique model of “overlapping jurisdiction” - whereby complaints relating to the misuse of substantial market power may be filed and heard in either jurisdiction and valid and enforceable subpoenas and remedial orders issued in the other country. These are buttressed by a separate bilateral enforcement agreement providing for extensive investigatory assistance, the exchange of information (subject to rules of confidentiality) and co-ordinated enforcement.

NAFTA and the Canada-Chile FTA adopt a different approach which does not rely on supranational institutions for enforcement. Furthermore, detailed procedures for co-operation are not set out and recourse to dispute settlement is excluded.<sup>42</sup> Rather, general consultation and co-operation requirements call on the parties to consult on the effectiveness of their national competition laws and

to co-operate on the enforcement of those laws via mutual legal assistance, notification, consultation and the exchange of information. Here, however, a full picture would need to take into account bilateral co-operation arrangements that exist between the parties.<sup>43</sup> The EFTA only refers to the possibility of dealing with abuses of its competition provisions through consultation and complaints procedures in Article 31 which, unlike those in the EC Treaty, EEA and the Andean Community, do not include the power to launch investigations, compel firms to supply information or modify practices.<sup>44</sup>

Finally, the Asia-Pacific Economic Co-operation forum (APEC), provides a forum for a broad exchange of views, technical co-operation and discussion of competition issues.<sup>45</sup> Within the context of negotiations of the competition policy provisions of the FTAA, most countries within the region with competition laws have undertaken to co-operate with one another, in accordance with their respective laws, to improve enforcement and disseminate best practices in this area and to encourage efforts by economies that do not yet have solid competition regimes to develop their legal frameworks and to advance competition principles. Under the JSEPA, Japan and Singapore will consider extending co-operation to co-ordinated enforcement activities. As Singapore does not have a comprehensive competition law or authority, this RTA provides an example of the potential for such co-operation with countries which do not have comprehensive competition regimes or institutions.

The WTO Agreements also provide for co-operation and consultation obligations with respect to competition-related provisions. Beyond the general consultation procedures applicable to WTO disputes, special consultation procedures are provided under: (a) the 1960 Decision, which recommends that parties enter into consultations on harmful restrictive practices in international trade at the request of another party;<sup>46</sup> (b) GATS Article IX and (c) TRIPS Article 40.3. Notably, the latter two provisions also provide for the exchange of non-confidential information. RTAs that set out requirements for consultation and co-operation with respect to their competition provisions tend nonetheless to be more extensive than those in the WTO. This is particularly the case where the co-operation obligations cover a broader number of disciplines and where they extend to the direct enforcement of competition rules including investigations of complaints, hearings and judgements. With respect to the latter, while the WTO dispute settlement mechanism provides an international institution for the enforcement of breaches of WTO competition-related provisions it is limited to these provisions which, as mentioned in Part I, have been developed in a piecemeal manner.<sup>47</sup>

### ***The relationship of competition policy rules to the application of trade remedies***

Some RTAs prohibit the use of antidumping measures between signatories in light of co-operation on competition policy matters (see also section on Contingency Protection).

A key example is ANZCERTA which, as already mentioned, has phased out, since 1 July 1990, the application of antidumping remedies in bilateral trade relations between Australia and New Zealand in parallel with the amendment of domestic competition laws to make their misuse of substantial market power prohibitions fully applicable to anti-competitive transactions occurring within the region. Similarly, and matching their non-application within the EU, the EEA precludes the application of anti-dumping measures, countervailing measures and measures against illicit commercial practices in the relations between the Contracting Parties.<sup>48</sup> Under MERCOSUR, although the use of anti-dumping duties remains possible in internal trade, it is envisaged that these measures will be gradually eliminated in parallel with ongoing progress to harmonise competition policy.<sup>49</sup>

The Canada-Chile FTA also provides for the reciprocal elimination of anti-dumping actions between the two parties.<sup>50</sup> The agreement is significant in this regard as it is the first to prohibit anti-dumping measures between the parties while only addressing competition policy in general terms

elsewhere in the RTA.<sup>51</sup> The approach to the interface between anti-dumping and competition adopted in the Canada-Chile FTA diverges considerably from that of the NAFTA which, while containing similarly broad competition policy provisions, maintains the parties' rights to apply anti-dumping or countervailing measures (Article 1902).<sup>52</sup> What direction the FTAA initiative will follow, and whether it will adopt a model similar to the Canada-Chile FTA or that of the NAFTA, has not yet been determined but will likely need to accommodate a number of country specific considerations, including the fact that less than half the countries in the region currently have competition laws.<sup>53</sup>

Beyond NAFTA, RTAs that continue to allow for the application of anti-dumping measures in line with the GATT/WTO commitments include the EU-Mexico FTA and the Euro-Mediterranean Association Agreements. Similarly, the COMESA Treaty provides for anti-dumping trade remedies which are seen as a necessary tool "to ensure that the regional liberalisation programme does not unfairly disadvantage weak and vulnerable industries".<sup>54</sup> A challenge in this respect, may be how to reconcile this notion of "unfairness" with a treaty including competition provisions aimed in principle at the protection of consumers and economic efficiency.

As noted earlier, the GATT/WTO provides for the use of anti-dumping duties. Thus to the extent that such duties are no longer permitted under a RTA then it differs from the WTO. The use of competition measures in lieu of anti-dumping measures in intra-regional trade, where anti-dumping measures would still apply to third parties, has been raised by certain WTO Members as risking potential distortions in the international trading system where both regimes are based on different criteria and conditions.<sup>55</sup> Certainly it is an area where it has been suggested that the relationship between "competition policy and RTAs should be explored".<sup>56</sup>

## NOTES

1. The launch of negotiations will, however, be contingent on “a decision to be taken by explicit consensus, at that [5th] session on modalities of negotiations”, see WTO Ministerial Declaration, Ministerial Conference, 4th Session, 14 November 2001, WT/MIN(01)/DEC/W/1, paras 2325. This survey does not intend therefore to prejudge the question of whether negotiations will or should be initiated in the future within the WTO.
2. Article 46.1, Havana Charter for an International Trade Organisation, Final Act and related documents, United Nations Conference on Trade and Employment, Havana, Cuba, from 21 November 1947 to 24 March 1948. The Charter specified six key anticompetitive practices considered potentially harmful to trade, namely: (i) price fixing and other related practices; (ii) exclusion of enterprises from markets or allocation of markets and customers and fixing sales and purchase quotas; (iii) discrimination against certain enterprises; (iv) output restrictions and quotas; (v) agreements preventing the development and use of patented or unpatented technology and inventions; and (vi) certain extensions of the use of rights under patents, trademarks or copyrights. Furthermore, the ITO envisaged investigating and ruling on complaints with the power to request Members to take remedial action.
3. BISD 9S/ 28-29.
4. These arrangements have been invoked on only three occasions, all in 1996, between the US and Japan concerning business practices affecting consumer photographic film and paper.
5. OECD (1999), OECD (1994).
6. WTO (1997).
7. See for example, Petersmann, EU, “International Competition Rules for Governments and for Private Business”, *Journal of World Trade*, 1996, 30:3, at 5.
8. The potential relationships of these to competition policy are described in Chapter VI of the WTO Annual Report 1997, pp. 76-80.
9. OECD (1999), p. 75.
10. *The Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices* was adopted under UNGA Resolution 35/63 of 5 December 1980. The fourth review Conference of the Set “calls upon all Member States to implement the provisions of the Set” (TD/RBP/CONF.5/15 of 4 October 2000). The set nonetheless remains a non-binding instrument.
11. See OECD (1995), OECD (1998).
12. See UNCTAD (2001), which distinguishes amongst six types of international instruments dealing with competition law and policy. They are (a) bilateral or tripartite agreements focussing on co-operation, (b) mutual legal assistance treaties, (c) friendship, commerce and navigation treaties, (d) agreements for technical co-operation in economic regulation, (e) RTAs, and (f) multilateral arrangements.

13. This categorisation follows, to a certain extent, that of the WTO (1997), pp. 82-87.
14. Article 1501.
15. The Energy Charter Treaty is somewhat analogous in approach requiring contracting parties to ensure that within their jurisdictions they have and enforce such laws as are necessary and appropriate to address anti-competitive conduct in economic activity in the energy sector.
16. The CCRFTA was recently presented to the WTO Working Group on the Interaction between Trade and Competition Policy, see Joint Communication from Canada and Costa-Rica, 2 July 2001, WT/WGTCP/W/173. Copies of the full text are available at [http://www.dfait-maeci.gc.ca/tna-nac/Costa\\_Rica-e.asp](http://www.dfait-maeci.gc.ca/tna-nac/Costa_Rica-e.asp).
17. Furthermore, any modifications to such measures are to be notified to the other Party within 60 days, with advance notification to be provided where possible [Chapter XI, XI.2, para 4(b)].
18. Revised by the Treaty of Amsterdam which came into force on 1 May 1999.
19. The EC Treaty sets out as a fundamental objective, “the institution of a system ensuring that competition in the common market is not distorted”, para 3(g) [ex para 3(f)].
20. Ex Article 85.
21. Ex Article 86.
22. Ex Article 92.
23. The EU represents an advanced model of co-ordination. When comparing this approach to others, however, it should be noted that it represents a customs union rather than a free trade area.
24. As the reach of EC competition rules is confined to practices and conduct which may affect trade between EC Member States, they have not displaced national competition laws of Member States.
25. EFTA members are Iceland, Liechtenstein, Norway and Switzerland.
26. Secondary EC competition law is also incorporated into the EEA in areas such as exclusive dealing agreements, technology transfer, specialisation and research and development agreements etc.
27. Notably, the Europe Agreements declare as incompatible (i) all agreements between undertakings, decisions by associations of undertakings and concerted practices between undertakings which have as their object or effect the prevention, restriction or distortion of competition; and (ii) abuse by one or more undertakings of a dominant position in the territories of the Community or of the country in question as a whole or a substantial part thereof. The Europe Agreements also include rules on the granting of state aids, although these are more closely aligned with the EU rules applicable to the least prosperous regions of the EU and allow for exemptions in connection with the CAP and the Treaty Establishing the European Coal and Steel Community. Under the CEFTA, see in particular Articles 22 and 23.
28. See for example Article 68 (Approximation of Laws and Law Enforcement) of the Stabilisation and Association Agreement Between the European Communities, of the one part, and the Former Yugoslav Republic of Macedonia, of the other part, (Brussels, 26 March 2001, 2001/0049 (ACV) [available at [http://europa.eu.int/comm/external\\_relations/see/fyrom/saa/saa03\\_01.pdf](http://europa.eu.int/comm/external_relations/see/fyrom/saa/saa03_01.pdf) ]

29. Notably, the EU-Med Agreement with Tunisia has detailed substantive competition provisions under Articles 36, 81, 82 and 87.
30. Musonda (2000).
31. See in particular the December 1996 protocol on competition policy.
32. See in particular the March 1991, Decision No. 285, of the Commission of the Cartagena Agreement, entitled "Norms to Prevent or Correct Distortions in Competition Caused by Practices that Restrict Free Competition".
33. See in particular Article 15.1.
34. OECD (2001), page 19.
35. Ex Articles 30 and 37.
36. Article 31 explicitly states that it "shall apply to any body through which a Member State, in law or in fact, either directly or indirectly supervises, determines or appreciably influences imports or exports between Member States. These provisions shall likewise apply to monopolies delegated by the State to others."
37. *Pubblico Ministero v Flavia Manghera and Others*, Case 59/75 [1976] ECR 91.
38. Ex Article 90.
39. For example, the concept of "positive comity", whereby a party may request that another party initiate enforcement action against anti-competitive conduct which is seen as adversely affecting its interests, has been incorporated in a number of RTAs (including the Energy Charter Treaty and the Europe Agreements) following its use in various bilateral co-operation arrangements (such as the 1991 Agreement Between the Government of the United States of America and the Commission of the European Communities Regarding the Application of their Competition Laws).
40. For example, the EC Commission has now adopted a draft regulation which provides for the devolution to national jurisdictions of its powers under Article 81 of the EC Treaty to investigate restrictive business practices and to grant exemptions (Article 82 can already be enforced at the national level). The Commission would however continue to undertake enforcement in cases which are of general importance to the European Union.
41. The EFTA Surveillance Authority is set up under Article 108 of the EEA and allocation of jurisdiction between it and the EC Commission is regulated under Article 56 of the EEA.
42. See NAFTA Articles 1501, 1502, 1503 and 1504.
43. For example, the 1995 Agreement Between the Government of Canada and the Government of the United States of America Regarding the Application of their Competition and Deceptive Marketing Practices Laws contains detailed provisions regarding notifications, exchanges of information, co-ordination of enforcement actions, co-operation regarding anticompetitive activities that affect the interests of the other party ("positive comity"), avoidance of conflicts ("traditional comity"), and consultations. The 2000 Mexico-USA Agreement and the 2001 Mexico-Canada Agreement, regarding the application of their competition laws, contain similar provisions.
44. See OECD (1994), para 51.

45. Members have however undertaken in the legally non-binding APEC Principles to Enhance Competition Policy and Regulatory Reform to introduce or maintain effective, adequate and transparent competition policies or laws and enforcement, to promote competition among APEC economies and to take action in the area of deregulation.
46. The 1960 Decision recommends that if addressed a party should accord sympathetic consideration to, and should afford adequate opportunity for consultations with, the requesting party with a view to reaching mutually satisfactory conclusions. If it agrees that such harmful effects are present it should take such measures as it deems appropriate to eliminate these effects. As mentioned, these arrangements have only been invoked on three occasions, see above at note 5.
47. See WTO Annual Report 1997 for a discussion of how WTO dispute settlement potentially relates to this area.
48. EC Treaty, Article 91; EEA, Article 26.
49. Decision 28/00, see Chapter on Contingency Protection.
50. Article M-01 (Reciprocal Exemption from the Application of Anti-dumping Duty Laws) of the Canada-Chile FTA sets out that [Subject to Article M-03] “as of the date of entry into force of this Agreement each Party agrees not to apply its domestic anti-dumping law to goods of the other Party”. Specifically: (a) neither Party shall initiate any anti-dumping investigations or reviews with respect to goods of the other Party; (b) each Party shall terminate any ongoing anti-dumping investigations or inquiries; (c) neither Party shall impose new anti-dumping duties or other measures in respect of such goods; and (d) each Party shall revoke all existing orders levying anti-dumping duties. Furthermore, each Party shall amend, and publish as appropriate, its relevant domestic anti-dumping law in relation to goods of the other Party to ensure that the objectives of the article are achieved.
51. In contrast, as noted earlier in this paper the ANZCERTA, EU and EEA have been matched by significant harmonisation of substantive competition rules.
52. The NAFTA has established its own dispute settlement procedures in the field of anti-dumping.
53. See *Inside US Trade* (2001).
54. Musonda (2000).
55. See WTO (2000), p 7.
56. Japanese contribution in the WTO Committee on Regional Trade Agreements, see “Note of the Meetings of 27 November and 4-5 December 1997”, WTO Committee on Regional Trade Agreements, 13 January 1998, WT/REG/M/15 at para 29. See also the contribution by Canada which concluded that the consequences under GATT Article XXVI(5) of parties to a RTA doing away with anti-dumping remedies and adopting a different mechanism to deal with price discrimination “was not clear, and this deserved more consideration... (as) there might be a link between the two elements that would need to be further explored”, para 26. Most recently, the Joint Study Group for the JSEPA acknowledged that “whilst non-application of AD... could have a significant positive demonstration effect, there were differing interpretations regarding its consistency with the WTO MFN obligation” and thus suggested that it remain a subject for “further negotiations”, see JSEPA Joint Study Report, paras 48-49.

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*Chapter 5*

**TRADE FACILITATION**

*by*

**Evdokia Moisé**

**Abstract:** This chapter surveys provisions concerning trade facilitation in a selection of nine regional trade agreements (RTAs). It highlights how these provisions compare with trade facilitation provisions under the multilateral trading system as embodied in GATT Articles V, VII, VIII and X, the Agreements on Customs Valuation, Import Licensing, Preshipment Inspection, Rules of Origin, TBT and SPS. Trade facilitation provisions are not a common features in RTAs but are increasingly included in more recent agreements, as well as in agreement providing for a higher level of integration. In RTAs, where such provisions exist, they mainly give concrete expression to existing multilateral instruments such as the WCO Kyoto Convention or the UN/EDIFACT initiative. Implementation of facilitation provisions at the regional level rarely has a preferential effect, so that RTA endeavours have a more generally positive impact on all traders operating in the region and not only on traders from the participating countries. In that sense, RTA facilitation provisions go beyond and complement existing WTO provisions and appear to be a proven laboratory for testing ideas.

## Key points

The review of trade facilitation<sup>1</sup> provisions in RTAs shows that the degree of facilitation in an RTA may be influenced by a number of factors, such as the date when the agreement was concluded, the type of the agreement, and the number and relative level of development of participating countries (noting that, all other things being equal, it is easier to simplify and harmonise procedures bilaterally, especially where concerned countries display similar levels of development).

With respect to the date factor, it should be noted that comprehensive trade facilitation endeavours seem to be at a relatively early stage within regional trade initiatives.<sup>2</sup> With respect to the movement of goods in international trade, several older RTAs focus exclusively on lowering tariff barriers and do not contain any provisions to simplify and harmonise related procedures. RTAs which take some steps towards facilitation commonly aim at simplifying and harmonising certification procedures related to technical requirements and to sanitary and phytosanitary measures. There are very few RTAs in force that tackle more specifically import, export and border-crossing procedures in detail. In general, applicable procedures stay within the ambit of domestic regulation well after preferential tariff treatment has been established by means of an RTA. For instance, EFTA does not contain common procedures and formalities related to the movement of goods in international trade, but simply calls for co-operation between Parties to ensure effective application of its customs related provisions while reducing as far as possible the formalities imposed on trade. Similarly, NAFTA has not affected customs administrations and procedures in Member countries, with the exception of rules of origin and origin determination procedures.

However, the growing awareness of the costs generated by unduly burdensome, inefficient, duplicative or uncertain provisions has prompted increased attention to the issue of trade facilitation within more recent initiatives, even though this attention has not yet led to the formulation of formal engagements. An interesting example is APEC: although Members' co-operation does not entail preferential provisions intended to facilitate trade between them, APEC Members have developed a set of principles on trade facilitation intended to be used on a voluntary basis and in a co-operative manner with the business sector. The principles are supplemented by illustrative examples of such initiatives that would contribute to putting them into practice. They are intended to encourage individual initiatives by APEC Members with a view to gradually suppressing procedural burdens and red tape, saving time and reducing costs for businesses, and more generally improving business conditions in the region.

In "new-generation" RTAs recently concluded or currently under negotiation, such as JSEPA or the FTAA, trade facilitation is a major focus. Increasingly new generation RTAs adopt common approaches for risk management so as to facilitate the clearance of low-risk<sup>3</sup> goods with minimal or no documentary verification and physical inspection; they elaborate differentiated, simplified procedures applicable to express shipments; they develop common data sets to be requested in the process of release and clearance. Moreover, one of the main factors stimulating facilitation initiatives in recent RTAs is the attention paid by negotiators to electronic commerce and the increased use of information and communication technologies. Electronic data interchange is an essential feature both in the JSEPA and in the FTAA.

In order to assess accurately trade facilitation measures in an RTA it is also necessary to keep in mind the type of the agreement and in particular the distinction between *customs unions* and *free trade*

*areas*. The common external tariff of customs unions makes it possible to simplify internal border formalities considerably. The very absence of preferential rules of origin in customs unions is a very significant factor of simplification both for intra-union trade and for third country goods. Simplification and harmonisation is even deeper in customs unions that have taken steps towards overall harmonisation of their trade policy. The most developed example is the European Union, which has long gone beyond the customs union of the 1960s, achieving a Single Market by the end of 1992. Given the degree and extent of economic integration in the EU, it is even inappropriate to refer to a concept of trade facilitation with respect to intra-community trade. The common market implies a suppression of internal borders or border controls and free movement for goods, services and people. As far as import and export procedures are concerned, trade between Member countries does not need to be facilitated, it is totally free.<sup>4</sup>

Finally, the possibility of quick and significant progress in the area of trade facilitation is influenced by the relative level of development of participating countries. This is clearly linked to differences in the quality of infrastructure, and scope for extended automation and financing of new facilitation projects, but also to the different priorities that may be attributed to the simplification of trade procedures at different stages of development.

This leads to an important observation with respect to regional trade facilitation initiatives: with the exception of cases of deep integration, and although they are all more or less inspired by the same multilateral instruments, such as the WCO Kyoto Convention or the UN/EDIFACT initiative, to which they give a concrete expression, RTAs generally stop short of common rules and procedures. This appears to be a deliberate choice. Although harmonisation is high on the agenda in some RTAs, facilitation mostly rests on common principles that are then tailored to the specific circumstances of each participating country. For instance, goods moving between NAFTA countries must still comply with each country's laws, regulations, procedures and formalities. NAFTA provisions on customs matters, mainly covering origin marking, valuation methods, user fees and appeal procedures, have accordingly been given effect within the context of each Member's existing procedures and in line with its own specific legal and regulatory structure. As a result, implementation is somewhat different in each country. Similarly, APEC Members are expected to undertake the implementation of the principles in accordance with their level of economic and technological development, differing legal framework and development objectives, in order to allow quick progress in facilitation despite the large number and different levels of development of participating countries. As a result, the design of the principles is such that they will lead to different implementation outcomes in different APEC Members. Slightly differing national implementation practices allow at least some of the participants to go beyond the lowest common denominator, but entails at the same time a risk of "facilitation *à la carte*".

Another broad observation is that measures of simplification of international trade procedures undertaken at the regional level rarely have a preferential effect. Exceptions to this observation include the level of customs fees,<sup>5</sup> origin marking requirements,<sup>6</sup> or certification of conformity assessment.<sup>7</sup> Apart from these provisions it is impracticable, if not outright WTO-illegal, to distinguish between streamlined procedures for RTA-originating goods and more burdensome procedures for third-party goods. Efforts within regional agreements have thus a more generally positive effect on all traders operating in the region, and not only to traders from the countries participating in the RTA. Some RTAs even explicitly refer to "*common approaches towards the world outside the area covered by the agreement*" (ANZCERTA).

It could thus reasonably be argued that, in those cases where regional trade agreements contain provisions aimed at trade facilitation, these go beyond and complement existing WTO provisions. In the post-Doha context it should be noted that whether WTO Members decide to undertake the

elaboration of specific trade facilitation rules in the WTO framework, or retain existing provisions, enhancing their implementation at the national level, including through technical assistance, the reflections at the regional level seem to be a proven laboratory for testing ideas.

### **Provisions in WTO agreements**

Specific provisions related to the simplification and harmonisation of trade procedures, including transparency and predictability requirements, are already contained in the WTO legal framework, such as in GATT Articles V, VII, VIII and X, the Agreements on Customs Valuation, Import Licensing, Preshipment Inspection, Rules of Origin, TBT and SPS.<sup>8</sup> Among them only the Agreement on Customs Valuation contains specific provisions on customs and border-crossing procedures. So far there exists no comprehensive agreement on trade facilitation as such.

#### ***Transparency of applicable requirements***

*Transparency of trade regulations and due process:* GATT 1994 Article X requires Members to publish promptly all laws, regulations, judicial decisions and administrative rulings affecting imports and exports, and all bilateral agreements affecting international trade policy, so as to enable traders to become acquainted with them. Such laws, regulations, and rulings should be administered in a uniform, impartial and reasonable manner. Measures imposing new or more burdensome requirements, restrictions or prohibitions on imports, or on the transfer of payments have to be published before enforcement. Judicial, arbitral or administrative tribunals or procedures have to be available in order to review and correct administrative action related to customs matters. Obligations set forth in GATT Article X are reaffirmed in the Customs Valuation Agreement and the Import Licensing Agreement.

*Trade in services:* Under the General Agreement on Trade in Services (GATS), a general transparency requirement applies to all regulations “of general application” with respect to trade in services.

#### ***Harmonisation of procedures and formalities***

*Valuation for customs purposes:* GATT Article VII lays down the main principles governing the valuation of imports for assessment of duties or other charges (not including internal taxes), in order to enable traders to estimate, with a reasonable degree of certainty, the value of imported products for customs purposes. The assessment should be based on the “actual value” of the imported products or of like products (defined as the price at which the products are sold or offered for sale in the ordinary course of trade under fully competitive conditions) and not on the value of corresponding national merchandise or on arbitrary or fictitious values. The methods of determination should be stable and should be given sufficient publicity.

More detailed rules for valuing imports for customs purposes are contained in the Agreement on Customs Valuation, which aims at providing greater uniformity and certainty in implementation. The agreement pursues this objective by establishing specific definitions, rules, procedural requirements and, in particular, a limited number of applicable valuation methods and conditions as to when a specific valuation method is to be applied. The Agreement provides for the establishment of an adequate legal and judicial framework to ensure the right of appeal of importers and calls for customs authorities to release goods to importers with the posting of a guarantee in cases where further investigation is required.

The Agreement on Preshipment Inspection (PSI) governs the use by government authorities of private agents to conduct quantity, quality and price inspection of imports. The Agreement does not encourage PSI but harmonises the world-wide use of PSI services by requiring, when PSI entities are employed, that pre-shipment inspection activities are carried out in an objective and non-discriminatory manner and offer sufficient guarantees of uniform, fair and due process. The implementation of these provisions is of course the responsibility of the Members using these private services.

### *Simplification and avoidance of unnecessary restrictiveness*

*Traffic in transit:* GATT 1994 Article V requires freedom of transit for traffic in transit through the territory of Members and MFN treatment with respect to all charges, regulations and formalities. Traffic in transit shall be exempt from customs and transit duties or any unnecessary delays or restrictions other than for failure to comply with customs regulations.

*Import and export formalities:* GATT 1994 Article VIII calls for minimising the incidence and complexity of fees and formalities connected with import and export, keeping such fees and charges proportional to the government services rendered, and decreasing and simplifying related documentation requirements. The Agreement on Import Licensing Procedures further establishes disciplines to ensure that import licensing procedures are administered in a neutral and non-discriminatory manner. The Agreement sets up time limits for the publication of information concerning licensing procedures and for the processing of licence applications.

*Marks of origin:* GATT 1994 Article IX establishes MFN treatment with respect to marking requirements and calls for the burden stemming from such requirements to be reduced to the minimum necessary for consumer protection. This means *inter alia* allowing marks of origin to be affixed if possible at the time of importation and doing so without damaging the product, reducing its value or increasing its cost.

*Trade in services:* MFN treatment applies to all trade in services between WTO members, regardless of whether specific commitments have been undertaken. With respect to those sectors for which a WTO Member has made specific commitments in its schedule, the GATS introduces a series of important obligations, including the administration of measures in a reasonable, objective and impartial manner; the availability of administrative and judicial procedures for the review of administrative decisions affecting trade in services; and the existence of objective and transparent criteria to support qualification requirements, such as competence and the ability to supply the service.

Several service sectors provide opportunities and means for facilitating trade, including all types of transport services, telecommunications services (among which *Electronic Data Interchange*), financial services and distribution services. A number of WTO Members have specific commitments in several of these areas.

*Trade-related aspects of intellectual property rights:* The TRIPS Agreement establishes minimum standards for intellectual property rights protection and enforcement. It contains a series of specific provisions on *Special Requirements Related to Border Measures*, relating to measures by which intellectual property rights holders can obtain the assistance of customs authorities in suspending the release of counterfeit or pirated goods into free circulation. The provisions contain safeguards aimed at avoiding the creation of barriers to legitimate trade and against the abuse of IP enforcement procedures.

## ***Ongoing work***

In December 1996 the Singapore Ministerial Declaration (paragraph 21) directed the Council for Trade in Goods “to undertake exploratory and analytical work, drawing on the work of other relevant organisations, on the simplification of trade procedures in order to assess the scope for WTO rules in this area”. Work has focused to date mainly on customs and border-crossing procedures. A Symposium on Trade Facilitation was held in 1998 to explore the main concerns of traders when moving goods across borders, including excessive documentation requirements; insufficient use of information-technology; lack of transparency; unclear import and export requirements; and lack of co-operation among customs authorities. Additional meetings were held *inter alia* on import and export procedures and requirements, on transport and transit of consignments and payments, on electronic facilities and on technical co-operation and development issues.

In November 2001 the Doha Ministerial Conference called for negotiations on trade facilitation after the 2003 WTO Ministerial and subject to agreement on the modalities of negotiation. Until then, “... the Council for Trade in Goods shall review and as appropriate, clarify and improve relevant aspects of Articles V, VIII and X of the GATT 1994 and identify the trade facilitation needs and priorities of Members, in particular developing and least-developed countries.”

## **Provisions in Regional Trade Agreements**

The section below discusses a series of principles and concepts central to trade facilitation and provides illustrations of the way those principles and concepts are given concrete expression in RTAs. Many of these principles and concepts are inspired by existing mandatory or voluntary multilateral instruments, such as the WCO Kyoto Convention, the WCO Arusha Declaration, or the UN/EDIFACT initiative, to which they have usefully given concrete expression in practice. For the sake of illustration, the APEC principles are discussed quite extensively because they are one of the most elaborate examples of reflection on the issue of trade facilitation *per se*; accordingly they could usefully serve as a model for further developments at the multilateral level, despite their non-binding character.

### ***Rules on transparency and due process***

Transparency and due process are essential facilitating measures in most RTAs, especially in order to avoid that persisting differences in implementation jeopardise facilitation. The terms of these provisions parallel quite closely corresponding WTO provisions, such as GATT X, to which several RTAs refer explicitly. For instance, APEC principles call for information on laws, regulations, requirements and procedures affecting trade in goods and services to be made available to all interested parties in a timely and cost-effective manner, for instance through inquiry points and electronic homepages. Stakeholders should be given the opportunity to comment on effective and prospective rules and procedures, so as to increase the degree of confidence and heighten the likelihood of compliance. Stakeholders seeking redress with respect to the implementation of rules and procedures should have access to appropriate appeal mechanisms. EFTA calls for new inspections and formalities to be notified beforehand to the other Parties. Any such new formalities should not render inoperative the trade facilitating measures already adopted.

In NAFTA, general provisions on *Publication, Notification and Administration of Laws* require prompt publication of all laws, regulations, procedures and administrative rulings of general application related to the Agreement. They further encourage Parties to publish measures in advance of their adoption and provide interested parties with the opportunity to comment. Persons directly affected by a particular measure or administrative proceeding are to be provided

reasonable notice, including a description of the proceedings and any controversial issues and afforded sufficient opportunity to present facts and arguments in support of their position. NAFTA calls for the establishment of impartial and independent judicial or administrative appeals tribunals or procedures for reviewing administrative actions related to the Agreement.

RTAs also promote transparency through the collection and dissemination of all relevant information through centralised inquiry points, publications and display on-line. ASEAN has established a Customs website, including information on ASEAN countries' practices for handling complaints and appeals from the trading community. Although still under negotiation, the FTAA already makes available on-line information on customs procedures, laws, regulations, guidelines and administrative rulings, namely through the publication of a *Hemispheric Guide on Customs Procedures*.

*Consistency and predictability* may be seen as corollaries of the principles of transparency and due process. In several RTAs they are not stated explicitly but only implied as objectives to be achieved through the implementation of other principles. In the APEC framework the principle is not limited to advocating the predictability necessary for informed business choices, but stresses the importance of uniform application and the restriction of discretionary interpretation and implementation for promoting integrity and combating corruption in customs services. Reference is made to the Arusha Declaration of the World Customs Organisation with respect to the management of operations and personnel in Customs. The principle also recommends the introduction of commitments to the public with respect to targeted maximum processing times or other service standards.

### ***Harmonisation of procedures and formalities***

Full harmonisation of procedures and formalities is still limited in RTAs. It would be more appropriate to talk of convergence of the modes of operation of concerned administrations. Such convergence draws both on the momentum of regional integration and on the elaboration of best practices for customs and border procedures world-wide. RTAs commonly refer to relevant WTO provisions, such as GATT Article VII, but the most important reference is the WCO Kyoto Convention on the simplification and harmonisation of customs procedures. RTAs offer useful opportunities for testing those practices in a co-operative setting, transcending the strictly national framework. APEC principles reaffirm the importance of harmonisation and mutual recognition for reducing administrative and compliance costs for business not only in the area of customs procedures and customs tariff classification and valuation, but also with respect to data requirements for import and export procedures. The principles further call for the development of mutual recognition arrangements for standards and conformity assessment results, or for professional qualification and registration.

Customs-related provisions in RTAs often provide for the development of a common understanding among concerned administrations on the daily management of applicable requirements and procedures in tariff classification, valuation procedures, clearance documentation and data transmission and storage. In NAFTA, the Customs administrations of the three countries decided to establish a "Trilateral Heads of Customs Conference" (HCC) during the negotiations and implementation phase, in order to co-operatively address issues related to the conduct of business between them. One of these issues was the requirement of NAFTA Article 906 for enhancing the compatibility of standards- and conformity assessment related measures and procedures so as to facilitate trade. In 1993 the HCC established the NAFTA Laboratory Working Group (LWG) to focus on technical and scientific issues of Customs administration. One of the primary tasks of the LWG was to establish harmonised laboratory methods for analytical determinations made in the Customs

laboratories of the three countries. A list of accepted methods has already been established for the purpose of determining the specified physical and chemical properties required for Customs processing, including admissibility and classification within the Harmonised Tariff System.

In ANZCERTA a *Memorandum of Understanding Regarding Mutual assistance between Customs Agencies* provides for co-operation to harmonise customs procedures and policies “to the maximum extent practicable”. This entails *inter alia* closer alignment of national level tariff structures involving a minimum of national subdivisions and of national legal notes relating to tariffs, formats and phraseology; consultations on interpretations; or elaborating common bases for valuation. MERCOSUR has established a series of agreements ensuring co-operation between customs authorities, including the 1993 Recife agreement for co-ordinating border controls, which establishes technical and operational measures to regulate the functioning of integrated border controls,<sup>9</sup> the 1997 agreement on reciprocal co-operation and assistance between customs administrations for preventing and combating contraband; or the 1999 Asunción Programme on measures for simplifying foreign trade procedures and border procedures, setting goals relating to the streamlining of administrative procedures.

Alternatively, where the level of regulatory confidence is high, RTAs may provide for mutual recognition of formalities carried out by the competent authorities of the other parties. In the event of goods being imported or entering in transit, the EFTA agreement provides for mutual recognition of inspections carried out and of documents certifying compliance with the requirements of the import country or equivalent requirements of the export country. ASEAN countries have concluded an agreement for the recognition of commercial vehicle inspection certificates for goods vehicles used for transit transport.

### ***Simplification and avoidance of unnecessary restrictiveness***

In a number of “older” RTAs simplification is limited to measures specifically related to products of preferential origin, such as customs fees or marking. The NAFTA Agreement provides that any measure relating to country-of-origin marking adopted and implemented by the Parties shall be designed so as to minimise the difficulties, costs and inconveniences that the measure may cause. Parties should accept any method of marking used by the other Parties as long as it adequately ensures visibility and permanence, and should exempt from marking requirements goods that cannot be marked without being damaged or only at a prohibitive cost. Furthermore, although some merchandise processing fees are still applicable to imports and exports between NAFTA countries, customs user fees are no longer allowed for originating goods.

Other RTAs widen the scope of simplification to cover border inspections and formalities. APEC principles indicate that the streamlining of applicable rules and procedures in order to avoid unnecessary trade restrictiveness may be achieved by minimising documentation and procedural requirements and instituting one-stop-shopping services, expediting customs clearance, or gradually reducing the frequency of conformity assessment controls to match good compliance records. The ASEAN Framework Agreement on the Facilitation of Goods in Transit encourages joint customs inspection for goods in transit.

EFTA provides that border inspections and formalities must be carried out with the minimum delay necessary and be centralised at one place only to the extent possible. Parties are expected to promote the use of simplified procedures and data processing and transmission techniques. For instance, they shall allow for the different involved authorities to delegate their inspection powers to a service (preferably the customs service), which will carry out inspection on their behalf; departments shall be organised so as to reduce waiting time; if a disruption occurs with respect to the crossing of frontiers, the relevant authorities

shall immediately inform the authorities of the other Parties. Plant health inspections should be limited to random checks and sample testing only, unless duly justified circumstances require otherwise. Frontier posts must operate so that goods in transit can cross them twenty-four hours a day without unloading, unless frontier inspection is necessary for health protection reasons; for goods that are not in transit minimum working hour periods per week are defined. Parties are also encouraged to establish express lanes where technically possible. In order to respond to an EEA requirement for co-operation between Parties in order to simplify the procedures for trade in goods, an EFTA Group of Experts on Efficient Trade Procedures (GEETP) was established, made up of experts in the field of trade facilitation from the different EFTA countries. GEETP meets regularly to co-ordinate trade efficiency activities within the EFTA structure and participates in international fora such as EUROPRPO and UN/CEFACT.

The Agreement on the European Economic Area (EEA) requires Parties not only to simplify border controls and formalities but also to assist each other in customs matters. Two Protocols were adopted on the “*simplification of inspections and formalities in respect of carriage of goods*” and on “*mutual assistance in customs matters*”. EEA Protocol 10 on simplification of inspection and formalities in respect of carriage of goods does not apply to maritime or air transport, nor to inspections and formalities related to the issue of health or plant health certificates. With the exception of rules relating to plant health inspections, trade facilitation measures contained in the Protocol benefit goods crossing EFTA or EFTA-EU frontiers irrespective of the origin of the goods or the nationality of involved traders.

### ***Modernisation and the use of new technology***

RTA provisions increasingly acknowledge that technological developments may render inefficient procedures that used to be well adapted to prevailing circumstances. APEC principles call for the regular updating of applicable rules and requirements to match changed circumstances, and for maintaining the efficiency of procedures through the introduction of modern techniques and new technology. Examples of such technology are advanced risk management and systematic cargo-profiling techniques which curtail the physical inspection of shipments; or computerisation, electronic data interchange (EDI) and internet technology which provide an environment for paperless trading, including the use of secure on-line technology to facilitate certification procedures. Authorities should ensure the interoperability and/or interconnectivity of such technologies

NAFTA countries are also in the process of developing a concept of trade automation (North American Trade Automation Prototype or NATAP) that implies introducing standardised trade data elements, harmonising customs clearance procedures and promoting the electronic transmission of standard commercial data using UN/EDIFACT MESSAGES and advance processing by governments. NATAP will use advanced technologies such as the internet for the transmission and receipt of data and Intelligent Transportation System transponder technologies to electronically identify conveyances.

New technologies are central in RTA endeavours to achieve a “paperless” clearance environment. Australian and New Zealand Customs have developed a common format to expedite cargo clearance, accessible either from client’s own facilities, via community data networks or via facilities in Customs premises. In the framework of the JSEPA, the participating authorities aim to establish a paperless trading system allowing the electronic transfer of all trade-related information and documents (including invoices, bills of lading etc.) between importers and exporters. A Joint Committee on Paperless Trading will work to implement such a system by 2004 and see that electronic trade-related information exchanged between enterprises may be used as supporting documentation by the trade regulatory bodies of the Parties.

## NOTES

1. Trade facilitation can be defined as “*the simplification and harmonisation of international trade procedures*”, understood as “*activities, practices and formalities involved in collecting, presenting, communicating and processing data required for the movement of goods in international trade*” (WTO homepage). In this sense it relates to a wide range of activities such as import and export procedures (*e.g.* procedures relating to customs, licensing, and quarantine); transport formalities; payments, insurance, and other financial requirements. In some regional trade agreements trade facilitation also covers labour mobility, as well as testing and certification; however, as these issues are beyond the scope of the WTO definition, they will not be covered here. Furthermore, although trade facilitation as defined above does not cover the facilitation of services movements, it should be born in mind that, the liberalisation of transportation, financial and other services related to the movement of goods is essential in enabling goods trade facilitation to occur.
2. With the notable exception of the European Union, which will be discussed at a later stage.
3. In the context of customs procedures, risk relates to piracy, smuggling, or fraud with respect to valuation, origin, sanitary requirements, etc.
4. Unlike any other RTA analysed here, the European Union has a common external trade policy, including import and export procedures, that has substituted domestic requirements and procedures in these areas vis-à-vis third countries. Provision-by-provision, detailed comparisons between this common regime and pre-dating individual domestic regimes are impossible, as for most EU Members such domestic regimes ceased to exist more than fifteen years ago. Yet it is fair to say that on balance this single regime is an important trade-facilitating step forward in terms both of harmonisation and simplification of fifteen individual regimes that third-country traders might otherwise have had to face. Because of these fundamental differences, trade facilitation *within* the European Union will not be further analysed here.
5. Usually RTAs provide for lower or no customs fees in favour of preferential partners. APEC principles, (adopted in the context of an agreement not entailing regional preferences) provide that rules and procedures should not discriminate between like products or services or economic entities in like circumstances, for instance with respect to fees charged for import or export related governmental services.
6. RTAs may provide for simplified or cheaper marking requirements for preferential partners.
7. Facilitation in the area of conformity assessment is implemented mainly through mutual recognition agreements covering the testing and assessment procedures and/or bodies of the participating countries. Such recognition is preferential.
8. As noted above, the present text will not discuss any TBT or SPS provisions.
9. Controls through a single, shared physical infrastructure in which the neighbouring countries’ customs services operate side by side.

*Chapter 6*

**GOVERNMENT PROCUREMENT**

*by*

**Massimo Geloso-Grosso**

**Abstract:** This chapter surveys government procurement provisions contained in RTAs, discusses their relationship with the WTO and its plurilateral Agreement on Government Procurement (GPA), and assesses the extent to which RTA provisions may go beyond the WTO provisions. The review shows that there are many common elements, if not a symbiosis, between the procurement liberalisation process in the WTO GPA and the procurement reform process at the regional level. There are two ways in which RTAs appear to have gone beyond or provide something in addition to the WTO Agreement. First, some RTAs have adopted obligations substantially similar to the GPA, but include countries that are not parties to the GPA. Second, some RTAs have provided for broader coverage or by allowing for the provision of additional information. In addition, although procurement-related provisions contained in most RTAs are of a preferential nature, the procedures dictated in these provisions may help foster the practice of transparency more widely and so eventually yield more far-reaching benefits.

## Key points

This section surveys government procurement provisions contained in RTAs, discusses their relationship with the WTO and its Agreement on Government Procurement (GPA) - a plurilateral agreement applied by 28 WTO Members<sup>1</sup> - and assesses the extent to which RTA provisions may go beyond the WTO provisions. Public procurement is relevant for the wide range of goods and services bought by governments as well as public entities on the national, provincial, and municipal levels throughout the world. Such purchases are estimated to represent 14-20% of a country's gross national product.<sup>2</sup> With the increasing globalisation of the world economy, international procurement is also on the increase and currently amounts to several hundred billion dollars.

The review of the procurement provisions in RTAs shows that there are many common elements, if not a symbiosis, between the procurement liberalisation process in the WTO GPA and the procurement reform process at the regional level. This reflects the recognition that foreign suppliers of goods and services require not only market access in the sense of non-discriminatory treatment; in order to compete effectively they also require transparent, predictable and fair procedures. These happen also to be the features that are needed as part of the ongoing modernisation and reform of procurement rules and systems at the national level.<sup>3</sup>

Awareness that economic development benefits can be derived from a transparent and competitive procurement system has prompted increased attention to the issue of public procurement in recent years. APEC provides an interesting example. Even though the intended co-operation does not entail preferential treatment between them, APEC Members have developed a set of non-binding principles intended to be used on a voluntary basis, taking into account the individual characteristics of Members' economies. The principles are supplemented by detailed illustrative examples of such initiatives that would contribute to putting them into practice. They are intended to provide a basis to help APEC Members in the course of achieving liberalisation of government procurement markets.

Another example, although it is not a regional arrangement, is the United Nations Commission on International Trade Law (UNCITRAL) Model Law on procurement of Goods, Construction and Services. The Model is now being used in practically all Eastern European countries and provides a template on which to base a modern and market-oriented procurement law. The Model - given that it codifies what are widely recognised as a set of procurement procedures providing economic efficiency, competition, transparency and accountability - may also prove useful for countries in other geographic regions to measure the adequacy of existing rules on procurement and to serve as a model for national procurement law reform that can be used to help implement the procedures dictated by regional and multilateral procurement arrangements in national law. Use of the Model Law to help implement in national law a country's regional and multilateral procurement commitments is made possible by the broad similarity between the procedures and principles in the Model Law and those contained in regional and multilateral arrangements.<sup>4</sup>

In a number of recently signed RTAs government procurement is a major focus, with a whole chapter dedicated to the issue. This includes the EU-Mexico FTA as well as initiatives in the Pacific Rim region, such as the agreement between New Zealand and Singapore on a Closer Economic Partnership (CEP) and the Japan-Singapore Economic Partnership Agreement (JSEPA). These

agreements contain extensive provisions dealing with transparency and various aspects of procurement procedures. Another important observation concerning regional initiatives in the procurement field is that developing and emerging economies are increasingly entering into bilateral or regional procurement agreements whether or not they are parties to the GPA. The Group of Three Accord<sup>5</sup> and other bilateral agreements concluded by Mexico, such as the Mexico-Bolivia FTA, the Mexico-Costa Rica FTA and the Mexico-Nicaragua FTA, show that developing countries are increasingly concluding regional procurement agreements with other developing countries. Likewise, NAFTA and more recently the EU-Mexico FTA demonstrate that it is possible to bring countries at different levels of economic development together in a liberalising agreement on public procurement.

Typically, RTAs include provisions that are similar to the WTO GPA, but to different degrees. There are two ways in which RTAs appear to have gone beyond or provide something in addition to the WTO Agreement. First, some RTAs have gone beyond the WTO by adopting obligations substantially similar to the GPA, but including countries that are not parties to the GPA. In the post-Doha scenario, particularly with the scheduled negotiations on transparency aspects of procurement, this can have a positive effect in that countries not Members to the GPA can gain experience in meeting the transparency requirements agreed to at the regional level. In this regard, it may be noted that a number of countries are seeking accession to the GPA (see Section II).

Second, some RTAs have gone beyond the WTO by providing for broader coverage or by allowing for the provision of additional information. For instance, several RTAs have expanded the procurement coverage, widened the scope by covering more entities or reduced the thresholds of procurement contracts covered.

Another noteworthy point concerns the effects on third-party goods and services. Although procurement-related provisions contained in most RTAs are of a preferential nature, the procedures dictated in these provisions may help foster the practice of transparency more widely and so, eventually, yield more far-reaching benefits. In addition, the regional experience may point the way toward confidence building among a wider group of countries, thereby helping extend WTO disciplines.

### **Provisions in the WTO Agreement on Government Procurement**

As with investment and services trade, government procurement was traditionally a sector excluded from the scope of the multilateral trade rules. In the GATT, government procurement was explicitly excluded from the key national treatment obligation and, more recently, public procurement has also been carved out of main commitments of the GATS.<sup>6</sup> A growing awareness of the trade-restrictive effects of discriminatory procurement policies resulted in a first effort to bring government procurement under internationally agreed trade rules in the Tokyo Round. As a result, the first plurilateral Agreement on Government Procurement (GPA), also called the GATT Government Procurement Code, was signed in 1979, entered into force in 1981, and was amended in 1987. The Agreement is intended to allow members to implement stringent procurement procedures and requirements in an open, transparent and non-discriminatory manner.

The limited initial scope of the GPA reflected the tentative steps with which the process of multilateral trade liberalisation advanced into the procurement field. Its scope was confined to procurement of goods, it was subject to quite high monetary thresholds, and it extended only to contracting entities expressly listed in the annexes. This “positive list” approach resulted from the negotiation of individual commitments among participating countries.

The Uruguay Round resulted in a substantial expansion of coverage. A new Agreement took effect on 1 January 1996 covering procurement of services and construction in addition to goods, monetary thresholds have been lowered, and sub-central authorities now fall within the scope of the GPA. The WTO reports that the GPA applied annually to a total value of contracts of around US \$30 billion in 1990-1994. It also reports that the value of procurement that is opened up to international competition is estimated to have increased by ten times under the revised GPA.

Even though the GPA is essentially a market access agreement because it has lowered trade barriers in the procurement field, the bulk of the text of the Agreement is concerned with various aspects of procurement proceedings. The Agreement provides for a framework of common procurement procedures, transparency at all stages of the procurement process and the opportunity - through the establishment of an impartial and independent review body with no interest in the outcome of the procurement - for aggrieved private bidders to challenge procurement decisions and obtain redress in a timely fashion in the event of inconsistencies with the rules of the Agreement. This reflects the recognition that to give meaning to the provisions on market access it is also necessary to ensure that the procurement systems are transparent, fair, objective and accountable.

Although the scope of procurement covered by the GPA has expanded after the Uruguay Round, it remains a plurilateral agreement mainly among developed economies,<sup>7</sup> with benefits accruing to Members. Moreover, the scope of application depends, in addition to monetary thresholds, on a "scheduling" system where each party lists its covered entities. With respect to goods and services, most countries have a negative list for goods and a positive list for services. There are, however, countries that have done just the opposite. Coverage of defence-related goods also varies widely among the Parties. Hence, coverage under the GPA is flexible, allowing Members to select the approach that is preferable.

As is the case with other WTO Agreements, the GPA is not static. Indeed, several countries are currently seeking accession to the Agreement.<sup>8</sup> In addition, the GPA contains a mechanism for periodic review and negotiations with the aim of improving the Agreement.<sup>9</sup> The goal of these negotiations, currently underway, is the expansion of the coverage of the GPA, the elimination of discriminatory measures and practices which distort open procurement and the simplification and improvement of the GPA, in particular adoption of advances in the area of information technology. An important consideration underlying this review mechanism is the desire to make the Agreement more accessible to non-members and to promote the expansion of its membership.

In addition to promoting accession to the GPA, WTO Members have also been exploring a multilateral agreement on transparency in government procurement. A Working Group on Transparency in Government Procurement, established after the 1996 WTO Ministerial meeting in Singapore, has been gathering information on national practices and was charged with developing elements of an agreement on transparency in government procurement.

At the Ministerial meeting in Doha, WTO Members agreed that "negotiations will take place after the Fifth Session of the Ministerial Conference on the basis of a decision to be taken, by explicit consensus, at that Session on modalities of negotiations ... Negotiations shall be limited to the transparency aspects and therefore will not restrict the scope for countries to give preferences to domestic supplies and suppliers." This highlights the benefits to national economies expected to accrue from transparent public procurement procedures, irrespective of other factors that may impinge on market access. WTO Members also stressed the importance of enhanced technical assistance and capacity building in this area and the need to take into account participants' development priorities.

In the WTO, government procurement is also discussed separately in the context of the GATS negotiations. Although the initial GATS agreement excluded public procurement of services, Member countries agreed to begin multilateral negotiations on government procurement in services within two years from the date of entry into force of the WTO. These discussions are being pursued in the context of the overall GATS negotiations currently underway, under the so-called “Built-in Agenda”.

### **Provisions in Regional Trade Agreements**

With different degrees of intensity, RTAs promote a procurement component for their economic integration. In the EU, the removal of trade barriers in public procurement has been an important element of the integration efforts. This has resulted in the issuance of a number of directives freeing market access and establishing procedural standards in the procurement field.<sup>10</sup> The same rules now also apply between EU Member States and non-members Norway, Iceland and Liechtenstein by virtue of the EEA. And EFTA, as well as the recent EU-Mexico FTA also contain extensive provisions aiming at liberalising public procurement markets. Within Central Europe, CEFTA provides for the opening up of public procurement between the Members as part of a general free trade programme, at first limited to central government supplies in accordance with the 1979 GATT Agreement on procurement, but with the prospect of later expanding coverage.

Trade liberalisation in government procurement is also an integral component of NAFTA, with an extensive chapter of the Agreement devoted to the issue<sup>11</sup> (see below). Other developments in the Western Hemisphere include the procurement-related provisions in the Group of Three (G-3) Accord, other neighbouring bilateral agreements concluded by Mexico,<sup>12</sup> the recently concluded EU-Chile Agreement,<sup>13</sup> and the on-going negotiations on government procurement in the context of a US-Chile FTA. Elsewhere in the Americas, consideration to cover procurement issues has been given in regional agreements such as MERCOSUR, the Canada-Costa Rica FTA, the Andean Community, the CACM and the CARICOM. Negotiations are also underway within the FTAA framework, where a Negotiating Group on Government Procurement was created with the broad aim of expanding access to the procurement markets of the FTAA countries. Specifically, the objectives include non-discrimination among members within a negotiated scope of covered procurement, transparency and openness in the normative framework, and fairness and impartiality in the review procedures.

In the Pacific Rim region substantial achievement in the liberalisation of procurement markets has been achieved in ANZCERTA. Liberalisation of procurement markets is also an integral component of the CEP, which adopts a similar approach to ANZCERTA, and of the JSEPA. In the APEC framework a process is underway with the aim of collecting and disseminating information on existing procurement regimes, enhancing transparency and ultimately leading to liberalisation of procurement markets. In 1995, the Government Procurement Experts Group (GPEG) was established as part of APEC with the key goal of achieving liberalisation of government procurement markets through-out the Asia-Pacific region. GPEG fundamentally embraces a set of six Non-Binding Principles on Government Procurement that were agreed in 1999 for adoption by members on a voluntary basis.<sup>14</sup>

Members of GPEG are committed to working towards adopting these principles in their procurement regimes. To identify how GPEG members are adopting the non-binding principles, they have been invited to review their alignment with the principles and report outcomes and findings to GPEG member economies. Once members have made their initial report, they will provide updates on developments within their procurement framework that also contribute to the achievement of the non-binding principles. The first principle that GPEG members have been reporting on is Transparency, for submission to the GPEG meeting as part of the SOM III in August 2002 in Acapulco, Mexico. The second identified principle for reporting on is Accountability and Due Process.

As only two principles are currently being reported against by GPEG members, it is too early to undertake an assessment of the principles and provide a report on their practical outcomes in member economies.

### *Some features of government procurement systems*

The remainder of this section discusses a series of features central to public procurement systems and describes the way these features are given concrete expression in RTAs. The discussion includes APEC principles because they are one of the most elaborated examples of reflection on the issue of public procurement, despite their non-binding nature. The sections dealing with procurement procedures, rules on transparency, and accountability and due process, in particular, are directly relevant to ongoing work in the WTO Working Group on Transparency in Government Procurement.

### *Scope and coverage*

With respect to the scope of commitments, many RTAs adopt approaches similar in many respects to the GPA, although a number of RTAs have gone beyond the scope of the WTO Agreement. Some RTAs have expanded the procurement coverage, other RTAs have widened the scope by covering more entities, and yet other RTAs have reduced the thresholds of procurement contracts covered. The EC Directives, for example, apply to purchases of supplies, works and services, including entities in the formerly excluded utilities field. The extended coverage includes purchases of products, works and services, by railway operators, entities active in the field of energy other than electricity and telecommunications providers.<sup>15</sup> In contrast to the GPA, the entity coverage includes all entities, at the State, regional and local level, whether or not they are listed in annexes to the Directives.

In ANZCERTA, while the original 1983 agreement extended preferential trade in goods to purchases made by the Australian Commonwealth and the New Zealand Government, it did not apply to purchases by Australian State Governments. This omission was overcome in 1989 by allowing New Zealand to join the National Preference Agreement (NPA) under which States had earlier agreed not to apply preferences against each other. The two countries are now parties to the Australia-New Zealand Government Procurement Agreement (ANZGPA) that superseded the NPA, reflecting the wider range of agreement between them on public procurement policies and practices. Indeed, with some exceptions, the agreement covers all goods, services and construction activities. The broader scope of application extends also to entities as all contracting entities, unless specifically exempted (a negative list approach), are covered. Nevertheless, both countries exclude local authorities and public enterprises though the Agreement stipulates that the parties are to use their best endeavours to encourage wider application. A similar approach was adopted by New Zealand and Singapore in the CEP.

The approach taken by NAFTA concerning the scope of liberalisation is in many respects similar to the GPA, relying on monetary thresholds and a positive list approach to covered entities. However, there are also a number of differences. NAFTA, in contrast to the GPA, does not cover state and provincial governments. At the same time, NAFTA - which also comprises goods and services, including construction services - expands upon the obligations of the GPA by adopting lower thresholds and a negative list approach to the coverage of services procured by the listed entities. Consequently, all services are covered unless specifically exempted. NAFTA seems to have influenced other RTAs concluded in its periphery, such as the Group of Three Accord and several bilateral agreements signed by Mexico with other Latin American counterparts.<sup>16</sup> Indeed, the relevant provisions of these agreements are in many respects similar to the procurement provisions in the

NAFTA, although they contain a number of reservations and in some cases the applicability varies among the countries.<sup>17</sup>

In this connection, another interesting RTA is that signed by the EU and Mexico. In this Agreement, Mexico offers to the EU the lower thresholds of the NAFTA, while the EU offers to Mexico the higher thresholds of the GPA (and of the EC Directives). This has been done to facilitate the tender procedure through a transparent and widely-known rule identical for all tenderers within each of the Members, and to avoid, for both procuring entities and suppliers, the need to handle different thresholds and verify which agreement applies for each call for tender.

### ***Non-discriminatory treatment***

As with the GPA, non-discriminatory treatment of foreign supplies and services *among members of the agreement* is an essential element of the government procurement provisions in most RTAs. For instance, non-discriminatory treatment at all stages of procurement is an integral part of the provisions contained in agreements concluded in the Americas, such as NAFTA and the other agreements signed by Mexico. This includes qualification of suppliers, selection procedures, receipt and opening of tenders, and objective award criteria. As in the case of the GPA, these agreements also include explicit prohibition of so-called offsets, policies such as the imposition of conditions that encourage local development or improve a party's balance-of-payments account by such methods as local-content requirements, licensing of technology, or investment. But, unlike the GPA where a developing country may at the time of accession negotiate conditions for the use of offsets,<sup>18</sup> in these agreements these measures are prohibited for all countries.

The EC Treaty places a general ban on discriminatory measures and unfair treatment. The main liberalising principles include non-discrimination, free movement of goods, free movement of services, and competition.<sup>19</sup> The Directives supplemented the ban by establishing co-ordinating procedures to make sure that public contracts throughout the Community are open to firms from all members *and non-members* on equal terms.<sup>20</sup> The co-ordination was based on three main principles: a) Community-wide advertising of contracts to develop real competition between economic operators in all Members; (b) the banning of technical specifications liable to discriminate against potential foreign bidders; (c) application of objective criteria for the selection of tenderers and the award of contracts. However, on the latter point it should be mentioned that although it may be argued that offsets are inconsistent with the rules on non-discrimination, the Directives do not contain any explicit prohibition of their use.

APEC principles call for procurement laws, regulations and practices not to be adopted so as to afford discrimination against the goods and services of any particular country. The principles apply to all stages of procurement, including in the criteria for qualification of suppliers, provision of the same information to all parties, technical specification, evaluation of bids and award of contracts. Some RTAs explicitly make reference to the APEC principles. One such case is the CEP, and the prospective US-Singapore FTA is also expected to contain such a reference. The provisions contained in the CEP stipulate that procurement procedures, including supplier invitation, qualification and award procedures, shall be applied in a manner consistent with the APEC principles.

### ***Open and fair procurement procedures***

RTAs recognise the importance of a framework of common procurement procedures. Such a framework provides a predictable environment for suppliers where the procurement process, including rules and regulations, is clear and understandable. This has also been recognised in the WTO Working Group on Transparency in Government Procurement. The terms of RTAs provisions in this area often

parallel quite closely corresponding GPA provisions, to which several RTAs refer explicitly. For instance, EFTA reaffirms the commitments under the GPA, to which all EFTA States are parties. A similar approach was also taken by the JSEPA, which stipulates that relevant GPA articles shall apply to the covered procurement of goods and services of the two countries.

NAFTA's procurement chapter corresponds with much of what can be found in the GPA.<sup>21</sup> This includes, e.g. guidelines to follow under open, selective and limited tendering procedures and rules on the submission, receipt and opening of tenders and awarding of contracts. In open tendering procedures any interested supplier may submit a tender. In selective tendering procedures only those suppliers invited to do so may submit a tender. Entities desiring to make use of these procedures should keep lists of qualified suppliers interested in bidding. In limited tendering procedures, when specific circumstances apply,<sup>22</sup> the entity may contact suppliers individually. NAFTA requires that to be considered for award a tender must, at the time of openings, conform to the essential requirements of the notices or tender documentation and be from a supplier which complies with the conditions for participation. An entity must award the contract to the supplier who has been determined to be fully capable of undertaking the contract and whose bid is either the lowest or the most advantageous.

The EC Directives are also generally similar to the GPA, although the terminology used at times differs.<sup>23</sup> The Directives allow for the provision of additional information, for example by requiring in the qualification system that evidence of the suppliers' financial, economic and technical standing must be obtained through administrative certificates, guarantees and records.<sup>24</sup> On the other hand, the GPA covers issues that are not addressed in the Directives, such as specific rules on the opening of bids. The basis of the contract award is similar. It shall be either the lowest price or the most economically advantageous tender, based on, e.g. price, delivery date, running costs, cost-effectiveness, quality, technical merit, after-sale service and technical assistance. Abnormally low tenders may be questioned and rejection of too low tenders must be communicated to the Commission.

APEC principles in this area, while non-binding, are comparable to those of the GPA. They call for the procurement process to be designed to encourage levels of competition among suppliers, commensurate with the benefits received. As in the GPA, buyers may choose from open, limited or restricted procedures and steps are laid down to ensure effective competition. This includes, for example, ensuring that any negotiation undertaken with suppliers is conducted in a structured manner. The principles also call on buyers to conduct themselves in ways such that procurement activities are managed fairly and equitably. In practice, this can be achieved by, e.g. ensuring that contact between all procurement and evaluation personnel and tenderers is on a formal basis; tenders are sealed until they are opened; and tenders should be opened by a designated tender opening team, which should authenticate the tenders and keep a duplicate copy. Finally, the principles call for best value for money. Besides price and fitness of purpose, other factors that may be taken into account include performance, quality, reliability, delivery, inventory costs, running costs, warranties and after-sale support, and disposal. At the same time, benefits in terms of savings to taxpayers and suppliers may also be obtained through improvement in the procurement processes and management.

### ***Rules on transparency***

Transparency of laws, regulations and procurement procedures is a cornerstone of procurement systems in most RTAs, especially in order to ensure that suppliers of countries within the region do not meet with discrimination and that an unsuccessful foreign bidder has the right to seek redress where he finds that the contract has been wrongly or arbitrarily denied to him. The decision at Doha to

undertake negotiations on transparency in government procurement underlines the importance of this area, and the transparency requirements agreed to regionally may prove useful for countries not parties to the GPA in gaining relevant experience.

The approach taken at the regional level in this area tends to resemble the one adopted in the GPA, but to different degrees from one RTA to another. For instance, NAFTA and neighbouring agreements replicate much of what can be found in the WTO Agreement. There are guidelines on matters such as: conditions for qualification of suppliers to be published sufficiently in advance so as to provide the suppliers adequate time to initiate and complete any necessary qualification procedures; invitation to participate in the procurement must be published with all required information,<sup>25</sup> time-limits for tendering and delivery, which are meant to give all potential suppliers a chance to prepare a response tender for a contract or seek an invitation to participate in a procurement; where an entity provides tender documentation to suppliers, the documentation shall contain all information necessary to permit suppliers to submit responsive tenders; tenders must be submitted in writing, directly or by mail, but cannot be presented by telephone; entities must publish a notice after the award of each contract including the value of the winning award or the highest and lowest offer taken into account; and on request, the awarding entity shall promptly inform suppliers participating in the tendering procedures of decisions on contract awards and provide pertinent information to a supplier whose tender was not selected, the reasons for not selecting its tender and the advantages of the winning supplier. NAFTA and the other agreements concluded in the Americas<sup>26</sup> demonstrate that it is possible for countries with different levels of economic development to enter into agreements that promote greater regulatory transparency in the procurement field.

The EC Directives also contain similar requirements. Under the *common advertising rules* entities are to publish: an *indicative notice* after the beginning of their budgetary year to make known the total procurement they intend to award during the subsequent twelve months; a *contract notice* when the award procedure is about to be launched; and a *contract award notice* setting out the most important points concerning the conditions under which the contract has been awarded. In order to give all potential suppliers a chance to tender for a contract or seek an invitation, the Directives, like the GPA and NAFTA, lay down minimum periods to be allowed at the different stages of the procedures. An interesting feature of the Directives is that they stipulate that any notice published in the national press must not contain information other than that published in the Official Journal of the EC and may not be published at the national level before it is dispatched for publication at Community level. Similarly to the GPA, the Directives stipulate that any eliminated candidate has the right to ask for the reasons for his rejection and the name of the successful tender.

The recently signed CEP also provides for disciplines on transparency in the procurement field. The relevant provisions, though not as detailed as WTO provisions, provide for each party to take steps to enhance transparency at all stages of their procurement procedures. This includes publication of invitation to tender, provision on request of information on contract awards, and provision of pertinent information concerning the rejection of an unsuccessful bidder. APEC principles call for sufficient and relevant information to be made available to all interested parties consistently and in a timely manner through a widely available medium. This general principle is applicable to all aspects of public procurement, including the general operational environment, procurement opportunities, purchase requirements, bid evaluation criteria and award of contracts.

RTAs also promote transparency through the collection and dissemination of all relevant information through electronic means. It should in addition be mentioned that several countries (e.g. NAFTA countries) have established such regimes nationally, but the focus here is on initiatives at the regional level. For instance, the EU has recently introduced a new Directive<sup>27</sup> on the mandatory use of standard forms for the publication of contract notices. The aim is to simplify the implementation of the

advertising rules while adapting them to the electronic means developed as part of the information system on public procurement (SIMAP), launched several years ago by the Commission in collaboration with the Member States. The EC launched the project in order to encourage best practice in the use of modern information technology for public procurement. Initially the project aims to improve the quality of information about the EU procurement opportunities and ensure that information is made known to all potentially interested suppliers. In the longer term it is envisaged that the project will address the whole procurement process, including bids, award of contracts, delivery, invoicing and payment.<sup>28</sup> Moreover, the possible use of the common procurement vocabulary (CPV) will contribute to enhance transparency in the EU market. The CPV was created by the EC in 1993 as a tool for improving transparency and efficiency in the field of public procurement. Use of standard terms in the CPV makes it easier for potential suppliers to identify the procurement contracts in which they are interested. The CPV also facilitates fast and accurate translation of contract notices for publication in the EC Official Journal, and makes it easier to establish procurement statistics.

As part of the ongoing ASEAN integration initiatives, Member States recently signed the E-ASEAN Framework Agreement, which calls for the promotion of the use of electronic means in Members' procurement of goods and services.

### *Accountability and due process*

Providing the opportunity for suppliers to challenge the consistency of the conduct of a procurement with the agreement in a timely manner is an important element of many RTAs, especially in order to ensure transparency and fairness in the application of the procurement process. This has also been recognised in the WTO, e.g. with respect to bid procedures contained in the GPA as briefly discussed in Section II above; due process is another element that might be included in a possible Agreement on Transparency in Government Procurement, subject to the outcome of the negotiations. The terms of relevant RTA provisions resemble corresponding WTO provisions. For instance, NAFTA and neighbouring agreements provide detailed provisions allowing suppliers to challenge procurement procedures for covered procurement contracts. These challenges are to be reviewed expeditiously by a national authority that has "no substantial interest" in the outcome of the purchase. The reviewing authority can recommend changes in the procurement procedures of the entity being challenged if these violate NAFTA rules. This recourse is available not only to suppliers of one NAFTA country wishing to challenge the procurement procedure of another, but also to suppliers wishing to challenge the procurement practices of their own government. Recourse to panel procedures is an option in case of failure to produce a satisfactory result.

Two EC Directives address violations of EU procurement law. The first Directive deals with complaints regarding awards of contracts in the non-excluded sectors<sup>29</sup> and the second provides for remedies in the "excluded" sectors.<sup>30</sup> The Directives require Member States to set up competent bodies to take interim measures to correct alleged violations. This includes measures to suspend awarding procedures or implementation of any decision; set aside decisions taken unlawfully (including the removal of discriminatory specifications); and award damages. Where the Commission considers that an infringement has been committed during a contract award procedure, it is empowered to bring this to the attention of the competent authorities so that appropriate steps can be taken for the rapid correction of any alleged infringement. The EC may ultimately bring proceedings before the European Court of Justice.

With respect to bid challenge provisions, the ANZGPA adopts a different approach. The relevant procedures for dealing with complaints<sup>31</sup> are designed to resolve problems and avoid recurrence through discussion and mutual agreement between the "designated bodies". The Agreement relies on the political will and commitment of the parties for compliance, rather than any legal redress. Thus, the final authority for decision is the relevant Minister in the purchasing jurisdiction. Should there continue to be serious concern on the part of one or more of the other jurisdictions, this would be raised and discussed in the Council at officials' and/or Ministerial level in order to reach a mutually agreeable outcome. But the Agreement does not contain any formal provision for negotiation of a solution at these levels.

APEC principles call on governments and individual agencies to establish and make known procurement laws and practices, and on procuring agencies and personnel to follow them without infraction throughout the entire procurement process. The principles lay down concrete examples on how this is to be achieved, such as record keeping of the entire procurement process, the establishment of scrutiny mechanisms to ensure accountability and of review mechanisms to handle complaints.

## NOTES

1. The European Communities are counted here as a Member.
2. See OECD, (2002).
3. See Sahaydachny and Wallace (1999). This process of reform in government procurement has also been studied in the context of OECD work on regulatory reform and market openness.
4. Examples of features that show significant common ground include scope of application, non-discrimination principles, qualification assessment procedures, variety of procurement methods (with a preference for competitive ones), transparency requirements, notice of contract award, and review procedures. See Sahaydachny and Wallace (1999).
5. Parties to the Agreement include Colombia, Mexico and Venezuela.
6. Article III of the basic GATT reads as follows at paragraph 8(a): “The provisions of this Article shall not apply to laws, regulations or requirements governing the procurement by governmental agencies of products purchased for governmental purposes and not with a view to commercial resale or with a view to use in the production of goods for commercial sale.” An analogous exclusion of government procurement is set forth in Article XIII of the GATS. However, GATS Article XIII:2 provides for negotiations in the government procurement of services (see below).
7. Parties to the GPA comprise Austria, Belgium, Canada, Denmark, European Communities, Finland, France, Germany, Greece, Hong Kong China, Iceland, Ireland, Israel, Italy, Japan, Korea, Liechtenstein, Luxembourg, Netherlands, Netherlands with respect to Aruba, Norway, Portugal, Singapore, Spain, Sweden, Switzerland, United Kingdom, and the United States.
8. The following countries are in the process of negotiating accession or have applied for accession: Bulgaria, Chinese Taipei, Estonia, Jordan, Kyrgyz Republic, Latvia, Panama. The following governments have undertaken commitments with regard to the Agreement: Croatia, Georgia, Mongolia, Oman.
9. GPA Article XXIV(7)(b).
10. The public authorities Directives 93/36/EC, 93/37/EC and 92/50/EC (amended by 97/52/EC) and the utilities Directive 93/38/EC (amended by 98/4/EC). The amendments were made in an effort to accommodate procedural changes required by the GPA.
11. NAFTA, Chapter 10 (“Government Procurement”).
12. For example the Mexico-Bolivia FTA, the Mexico-Costa Rica FTA and the Mexico-Nicaragua FTA.
13. A detailed presentation of the provisions of the EU-Chile Agreement cannot be included in the analysis here because the text of the Agreement is currently under translation and legal revision, and therefore it is not available yet.
14. The principles comprise transparency; value for money; open and effective competition; fair dealing; accountability and due process; and non-discrimination.

15. Some of the telecommunication services are excluded from the scope of Directive 98/38/EEC. The list of excluded telecommunications services was published in the Official Journal (OJ C 156, 3.6. 1999, p. 3). EFTA members have also adopted a similar expanded coverage.
16. The Mexico-Bolivia FTA and the Mexico-Costa Rica FTA.
17. The Group of Three Accord, for example, provides reservations—to be reduced and ultimately eliminated in 2004 - of 45% (in 1996) of the procurement of goods, services and construction services have been made for Federal entities and some government enterprises of all three countries. In the case of the Mexico-Bolivia FTA, the Agreement provides different thresholds between the two countries.
18. The practical application of these measures is very important, but empirical evidence is lacking.
19. Respectively: Articles 12; 28; 49; and 81, 82, 86.
20. An interesting observation about the Directives is that they apply to all procurement, whether or not of EU origin.
21. NAFTA's approach has also been subsequently adopted by neighbouring agreements to which Mexico is a party.
22. See NAFTA Article 1016.
23. For example, the GPA's *limited tendering* corresponds to the EC *negotiated procedures* (also, in exceptional circumstances, without prior call). In contrast to the GPA, which considers *negotiation* a modality of awarding contracts and not a separate procedure, the Directives consider negotiation a procedure of its own.
24. Supply Directive Articles 20-25.
25. For a description of the information required in the invitation to participate see NAFTA Article 1010.
26. This includes also the EU-Mexico FTA.
27. EC Directive 2001/78/EC.
28. See <http://simap.eu.int/EN/pub/src/welcome.htm>.
29. Directive 93/38/EEC.
30. Directive 92/13 EEC.
31. Annex 1: "Monitoring Procedures".

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*Chapter 7*

**INTELLECTUAL PROPERTY RIGHTS**

*by*

**Douglas Lippoldt**

**Abstract:** This chapter surveys provisions concerning intellectual property rights (IPRs) in a selection of fifteen regional trade agreements (RTAs). It highlights how these provisions compare with IPR provisions under the multilateral trading system as embodied in the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights. Members of the WTO may implement in their law more extensive IPR protection than the minimum required under the TRIPS Agreement, provided that this does not contravene the agreement. While varying in the extent of their coverage of IPR issues, the surveyed RTAs often include one or more provisions going beyond the strict requirements of the TRIPS Agreement. In a number of cases, these additional requirements concern conformity with, or accession to, other relevant international agreements. Some RTAs have special provisions going beyond the TRIPS Agreement in the manner in which they address transition periods, enforcement or co-operation, or forward-looking clauses concerning potential future revisions to the RTAs.

## Key points

Given the on-going debate across countries concerning some aspects of the implementation of the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (the TRIPS Agreement), it is timely to consider how these issues have been treated in RTAs. In moving beyond the minimum requirements of the TRIPS Agreement, which RTAs address IPRs? Have they tended to simply make reference to the TRIPS Agreement? Do they include provisions that differ from the TRIPS Agreement or go beyond it in terms of protections afforded to holders of IPRs? The study is not intended to be a comprehensive review of the individual legal provisions, but rather an illustrative presentation of the nature of IPR provisions in 15 selected RTAs.

In recent years, the tendency has been for new RTAs to extend beyond tariff-cutting exercises (as many traditionally were), to include a much broader range of products and issues, including intellectual property [Crawford and Laird (2001)]. According to the TRIPS Agreement, the Members of the WTO may implement in their law more extensive IPR protection than the minimum required under the agreement, provided that this does not contravene the agreement.<sup>1</sup> Already in 1997, Maskus (1997) found that the strengthening and harmonisation of IPRs under such regional groupings as NAFTA and the EU substantially exceeded the new IPR requirements resulting from the Uruguay Round.

Based on the review of the selected RTAs, a few preliminary observations can be made concerning the treatment of IPR issues in the various agreements. These RTAs generally affirm provisions of the TRIPS Agreement, either by explicit reference or implicitly by echoing at least some of its content. While varying in the extent of their coverage of IPR issues, the RTAs often include one or more provisions going beyond the strict requirements the TRIPS Agreement. Table 7.1 provides an illustrative list of requirements not embodied in the TRIPS Agreement and examples of RTAs that include such requirements.<sup>2</sup> Often these additional requirements concern conformity with, or accession to, other relevant international agreements. Also, the table provides examples of RTAs that have special provisions going beyond the TRIPS Agreement in the manner in which they address transition periods (*e.g.* defining periods that are shorter than similar periods under the TRIPS Agreement), enforcement or co-operation, or they include forward-looking clauses concerning potential future revisions to the RTAs.

To the extent RTAs include these additional aspects, they are pushing harmonisation forward at a pace that is greater than is apparently possible within the framework of the WTO. Such a result is not surprising because, as Maskus noted “it is often possible to achieve broad consensus on standards on the basis of commonality of interests associated with regional integration, while in [multilateral approaches] economic interests are more divergent [...]” The spread of requirements for IPR protection in RTAs has provided a means to move beyond the provisions of the TRIPS Agreement [GRAIN (2001)]. However, this has not necessarily led to a greater divergence in requirements. To the extent that these requirements are centred on widely accepted international accords, they may facilitate greater harmonisation in the treatment of IPRs. At the same time, certain RTA provisions are tailored for application internally among the member states. While increasing the degree of harmonisation and, potentially, IPR protection in the RTA area, the RTA specific provisions may diverge in their content *between* RTAs. For example, IPR provisions under NAFTA or the EU reduce variation among their

respective member states, but the two trade areas are not necessarily converging with respect to procedural issues.

### **Provisions in the TRIPS Agreement**

The TRIPS Agreement emerged, in part, as a consequence of concerns about the variability of protection and enforcement of IPRs around the world. A key product of the Uruguay Round, it represented a breakthrough in inclusion of a broad range of intellectual property under the terms of an agreement under the multilateral trading system.

### ***Foundations of the TRIPS Agreement***

The TRIPS Agreement built upon the existing framework of intellectual property conventions established under World Intellectual Property Organization (WIPO), drawing in particular on:

- The Paris Convention for the Protection of Industrial Property, 1967, covering such issues as patents, trademarks, industrial designs, and protection against unfair competition,
- The Berne Convention for the Protection of Literary and Artistic Works, 1971, covering copyrights (although the TRIPS Agreement notably did not incorporate its provisions on moral rights),
- The Washington Treaty on Intellectual Property in Respect of Integrated Circuits, 1989, covering the designs of such circuits, and
- The Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, 1961 (although the TRIPS Agreement did not incorporate a general requirement to comply with the substantive provisions of the Rome Convention).

The TRIPS Agreement represented an attempt to render the treatment of IPRs more systematic and to improve predictability and dispute resolution with respect to IPRs. The *general provisions* of the agreement mandate national treatment and most-favoured-nation treatment, albeit with some exceptions or exemptions with respect to the pre-existing treaties cited above, certain other international agreements, or certain rights not covered in the TRIPS Agreement. The agreement promotes transparency and calls for a balance between the need to provide an incentive for innovation and the need to foster transfer of technology and economic and social welfare.

Key areas covered include copyrights, trademarks and service marks, geographical indications, industrial designs, patents, lay-out designs of integrated circuits, and trade secrets or other undisclosed information (Table 7.1, column 1).<sup>3</sup> The scope of the TRIPS Agreement also includes control of anti-competitive practices in contractual licences. The agreement introduced a number of new or augmented standards in its coverage of a number of areas. It specified how the principles of the trading system should be applied to IPRs, how to give adequate protection to IPRs, how to enforce those rights adequately, how to settle IPR disputes among WTO Members, and what the special transitional arrangements would be.

### ***Types of intellectual property covered***

With respect to *copyrights*, the TRIPS Agreement grants protection for computer programmes as literary works under the Berne Convention. Databases were granted similar protection. Copyright rules were expanded to cover rental rights whereby authors of computer programmes and producers of

sound recordings were ensured the right to prohibit the commercial rental of their works to the public and films were granted similar protection. Performers were also ensured of the right to prevent unauthorised recording, reproduction and broadcast of live-performances for at least 50 years. The TRIPS Agreement also clarifies the types of signs eligible for *trademark* protection and the minimum protection for service marks, with well-known service marks eligible for additional protection. The initial period of trademark protection (and an indefinite number of subsequent renewals) shall be for no less than seven years. Compulsory licensing of trademarks is not permitted.

With respect to *geographical indications*, the TRIPS Agreement addresses the use of place names that identify the quality, reputation or other characteristics of a good. Members are required to provide legal means for interested parties to prevent misleading use of these terms or use which constitutes unfair competition. With respect to wines and spirits, a higher standard applies in which the use of such terms is prohibited for goods originating elsewhere, even where there is little risk of consumers being misled. There are some exceptions for geographical indications including those that have become generic terms, such as gouda cheese. Under the TRIPS Agreement, *industrial designs* are ensured protection for at least 10 years with owners of such designs able to prevent the manufacture, sale or importation of articles bearing or embodying a design that is protected.

*Patent* protection is to be provided for at least 20 years, for both products and processes with respect to most technologies. Some areas can be excluded such as diagnostic, therapeutic and surgical methods; plants and animals (other than micro-organisms); biological processes for the production of plants and animals (other than microbiological processes); and inventions that threaten public order or morality. Protection is ensured for plant varieties by either patents or *sui generis* systems (*i.e.* separate recognised systems). For example, the International Union for the Protection of New Varieties of Plants (UPOV) is utilised by many countries, but the TRIPS Agreement does not make specific reference to it. Moreover, the TRIPS Agreement allows exclusion of plants and animals from patent protection.

The patent rights mandated under the TRIPS Agreement include the ability to prevent third parties from making, using, offering for sale, selling or importing of the products concerned or, in the case of processes, the products directly obtained from those processes. Patent owners also must have the right to assign, license or transfer by succession the patents. Governments are authorised to issue compulsory licenses, albeit within certain constraints. Similarly, the agreement recognises the right of governments to intervene in cases where anti-competitive licensing of IPRs takes place (*e.g.* where it impedes technology transfer or restricts competition), providing for consultations and information exchange between governments of the countries where the concerned parties are domiciled.

Certain flexibility in application of patent rights is available in the case of public health emergencies, a point reinforced at the-WTO Ministerial Conference in Doha. In cases where a government authorises use of a patent without the authorisation of the rights holder, the TRIPS Agreement requires:

- consideration on a case-by-case basis on the merits of the case;
- efforts to be made to obtain authorisation from the rights holder unless it is the case of a national emergency, extreme urgency, or public non-commercial use; and
- limitation of such use to the original purpose for the authorisation.

Such compulsory licensing shall be non-exclusive, predominantly for the supply of the domestic market<sup>4</sup>, linked in duration to the duration of the emergency, include adequate remuneration taking into account the economic value of the authorised use, and be subject to independent review with

respect to its legal validity and compensation for the rights holder. With respect to patented processes, the rights of the patent holders extend to products directly obtained from such processes.

*Designs for integrated circuits* are protected under the TRIPS Agreement. Protection is extended, for example, by requiring a minimum term of protection of ten years. Members are required to grant the owner of a protected design the right to prohibit third parties from importing, selling, copying (identically or in substantial part), or engaging in other commercial activity involving a protected layout-design.

The TRIPS Agreement requires that *trade secrets and undisclosed information* must be ensured protection in cases where reasonable steps were taken to keep it secret by the owners. Governments must ensure protection of test data related to marketing approvals for new pharmaceutical or agricultural chemicals.

### ***Enforcement and transition arrangements***

The TRIPS Agreement was the first international treaty to address concretely the enforcement of international property rights. Governments are required to ensure legal protection for IPRs with penalties sufficient to deter infringement and with channels for review or appeal, but no separate legal system for IPRs is required. The procedures are to be fair and not too costly or complicated. Courts are to have the right to order the disposal or destruction of pirated or counterfeit goods and the means of their production, without compensation.

Members agreed to exchange information on trade in goods infringing, intellectual property rights, with a view to eliminating the trade in such goods. Some trademark and copyright offences are to be considered criminal. The authorities must be available in response to applications from rights holders to prevent import of counterfeit or pirated goods, and to order prompt and effective provisional measures to prevent infringement or preserve evidence. In the case of process patents, the burden of proof is shifted to the alleged infringer who must demonstrate that the product concerned was produced by a process different from that of the rights holder.

Judicial authorities are to have the authority to order adequate compensation for the injury suffered. The Council for Trade-Related Aspects of Intellectual Property Rights monitors the working of the agreement and reviews government compliance with it. In order to promote transparency, Member countries are required to provide notification to the WTO of domestic laws concerning intellectual property. Moreover, the TRIPS Agreement emphasises consultation in dispute settlement, as provided for under the GATT.

The TRIPS Agreement provided transition periods for WTO Members including one year for developed countries, five years for developing or transition countries, and 11 years for the least developed countries. TRIPS provided a transition period of 10 years for developing countries for pharmaceuticals and agricultural chemicals where the country did not already have product patent protection in place. During the transition periods, pharmaceutical and agricultural chemical product patent applications must be accepted and some rights provided.<sup>5</sup> Developed country Members are obligated to provide technical co-operation upon request and by mutual agreement to assist developing countries in satisfying the terms of the agreement.

### **Provisions in Regional Trade Agreements**

In this survey of RTAs, the States that are parties to these agreements have often mutually agreed to include IPR provisions in addition to those under the TRIPS Agreement or in advance of the timing

foreseen in that agreement. Also, in some cases, the RTAs engage countries that are not yet WTO Members (e.g. Vietnam is a party to the APEC discussions but not yet a Member of the WTO). Table 7.1, column 2, illustrates the types of important additional requirements or features included in selected RTAs.

Although the RTAs surveyed are broadly consistent with the TRIPS Agreement, they do not always extensively address IPR issues or make references to the TRIPS Agreement. IPRs are included in different ways, depending on the agreement. For example, the ANZCERTA Agreement makes little reference to IPRs, except to note that the agreement should not interfere with measures for the protection of intellectual property (provided they are not means of arbitrary or unjustified discrimination). Instead, Australia and New Zealand rely on the multilateral agreements of WIPO and WTO for international protection of IPRs.<sup>6</sup> However, Australia and New Zealand are also exploring “the potential for more closely coordinating the granting and recognition of registered intellectual property rights” under the work programme of a separate accord, the bilateral “Memorandum of Understanding on the Co-ordination of Business Law”.<sup>7</sup>

Certain RTAs make reference to the TRIPS Agreement with respect to specific issues, but have no separate chapter or section on IPRs. For example, the Canada-Chile Free Trade Agreement briefly cites the TRIPS Agreement in two articles. COMESA includes among its objectives only a reference to the eventual standardisation of “conditions regarding industrial co-operation, particularly on company laws, intellectual property rights and investment laws.” Discussions on IPRs in the context of SADC have focused primarily on strengthening domestic laws to ensure compliance with the TRIPS Agreement.

Other RTAs provide more extensive treatment of intellectual property with respect to one or more issues. Under MERCOSUR there is a *Harmonization Protocol of Norms on Intellectual Property*, for which ratification is pending, that addresses primarily trademarks (in some depth) and geographical indications, but touches on other IPR issues only briefly.<sup>8</sup> In JSEPA, IPRs are covered in a short chapter on intellectual property plus a number of additional references in other chapters concerning such issues as science and technology co-operation and investment.

Coverage on IPRs is much deeper under the NAFTA or EU, which devote substantial attention to a broad range of issues. These RTAs reiterate provisions in the TRIPS Agreement, while pushing beyond in a number of areas. The EU, in particular, is of a different nature than most RTAs in that it includes a focus on harmonisation of IPR regimes and convergence in standards, among other issues. In the view of some EU authorities, the WTO/WIPO intellectual property framework “does not provide an adequate basis for completing the single market.”<sup>9</sup> Thus, the Commission has taken steps through a number of directives to seek greater harmonisation of national laws.

While the TRIPS Agreement provides baseline IPR protection, certain RTAs clearly aim to go beyond minimum protection of IPRs. A prime statement of such intentions can be found under the Euro-Mediterranean Partnership agreements.<sup>10</sup> These agreements incorporate language such as that in the EU-Tunisia, EU-Palestinian Authority and EU Morocco Association Agreements, which state that, “The Parties shall provide suitable and effective protection of intellectual, industrial and commercial property rights, in line with the highest international standards. This shall encompass effective means of enforcing such rights.”<sup>11</sup> The reference to highest international standards points to IPR provisions additional to those laid out in the TRIPS Agreement.

## ***General provisions***

As noted above, the TRIPS Agreement includes general provisions concerning national treatment, most-favoured nation treatment and transparency. RTAs such as the Canada-Chile agreement make no separate mention of these issues with respect to IPRs (although they are broadly addressed in the full context of the Canada-Chile agreement). A few agreements, such as NAFTA, the US-Jordan agreement or the MERCOSUR protocol, make explicit reference to national treatment with respect to the protection and enjoyment of IPRs.<sup>12</sup> Proposals in the draft Free Trade Area of the Americas agreement (FTAA-draft) do so as well, although the FTAA-draft also includes bracketed text concerning specific exemptions. JSEPA includes a reference to intellectual property in its definition of assets covered by the chapter on investment and then in a separate article provides for national treatment of investors and investments.<sup>13</sup> Others, including CEFTA, also make explicit reference to non-discrimination in the granting and protection of IPRs. In these areas, RTAs broadly parallel the requirements under the TRIPS Agreement.

## ***Copyright and related provisions***

Generally, the RTAs reviewed reflect the TRIPS Agreement with respect to copyrights and related rights or omit specific mention of this topic. Several RTAs go beyond the TRIPS Agreement requirements in mandating accession or compliance with subsequent international accords, particularly the WIPO (1996) Copyright Treaty and the WIPO (1996) Performances and Phonogram Treaty (*e.g.* both are required under EFTA, FTAA-draft, EU-Mexico, US-Jordan and the EU).<sup>14</sup> Among other issues, these treaties take into account issues related to the development of new technologies such as those related to the Internet.

Some RTAs go beyond the TRIPS Agreement with respect to specific copyright issues. For example, bracketed text in the FTAA-draft makes reference to respect for moral rights (*i.e.* authors' rights to object to certain modifications and derogatory actions), which would go beyond the TRIPS Agreement which explicitly excludes article 6bis of the Berne Convention that refers to moral rights. NAFTA clarifies that the use of decoding devices for intercepting satellite transmissions is illegal. Within the EU, the Commission has sought harmonisation and enhanced protection for copyrights through a number of directives dealing with computer programmes and databases, satellite broadcasting and cable transmission, rental and lending rights, and duration of protection, among others.<sup>15</sup> The EU has also become party to the WIPO Copyright Treaty and Performances and Phonogram Treaty. Steps are now underway to further harmonise the national and EU systems.

## ***Trademarks***

As in the case of copyrights and related rights, the selected RTAs reflect the TRIPS Agreement requirements for trademarks or omit separate discussion of the topic. In addition, some RTAs have mandated conformity with the Madrid Agreement concerning the International Registration of Marks, in order to facilitate the registration of marks (*e.g.* the Euro-Mediterranean Association Agreements). RTAs such as US-Jordan, FTAA-draft and APEC endorse the WIPO Joint Recommendation Concerning Provisions on the Protection of Well-Known Marks (1999), which was agreed after the TRIPS Agreement was finalised and which clarifies such issues as the determination of well-known marks and resolution of conflicts concerning Internet domain names. Also, the EU has included requirements to observe the Nice Agreement in several RTAs.

The MERCOSUR protocol referenced above provides a more detailed illustrative list of protectable subject matter (*e.g.* by mentioning pseudonyms and portraits) than does the TRIPS Agreement. It offers a longer initial and renewal term than required under the TRIPS Agreement, and relatively detailed procedural requirements.

Within the EU, the trademark requirements go into greater detail than those of the TRIPS Agreement. A Commission directive provides for a harmonisation of conditions for registration of a national trade mark and the rights conferred by registration, with a subsequent *Regulation on the Community Trade Mark* providing for the holder of such a trademark to benefit from a single set of rules for protection.<sup>16</sup> Further EU regulations address implementation issues, fees, appeals and institutional arrangements, also going well beyond the implementation details in the TRIPS Agreement.

### ***Geographical indications***

Among the selected RTAs, some make reference to protection of geographical indications as part of their coverage, but without extensive provisions on the topic. Where they go beyond the TRIPS Agreement, it is to address specific product issues or to extend higher protection to goods beyond wines and spirits. The TRIPS Agreement focuses on misleading or unfairly competitive use of geographical indications with higher protection for geographical indications for wines and spirits.<sup>17</sup>

The Euro-Mediterranean Association Agreements include designations of origin in their scope. EFTA specifically requires adequate and effective protection of geographical indications including appellations of origin for all products and services. As Chile's obligations under TRIPS were not yet in effect at the time of the signing of the Canada-Chile Free Trade Agreement, that RTA incorporated an article on geographical indications ensuring protection of the designations "Chilean Pisco" and "Canadian Whiskey" on a reciprocal basis. The pending MERCOSUR protocol includes an obligation for the member states to reciprocally protect their indications of source and denominations of origin, and prohibits their registration as trademarks. The US-Jordan agreement is a particular case in that it considers geographical indications as trademarks, subject to certain conditions.

### ***Industrial designs***

Industrial designs are generally not treated separately under the RTAs or, where they are treated they tend to reflect the requirements of the TRIPS Agreement. EFTA is notable in that it takes as its reference for registration of industrial designs, the Geneva Act (1999) of the Hague Agreement Concerning the International Registration of Industrial Designs.<sup>18</sup> It extends the duration of potential protection from 10 years under the TRIPS to at least 25 years (5 years plus 4 consecutive renewals). The Geneva Act explicitly seeks to establish a link between the international registration system for industrial designs and regional systems such as under the European Community or the African Intellectual Property Organisation (permitting intergovernmental organisations to become party to the Act).

In the EU, using an approach similar to that for trademarks, a Community directive on the protection of designs has been adopted along with a regulation establishing a Community system for the protection of designs.<sup>19</sup> Community protection is extended to designs registered with the European Union's Office for Harmonisation in the Internal Market in Alicante as well as to unregistered designs, within certain limits. The former benefit from a period of up to 25 years of protection, well beyond the 10 years minimum established under TRIPS.

### ***Patents***

With respect to patents, many of the RTAs go beyond the TRIPS Agreement, particularly in their requirements to observe international accords beyond those cited in the agreement. Several including NAFTA, the draft FTAA, US-Jordan, EU-Mexico and certain Euro-Mediterranean Association Agreements mandate UPOV as the appropriate vehicle to protect plant breeder rights (with the result

that Mexico, Jordan, Tunisia and Morocco engaged to ratify UPOV within specific timeframes). The US-Jordan and the EU-Mexico, EU-Morocco, EU-Tunisia agreements make reference to use of international depository authority as defined in the Budapest Treaty in instances where a written description is not sufficient.

With respect to patents within the EU, two key instruments are working to promote additional harmonisation of patent protection. All EU members are now parties to the Munich Convention on the European Patent providing for patents for a number of countries to be obtained through a single application to the European Patent Office. Furthermore, work is currently underway to produce an updated version of the Luxembourg Convention on European Patents which did not enter into force, aimed at the creation of a single European Patent valid in the whole of the EU, which would coexist with national patents.<sup>20</sup>

Several RTAs have provisions dealing with specific patent-related issues, which do not necessarily go beyond the TRIPS Agreement requirements. For example, an article in the Canada-Chile RTA specifies limits on expropriation and nature of compensation with respect to investments. However, it states that this does not apply with respect to compulsory licensing, revocation, limitation or creation of intellectual property rights, provided that any such actions are consistent with the TRIPS Agreement. (*i.e.* they must be TRIPS consistent). On the other hand, certain RTAs have augmented IPRs in certain patent areas beyond the strict minima under the TRIPS Agreement. For example, in the context of NAFTA, Canada removed its compulsory licensing scheme for pharmaceuticals, which enhanced the situation of holders of pharmaceutical IPRs [Maskus (1997)]. EFTA provides for an additional period of protection of five years at the most for pharmaceuticals and plant protection products where the amount of time between the application date of the patent and the authorisation to market such a product exceeds specified time limits.

#### ***Other issues: layout-designs of integrated circuits, undisclosed information, anti-competitive practices***

Some RTAs reference IPR issues with respect to layout-designs of integrated circuits, undisclosed information and anti-competitive practices. These references are not generally requirements for adherence to additional international accords. Some of these references can be quite specific or detailed, but tend to parallel the types of coverage seen in the TRIPS Agreement. For example, NAFTA includes detailed provisions concerning protection of such topographies in line with the Washington Treaty and the TRIPS Agreement. An EU directive addresses legal protection for topographies.<sup>21</sup> CEFTA, which predates the TRIPS Agreement, explicitly states that protection of topographies of integrated circuits ensured by any party shall be granted on a reciprocal basis.

#### ***Enforcement***

Some RTAs include specific references to enforcement, usually in general terms that parallel the types of requirements of the TRIPS Agreement. For example, the Euro-Mediterranean Association Agreements include a requirement for the signatories to provide effective means of enforcing intellectual property rights. EFTA requires enforcement provisions of the same level as that provided in the TRIPS Agreement.

In a few cases, RTAs go beyond the TRIPS Agreement in terms of the detail in procedure. For example, NAFTA includes lengthy enforcement provisions covering such matters as enforcement at the border, provisional measures, and civil and criminal procedures and penalties. The agreement between the United States and Jordan to establish a free trade area was accompanied by a memorandum of understanding (MOU) on issues related to the protection of intellectual property rights.<sup>22</sup> This short MOU mandates clarifications in a few points of Jordan's IPR regime and provides for an increase in criminal penalties in Jordan for infringement of copyrights and related rights or trademarks.

### *Forward-looking provisions and co-operation*

The TRIPS Agreement provides for a periodic review by the Council for TRIPS. It also opens a limited possibility for amendments to adjust to higher levels of IPR protection that come into force via international agreements accepted by all WTO Members. Based on a consensus recommendation by the Council, the Ministerial Council may take action to amend the TRIPS Agreement accordingly. The agreement also includes provisions for international co-operation in the elimination of trade in goods infringing on IPRs and for technical co-operation between developed countries and least developed countries in implementing the agreement.

A number of RTAs have provisions for technical co-operation or future enhancements in the internal harmonisation and levels of IPR protection, in some cases potentially going beyond the requirements of the TRIPS Agreement. Some of the Euro-Mediterranean Association Agreements foresee co-operation in developing the institutions responsible for intellectual property (EU-Tunisia, EU-Morocco, EU-Palestinian Authority) and in helping the partner countries of the EU “to bring their legislation closer to that of the Community”, which could potentially go beyond the requirements of the TRIPS Agreement. Moreover, in the EU-Tunisia agreement, Tunisia undertook to “do its utmost to accede in particular to the conventions to which the Member States of the European Community are party.” In addition, several of the agreements specify principles relating to data protection (particularly with respect to personal data). The Euro-Mediterranean Co-operation Agreement with Algeria includes references to facilitation of patent acquisitions on favourable terms. The JSEPA underscores the potential of “developing co-operation between the Parties in the field of intellectual property”.<sup>23</sup> It encourages use of such means as information exchanges, joint training and exchanges of experts with the potential to contribute to a better understanding of each other’s policies as well as sharing information and experiences regarding enforcement.<sup>24</sup>

EFTA incorporates a provision for consultations on activities relating to “the identified or future international conventions on harmonisation, administration and enforcement of intellectual property rights”. It provides for continual review and updating, leaving open the door to additional requirements such as adherence to future international agreements. Similarly, the JSEPA establishes a Joint Committee on Intellectual Property with the function of “considering and recommending new areas of co-operation”.<sup>25</sup> CEFTA, as well, provides for consultations with respect “to the existing or to the future international conventions on harmonization, administration and enforcement of intellectual property.” CEFTA also called for gradual improvement in IPRs with the requirement to attain within five years the standards in the Berne, Paris and Rome Conventions as well as those of the European Patent Convention. The pending MERCOSUR protocol also obligates the party states “to make efforts to sign, as soon as possible, additional agreements” concerning IPRs.

The European and North American RTAs tend to have transition periods in some of their requirements that are shorter than the periods for the kinds of requirements in the TRIPS Agreement with respect to developing and transition countries (5 to 10 years). The EU-Tunisia Association Agreement, for example, included accession requirements with respect to a number of international accords with a four year transition period. In another example, under NAFTA, Mexico was permitted a three year period to conform to the Washington Treaty requirements.

As under the TRIPS Agreement, most of the RTAs have provisions for consultation as a preferred means for dispute resolution including by implication, or expressly, IPR issues. For example, the pending MERCOSUR protocol includes a requirement to co-operate in IPR issues, citing direct negotiation as the preferred mode for conflict resolution (but where this does not yield agreement, the MERCOSUR conflict resolution system will apply).

**Table 7.1 IPRs: requirements or points of reference under selected RTAs  
(additional to those in the TRIPS Agreement)**

Selected TRIPS requirements	Illustrative list of RTA additions
<b>General obligations</b>	
National treatment Most-favoured nation treatment (prior regional/bilateral accords allowed) Transparency	Adjustment to bring applicable legislation closer into line with EU legislation (EU-Morocco, EU-Tunisia) IPR protection to be assured in accordance with <i>highest international standards</i> (EU-Morocco, EU-Palestinian Authority, EU-Tunisia, EU-Mexico)
<b>Copyrights and related rights</b>	
Berne Convention Rome Convention (performers, phonograms, broadcasts) Minimum 50-year term Computer programmes protected as literary works Databases granted copyright protection “Neighbouring rights” protection for phonogram producers, performers Rental rights	The WIPO (1996) Copyright Treaty (EFTA, EU-Mexico, US-Jordan, EU, FTAA-draft) The WIPO (1996) Performances and Phonogram Treaty (EFTA, EU-Mexico, US-Jordan, EU, FTAA-draft) Geneva Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of their Phonograms (1971)(NAFTA, FTAA-draft)
<b>Trademarks</b>	
Paris Convention (industrial property) Well-known marks better protected requirement of use clarified Prohibits compulsory licensing	Nice Agreement concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks (Geneva, 1979), (EU-Morocco, EU-Tunisia, EU-Mexico) Madrid Agreement Concerning the International Registration of Marks and the Protocol relating to the Madrid Agreement concerning the International Registration of Marks (1989), (EU-Morocco, US-Jordan) Joint Recommendation Concerning Provisions on the Protection of Well-known Marks (1999), (US-Jordan, APEC, FTAA-draft)
<b>Geographical indications</b>	
Prevents use that misleads public or constitutes unfair competition Provides higher protection for wines and spirits	Some RTAs provide additional protection for a broad range of products, as TRIPS does specifically for wines and spirits (EFTA, EU).
<b>Industrial designs</b>	
Minimum 10 years protection	The Geneva Act (1999) of the Hague Agreement Concerning the International Registration of Industrial Designs (EFTA)
<b>Patents</b>	
Paris Convention (industrial property) Subject matter coverage for products and processes in all fields of technology Biotechnology covered with exceptions permitted for plants and animals Exclusive right of making, using, offering for sale, selling, or importing Minimum 20 years patent protection from date of filing Reversal of burden of proof in process patents (placed on the alleged infringer subject to certain conditions) Plant varieties protected either by patents or by an effective <i>sui generis</i> system or by a combination thereof.	The European Patent Convention (provides for a single application, 1973) (EFTA: only Liechtenstein and Switzerland; CEFTA, EU) The European Economic Area Agreement (EFTA: only Iceland and Norway) The Budapest Treaty (1980) on the International Recognition of the Deposit of Micro-organisms for the Purposes of Patent Procedure (EU-Morocco, EU-Tunisia, EU-Mexico, US-Jordan) Patent Cooperation Treaty (as modified in 1984) (EU-Morocco, EU-Tunisia, EU-Mexico, US-Jordan) Memo item (a <i>sui generis</i> system): International Convention for the Protection of New Varieties of Plants (1991) (EU-Morocco, EU-Tunisia, EU-Mexico, US-Jordan, NAFTA).

**Table 7.1 (continued) IPRs: requirements or points of reference under selected RTAs (additional to those in the TRIPS Agreement)**

<b>Selected TRIPS requirements</b>	<b>Illustrative list of RTA additions</b>
<b>Layout-designs (topographies) of integrated circuits</b>	
Treaty on Intellectual Property In Respect of Integrated Circuits (Washington, 1989) Protection extended to articles incorporating infringed design Minimum 10 years protection	Specifically referenced in some RTAs (e.g. detailed provisions in NAFTA)
<b>Protection of undisclosed information</b>	
Protection extended to articles incorporating infringed design	Generally, not specifically referenced in RTAs with the exception of certain of the more extensive agreements such as NAFTA.
<b>Abuse of IPRs</b>	
Wide latitude for competitive policy to control competitive abuses	Generally, not specifically referenced in RTAs with the exception of certain of the more extensive agreements such as NAFTA.
<b>Enforcement measures</b>	
Requires civil & criminal measures and border enforcement	Specifically referenced in some RTAs (e.g. detailed provisions in NAFTA)
<b>Transitional arrangements</b>	
Transition periods of 5 years for most developing and transition economies; for the least developed WTO Member countries, a period of 11 years (with a possibility of extensions).	US-Jordan provides transition periods of up to three years depending on the issue. EU-Tunisia and EU-Morocco provide up to 4 years for accession to multilateral conventions and opened some other areas. EU-Mexico provides for up to three years for accession to Budapest Treaty, "best efforts" for WCT and WPPT accession. CEFTA (1992): provided up to five years to provide protection equal to Paris, Berne and Rome Conventions and European Patent Convention. NAFTA provided Mexico with 2 years to comply with UPOV's provisions, 3 years with the Washington Treaty (1989), and 4 years with respect to border enforcement provisions.
<b>Institutional arrangements</b>	
TRIPS Council Dispute settlement, standard approach with a 5 year moratorium in some cases	Provisions for co-operation or a separate channel for consultations exist under some RTAs (, JSEPA includes provisions for co-operation activities in the field of science and technology and for consultation on IPR issues arising thereunder; under MERCOSUR, the RTA's separate conflict resolution mechanism may be invoked under certain circumstances with respect to IPR issues).

Sources: OECD Secretariat review of individual RTAs, the TRIPS Agreement text and Maskus (1997).

## NOTES

1. This is stated in the Uruguay Round Final Act, Annex 1c (TRIPS), Article 1.1, available at: [http://www.wto.org/english/docs\\_e/legal\\_e/27-trips.pdf](http://www.wto.org/english/docs_e/legal_e/27-trips.pdf).
2. Table 7.1 highlights examples from 11 of the 15 RTAs covered in this IPR review as going beyond the TRIPS Agreement requirements. (For the purposes of this tabulation, the Euro-Mediterranean Partnership Agreements are counted as a single RTA.)
3. In addition to providing for certain rights, the TRIPS Agreement contains articles addressing limitations and exceptions to exclusive rights with respect to *copyrights and related rights*, exceptions to the rights conferred by a *trademark*, and exceptions to the exclusive rights conferred by a *patent*.
4. The Doha Declaration on TRIPS and Public Health mandates that WTO members are to work to find an expeditious solution permitting access to medicines in severe health crisis situations.
5. According to the *Declaration on the TRIPS Agreement and public health* from the WTO Ministerial Conference in Doha, it was agreed that with respect to pharmaceutical products the least-developed country Members would not be obliged to implement or apply TRIPS provisions concerning patents or protection of undisclosed information or to enforce rights under these provisions, until 1 January 2016 (without prejudice to their right to seek other extensions under the provisions of the TRIPS Agreement).
6. See, for example: Commonwealth of Australia (1997).
7. This Memorandum of Understanding was signed on 31 August 2000 and can be found at: <http://www.mfat.govt.nz>
8. The original MERCOSUR agreement did not explicitly reference IPRs. A subsequent protocol, the Harmonization Protocol of Norms on Intellectual Property in the MERCOSUR Regarding Trademarks, Indications of Source and Denominations of Origin (1996), will -- once it is in effect -- ensure harmonisation in the treatment of certain IPRs issues among the parties to the agreement.
9. This refers to an overview of EU strategy on intellectual property (as of 19/07/01) posted at: <http://europa.eu.int>
10. The Euro-Mediterranean Partnership is based on the 1995 Barcelona Declaration's objective of establishing a free-trade area by 2010 between the EU (which itself is a customs union with 15 Member States) and 12 Mediterranean Partners. Under the partnership there are: Association Agreements (Tunisia, Israel, Morocco, and an Interim Association Agreement with the Palestinian Authority), Co-operation Agreements (Algeria, Egypt, Jordan, Lebanon, Syria), and First-generation Association Agreements (Cyprus, Malta, Turkey). Negotiations for an EU association agreement with Algeria have recently been completed and others are pending. The agreements cover such issues as suitable measures regarding rules of origin, certification, protection of intellectual and industrial property rights and competition, among others. The specific provisions of the Euro-Mediterranean Partnership agreements vary somewhat depending on the partner (for details see <http://europa.eu.int>).
11. For the full text, see the following references: Article 39 (EU-Tunisia and EU-Morocco) and Article 33 (EU-Palestinian Authority).
12. Maskus (1997) notes that under NAFTA there are some exemptions, for example concerning cultural industries in Canada.
13. At the time of drafting, these two WIPO conventions had not yet entered into force. For the full text, see Chapter 8, Articles 72 and 73, JSEPA.

14. The WIPO Copyright Treaty entered into force on 6 March 2002. The WIPO Performances and Phonograms Treaty entered into force on 20 May 2002.
15. For more information, see Council Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programmes; Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases; Council Directive 93/83/EEC of 27 September 1993 on the co-ordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission; Council Directive 92/100/EEC of 19 November 1992 on rental right and lending right and on certain rights related to copyright in the field of intellectual property; and Council Directive 93/98/EEC of 29 October 1993 harmonising the term of protection of copyright and certain related rights
16. See the Council Regulation (EC) No 40/94 of 20 December 1993 for information on the Community trade mark. Also, see the amendment contained in Council Regulation (EC) No 3288/94 of 22 December 1994.
17. In the case of wines and spirits, the TRIPS Agreement aims to prevent use of a geographical indication identifying wines or spirits not originating in the place indicated by the geographical indication in question.
18. The Geneva Act has not yet entered into force; this will occur after 6 states have deposited their instruments of ratification or accession, subject to minimum amounts of foreign or domestic applications filed for each country. As of May 2002, 3 States fulfil these criteria.
19. For more information, see Directive 98/71/EC on the legal protection of designs and Council Regulation (EC) No 6/2002 on Community designs.
20. See <http://europa.eu.int> for information on the Commission Proposal on a European Patent.
21. For more information, see Council Directive 87/54/EEC of 16 December 1986 on the legal protection of topographies of semiconductor products.
22. For the full text, see <http://www.ustr.gov/regions/eu-med/middleeast/memopro.pdf>
23. This is referenced in JSEPA, Chapter 1 (General Provisions), Article 1.a (viii).
24. This is referenced in JSEPA, Chapter 10, Article 96 (3) a-c.
25. This is referenced in JSEPA, Chapter 10, Article 97 (1) c.

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*Chapter 8*

**CONTINGENCY PROTECTION**

*by*

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**Abstract:** This chapter surveys contingency protection provisions in RTAs with the aim of highlighting how these have gone beyond the WTO framework. WTO provisions in the areas of safeguards, anti-dumping and subsidies were all strengthened in the Uruguay Round. In RTAs, the approach taken in these areas is quite diverse. Some RTAs have eliminated the possibility of using anti-dumping and countervailing duties, while allowing the use of safeguard measures in relations between members. Others have eliminated the possibility of using anti-dumping and safeguards but have kept the possibility of using countervailing duties. Yet in other cases, RTAs have kept the possibility of using both anti-dumping and countervailing duties, but have eliminated safeguard measures or apply stricter provisions than those existing in the WTO. Several RTAs have also gone beyond the WTO in the area of subsidies. The combination of provisions in each RTA, the rationale for which may warrant further analysis, in part reflects the objective and choice of policy measures for achieving the desired level of economic integration.

## Key points

Contingency protection<sup>1</sup> is an issue that arises essentially under liberal trading regimes, when border barriers are relatively low and the volume of imports is felt to justify exceptional import restraints. At the national level, adjustment assistance often complements (or partly replaces the need for) contingency protection.

WTO provisions in the areas of safeguards, anti-dumping and subsidies were all strengthened in the Uruguay Round. In RTAs, provisions in these areas reflect two tendencies: on the one hand, border trade barriers between members have been reduced below MFN levels, which could give rise to fears of an increased resort to contingency measures; yet at the same time the objective of deeper integration may obviate the need or lead the members to forgo (or limit the scope of) contingency measures, and in the case of customs unions to implement common external policies in these areas.

The result is that the approach taken by RTAs to contingency protection is quite diverse. Some RTAs have gone beyond the WTO by strengthening WTO rules to minimise the opportunity to use these measures in a protectionist manner, while other RTAs have completely eliminated the possibility of using them among participating countries. Yet, in the area of safeguards, some RTAs add new opportunities to use these measures.

RTAs usually retain the possibility of using some of these measures, but in varying combinations, the rationale for which may warrant further analysis. Special mention should be made of the EU where all these measures have been eliminated in internal trade, and where a common policy has been adopted toward situations arising in external trade. Some other RTAs have eliminated the possibility of using anti-dumping and countervailing duties, while allowing the use of safeguard measures in relations between members. Others have eliminated the possibility of using anti-dumping and safeguards but have kept the possibility of using countervailing duties. Yet in other cases, RTAs have kept the possibility of using both anti-dumping and countervailing duties, but have eliminated safeguard measures or apply stricter provisions than those existing in the WTO. Several RTAs have also gone beyond the WTO in the area of subsidies.

The combination of provisions in each RTA in part reflects the objective and choice of policy measures for achieving the desired level of economic integration. Some commentators<sup>2</sup>, in seeking to identify the conditions under which RTAs have eliminated the use of trade remedies among their members, assert that the most relevant parameter affecting the costs and benefits of contingency protection is the degree of economic integration between participating countries. Indeed, according to this view, in the European agreements and ANZCERTA the achievements in the area of contingency protection appear to have been part of a deep integration process fostered by the economic convergence of the competition conditions in the domestic markets of members. This would include convergence at both the macroeconomic level - such as the creation of a single currency for the EU - and at the microeconomic level - such as antitrust, subsidies and fiscal incentives, labour and capital mobility, and regulation of monopolies.

However, deep integration is not always associated with the abolition of anti-dumping and countervailing duties among members. In the case of the Canada-Chile FTA, which eliminates the use

of anti-dumping duties between members, Canada and Chile have a comparatively lower level of integration and they have not adopted common antitrust rules (see Chapter on Competition Policy). Moreover, safeguard measures can still be applied between the two countries.

A similar approach (eliminating anti-dumping action but retaining safeguard measures) has also been taken in some agreements where members have achieved deep economic integration, such as the EEA and EFTA. Although anti-dumping actions are generally no longer possible among members, it may be noted that the safeguard disciplines contained in these agreements remain less stringent than in the WTO.

### **Provisions in WTO agreements**

Binding tariffs and applying them equally to all trading partners (MFN) are key to the smooth flow of trade in goods. The WTO agreements uphold these principles, but they also allow exceptions - in some circumstances. These include:

- emergency measures to limit imports temporarily, designed to “safeguard” domestic industries;
- actions taken against dumping (selling at an unfairly low price);
- subsidies and special “countervailing” duties to offset the subsidies.

It should be noted that some of these areas are under ongoing examination in light of the Doha Ministerial Conference. Specifically, members agreed to negotiations with the aim of improving and clarifying disciplines under the Agreements on Implementation of Article VI of the GATT (the anti-dumping Agreement) and on Subsidies and Countervailing Measures.

### ***Safeguards***

Article XIX of the GATT allows a member to take a “safeguard” action to protect a specific domestic industry from an unforeseen increase of imports of any product which is causing, or which threatens to cause, serious injury to the industry. More detailed provisions relating to the implementation of this article have been set out in the Uruguay Round Agreement on Safeguards.

This Agreement adds provisions establishing a prohibition against so-called “grey area” measures restraining exports or imports and in setting a “sunset clause” on all safeguard actions. It also sets out the criteria for “serious injury” and the factors which must be considered in determining the impact of imports. The safeguard measure should be applied only to the extent necessary to prevent or remedy serious injury and to facilitate adjustment. Where quantitative restrictions are imposed, they normally should not reduce the quantities of imports below the annual average for the last three representative years for which statistics are available, unless clear justification is given that a different level is necessary to prevent or remedy serious injury.

In principle, safeguard measures have to be applied irrespective of source. Allocation of shares would be on the basis of proportion of total quantity or value of the imported product over a previous representative period. However, it would be possible for the importing country to depart from this approach if it could demonstrate, in consultations under the auspices of the Safeguards Committee, that imports from certain countries had increased disproportionately in relation to the total increase and that such a departure would be justified and equitable to all suppliers.

The Agreement lays down time limits for all safeguard measures. Generally, the duration of a measure should not exceed four years, though this could be extended up to a maximum of eight years, subject to confirmation of continued necessity by the competent national authorities and if there is evidence that the industry is adjusting. Any measure imposed for a period greater than one year should be progressively liberalised during its lifetime.

The Agreement envisages consultations on compensation for safeguard measures. Where consultations are not successful, the affected members may withdraw equivalent concessions or other obligations under GATT 1994. However, such action is not allowed for the first three years of the safeguard measure if it conforms to the provisions of the Agreement, and is taken as a result of an absolute increase in imports.

Special mention should be made of the agricultural sector where members are allowed to take so-called Special Safeguard (SSG) provisions in accordance with the Agreement on Agriculture (AoA). For products whose non-tariff restrictions have been converted to tariffs, governments have the possibility to impose an additional duty on a product, if the country faces a sudden surge of import quantities or a substantial cut in import prices. In effect, the conditions that should be met when a member applies SSG to agricultural products are relatively less strict than those provided by the Agreement on Safeguards (i.e. an ‘injury test’ is not required).

Safeguards have also been considered in the area of services. Negotiations on the question of emergency safeguard measures based on the principle of non-discrimination are mandated under Article X of the GATS and are being conducted in the Working Party on GATS Rules.

### ***Anti-dumping***

WTO provisions allow countries to apply anti-dumping measures against imports of a product whose export price is below its “normal value” (usually the price of the product in the domestic market of the exporting country) and if such dumped imports cause material injury to a domestic industry or threaten to cause such injury. Complementing Article VI of the GATT, more detailed rules governing the application of such measures were provided in a voluntary Anti-Dumping code concluded at the end of the Tokyo Round. Negotiations in the Uruguay Round resulted in an Anti-Dumping Agreement, based on the old code, which addresses many areas previously lacking precision and detail, and which is mandatory to all WTO Members.

In particular, the revised Agreement provides for greater clarity and more detailed rules in relation to the method of determining that a product is dumped, the criteria to be taken into account in a determination that dumped imports cause injury to a domestic industry, the procedures to be followed in initiating and conducting anti-dumping investigations, and the implementation and duration of anti-dumping measures. In addition, the new Agreement clarifies the role of dispute settlement panels in disputes relating to anti-dumping actions.

On the methodology for determining that a product is exported at a dumped price, the new Agreement adds relatively specific provisions on such issues as criteria for allocating costs when the export price is compared with a “constructed” normal value and rules to ensure that a fair comparison is made between the export price and the normal value of a product.

The Agreement retains the requirement for the importing country to establish a causal relationship between dumped imports and injury to the domestic industry. The examination of the dumped imports on the industry concerned must include an evaluation of all relevant economic factors bearing on the state of the industry concerned. The Agreement confirms the existing interpretation of the term “domestic

industry”. Subject to a few exceptions, “domestic industry” refers to the domestic producers as a whole of the like products or to those of them whose collective output of the products constitutes a major proportion of the total domestic production of those products.

Procedures have been established on how anti-dumping cases are to be initiated and how such investigations are to be conducted. Conditions for ensuring that all interested parties are given an opportunity to present evidence are set out. Provisions on the application of provisional measures, the use of price undertakings in anti-dumping cases, and on the duration of anti-dumping measures have been strengthened. A significant addition to the new Agreement is a provision under which anti-dumping measures shall expire five years after the date of imposition, unless a determination is made that, in the event of termination of the measures, dumping and injury would be likely to continue or recur.

A new provision requires the immediate termination of an anti-dumping investigation in cases where the authorities determine that the margin of dumping is *de minimis* (which is defined as less than 2%, expressed as a percentage of the export price of the product) or that the volume of dumped imports is negligible (generally when the volume of dumped imports from an individual country accounts for less than 3% of the imports of the product in question into the importing country).

### ***Subsidies and countervailing measures***

The WTO disciplines in this area are laid down in the Agreement on Subsidies and Countervailing Measures, which builds on certain aspects of Articles VI, XVI and XXIII and on the Tokyo Round code in this area. The Agreement defines a subsidy as a financial benefit conferred either directly or indirectly by a government or any public body. Only those subsidies that are reserved to an enterprise or industry or a group of enterprises or industries (“specific subsidies”) are subject to the disciplines set out in the Agreement.

The Agreement establishes two categories of subsidies. First, it prohibits subsidies that are contingent upon export performance or upon the use of domestic over imported goods<sup>3</sup>. Prohibited subsidies are subject to special dispute settlement procedures, which include an expedited timetable for action by the Dispute Settlement Body and the requirement that, if the subsidy is indeed found to be “prohibited”, it must be immediately withdrawn. If this is not done within the specified time period, the complaining member is authorised to take countermeasures.

The second category is “actionable” subsidies. The Agreement stipulates that no member should provide subsidies that cause adverse effects to another country’s industry or other interests. Issues relating to actionable subsidies may be referred to the Dispute Settlement Body. In the event that it is determined that such adverse effects exist, the subsidising member must withdraw the subsidy or remove the adverse effects. If this is not done, the affected country may apply countermeasures.

The agricultural sector is dealt with separately in accordance with the AoA. The Agreement provides for the reduction during 1995-2000 (2004 for developing countries) of trade-distorting domestic support with the exclusion of some support measures, the so-called “blue box” (payments under production-limiting programmes) and “green box” payments (domestic support policies that have “little or no trade impact”). In addition, the AoA allows the use of export subsidies, although those too have to be reduced over six and ten years for developed and developing-country members, respectively (with no reduction applying to least-developed countries). Nevertheless, recognising the work already initiated in early 2000 under Article 20 of the AoA, members agreed at Doha to further substantially reduce both trade-distorting domestic support and export subsidies, with a view to completely phasing out the latter.

One part of the Agreement on Subsidies and Countervailing Measures concerns the use of countervailing measures on subsidised imported goods. It sets out disciplines on the initiation of countervailing cases, investigations by national authorities and rules of evidence to ensure that all interested parties can present information and argument. Certain disciplines on the calculation of the amount of a subsidy are outlined as is the basis for the determination of injury to the domestic industry.

The Agreement requires that all relevant economic factors be taken into account in assessing the state of the industry and that a causal link be established between the subsidised imports and the alleged injury. Countervailing investigations shall be terminated immediately in cases where the amount of a subsidy is *de minimis* (the subsidy is less than 1% *ad valorem*) or where the volume of subsidised imports, actual or potential, or the injury is negligible. Except under exceptional circumstances, investigations shall be concluded within one year after their initiation and in no case more than eighteen months. All countervailing duties have to be terminated within five years of their imposition unless the authorities determine on the basis of a review that the expiry of the duty would be likely to lead to continuation or recurrence of subsidisation and injury.

## **Provisions in Regional Trade Agreements**

### ***Safeguard measures***

With respect to safeguard measures, a number of RTAs have gone beyond the WTO framework either by eliminating the possibility of using these measures, or by strengthening WTO rules to minimise the opportunity to use them in a protectionist manner.<sup>4</sup>

The EU is a unique case in that though GATT Article XIX safeguard measures are prohibited in internal trade, a transfer mechanism is in place, mandated by Article 158 of the EC Treaty, that aims at “reducing disparities between the levels of development of the various regions and the backwardness of the least favoured regions or islands, including rural areas.” Specifically, the so-called “structural funds” (European Agricultural Guidance and Guarantee Fund, European Social Fund, and European Regional Development Fund) are available in the Internal Market, coupled to the existence of a European Investment Bank.

Similarly to the EU, safeguard measures have also been eliminated on internal trade in the context of the CEP agreement between New Zealand and Singapore and in MERCOSUR. This is also true for ANZCERTA, where Article 17 states that safeguard measures can only be applied during the transition period, being the period in which the following measures remain in force in either member: (i) tariffs; (ii) quantitative import restrictions or tariff quotas; (iii) the performance-based export incentives listed in Annex D of the agreement; or (iv) measures for stabilisation or support which hinder the development of trading opportunities between the member states on an equitable basis.

In the case of the Mexico-EU FTA, safeguard measures have not been eliminated in internal trade but the provisions have been strengthened and go beyond the WTO. Indeed, the allowed duration of the measure has been reduced from four to one year, and in exceptional circumstances from eight to three years. In addition, a member intending to take a safeguard measure shall offer, prior to the adoption of the measure, compensation to the other member. An interesting element of this agreement is the so-called “Shortage Clause” (Article 16), whereby a member may adopt export restrictions or export customs duties should a critical shortage occur.

Safeguards disciplines have also been strengthened in North America. Canada and the US agreed in Article 1102 of the Canada-US Free Trade Agreement (CUSFTA) to exclude each other from

global safeguard actions under GATT Article XIX unless imports from the other Party were “substantial” and “contributing importantly” to the serious injury or threat thereof caused by increased imports.

The CUSFTA standards in respect of emergency safeguard actions were essentially carried over into NAFTA. In this regard, Article 802 of NAFTA provides for the exclusion of one member’s goods from another member’s global safeguard actions unless imports from that member: i) account for a substantial share of total imports, (i.e., the member must normally be among the top five suppliers measured in terms of import share during the most recent three-year period); and ii) contribute importantly to the serious injury or the threat thereof.<sup>5</sup> In addition, a member is allowed to take bilateral emergency actions after the expiration of the transition period only with the consent of the other member and with a mutually agreed compensation (Article 801). Members may also take a special safeguard in the form of tariff rate quota for agricultural products (though the over-quota tariff should not exceed the MFN rate) and, only during the transition period, a special safeguard for textile and apparel goods.

The safeguards provisions contained in the Canada-Chile FTA and the Canada-Costa Rica FTA reflect NAFTA’s approach. In both agreements, members can take safeguards measures at the end of the transition period only with the consent of the other members and with an agreed compensation. The agreements also contain special safeguards provisions for textile and apparel products similar to those of NAFTA and, in the case of the Canada-Costa Rica FTA, members may also resort to special safeguards in the agricultural sector during the phase-out period.

The provisions contained in some other RTAs are less stringent than WTO provisions in this area, thus raising questions about the conditions under which safeguard measures may be taken between participating countries. This is notably the case of the EEA and EFTA, where the conditions for safeguard measures are defined in EEA Articles 112/114 and EFTA Articles 40/41.

Indeed, in these articles there is no mention of a criterion for “serious injury”; the agreements merely state that safeguard measures can be applied “if serious economic, societal or environmental difficulties of a sectoral or regional nature liable to persist are arising.” Similarly, there is no mention of particular measures that should not be taken (i.e. “grey area” measures), nor specific mention of the duration of the policy (“safeguard measures shall be restricted with regard to their scope and duration to what is strictly necessary in order to remedy the situation”). In the case of EFTA, there is also no mention of compensation or of rebalancing measures to remedy potential imbalances.<sup>6</sup>

A similar approach has been adopted by CEFTA members. In this agreement, there is also no mention of the duration of the measure nor of compensation or of rebalancing measures.<sup>7</sup> In addition, what appears interesting in the CEFTA approach is the fact that the provisions for the application of safeguards (Article 31) make reference to several measures, including the classical actions against a sudden surge of imports, but also actions against undertakings, state aid, dumping and shortages - seemingly putting them all in one basket. Another interesting feature of CEFTA safeguards provisions is the so-called “Structural Adjustment” article (Article 28). During the transition period members are allowed to take exceptional measures (in the form of increased customs duties) to protect infant industries or certain sectors facing serious difficulties or undergoing restructuring.<sup>8</sup>

Other RTAs provide for the use of safeguard measures according to WTO disciplines. A recent example of this approach is the Agreement between Japan and Singapore for a New-Age Economic Partnership (JSEPA). The JSEPA underscores non-discriminatory application of safeguard measures under Article 2.2 of the WTO Agreement on Safeguards and does not exclude the parties from safeguard

application. The JSEPA also provides for provisional bilateral emergency measures to facilitate the liberalisation process.

### ***Anti-dumping and countervailing duties***

Most RTAs allow the use of anti-dumping and countervailing duties according to WTO rules. One such case is the JSEPA, which maintains WTO disciplines on both these measures. On the other hand, there are a few agreements that have attempted to go beyond the WTO framework in these areas by eliminating the possibility of using these measures in relations between participating countries.

One such case is the EU. A consequence of the far-reaching integration of markets and adoption of common competition policies (see Chapter on Competition Policy) was the explicit recognition that anti-dumping and countervailing duties did not have a place in the common market and, hence, they cannot be applied between members (Article 91 of the European Community Treaty provides for the application of anti-dumping duties only during the transition period). A similar approach was taken in the creation of the EEA and subsequently in the agreement amending the EFTA Convention in 2001. Article 26 and new Article 36 eliminate the possibility to use these measures, respectively. It should be noted, however, that EEA members retain the right to apply these measures for agricultural products - defined as products falling within Chapters 1 to 25 of the Harmonized Commodity Description and Coding System—as these products are completely excluded from the agreement.

In the case of ANZCERTA, a Protocol on Acceleration of Free Trade on Goods was appended to the agreement in 1988. The Preamble to this Protocol states that: "...the maintenance of anti-dumping provisions in respect of goods originating in other Member States ceases to be appropriate as the Member States move towards the achievement of full trade in goods between them." Article 4 of ANZCERTA was modified to eliminate the possibility to use anti-dumping between members of the bloc. However, a closer look at ANZCERTA reveals that these two countries did not replicate the EU initiative entirely. Indeed, countervailing duties can still be applied between the two members, in accordance with GATT, though they have never been used since ANZCERTA came into effect.

The Canada-Chile FTA is an interesting agreement in that it goes beyond NAFTA by eliminating the possibility of using anti-dumping duties between members. Elimination is conditional upon the abolition of tariffs: anti-dumping on specific products ceases to be applicable on intra-FTA trade on the date that tariffs on that product are eliminated (defined at the 8-digit level). In no case is this period to extend beyond 1 January, 2003.

Like ANZCERTA, the abolition of anti-dumping does not extend to countervailing duties. Nevertheless, this exclusion is intended to be temporary as Article M-05 of the agreement stipulates that members are to consult with a view of eliminating the use of countervailing duties among them. This is similar to the case of MERCOSUR where, though the use of both anti-dumping and countervailing duties remain possible in internal trade, it is envisaged that these measures will be gradually eliminated in parallel with ongoing progress to harmonise competition policy (Decision 28/00).

CEP does not eliminate the possibility to use anti-dumping in intra-bloc trade but it nevertheless goes beyond the WTO framework in this area by strengthening the provisions of the WTO Anti-dumping Agreement. Indeed, the *de minimis* dumping margin has been raised from 2% to 5% and the margin of dumped imports normally regarded as negligible increased from 3% to 5%. The agreement also provides for reviews and reassessments of anti-dumping duties to be undertaken after three rather than five years.

## *Subsidies*

Several RTAs have gone beyond WTO disciplines in the area of state aids. In both EU and the EEA, state-aids affecting trade flows are prohibited between members, although general available subsidies (aid having a social character, aid granted for damage caused by natural disasters, etc.) are permitted in principle, as is aid targeted at disadvantaged regions (Articles 87/89 and 61/63, respectively). A similar approach has also been adopted by CEFTA, where all subsidies affecting trade flows have been eliminated in internal trade. Nevertheless, in the case of both the EEA and CEFTA, subsidies can be used according to WTO rules for agricultural products, which have been excluded from the agreement and from the relevant article (Article 23), respectively.

ANZCERTA also includes disciplines on subsidies that are stronger than those contained in the WTO. All export subsidies were eliminated in internal trade by 1987. Regarding domestic support, following the first five-yearly General Review of ANZCERTA in 1988, the two members signed an Agreed Minute on Industry Assistance agreeing not to pay (from July 1990) production bounties or similar measures on goods exported to the other member and undertook to attempt to avoid the adoption of industry-specific measures (bounties, subsidies and other financial support) that have adverse effects on competition within the FTA. Following the second five-yearly General Review in 1992, this was strengthened by an agreement that each member would also give due consideration to representations from the other on the effect industry-specific non-financial assistance measures may have on competition within the FTA. These measures have gone a long way towards eliminating subsidy-related trade distortions of all forms, a unique accomplishment among RTAs.

Similarly to ANZCERTA, CEP also prohibits all export subsidies on goods in internal trade, including on agricultural products. In addition, in the event that a domestic subsidy maintained by one member causes serious prejudice to the (trade) interests of the other member, consultations can be sought with a view to limiting the subsidisation.

NAFTA's subsidies disciplines correspond to those of the WTO,<sup>9</sup> with the exception of export subsidies in the agricultural sector. Indeed, export subsidies for agricultural products are prohibited in relations between Canada and the US as a result of CUSFTA (this has been incorporated in Annex 702.1 of NAFTA). With respect to trilateral trade NAFTA Article 705 affirms that it is inappropriate to provide an export subsidy for goods exported to another member where there are no other subsidised imports of that good. In addition, a member may adopt or maintain an export subsidy for an agricultural good exported to the territory of another member where there is an express agreement with the importing country.

CUSFTA seems to have influenced other RTAs concluded in its periphery. Indeed, the Canada-Chile FTA eliminates the possibility to use export subsidies in the agricultural sector. Article C-14 of the agreement stipulates that no member is allowed to maintain export subsidies in internal trade after 1 January 2003. This is also true for the Canada-Costa Rica FTA where export subsidies for agricultural goods have been eliminated since the entry into force of the agreement.

## *Work in progress*

Given their significance it seems useful to include in the discussion here some prospective agreements. In APEC, several bodies have been established responsible for exploring possible "collective actions" in a number of areas in order to achieve the free trade goal, and competition policy is among these topics. The main focus of work has been on information collection and dissemination and on technical assistance (see Chapter on Competition Policy). The implications of a "competition

framework” for several regulatory areas is one of the dimensions of the work program on competition policy, and contingency protection is part of this agenda.

In the FTAA context, a working group on subsidies, anti-dumping and countervailing duties was created. This group has engaged in a process of information collection and exchange, and discussions are ongoing on a Draft Agreement with the aim of making progress toward concluding negotiations by 2005. The terms of reference of the group commit to the achievement of a common understanding with the view to improving the operation and application of contingency protection “in order to not create unjustified barriers to trade in the Hemisphere.”

## NOTES

1. “Contingency Protection” refers here to measures taken by governments to counteract injury to domestic producers seen to arise from imports, including when such injury is determined to be caused by practices such as dumping or subsidisation.
2. See Hoekman (1998) and Tavares *et al.* (2001).
3. Recognising that subsidies may play an important role for economic development in developing economies, the Agreement exempts certain developing country members from this prohibition, and sets forth phase-out periods for export subsidies.
4. The propriety of exempting RTA members from safeguard application is under consideration in the WTO Committee on Regional Trade Agreements’ and several dispute settlement cases.
5. In *Wheat Gluten* [Investigation No. TA-201-67 (Publication 3088; March 1998)], for instance, the United States International Trade Commission, in excluding Canada, found that while Canada accounted for a substantial share of imports, imports from Canada did not contribute importantly to the injury caused by imports.
6. EFTA members retain also the right to resort to special safeguard measures for agricultural goods, in accordance with GATT.
7. The agreement also contains specific safeguards for agricultural products, which can be taken after consultation between members.
8. A similar approach has also been adopted in the context of the Europe Agreements between the EU and the Central and Eastern European countries. Indeed, these agreements contain the same provisions, with the only difference that they are one sided while the provisions contained in CEFTA are valid for all members because of the similar level of economic development.
9. It should be noted that duty waivers on imported parts and components tied to exportation, which are exempted from the restrictions of the WTO Agreement on Subsidies and Countervailing Duties, are restricted in intra-NAFTA trade. However, these restrictions apply to imported non-NAFTA originating goods (or goods substituted with identical or similar goods) that are used in the production of another good that is exported to a NAFTA country, but do not apply to goods originating in a NAFTA country.

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## *Chapter 9*

### **ENVIRONMENT**

*by*

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**Abstract:** This chapter provides an overview of how environmental considerations are addressed in regional trade agreements and partnerships (RTAs), and highlights similarities and differences between these agreements and relevant provisions in the WTO Agreements. It shows that provisions in RTAs relating to the environment reflect to a large extent the approach taken in the WTO Agreements. For example, many contain language in their preambles recognising the need for environmental protection and achievement of sustainable development objectives. One of the major differences between the WTO Agreements and some RTAs is the institutional structure. Whereas in the WTO provisions for environmental measures are integrated into the various Agreements and addressed in Committees, in a number of RTAs the environment is also the subject of separate agreements on environmental co-operation. As well, several RTAs that did not initially contain specific provisions on the environment have since created separate protocols or instruments to deal with the environment in general, or with specific environmental problems. The degree of harmonisation attempted in the area of environmental standards and regulations tends to vary according to whether the regional group's members aim at economic integration or simply trade facilitation. In three areas a few RTAs have gone beyond the multilateral trading system in the sense of including provisions preventing the relaxation of domestic environmental laws and the enforcement of those laws; defining the relationship between multilateral environmental agreements and the RTA; and requiring each Party to periodically prepare (and make publicly available) a report on the state of its environment.

## Key points

This section provides an overview of how environmental considerations are addressed in regional trade agreements and partnerships, and highlights similarities and differences between these agreements and relevant provisions in the WTO Agreements. For present purposes the survey includes not only provisions relating to protection of natural resources, but also protection of human, animal or plant life or health, and those relating to the promotion of sustainable development.

Protection of human health and of the natural environment has been recognised by the multilateral trading system as a legitimate objective of public policy since the original GATT treaty was signed in 1947, even though the word “environment” never actually appears in the text.<sup>1</sup> The relationship between trade and environmental policies was made much more explicit in the Uruguay Round, as reflected in the Preamble to the Agreement Establishing The World Trade Organization and in the various separate Agreements. In general, measures related to the protection of the environment are considered to be compatible with the general disciplines of the multilateral trading system.

Provisions in RTAs relating to the environment to a large extent reflect the approach taken in the WTO Agreements. Many contain language in their preambles recognising the need for environmental protection and achievement of sustainable development objectives. Many contain general exception clauses similar to those found in Article XX of the GATT, and the trend is to include language (often borrowed from other RTAs) affirming that the measures referred to in Article XX(b) of the GATT 1994 include environmental measures necessary to protect human, animal or plant life or health.

One of the major differences between the way that the environment is treated under the WTO Agreements and in some RTAs and regional co-operation organisations is the institutional structure. Whereas, in the WTO, provisions for environmental measures are integrated into the various Agreements and addressed in Committees, in a number of RTAs, the environment is also the subject of separate agreements on environmental co-operation. Several RTAs that did not initially contain specific provisions on the environment have since created separate protocols or instruments to deal with the environment in general, or with specific environmental problems. This is the case of MERCOSUR (Mercado Común del Sur), for example, for which a protocol on the environment is under preparation.

Although it is becoming more common to include side agreements that address environmental issues, wide divergences can be observed among RTAs in the institutions created to administer their agreements on environmental co-operation (AECs). The pioneering AEC, the North American Agreement on Environmental Co-operation (NAAEC, a side agreement to NAFTA) has its own Secretariat, with a mandate to document cases involving allegations of lax environmental enforcement.<sup>2</sup> More common are the many environmental co-operation agreements associated with RTAs that have been created to facilitate exchange of information and technical co-operation on matters related to the environment. Canada’s AEC with Costa Rica and the various “Partnership Agreements” between the EU and non-EU Mediterranean countries are prime examples. Indeed, technical co-operation on the environment - especially capacity building - would appear to be one of the areas in which RTAs have gone beyond what is provided for under the WTO Agreements.

Generally, bilateral or multilateral working groups or committees, rather than full-fledged Secretariats, are established to administer these types of agreements.

The institutional structure of RTAs in the environmental area naturally reflects their underlying aspirations, especially with regard to improvement in the levels and enforcement of environmental regulations. The degree of harmonisation attempted in the area of environmental standards and regulations tends to vary according to whether the regional group's members aim at economic integration or simply trade facilitation. The EU, the most economically integrated RTA, has moved progressively to harmonising standards and setting binding norms for all its member States. Other regional organisations, such as Asia Pacific Economic Co-operation (APEC) and the South African Development Community (SADC), have established collaborative programmes in specific fields, including the environment and natural resources management.

An important objective of many environmental co-operation agreements associated with Free-Trade Agreements (FTAs), especially those involving OECD Member countries, is preventing the relaxation of domestic environmental laws and the enforcement of those laws, especially for the purpose of attracting trade or investment. These commitments, as well as helping to preserve environmental quality, could also serve to lessen the risk that distortions in trade or investment might arise as a result of a country lowering its environmental standards. The language in Article 3 of the Canada-Chile Agreement on Environmental Co-operation (CCAEC) is typical: "each Party shall ensure that its laws and regulations provide for high levels of environmental protection and shall strive to continue to improve those laws and regulations." The US-Jordan FTA remains unique, inasmuch as its language admonishing Parties against relaxing domestic environmental laws (which appears in the FTA itself, not in a side agreement) explicitly recognises such practices as an inappropriate way to encourage *trade*. In NAFTA and the Canada-Chile Free-Trade Agreement (CCFTA), by contrast, the Parties recognise the inappropriateness of using such means to encourage *investment*.

In two other areas a few RTAs have gone beyond the multilateral trading system in the sense of including provisions not found in WTO Agreements: defining the relationship between multilateral environmental agreements and the RTA, and requiring each Party to periodically prepare (and make publicly available) a report on the state of its environment. Several RTAs contain provisions which aim to ensure that, in case of conflict (and subject to certain conditions), Parties' obligations under certain multilateral environmental agreements prevail over those under the RTA. In this regard, provisions in earlier agreements (*e.g.* NAFTA) may have had a "cascade" effect, re-appearing, in more or less similar terms, in bilateral agreements between one of the Parties to the RTA and a third country, as appears to have been the case in the FTA between Chile and Mexico. The requirement to produce "State-of-the-Environment" reports (using identical language) was also extended to the CCAEC after it was first included in the NAAEC.<sup>3</sup>

### **Provisions in WTO Agreements**

There is a multitude of provisions in WTO Agreements that are relevant to environmental measures, even though they may not explicitly mention environment. The ones highlighted in the paragraphs below constitute those most frequently referred to.

#### ***General objectives relating to the environment or sustainable development***

The concept of sustainable development appears prominently in the Preamble to the WTO Agreement, which states that the WTO has the objective of "raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, and expanding the production of and trade in goods and services, while allowing for the optimal use of the

world's resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance them and for doing so in a manner consistent with their respective needs and concerns at different levels of economic development.”<sup>4</sup> In the Preamble to the Doha Ministerial declaration, WTO Ministers, among other affirmations, strongly reaffirmed their commitment to the objective of sustainable development, asserted that “the aims of upholding and safeguarding an open and non-discriminatory multilateral trading system, and acting for the protection of the environment and the promotion of sustainable development can and must be mutually supportive.”

Protection of the environment also forms an integral part of the *Agreement on Agriculture*. In the preamble to that Agreement, Members acknowledged that commitments made under the reform programme should have regard for non-trade concerns, including food security and the need to protect the environment.<sup>5</sup>

### ***Institutions for the environment***

The Decision on Trade and Environment adopted in Marrakech in 1994 established a Committee on Trade and Environment (CTE) in the WTO, and suggested terms of reference and a work programme, together with a new institutional structure for its execution. In adopting this decision, Ministers considered that there should not be, or need not be, any policy contradiction between upholding an open, non-discriminatory and equitable multilateral trading system, and acting for the protection of the environment and the promotion of sustainable development. They also expressed their desire to co-ordinate policies in the field of trade and environment without exceeding the competence of the multilateral trading system, which is limited to trade policies and those trade-related aspects of environmental policies that could result in significant trade effects for WTO members. The CTE provides an important forum for Members to discuss issues at the interface between trade and the environment.<sup>6</sup> A separate Decision on Trade in Services and the Environment likewise commits the CTE to address environmental issues related to trade in services.

Other Committees also deal with questions relating to certain aspects of the environment. The Committee on Technical Barriers to Trade, for example, receives notifications on a diverse range of environmental measures related to such matters as fuels, energy saving, genetically modified organisms, organic agriculture, pesticides, fertilisers, wastes, eco-taxes, ozone-depleting substances, and hazardous materials. Through its formal question-and-answer process, members may elicit information additional to that provided in the notifications. The Committee on Sanitary and Phytosanitary Measures performs a similar function, for example, with respect to measures applied to prevent or limit damage within the territory of the Member from the entry, establishment or spread of pests.

### ***General exceptions relating to environmental protection or the conservation of natural resources***

Article XX of the GATT provides flexibility for Members to take legitimate exceptions to WTO disciplines for measures that would otherwise be inconsistent with their obligations:

“... nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:

- (b) necessary to protect human, animal or plant life or health;
- (d) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement, including those relating to customs enforcement, the enforcement of monopolies operated under paragraph 4 of Article II and Article XVII, the protection of patents, trade marks and copyrights, and the prevention of deceptive practices;

- (g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption; ...”.

However, measures related to the protection of the environment shall not constitute an obstacle to legitimate trade, nor disguised protectionism. Accordingly, the “chapeau” of Article XX states that such measures shall not be applied “in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade ...”. Compatibility of national and regional environmental regulations with the conditions set by Article XX has been subject to several key disputes in the GATT and WTO.<sup>7</sup>

In explaining its reasoning on the first environment-related case heard under the WTO, the WTO Appellate Body stated that “WTO Members have a large measure of autonomy to determine their own policies on the environment (including its relationship with trade), their environmental objectives and the environmental legislation they enact and implement. So far as concerns the WTO, that autonomy is circumscribed only by the need to respect the requirements of the General Agreement and the other covered agreements.”<sup>8</sup>

The Appellate Body has also noted that “the words of Article XX(g) ‘exhaustible natural resources’ were actually crafted more than 50 years ago. They must be read by a treaty interpreter in the light of contemporary concerns of the community of nations about the protection and conservation of the environment. While Article XX was not modified in the Uruguay Round, the preamble attached to the WTO Agreement shows that the signatories to that Agreement were, in 1994, fully aware of the importance and legitimacy of environmental protection as a goal of national and international policy.”<sup>9</sup>

Less-extensive language appears in Article XIV of the *General Agreement on Trade in Services* (GATS), which provides that “subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where like conditions prevail, or a disguised restriction on trade in services, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any Member of measures: (...) (b) necessary to protect human, animal or plant life or health; (...)”. Similar language appears in Article XXIII of the Agreement on Government Procurement, a plurilateral agreement annexed to the WTO Final Agreement.

Article 27:2 of the Agreement on *Trade-Related Aspects of Intellectual Property Rights* (TRIPS Agreement) allows Members to “exclude from patentability inventions, the prevention within their territory of the commercial exploitation of which is necessary to protect public order or morality, including to protect human, animal or plant life or health or to avoid serious prejudice to the environment, provided that such exclusion is not made merely because the exploitation is prohibited by their law.” Article 27:3(b) authorises Members to exclude from patentability “plants and animals other than micro-organisms, and essentially biological processes for the production of plants or animals other than non-biological and microbiological processes.”

### ***Standards and regulations***

Of relevance to most environmental measures are disciplines in the *Agreement on Technical Barriers to Trade* (“the TBT Agreement”), which addresses mandatory technical regulations, voluntary standards, and conformity assessment procedures. The TBT Agreement recognises in its Preamble that no country should be prevented from taking “measures necessary to ensure the quality of its exports, or for the protection of human, animal or plant life or health, of the environment ... at the levels it considers appropriate, subject to the requirement that they are not applied in a manner

which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail or a disguised restriction on international trade ... .”

Many measures covered by the *Agreement on Sanitary and Phytosanitary Measures* (“the SPS Agreement”), such as those regulating maximum residue limits for pesticides in food, or those relating to invasive species and health protection of wild fauna and flora, are closely associated with environmental policy. The SPS Agreement sets forth specific disciplines for such measures, among which are that such measures are “applied only to the extent necessary to protect human, animal or plant life or health”, are “based on scientific principles” and are “not maintained without sufficient scientific evidence” (Article 2.2), “do not arbitrarily or unjustifiably discriminate between Members” and are “not applied in a manner which would constitute a disguised restriction on international trade” (Article 2.3).

### ***Relationship with international environmental instruments***

The WTO Agreements contain no specific reference to Multilateral Environmental Agreements (MEAs) or other international environmental instruments. However, the Decision on Trade and Environment refers to the Rio Declaration on Environment and Development and to Agenda 21.<sup>10</sup> The relationship between the rules of the multilateral trading system and the trade measures contained in MEAs is part of the regular CTE’s work programme. The relationship between existing WTO rules and specific trade obligations set out in MEAs has been included in the Doha Development Agenda among the issues for negotiation in the area of trade and environment.<sup>11</sup>

In the *US-Shrimp* case the Appellate Body quoted, among others, the report of the CTE forming part of the Report of the General Council to Ministers on the occasion of the 1996 Singapore Ministerial Conference, which endorsed and supported “... multilateral solutions based on international co-operation and consensus as the most effective way for governments to tackle environmental problems of a transboundary or global nature. WTO Agreements and multilateral environmental agreements (MEAs) are representative of efforts of the international community to pursue shared goals, and in the development of a mutually supportive relationship between them, due respect must be afforded to both.”<sup>12</sup>

### ***Subsidies***

The Agreement on Subsidies and Countervailing Measures (ASCM) originally set out that certain subsidies are prohibited (Articles 3 and 4), others actionable (Articles 5 to 7) and a final category non-actionable (Articles 8 and 9).<sup>13</sup> The question of environmental subsidies was discussed by the negotiating group on subsidies and countervailing measures during the Uruguay Round. It was agreed that environmental subsidies would be placed in the non-actionable category along with subsidies for research activities and disadvantaged regions.<sup>14</sup>

This status was maintained for a period of five years (until the end of 1999) and has not been renewed.<sup>15</sup> Under Article 31 of the ASCM, the Committee on Subsidies and Countervailing Measures was entitled to prolong or modify the provisions of Article 8.2. While there was disagreement whether to extend the provisions or not, ultimately they lapsed due to a failure to reach consensus in the Committee.<sup>16</sup> At the November 2001 WTO Ministerial meeting in Doha, Qatar, agreement was reached to engage in negotiations aimed at clarifying and improving disciplines on Subsidies and Countervailing Measures; among other tasks, participants in these negotiations will “aim to clarify and improve WTO disciplines on fisheries subsidies, taking into account the importance of this sector to developing countries” (paragraph 28).<sup>17</sup>

Annex 2 of the Agreement on Agriculture,<sup>18</sup> which lists the different types of subsidies that are not subject to reduction commitments, covers a number of different types of measures relevant to the environment. Conditional on meeting the general criteria for such exemptions, Members are allowed to claim exemptions from reduction commitments for expenditures (or revenue foregone) in relation to programmes that provide services or benefits to agriculture or the rural community. These include: research in connection with environmental programmes, infrastructural works associated with environmental programmes, and payments under environmental programmes.

### ***Technical co-operation on the environment***

The WTO Agreements do not contain specific provisions on technical co-operation in the field of trade and environment. However, in paragraph 33 of the Doha Development Agenda, Ministers recognised the importance of technical assistance and capacity building in the field of trade and the environment to developing countries, in particular the least-developed countries. Over the past years the WTO Secretariat has conducted Regional Training Seminars on Trade and Environment in Asia, the Caribbean, the Mediterranean, Latin America, Central and Eastern Europe and Africa. The objective of these seminars was to increase awareness of the linkages between trade, environment and sustainable development; to inform countries of on-going discussions in the WTO and of relevant GATT/WTO rules; and to prepare participants for future discussions in the WTO's Committee on Trade and Environment or elsewhere in the organisation.

### **Provisions in Regional Trade Agreements**

RTAs that aspire mainly to economic co-operation seem to contain relatively general language relating to the environment. APEC, for example, does not involve binding rules. However, central to its modus operandi is a strong form of peer pressure, including increasingly elaborate and rigorous peer review mechanisms, which provides strong encouragement to its members to comply with agreed commitments. APEC Members define broad regional goals of common interest, the specific aspects of which are implemented unilaterally at the national level. At the other end of the spectrum is the European Union — an example of deep integration, involving supra-national authority — where protection of the environment plays a prominent role. Article 2 of the Treaty establishing the European Community, last updated through the 1998 Amsterdam Treaty (hereafter the Consolidated EC Treaty) enshrines the principle of sustainable development and includes a high level of protection and improvement of the environment among the Community's tasks. Article 6 of the Consolidated EC Treaty states that environmental protection requirements must be integrated into the definition and implementation of Community policies and activities — which include trade policies — in particular with a view to promoting sustainable development.<sup>19</sup>

Table 10.1 shows in summary form the diversity of provisions relating to the environment in 15 representative RTAs, comparing them with the WTO Agreements. In such a table, nuances and differences in detail are inevitably sacrificed for the sake of readability. Nonetheless, several general points emerge from it. One is that the preponderance of RTAs mention protection of the environment or promotion of sustainable development as an explicit objective and include general exception clauses for environmental measures. Another is that institutions to deal with the environment have often been created in connection with RTAs. In some cases these institutions are created with reference to the RTA itself; in others they are created by an associated agreement on environmental co-operation. Where an FTA has emerged from within a regional body with broader economic and political objectives, such as ASEAN or SADC, some of the associated environmental institutions - often set up to facilitate technical co-operation on transboundary natural resources - may actually pre-date the FTA.

### ***General objectives relating to the environment or sustainable development***

A number of RTAs contain general language referring to the protection of the environment, the conservation of exhaustible or non-renewable natural resources, or the promotion of sustainable development. Often the language is included in a general exceptions clause. In three reports produced since 1999 (WTO, 1999a, 2000 and 2001) the WTO Secretariat found environment-related provisions in over 60 notifications of RTAs; virtually all of them contain general provisions or general exceptions to trade in relation to environmental protection.<sup>20</sup>

The preamble to NAFTA, which entered into force in January 1994, ensures that the goals of the agreement are attained in a manner consistent with environmental protection and conservation, and includes among the goals of the agreement “the promotion of sustainable development” and the strengthening of the development and enforcement of environmental laws and regulations. In addition, the preamble reaffirms the importance of the conservation, protection and enhancement of the environment in their territories. It also reaffirms the Stockholm Declaration on the Human Environment of 1972 and the Rio Declaration on Environment and Development of 1992. Almost identical language is used in the two separate Agreements on Environmental Co-operation between the Government of Canada and the Governments of Chile and of Costa Rica — both side agreements to the respective bilateral FTAs (CCFTA and CCRFTA).

### ***Institutions for the environment***

Several RTAs have established standing working parties or committees for addressing environmental issues. Since 1994, APEC has held meetings of Ministers responsible for the environment, and the environment has been regularly on the agenda of the Economic Leaders’ meetings since the 1993 Blake Island meeting, where the “Sustainable Development Dialogue” was launched.<sup>21</sup> Several of APEC’s working groups and committees deal with environmental matters.<sup>22</sup>

There is only a minor reference to the environment in the Preamble of the MERCOSUR Agreement (Treaty of Asunción). However, several decisions of the Grupo Mercado Común and the Consejo de Mercado Común relate to issues such as pesticides, energy policies and transport of hazardous products. Meetings of the Member countries’ environment ministers laid a foundation for further co-operation in the region on these issues, as a result of which in 1992 an informal working group (Reunión especializada en Medio Ambiente) was established. This group issued basic guidelines on environmental policy, and over the years evolved into a Working Sub-Group on the Environment (SGT-6), which has discussed issues such as environment and competitiveness, non-tariff barriers to trade, and common systems of environmental information.<sup>23</sup>

Perhaps the most elaborate and integrated institution dealing specifically with the environment, is the North American Commission for Environmental Co-operation (NACEC), created in 1994 under NAAEC. The NACEC consists of a Council, a Secretariat, and a Joint Public Advisory Committee. The main tasks of the Council are: to serve as a forum of discussion, to oversee the implementation of the Agreement, to develop recommendations, and to promote and facilitate co-operation on environmental matters (Article 10). Article 13 states that the Secretariat may prepare public reports on any environmental matter, as long as they are not related to enforcement of laws. Under NAFTA, the latter’s Free Trade Commission and NACEC co-operate in a number of trade-environment issues, including avoiding trade-environment disputes.<sup>24</sup>

The model provided by NAFTA, and its side agreement, NAAEC, has since been adapted in the environmental co-operation agreements between Canada and other countries in the Americas. However, while the Canada-Chile Agreement on Environmental Co-operation (CCAEC) created a

Canada-Chile Commission for Environmental Co-operation (composed of a Council, a Joint Submissions Committee and a Joint Public Advisory Committee), unlike the NACEC, it is not a stand-alone organisation with its own secretariat. Rather, the Commission is supported by two national Secretariats, one established in each country. The more recent Agreement on Environmental Co-operation Between the Government of Canada and the Government of the Republic of Costa Rica (a side agreement to the CCRFTA) created neither a bilateral commission nor a dispute-settlement system. The main goal of the Agreement is to enhance bilateral co-operation. Official meetings will take place every other year, with ones on specific issues of technical co-operation much more frequent. The COMESA Treaty provides for the creation of a number of technical committees, which are responsible for the preparation and implementation of programmes in their respective sectors. One of them is the Technical Committee on Natural Resources and Environment.

### ***General exceptions relating to environmental protection or the conservation of natural resources***

As noted above, many RTAs contain general exceptions analogous to Article XX of the 1947 GATT. In some, such as ANZCERTA (which entered into force in 1983), the language is similar but not identical to that found in Article XX. Thus, providing that such measures are not used as a means of arbitrary or unjustified discrimination or as a disguised restriction on trade in the Area, nothing in ANZCERTA “shall preclude the adoption by either Member State of measures necessary ... (c) to protect human, animal or plant life or health, including the protection of indigenous or endangered animal or plant life;” or “(g) to conserve limited natural resources.” The distinguishing features of these two paragraphs are the explicit references to indigenous or endangered species and the qualification introduced by the word “limited” in paragraph (g).

Article 13 of the updated EFTA Convention states that the prohibition of quantitative restrictions on imports and exports, and measures having equivalent effect, shall not preclude the adoption of measures necessary to protect the health and life of humans, animals or plants and of the environment. However, these measures shall not constitute a means of arbitrary discrimination or a disguised trade restriction. Articles 27 and 33 provide for similar exceptions, respectively in the fields of investment and trade in services. Article 40 authorises a Member State to unilaterally take appropriate measures “if serious economic, societal or environmental difficulties of a sectoral or regional nature liable to persist are arising.” While this article bears some resemblance to Article XX of the GATT, its scope is more restricted since it applies only to quantitative restrictions.

Several RTAs or bilateral trade agreements involving Canada and the United States make explicit reference to Article XX. NAFTA, the US-Jordan FTA, the CCFTA, the CCRFTA and the CIFTA, for example, all contain identical language affirming that “the measures referred to in Article XX(b) of the GATT 1994 include environmental measures necessary to protect human, animal or plant life or health, and that Article XX(g) of the GATT 1994 applies to measures relating to the conservation of living and non-living exhaustible resources.”<sup>25</sup> In addition, NAFTA states that the exceptions of Article XX of the GATT are incorporated into and made part of the Agreement.

### ***Standards and regulations***

Several RTAs contain provisions on standards similar to those contained in the SPS and TBT Agreements. Under Chapter 7(B) of NAFTA, for example, each Party may adopt, maintain or apply any sanitary or phytosanitary measure necessary for the protection of human, animal or plant life or health in its territory, including a measure more stringent than an international standard, guideline or recommendation. And each party may, in protecting human, animal or plant life or health, establish the level of protection it considers appropriate.<sup>26</sup> To avoid abuses, each Party must ensure that any sanitary or phytosanitary measure it adopts does not arbitrarily or unjustifiably discriminate among

like goods. A measure must be based on scientific principles, not maintained where there is no longer scientific basis for it, be based on a risk assessment, as appropriate to the circumstances, be applied only to the extent necessary to achieve its appropriate level of protection and not represent a disguised restriction on trade. In conducting a risk assessment, Parties shall take into account a variety of factors, including relevant scientific evidence as well as relevant ecological and other environmental conditions. As a basis for their sanitary and phytosanitary measures, Parties are to use relevant international standards. However, the Agreement specifies that the latter shall not be construed to prevent a Party from adopting, maintaining or applying measures that are more stringent than the relevant international standards. The annex to the updated EFTA Convention on SPS measures requires that the Member States apply the WTO SPS Agreement and its provisions on the environment. Several references to environmental considerations are also made in the annex on mutual recognition in relation to conformity assessment (Art. 15 of the updated Convention).

Chapter 9 of NAFTA applies to standards-related measures other than those covered by Chapter 7. In it, the Parties affirm with respect to each other their existing rights and obligations relating to standards-related measures under the GATT Agreement on Technical Barriers to Trade and all other international agreements, including environmental and conservation agreements, to which those Parties are a member. As under Chapter 7, a Party may establish the levels of protection it considers appropriate in pursuing its legitimate objectives of safety or protection of human health, animal or plant life or health, the environment or consumers, subject to respecting obligations on non-discrimination and not creating unnecessary obstacles to trade. The provisions on international standards are similar to those in chapter 7. In an arbitration case brought by a Party under chapters 7 or 9, the Party challenging the law or regulation carries the burden of proof, whereas under the GATT, a Party must prove that its laws are consistent with the provisions of Article XX(b) or (g).<sup>27</sup>

Maintenance or progressive improvement of environmental standards and regulations is an aim expressed in several RTAs or their associated environmental agreements. SADC's Protocol on Trade (Article 17(3)), for example, while encouraging its members to make their environmental and other standards compatible with those of other members of the RTA, and with relevant international standards, notes that this should be done "[w]ithout reducing the level of safety, or of protection of human, animal or plant life or health, of the environment or of consumers ... ." The NAAEC, the Agreements on Environmental Co-operation between Canada and Chile and between Canada and Costa Rica, and the US-Jordan FTA, go beyond discouraging relaxation of standards and include language on the enforcement of domestic environmental laws.

Obligations relating to environmental measures are set out in Article 3 of NAAEC, which recognises the right of each party to establish its own levels of domestic protection, and agrees that this level should be high. The parties commit themselves to publish their environmental regulations (Article 4), enforce them (Article 5), and ensure access of private parties to remedies (Article 6) respecting certain procedural guarantees (Article 7).<sup>28</sup> Under Article 14 of the NAAEC, the NACEC may consider a submission from any non-governmental organisation or person asserting that a Party is failing to effectively enforce its environmental law, to the extent that the submission meets specific criteria set out in the article. If the Secretariat of the NACEC considers that the submission, in the light of any response by the Party, warrants developing a factual record, the Council may authorise it to do so, and eventually to release it to the public (Article 15). No other sanction is available under this procedure.

A different procedure is the State-to-State dispute settlement procedure, applicable if a Party persistently fails to effectively enforce its environmental law. In such cases other Parties may request consultations and engage in a formal dispute settlement process (Article 22).<sup>29</sup> If Council mediation and conciliation fails, an arbitral panel may consider the matter (Articles 23 and 24). If the Party does

not comply with the recommendations of the panel, the latter may impose monetary penalties (Article 34)<sup>30</sup> and, ultimately, suspension of NAFTA benefits sufficient to collect the monetary enforcement (Article 36).<sup>31</sup>

Provisions in the bilateral Environmental co-operation agreements between Canada and Chile and Canada and Costa Rica relating to enforcement differ in important ways from the NAAEC. Although both the CCAEC and the NAAEC establish “monetary enforcement assessments” (fines) for punishing a persistent pattern of failure to effectively enforce its environmental law only the NAAEC allows for trade sanctions (Suspension of Benefits, Article 36) in case a party fails to pay the fine. A second difference is that the CCAEC allowed Chile to decide an implementation schedule for its environmental laws. (Under the NAAEC, Mexico did not have this option.) The later environmental side-agreement to the CCRFTA has no provision for either sanctions or fines. Rather, enforcement is left as a purely national matter, and nothing in the Agreement empowers a Party’s authorities to undertake environmental law-enforcement activities in the territory of the other Party.

The US-Jordan FTA contains language relating to the inappropriateness of relaxing domestic environmental laws (and their enforcement) in order to attract trade, but unlike in the case of NAFTA and the CCFTA, these provisions form an integral part of the FTA. (In these other FTAs, it is investment, not trade, that the Parties are admonished not to encourage through relaxing environmental measures.) Moreover, while recognising the right of each Party to establish its own levels of domestic environmental protection and environmental development policies and priorities, the agreement requires that each Party strive to ensure that its laws provide for high levels of environmental protection, that it strive to continue to improve those laws, and that it enforces those laws effectively. A Party is deemed to be in compliance with the enforcement provision if an action or inaction appears reasonable, or results from a genuine decision regarding the allocation of resources. However, no actual remedies are specified in the case of non-compliance.

### ***Relationship with international environmental instruments***

Several recent RTAs, or environmental side agreements to RTAs, for example, the CCRAEC and the CCAEC, specifically address the relationship with environmental and conservation agreements. NAFTA states that, in the event of inconsistency between its provisions and specific trade obligations under certain specified environmental and conservation agreements<sup>32</sup>, the latter shall prevail to the extent that there is an inconsistency — provided that, where a Party has the choice among equally effective and reasonably available means of complying with such obligations, the Party chooses the alternative that is least inconsistent with the provisions in NAFTA. The Chile-Mexico agreement contains a very similar provision. Bilateral agreements between Georgia and various countries in the region<sup>33</sup> preserve the right of a Party to implement measures concerning the protection of human health, animals, plants and the environment that are necessary for the fulfilment of international agreements.

### ***Subsidies***

Article 704 of the NAFTA Agreement calls upon the signatory parties to ensure that their domestic support measures for agriculture: (a) have minimal or no trade-distorting or production effects; or (b) are exempt from any applicable domestic support reduction commitments that may be negotiated under the GATT. The latter criterion could be read as implicitly allowing for expenditures on certain types of environmental programmes, as set out in Annex 2 of the Agreement on Agriculture.

### *Technical co-operation on the environment*

Many RTAs contain side agreements or statements of intent to facilitate technical co-operation in the area of the environment. These have become particularly commonplace in bilateral free-trade agreements between OECD Member countries and non-member countries, and usually focus on capacity building in the less-developed of the two countries. The United States-Jordan Joint Statement on Environmental Technical Co-operation, for example, focuses on strengthening human and institutional capacity and improving management of Jordan's water and other natural resources upon which the country's development depends. In the agreements signed by Canada the commitment to environmental co-operation is spelled out in detail. While the framework of objectives and obligations provides a focus for implementation of the agreements, the associated co-operation activities form a major focus of ongoing implementation. The side agreements create an ongoing environmental partnership which parallels the economic partnership created by the trade agreement and deepens the overall relationship. In the context of the CCFTA, there has been a considerable amount of support provided to Chile for capacity building and co-operation, focusing on such areas as compliance and enforcement of environmental regulations, environmental certification, and environmental assessment of trade negotiations. Even more of the same is envisioned under the CCRFTA.

A substantial part of NACEC's work is related to co-operation (*e.g.* management of chemicals, harmonisation of toxic release data, air pollutant inventories, labelling and certification, etc.). Technical co-operation relating to the environment is also a hallmark of several partnership agreements between the EU and other countries or regions. Under the ACP-EC Partnership Agreement (Cotonou Agreement), signed in 2000, sustainable management of natural resources and environment shall be applied and integrated at all levels of the partnership. A number of provisions focus specifically on the environment, and provide for co-operation in this field, including institutional development and capacity building.<sup>34</sup> The Short and Medium Term Priority Environmental Action Programme (SMAP) for the Mediterranean, adopted in 1997, provides a framework for environmental protection in the region. It aims to guide investments to a number of specific environmental priority areas (*e.g.* waste and water management, coastal zone management, desertification and biodiversity loss) and calls for the adoption and implementation of legislation and regulatory measures, in particular preventive measures and appropriate environmental standards, while discussions continue over a proposed Mediterranean Free Trade Zone.<sup>35</sup> In the framework of EU-MERCOSUR negotiations (which started in 2000 and are still underway), co-operation in the field of agriculture aims at promoting mutual trade in agricultural products, increasing the compatibility of legislation so as to prevent the creation of trade barriers. In this context, it looks to implement certain environmental measures and an agrarian reform, particularly in the poorest regions in order to enable them to engage in both sustainable and environmentally friendly agriculture.

Technical co-operation in APEC has involved not only governments but also local authorities and the business and private sector. A wide range of projects have been conducted by various APEC working groups. The Energy Working Group has, among other initiatives: sponsored a demonstration project in the People's Republic of China involving the use of coal-mine gas; organised technical training courses in clean-coal technologies; and conducted colloquiums on technical issues relating to the setting of minimum energy-performance standards.

The Japan-Singapore Economic Partnership Agreement contains a chapter on cooperation in the field of science and technology including life sciences and environment. The forms of co-operative activities specified in the Agreement are exchange of information and data, joint seminars, workshops and meetings, visits and exchange of scientists, technical personnel or other experts, and implementation of joint projects and programmes.

A few RTAs contain provisions relating to co-operation in the management of natural resources. Chapter 16 of the COMESA Treaty, for example, provides for co-operation in the development of natural resources, environment and wildlife. In the COMESA Treaty, Parties commit to accede to relevant international environmental and conservation agreements. In 1999 the Ministers of another African RTA, SADC (which contains several members that are also members of COMESA), similarly adopted a Wildlife Conservation and Law Enforcement Protocol. These provisions aim at ensuring the conservation and sustainable use of wildlife resources in their respective regions. Both the COMESA Chapter and the SADC Protocol encourage co-operation at the national level and the development, as far as possible, of common approaches to the conservation and sustainable use of wildlife. They also make provision for collaboration between member states to achieve the objectives of international agreements applicable to the conservation and sustainable use of wildlife. In addition, SADC Protocol requires that member states ensure that activities within their borders do not cause damage to the wildlife resources of other states or areas beyond the limits of national jurisdiction.<sup>36</sup>

### ***Work in progress***

The current publicly available draft of the FTAA contains no specific chapter dealing with the environment. Negotiators are, however, working within the framework of the nine established FTAA negotiating groups (Agriculture, Market Access, Investment, Government Procurement, Services, Dispute Settlement, Intellectual Property, Competition Policy, and Subsidies, Anti-dumping, and Countervailing Duties), as well as within the Trade Negotiations Committee, to identify and incorporate relevant environmental considerations into the FTAA.

For the past several years, the MERCOSUR Working Sub-Group on the Environment has been involved in negotiations of an environmental Protocol to the MERCOSUR Agreement, a draft of which was finalised in June 2001. Its principles and norms are expected to have a considerable influence on the entire regional regime set up under the Agreement.<sup>37</sup> The draft Protocol provides for upward harmonisation of environmental management systems and increased co-operation on shared eco-systems; it includes provisions on instruments for environmental management, including quality standards, environmental impact assessment methods; environmental monitoring and costing; environmental information systems and certification processes; and provisions on protected areas and on conservation and sustainable use of natural resources.<sup>38</sup>

In connection with on-going negotiations on an FTA between the United States and Chile, the governments of the two countries are considering a range of elements that could form the basis of an environmental co-operation agreement.<sup>39</sup> The discussions between the Parties regarding environmental co-operation have not been exhaustive or conducted with the intention of prejudging how environmental issues will be addressed in the context of the proposed FTA. Any environmental co-operation work program would be agreed to by both Parties, reviewed on a periodic basis, and amended as appropriate.

Discussions in respect of a separate agreement on environmental co-operation are taking place between Canada and Singapore in connection with a possible FTA between the two countries and between Canada and four Central American countries (excluding Costa Rica and Panama). In the latter, the environment will be dealt with through parallel agreements (International Trade Daily, 2001). It will likely follow the model of the CCRFT agreement on environmental co-operation (Araya, 2001). New Zealand and Hong Kong have agreed, in their initial exploratory discussions on the principles and objectives for negotiating a closer economic partnership agreement, that trade and environment would be an element to be included in negotiations.

**Table 9.1 Linkages with the environment in the WTO Agreements and selected RTAs**

Name of agreement (associated environmental agreement)	Environmental protection or promotion of sustainable development specified as an objective	Includes general exception clause for environmental measures <sup>1</sup>	RTA (or associated agreement) establishes institution(s) to deal with environmental issues	Relationship between RTA and international environmental obligations specified	RTA (or associated agreement) provides for technical co-operation on environment	RTA (or associated agreement) aims to prevent lowering of environmental standards and regulations
WTO Agreements	YES	YES	YES	no	YES	no
AFTA	YES <sup>2</sup>	YES	YES <sup>3</sup>	no	YES <sup>3</sup>	no
APEC	YES	no	YES <sup>4</sup>	no	YES	no
CCFTA (CCAEC)	YES	YES	(YES)	(YES)	(YES)	(YES) <sup>5,6</sup>
CCRFTA (CCRAEC)	YES	YES	no	(YES)	(YES)	(YES) <sup>5</sup>
CIFTA	no	YES	no	no	no	no
COMESA	YES	no	YES	no	YES	no
EEA	YES	YES <sup>7</sup>	YES	no	YES	YES
EU-Mexico FTA <sup>8</sup>	YES	YES	(YES) <sup>9</sup>	no	(YES) <sup>9</sup>	no
EFTA	YES	YES	no	no	no	no
JSEPA	no	YES	no	no	YES	no
MERCOSUR	YES	no	YES	no	YES	no
NAFTA (NAAEC)	YES	YES	(YES)	(YES)	(YES)	(YES) <sup>5,6</sup>
NZ-Singapore CEP	no	no	no	no	no	no
SADC, Protocol on Trade	YES <sup>10</sup>	YES	(YES)	no	(YES)	YES
US-Jordan FTA	YES	YES	YES <sup>11</sup>	no	YES <sup>11</sup>	YES

(YES) = contained in associated environmental agreement.

1. More specifically, measures necessary to protect human, animal or plant life or health, and measures relating to the conservation of exhaustible natural resources.

2. As affirmed by ASEAN Ministers in the Manila Declaration on the ASEAN Environment (30 April 1981) and subsequent Agreements on the Environment.

3. Specific activities are administered by ASEAN.

4. Various working groups deal with environmental matters, such as those on energy, fisheries and marine resources conservation.

5. Contains language relating to the enforcement of environmental regulations.

6. Establishes a dispute-settlement procedure, sanctions in environment-related matters, or both.

7. Article 75 of the Agreement on the European Economic Area states that "The protective measures referred to in Article 74 shall not prevent any Contracting Party from maintaining or introducing more stringent protective measures compatible with this Agreement."

8. Technically, Decision 2/2000 of the EU-Mexico Joint Council.

9. As anticipated under Article 21 (Co-operation in agriculture and the rural sector), Article 23 (Co-operation on Energy), Article 24 (Co-operation on the environment and natural resources) and Article 27 (Regional Co-operation) of the Economic Partnership, Political coordination and Cooperation Agreement (usually named the Global Agreement between the European Community and its Member States and Mexico).

10. Referred to in the Declaration and Treaty of SADC.

11. Through the United States - Jordan Joint Statement on Technical Environmental Co-operation and through selected technical environmental co-operation programmes.

## NOTES

1. A history of the incorporation of environmental concerns in GATT negotiations can be found in WTO Secretariat (1999b).
2. Upon approval by the Council, which is composed of the three Parties' environment ministers.
3. Since NAFTA, Canada's approach in signing regional or bilateral trade agreements has been to address the environment both in trade agreements as well as in parallel environmental cooperation agreements. The provisions in the trade agreements vary slightly, but generally they promote sustainable development, mutually supportive economic and environmental policies, and protection of a country's legitimate right to regulate in the public interest. They also generally seek to discourage waiving or derogating from laws in order to encourage trade or investment. And they recognise that where conflicts with the trade agreement occur, the obligations provided for in certain multilateral environmental agreements shall prevail to the extent of the inconsistency.
4. In its interpretation of Article XX of the GATT, and making reference to the objective of sustainable development in the preamble of the WTO Agreement, the Appellate Body has said that "this preambular language ... must add colour, texture and shading to our interpretation of the agreements annexed to the WTO Agreement, in this case, the GATT 1994. ... It is proper for us to take into account, as part of the context of the chapeau, the specific language of the preamble to the WTO Agreement." *US-Shrimp*, paragraphs 153 and 155 of the Appellate Body report.
5. See also Article 20, which refers to non-trade concerns mentioned in the Preamble.
6. Fourth WTO Ministerial Conference, WTO Secretariat Background Note, Background paper No. 3 submitted by the WTO to the Commission on Sustainable Development acting as the preparatory committee for the World Summit on Sustainable Development; third preparatory session 25 March–5 April 2002.
7. Under the GATT, six panel proceedings involving an examination of environmental measures or health related measures under Article XX have been completed: *United States – Prohibition of Imports of Tuna and Tuna Products from Canada*, adopted on 22 February 1982, *Canada – Measures affecting Exports of Unprocessed Herring and Salmon*, adopted on 22 March 1988, *Thailand – Restrictions on Importation of and Internal Taxes on Cigarettes*, adopted on 7 November 1990, *United States-Restrictions on Imports of Tuna*, circulated on 3 September 1991, not adopted; *United States – Restrictions on Imports of Tuna*, circulated on 16 June 1991, not adopted; and *United States – Taxes on Automobiles*, circulated on 11 October 1994, not adopted. So far, under the WTO, three disputes led to the adoption of panel and Appellate Body reports: *United States – Standards for Reformulated and Conventional Gasoline* (hereafter *US-Gasoline*), Appellate Body Report and Panel Report, adopted on 20 May 1996.; *United States – Import Prohibition of Certain Shrimp and Shrimp Products* (hereafter *US-Shrimp*), Appellate Body Report and Panel Report adopted on 6 November 1998. and *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, Appellate Body Report and Panel Report adopted on 5 April 2001. GATT/WTO dispute Settlement Practice related to GATT Article XX, Paragraphs (b), (d), and (g). WT/CTE/203, 8 March 2002. See also Rao (2001).
8. *US-Gasoline*, pages 29-30 of the Appellate Body report.

9. *US-Shrimp*, paragraph 129 of the Appellate Body report.
10. Decision on Trade and Environment, preamble and paragraph 2 (b).
11. Paragraph 31(i) of the Doha Development Agenda (DDA). The other issues for negotiation in the area of environment mentioned in paragraph 31 of the DDA are: (ii) procedures for regular information exchange between MEA Secretariats and the relevant WTO Committees, and the criteria for granting observership status; and (iii) the reduction or, as appropriate, elimination of tariff and non-tariff barriers to environmental goods and services.
12. Report (1996) of the Committee on Trade and Environment, WT/CTE/1, 12 November 1996, para. 171, Section VII of the Report of the General Council to the 1996 Ministerial Conference, WT/MIN(96)2, 26 November 1996, quoted in paragraph 168 of the *US-Shrimp* Appellate Body Report.
13. A definition of a “subsidy” for the purposes of the ASCM is provided for in Article 1. It contains three basic elements. A “subsidy” only exists if: (a) a financial contribution is provided *and* (b) the contribution is made by a government or a public body within the territory of a WTO Member *and* (c) that contribution confers a benefit.
14. Under Article 8.2(c) of the ASCM, environmental subsidies were allowed for “assistance to promote adaptation of existing facilities to new environmental requirements imposed by law and/or regulations which result in greater constraints and financial burden on firms, provided that the assistance: (i) is a one-time non-recurring measure; and (ii) is limited to 20 per cent of the cost of adaptation; and (iii) does not cover the cost of replacing and operating the assisted investment, which must be fully borne by firms; and (iv) is directly linked to and proportionate to a firm’s planned reduction of nuisances and pollution, and does not cover any manufacturing cost savings which may be achieved; and (v) is available to all firms which can adopt the new equipment and/or production processes.”
15. See Committee on Subsidies and Countervailing Measures, “Minutes of Special Meeting”, 20 December 1999, WT/G/SCM/M/22; and Committee on Subsidies and Countervailing Measures, “Minutes of Regular Meeting”, 1-2 November 1999, WT/G/SCM/M/24.
16. In their 14 November 2001 decision on “Implementation-related issues and concerns” [WTO (2001)], however, WTO Ministers took note of the proposal to treat measures implemented by developing countries with a view to achieving legitimate development goals, “such as ... development and implementation of environmentally sound methods of production” as non-actionable subsidies, and agreed that this issue should be addressed during the course of the negotiations [WTO, (2001)]. Ministers also urged that, during the negotiations, members exercise due restraint with respect to challenging such measures.
17. Fisheries subsidies are also referred to in paragraph 31 of the Doha Development Agenda.
18. See also Article 20, which refers to non-trade concerns mentioned in the Preamble.
19. EU integration has also influenced environmental policies in EFTA. Most EFTA States have strengthened their environmental policies through either bilateral (EC-Switzerland Free Trade Agreement, 1972, and the seven bilateral agreements between Switzerland and the EU) or plurilateral agreements (EEA) with the European Union. In particular, the EEA basically makes EU legislation on the environment applicable to Iceland, Liechtenstein and Norway, in addition to Austria, Finland and Sweden, which have subsequently become EU Member States. An Agreement amending the original 1960 EFTA Convention (Stockholm Convention), signed in Vaduz in June 2001, reflects all provisions on the environment contained in WTO law. However, some provisions of the updated Convention and its annexes seem to be influenced more by the EU or local environmental legislation

than WTO law. For instance, the updated Convention provides for an environmental safeguard, which does not exist in the WTO.

20. For example, the SADC calls upon signatories to “[a]chieve sustainable utilization of natural resources and effective protection of the environment”; the Preamble of the Vaduz Convention (the updated EFTA Convention, 2001, hereafter “the updated EFTA Convention”) affirms that the Member States recognise “the need for mutually supportive trade and environment policies in order to achieve the objective of sustainable development”; the treaty establishing MERCOSUR mentions the achievement of economic development and social justice as primary aims, while noting that these objectives must be achieved by making optimum use of available resources and preserving the environment.
21. Already in 1991, the Seoul Declaration included a reference to the concept of sustainable growth.
22. Because it is considered a cross-cutting issue, APEC has no separate working group on the environment.
23. UNEP/IISD (2000), and Leichner (2001).
24. See also paragraph [432] below.
25. Respectively, Article 2101, Article 12(1), Article O-01(1), Article XIV.1 and Article 10.1.
26. Article 710 provides that the provisions of Article XX(b) of the GATT as incorporated into Article 2101(1) (General Exceptions) does not apply to any sanitary or phytosanitary measures.
27. Hufbauer *et al.* (2000).
28. The NAAEC also sets out obligations relating to transparency of environmental information, research, and even the types of instruments to be used. Under it, each party commits, with respect to its own territory, to: “(a) periodically prepare and make publicly available reports on the state of [its] environment; (b) develop and review environmental emergency preparedness measures; (c) promote education in environmental matters, including environmental law; (d) further scientific research and technology development in respect of environmental matters; (e) assess, as appropriate, environmental impacts; and (f) promote the use of economic instruments for the efficient achievement of environmental goals.”
29. The process described in Arts 22-36 of NAAEC is distinct from the dispute settlement procedure outlined in Chapter 20 of NAFTA.
30. Monetary enforcement assessments can be up to 0.007% of total trade in goods between the disputing parties during the most recent year for which data are available.
31. Trade sanctions cannot be imposed against Canada. Instead, Canada has agreed to make the panel’s determination legally binding under the Canadian courts (Hufbauer *et al.*, 2000).
32. These are set out in Article 104: The Convention on International Trade in Endangered Species of Wild Fauna and Flora, 1973; the Montreal Protocol on Substances that Deplete the Ozone Layer, 1987; the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, 1989 (when it enters into force for all NAFTA parties); and the Canada-United States Agreement Concerning Transboundary Movement of Hazardous Waste, 1986; and the Mexico-US Agreement on Co-operation for the Protection and Improvement of the Environment in the Border Area, 1983.

33. Ukraine, Turkmenistan, Azerbaijan, Kazakhstan. Information taken from the WTO Environmental Database for 2001.
34. Article 32 of the Cotonou Agreement. A Joint Declaration on Trade and Environment (Declaration IX) and an ACP Declaration on Trade and Environment (Declaration X) are annexed to the Agreement.
35. Insausti Muguruza (2001).
36. Taken from SADC web page.
37. Ryan (2000); Onestini (1999).
38. UNEP/IISD (2000).
39. Over the years the Governments of the two countries have co-operated in many areas, including air quality, solid-waste management, forestry, fisheries, mining, agriculture, national parks, and scientific research.

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*Chapter 10*

**RULES OF ORIGIN**

*by*

**Evdokia Moisé**

**Abstract:** This chapter surveys provisions concerning rules of origin in a selection of 14 regional trade agreements (RTAs). It highlights how these provisions compare with WTO principles governing the application of rules of origin contained in the WTO Agreement on Rules of Origin. WTO work on harmonisation of detailed rules of origin, which could serve as a model for RTA rules of origin negotiated in the future, is not yet completed, thus making comparisons between RTA and WTO provisions extremely difficult. However, it appears that the same basic mechanisms or criteria are used by all reviewed RTAs, although in varying combinations. These mechanisms do not seem more complex than similar mechanisms used at the domestic level, with the exception of sensitive sectors, where RTA schemes have sometimes “institutionalised” protectionist concerns and caused trade diversion in favour of the RTA region.

## Key points

It is difficult to draw firm comparisons between current WTO provisions on rules of origin (the provisions contained in the WTO Agreement on Rules of Origin) and corresponding provisions in RTAs, because of the very different nature of the two types of provisions. RTAs contain detailed rules of origin, while WTO provisions mainly introduce general principles “*to govern the application of rules of origin*” and not detailed rules of origin as such. The comparison may be easier once the WTO work on harmonisation has been completed and detailed rules of origin, harmonised at the WTO level, have been created. However, even after the completion of that work, the resulting *non-preferential* WTO rules will not be readily comparable to the RTA rules of origin, which are mainly *preferential*<sup>1</sup>.

One of the criticisms often made of RTAs is that they necessarily lead to the proliferation of preferential rules of origin and so add complexity to the trading system and potentially make harmonisation more difficult. The RTAs described here do not seem unambiguously to support this observation. Looked at first from the point of view of RTA members:

- On the one hand it is not uncommon for a single country to have to apply several different sets of rules, depending on the RTAs the country belongs to. For instance, certain types of goods produced in Mexico, both a NAFTA member and a partner in the EU-Mexico agreement, may be subject to two rather different origin determination mechanisms depending on whether they are shipped to North America or Europe, although the Mexican Authorities have made sure that similar principles are applied in the context of both RTAs (see also the next point). For RTA members a question arising is whether expected benefits from preferential access in other partners’ markets will outweigh the inconvenience. Related production and sourcing decisions by companies already established or considering investing in participating countries may vary accordingly. Viewed from the perspective of RTA participants the proliferation and overlap of differing systems of rules of origin is perhaps less a problem of systemic incompatibility than of increased transaction costs for involved traders.
- On the other hand it appears that the same basic mechanisms or criteria are used by all RTAs, although in varying combinations. As RTAs proliferate, a small number of models, initially formulated by major trading partners such as the US or the EU, are replicated in the new agreements concluded between them and third countries. Cumulation initiatives further expand the coverage of these models and promote harmonisation among participants. Most of Europe now benefits from the effects of the European cumulation area and similar benefits with respect to preferential access should probably be expected in the Americas once the FTAA process is concluded.

From the perspective of non-participating countries the stakes are obviously different than for participating countries. Although the increased transaction costs arising from the proliferation of rules of origin affect third country traders too, for them there is the added question of the more or less restrictive character of the rules in discouraging external sourcing. Most RTA members make sure that RTA provisions, including rules of origin, are appropriately published and publicly disseminated. If, however, such rules are not sufficiently transparent or predictable, they can represent a trade barrier in

their own right. This may also be the case if their discretionary character is subject to protectionist capture. Moreover, where the rules of origin allow minimal or no third country inputs (as is the often the case with respect to sensitive sectors), producers in RTA members have a strong incentive to avoid such inputs so as to preserve the preferential status of their own products. In this case third country supplies are not simply denied the preferential access provided for by the RTA, in practice they often lose access altogether. In addition to the resulting diversion of trade flows, this situation may provide a considerable incentive for potential investors to establish within the RTA region, rather than at its periphery.

Third country inputs may be widely allowed in several sectors among those covered by RTAs. For instance, in the context of NAFTA, printed circuits assemblies for magnetic tape recorders and other sound recording apparatus have to be produced in the NAFTA region but third country inputs can be used without limitation for their production. It is mainly with respect to sensitive sectors, like textiles and clothing, agricultural or automotive products where the comparison of RTA schemes with the situation that would have prevailed without them leads to concerns about protectionist capture. Often these sectors have been left out of the agreements altogether. In other cases, although detailed product-specific rules have been introduced in order to bring transparency and predictability and reduce the capture potential of more discretionary methods of determination, protectionist interests may have found their way into the texts at the drafting stage and thus been consolidated and “institutionalised” through this incorporation. The stringency of special sectoral rules ensures that third country inputs have very restricted access to the market, especially inputs of a higher value or level of processing. Sometimes the complexity of these rules is such that it may be difficult even for products from the beneficiary countries to qualify.

Although it appears that RTA preferential systems contain more restrictive rules than non-preferential systems adopted domestically by the Parties to an RTA, it is not clear that domestic preferential schemes, such as the GSP schemes, are less restrictive than comparable RTA schemes. Indeed, it has been argued that the potential advantage of such domestic preferential schemes is seriously curtailed by the complication of applicable rules of origin and the difficulty in qualifying under those rules. There seems therefore to be an increase in complexity when moving from non-preferential to preferential schemes, be they regional or domestic.

The harmonisation to be undertaken in the WTO may lessen the risks inherent in rules of origin by serving as a model for RTAs negotiated in the future. But at the same time, WTO activity will inevitably be influenced itself by the approach to rules of origin contained in existing RTAs, particularly by the models promoted by the major trading partners. A question arising is whether any move to simplify or lessen the restrictive effects of preferential rules of origin is more likely to result from the establishment of a world-wide harmonised system of rules of origin *per se*, or rather from further liberalisation of trade at the multilateral level.

## **Provisions in the WTO: The Agreement on Rules of Origin**

### ***Scope and coverage***

WTO provisions on “rules of origin” mainly set general principles on the elaboration and use of rules of origin applied by WTO Members in the context of goods trade. They do not introduce detailed harmonised rules of origin to be used by WTO Members. However, recognising the importance of such rules for enhancing transparency and predictability in world trade, the Agreement on Rules of Origin provided for harmonisation to be undertaken by the WTO Committee on Rules of Origin (CRO) and the WCO Technical Committee on Rules of Origin (TCRO). Work on harmonisation, initially due to be completed by July 1998 but extended since, has mainly focused on the concepts of

“*wholly obtained*”, for goods produced in a single country, and of “*last substantial transformation*”, if more than one country is involved in the production of the good. The principal criterion to be used for defining substantial transformation is the change of tariff heading (CTH), based on the harmonised system (HS) nomenclature; however, supplementary criteria such as the degree of value-added (VA) or the use of a specific process (SP) may also be used. In the context of WTO work on trade facilitation, several WTO Members have stressed that the achievement of harmonised rules of origin may prove to be the single most important measure of trade facilitation adopted at the multilateral level.

The WTO Agreement on Rules of Origin applies to *non-preferential* rules of origin used in commercial policy instruments such as the application of MFN treatment under GATT Articles I, II, III, XI and XIII; anti-dumping and countervailing duties; safeguard measures; origin marking requirements; discriminatory quantitative restrictions or tariff quotas; or in the context of government procurement. *Preferential* rules of origin are not covered by those provisions, although in a Common Declaration annexed to the Agreement WTO Members agree to observe the same principles when they use rules of origin to determine whether goods qualify for preferential treatment (with the obvious exception of principles that are incompatible with the concept of a preferential trade regime, such as the principle of non-discrimination).

WTO provisions on rules of origin do not cover rules on services or investment. However, GATS Article XXVII acknowledges the right of Members to deny the benefits of the agreement to “non-originating” services or service providers. By virtue of this provision, such services or service providers include services supplied from or in the territory of a non-Member; maritime transport services by vessels registered under the laws of non-Members; or juridical persons that are not service suppliers of another Member.

### ***Main principles***

*Neutrality:* By virtue of Article 2(b) and (c) of the Agreement on Rules of Origin, rules of origin should be tools for implementing the policy instruments mentioned above, and should not themselves be used as instruments to pursue trade policy, create restrictive, distorting, or disruptive trade effects, or be based on conditions unrelated to manufacturing, such as environmental or other conditions. However, the principle of neutrality is not included in the Common Declaration on preferential rules.

*Non-discrimination:* Article 2(d) expects rules of origin to observe national treatment and the MFN principle. The principle of non-discrimination is not reiterated in the Common Declaration on preferential rules.

*Transparency:* Article 2(a) calls for a clear definition of the requirements conferring origin and in particular specifying which tariff headings or subheadings are covered by a specific CTH rule or its exceptions; explaining the method for calculating ad valorem percentages within a VA system; or identifying relevant manufacturing or processing operations within a SP system. Article 2(f) requires Members to use rules specifying what confers origin (positive standard) and avoid rules stating what does not. Article 2(g) requires Members to publish promptly all relevant laws, regulations, judicial decisions and administrative rulings of general application, while Article 5 requests them to provide advance notice of new rules or proposed modifications of existing rules. Article 2(h) requires Members to provide for pre-assessments of the origin of goods upon request from interested businesses.

*Predictability and due process:* Article 2(e) calls for a consistent, uniform, impartial and reasonable application of rules of origin, while Article 2(j) requires Members to provide for the possibility of judicial, arbitral or administrative review of determinations of origin.

## **Rules of origin in regional trade agreements**

### ***Scope and coverage***

#### *Preferential rules of origin*

Rules of origin are contained in all regional trade agreements providing for preferential treatment among members, namely free trade areas and customs unions. Such *preferential* rules of origin are aimed at distinguishing products that are entitled to preferential tariff treatment from products that are not. They are an essential component of free trade areas, such as NAFTA, COMESA or ANZCERTA, or customs unions that have not yet completed the transition toward a common external tariff, such as MERCOSUR<sup>2</sup>. These RTAs use rules of origin to avoid free riding of their regional preferences (trade deflection), by stopping third parties from shipping to the FTA entry with the lowest external tariff for a given product. They are less important for accomplished customs unions, which have a common external tariff, but nevertheless keep their relevance for the administration of external trade preferences, such as GSP schemes, or preferential agreements concluded with third countries. For instance, the existence of a common EU external tariff and a common EU external policy makes the choice between different EU entry points irrelevant. EU preferential rules are thus used to distinguish between goods from various non-EU origins and not between EU and third country origins.

With respect to preferential rules of origin, RTAs cover an area that is not currently part of a work programme aiming at elaborating harmonised WTO rules in the future. However, this does not mean, in itself, liberalisation going beyond WTO commitments; indeed, commentators have often viewed negatively the very existence of preferential rules, since they imply by definition some kind of discrimination in the treatment of different trading partners. Yet, rules of origin are only tools for implementing the tariff policies contained in a given RTA; they should not be protectionist in themselves, although lack of transparency or excess of discretion may offer potential for protectionist capture. The present note focuses exclusively on the restrictiveness or flexibility of rules of origin *as such*, but it should be kept in mind that the more or less liberal character of the RTA will have to be judged mainly on the basis of the tariff policies which rules of origin are designed to help implement.

#### *Non-preferential rules of origin*

Most RTAs leave non-preferential rules outside their coverage: each RTA member country maintains its domestic system of rules of origin for administering anti-dumping and countervailing duties, marking requirements, or quantitative restrictions and quotas. The WTO Agreement on Rules of Origin thus goes beyond most RTAs in this area.

The only RTA that has common non-preferential rules of origin, in addition to its preferential rules, is the European Union, which, as a customs union, has a common external trade policy. Although the case is unique, it is worth mentioning as the only *regional* rules-of-origin system directly comparable to the systems already operating at the national level in WTO Members and to the WTO harmonised provisions, once they are finally adopted. At present comparisons between prospective WTO rules of origin and corresponding EU provisions are obviously premature. EU non-preferential rules have substituted domestic rules of Member countries and are used for administering MFN treatment, anti-dumping and countervailing duties, marking requirements, etc. This is an important step towards harmonisation, obviating the need for third countries to comply with differing rules from Member countries (see Box).

### **Box 10.1 EU Non-preferential Rules of Origin**

EU non-preferential rules are relatively simple, considering product transformation to be substantial if it is “economically justified” and results in a new product or represents an important stage of manufacture, but the criterion is not further defined. Interpretation of the criterion as applied in each case or policy area belongs to the relevant EU institution and leaves certain room for discretion depending on the policy measure for which origin needs to be determined. The criterion is supplemented by an anti-circumvention provision, which denies origin to products transformed solely in order to circumvent anti-dumping or other trade policy measures against specific countries.

However, this transfer of decision-making authority from the Members to EU authorities deprives individual companies of the possibility of seeking redress against questionable origin determinations: unlike, for example, anti-dumping decisions, determinations of origin are not considered to produce direct legal effects vis-à-vis natural or legal persons, so that such persons do not have a standing to initiate proceedings against them. Natural or legal persons affected by determinations of origin will thus either have to ask their national authorities to seek redress on their behalf, or challenge each anti-dumping, countervailing or other decision based on the determination that prejudices them directly.

The coverage of EU non-preferential rules of origin is quite general. Sectoral exceptions include textiles and clothing, shoes, several electronic products, vehicle and equipment parts and certain foodstuffs (including meat and wine). For these sectors or sub-sectors specific non-preferential rules of origin apply, based on lists of specific requirements, such as a minimum percentage of value added (for example 60% for automobiles and electronic products), or of specified types of manufacturing processes. For some industrial product groups it is possible for the importer to choose between a combination of CTH and value-added criteria, or a single value-added criterion which is easier to prove but entails a higher level of local content.

#### *The special case of APEC*

RTAs that do not entail preferential tariff treatment among members, such as APEC, do not include common rules of origin of either a preferential or a non-preferential type. Rules of origin applicable in the APEC area are the domestic rules of each country member, as well as the preferential rules of RTAs established among APEC members, such as NAFTA, ANZCERTA or AFTA.

The principal activity within APEC related to rules of origin is entirely complementary to the process of negotiating and implementing multilateral rules in the WTO. In the 1995 Osaka Action Agenda, APEC economies have pledged to “align [their] respective rules of origin with internationally harmonised rules of origin to be adopted as a result of the WTO/WCO process.” They have thus engaged in information gathering on their respective rules of origin, so as to facilitate WTO/WCO harmonisation work and have already published a compendium of rules of origin in force in the region.

#### ***Main principles***

##### *Criteria for the determination of origin*

As a general principle, the determination of the country of origin is based on the division of goods into two categories: “*goods wholly obtained or produced in one country*” and “*goods whose production involved more than one country*”. “*Goods wholly obtained*” in one country are considered as originating in that country, but, although the concept is still relevant for some agricultural and mining products, it has quite limited relevance for most other traded products given the increasing globalisation of production. Some RTAs simply indicate this covers “*the unmanufactured raw products of the territory*” and the goods

“wholly manufactured in the territory .. from .. unmanufactured raw products (or) materials wholly manufactured in the territory”(ANZCERTA). Other RTAs determine wholly obtained goods on the basis of a list of products, identical or similar to the one contained in the Kyoto Convention (this is the case for AFTA, MERCOSUR, EFTA, CEFTA, the EU and all the agreements it has concluded with third countries). This list contains products mined, harvested or extracted in the country, animals raised, hunted or fished there, waste resulting from local operations and goods produced using exclusively one or more of the above. By extension, RTAs generally consider goods wholly obtained in the territory of one *or more* of their Parties (cumulation) as originating in the territory covered by the RTA and entitled to preferential tariff treatment (see below).

Goods whose production involved more than one country are considered as originating in the country where they underwent their *last substantial transformation*, as determined by a series of quite complex rules. The three main criteria used world-wide for defining substantial transformation and which have also influenced WTO work on rules of origin are whether the transformation has caused a specified *change of tariff heading* (CTH), based on the harmonised system (HS) nomenclature; what is the percentage of *value added* (VA) by the transformation; and whether the transformation occurred using a *specified manufacturing process* (SP). Each criterion has its advantages and drawbacks and none is perfectly appropriate for all products and purposes, so that RTAs usually combine all of these criteria in varying degrees<sup>3</sup>. Special mention should be made of NAFTA and the EU, because these two agreements seem to have heavily influenced other RTAs concluded in their periphery, such as MERCOSUR, or the Canada-Chile FTA for NAFTA, and EFTA, CEFTA, or the agreements the EU has concluded with third countries for the EU. Other RTAs use different mixes of the above criteria (for instance, principally VA for the US-Jordan FTA; VA and SP for ANZCERTA; VA and CTH for COMESA). AFTA uses solely VA criteria, provided that the last manufacturing operation (not further specified) has taken place in the exporting Member State.

In NAFTA substantial transformation is judged mainly through a tariff-shift mechanism, supplemented by *value-added* criteria. The system is structured along detailed schedules of products or groups of products to which specified changes of tariff provision apply. Each non-originating material has to undergo a change in tariff classification, specified in the detailed schedule of HS tariff heading or subheading changes corresponding to each product or group of products. In some cases it is a change at the four-digit and in others at the six-digit subheading level of the tariff schedule. In certain circumstance where there is no change in the level of tariff classification specified in the first rule applicable to the good, origin can be conferred if a lesser tariff shift is satisfied and the regional value-added is not less than 60% of the transaction value or 50% of the net cost of the good. The extensive use of the tariff-shift mechanism brings considerable transparency and predictability to the system, although the choice of subheadings offers no less potential for protectionist capture than the other two main criteria for determining origin. In addition to the basically transparent nature of the system, NAFTA provides for an advance origin ruling at the request of importers, exporters or producers of the good, a provision that was taken up in the WTO Agreement on Rules of Origin.

In the EU substantial transformation is defined<sup>4</sup> on the basis of a list of processing or manufacturing operations which have to be carried out on specific non-originating materials in order to confer origin to the resulting product. The system thus follows a *specific processing* criterion, which is quite restrictive upon firms' choice of production methods. Requirements are very detailed and specific, bearing a considerable degree of transparency and predictability, although it is often argued that they are so complex as to make it quite difficult for products to qualify. ECJ jurisprudence has consistently maintained that EC authorities should apply preferential rules (GSP rules) in a more restrictive manner than non-preferential ones so as to ensure that preferences benefit only industries in developing countries.

### *De minimis or tolerance rules*

Most RTAs contain a *de minimis* rule, which allows for a specified maximum percentage of non-originating materials to be used without affecting origin (5% for EU, 7% for NAFTA, and 10% for EFTA). This rule concerns materials that would otherwise not be allowed under CTH or SP criteria but does not affect the operation of VA criteria: the non-originating materials will be counted in when calculating the maximum value of non-originating materials not to be exceeded. For instance, the Canada-Chile Agreement very clearly refers to “*the value of non-originating materials ... that do not undergo an applicable change in tariff classification*”<sup>5</sup>. In most RTAs energy, equipment and tools used in the manufacture of products are not taken into account in this respect. The *de minimis* rule acts as a softening of CTH or SP criteria making it easier for products with non-originating inputs to qualify. It has thus to be taken into account when judging the more-or-less restrictive character of a system.

### *Insufficient operations*

Independently from the criterion used primarily for defining substantial transformation, several RTAs contain a separate list indicating the operations that are in all circumstances considered insufficient to confer origin. The list may be quite short, such as in the US-Jordan Agreement (*simple combining and packaging operations, or mere dilution with water or with another substance that does not materially alter the characteristics of the article or material*)<sup>6</sup>, or in MERCOSUR (*assembly, division in lots or volumes, selection and classification, marking, putting together assortments of goods*). In these cases the list is often supplemented by an anti-circumvention provision, considering as non-qualifying any operation demonstrably aimed at circumventing rules of origin (such as in Canada-Chile). Other RTAs, such as EU, EFTA or CEFTA include a relatively detailed list of insufficient working or processing operations, covering preservation during transport and storage (f.i. ventilation, placing in salt or sulphur dioxide, removal of damaged parts), simple operations of cleaning, sorting, painting, packaging, marking and labelling, assembling, or animal slaughtering.

### *Intermediate materials*

The input of non-originating intermediate materials may be dealt with in a more or less liberal manner. The absorption, or “roll-up” principle allows materials which have acquired origin by fulfilling specific processing requirements to maintain this origin when used as input in a subsequent transformation (*i.e.* non-originating materials are no longer taken into account in calculating value-added). Absorption is used quite extensively in the RTAs participating in the European cumulation area (EU, EFTA, CEFTA, see below) and contributes to simplifying the application of an otherwise complicated system. The EU-Mexico Agreement states that “*..if a product which has acquired originating status by fulfilling the conditions ...is used in the manufacture of another product, the conditions applicable to the product in which it is incorporated do not apply to it, and no account shall be taken of the non-originating materials which may have been used in its manufacture.*” Similarly, a good may acquire originating status if it is produced in a NAFTA country from materials considered as originating (whether such materials are wholly obtained or having satisfied a CTH or VA criterion) even if no tariff shift takes place between the intermediate material and the final product.

Other provisions (such as NAFTA with respect to textiles) require changes to some headings to occur sequentially through other specified tariff headings in order for the product to qualify: for instance, clothing must have gone through the tariff change from yarn to thread, from thread to cloth and from cloth to clothing. This approach, which brings the system close to a “specified-process” mechanism, means that clothing manufactured in a NAFTA country from cloth woven there, but using yarn not formed in a NAFTA country cannot qualify. This affords a level of protection from low-cost

imports into NAFTA markets, which may be higher than that existing before NAFTA<sup>7</sup>. Furthermore, if a specified sequence of tariff changes has to apply, there is an incentive for producers to avoid any non-originating inputs, and this may result in trade diversion to the detriment of non participating countries.

#### *Excluded sectors and special sectoral rules*

In addition to their origin rules of general application, several RTAs contain sector-specific rules for a number of sensitive sectors. Special sectoral rules of origin are commonly more stringent than rules of general application, allowing more limited, if any, non-originating inputs. The two sectors that are most commonly covered by RTA preferential tariff treatment but excluded from general RTA rules of origin are textiles and clothing and the automotive sector. On the other hand, sectoral rules of origin for agricultural products are far less common, mainly because agriculture does not usually benefit from the same liberal treatment RTAs may bestow on other sectors (in CEFTA for instance, a schedule of concessions covers agricultural products while industrial products benefit from a timetable for the progressive abolition of customs duties). In RTAs which contain rules of origin on agricultural products (most RTAs using SP criteria, such as EFTA or EU agreements with third countries), several of these products need to be wholly obtained in order to qualify: non-originating inputs are not allowed as no working or processing carried out on them can confer originating status.

In NAFTA rules on automobiles require the item to satisfy minimum content requirements. The mechanism of regional value content is quite similar to a value-added mechanism, minus the “roll-up” principle: a good other than a motor vehicle produced from non-originating materials will acquire origin because of a change in tariff classification, but if it is subsequently used, for example, in a motor vehicle engine assembly, the value of the non-originating materials will be deducted when it comes to calculating the value-added of the engine as a whole. In the automotive sector regional value content requirements have been progressively raised from 60 to 62.5%, depending on the vehicle type (from an initial 50%, corresponding to the rule applicable under the US-Canada FTA).

Textiles and clothing are often subject to a very stringent specified sequence of tariff changes or manufacturing operations that strongly discourage non-originating inputs too. In RTAs mainly relying on SP criteria (for instance EFTA or EU-Mexico), the precision and sequencing of qualifying operations tends to allow non-originating inputs only if completely unprocessed or at a very early stage of processing (for NAFTA coverage of the textiles sector see above). However, this is very restrictive stance is somehow mitigated by the tolerance of some percentage of non-originating input in accordance with *de minimis* rules. Contrary to the *de minimis* rules of general application, tolerance in the textile sector usually refers to a maximum weight of non-originating materials (see EU-Mexico).

#### *Cumulation mechanisms*

Cumulation is another important instrument for the admission of non-originating materials. Where cumulation applies it allows producers to use non-originating materials from specified origins without losing the preferential status of the final product. The most basic form of cumulation is generally applied to materials which do not originate in the preference-seeking country but in another of the countries parties to the RTA (*bilateral* cumulation between the members of a bilateral RTA, *full* cumulation within a plurilateral RTA considered as a single preferential territory). In the application of such cumulation RTAs generally consider goods obtained in the territory of one or more of their Parties as originating in the territory covered by the RTA and entitled to preferential tariff treatment. This includes production in more than one of the RTA Members or production in one Member from materials originating in another Member. EFTA rules of origin consider as “*originating*” the products that have been obtained using materials originating in another EFTA Party. EU products that undergo transformation in a country granted

preferential access are considered as originating in that country. Similar rules of full or bilateral cumulation between the parties of the RTA apply to NAFTA, ANZCERTA, Canada-Chile or EU-Mexico.

*Diagonal* cumulation allows for materials supplied by specific countries *not* parties to a given RTA to be counted as “domestic”. The most important examples of diagonal cumulation, established by separate agreements between members of the “cumulated” RTAs, are the European Economic Area (EEA) Agreement between EU and those EFTA countries that have not joined the EU; and the Europe Agreements between EU and the European economies in transition. Since 1997 a system of European cumulation, based on a network of “connecting” agreements and protocols between the concerned countries, has been established between the EU, the EFTA countries, the central and eastern European countries, the Baltic States, Slovenia and Turkey, harmonising preferential rules of origin. European cumulation now allows economic operators to use components originating from any of the 30 participating countries without losing the preferential status of the final product. Cumulation thus goes a long way in expanding the geographical and product coverage of the system and is a major factor of harmonisation. However, some WTO Members have raised concerns that cumulation between separate, free-standing RTAs, where a particular RTA scheme provides benefits to certain non-Parties to that RTA but not to others, may violate the MFN principle<sup>8</sup>.

#### *Drawback provisions*

An important aspect of RTA rules of origin (which mitigates the above mentioned expansion effects of cumulation within the RTA) is that shipments among RTA partners are no longer considered to be “exports” for purposes of drawback laws. This means that tariffs collected on non-originating products can no longer be refunded when those products are incorporated into products exported to other RTA partners. This operates as a disincentive to the importation of some components from third-country sources, and may have the same trade-diverting effect as a restrictive rule of origin. Drawback prohibitions are to be found in most RTAs.

#### *Rules of origin for investment and services*

“Rules of origin”/denial of benefits clauses for investment and services are contained in few RTAs. A noteworthy example is NAFTA. Criteria used in determining the origin of investment or services are quite different from those applied to goods. In this area the Agreement has adopted a relatively liberal stance, compared to provisions previously applied by the US-Canada FTA. Origin is conferred to investments made by any resident or incorporated entity in a NAFTA country, regardless of country of ownership or control. The cross-border trade in services chapter goes even further, extending NAFTA privileges to any service-providing entity having substantial business activities in a NAFTA country. That is, a Party may deny the benefits of the cross-border trade in services chapter to a service provider incorporated in another Party only if it establishes that the entity is owned or controlled by persons of a third party *and* that the enterprise has no substantial business activities in the territory of *any* Party. NAFTA also contains preferential “rules of origin”/denial of benefits clauses for investment and for services trade. The focus in developing such rules was on ensuring that non-member entities did not circumvent the investment and services disciplines of the Agreement through recourse to shell companies.

## NOTES

1. It should be kept in mind that the European Union, as a customs union, sets non-preferential rules at the regional and not at the national level.
2. The validity of transitional rules of origin in MERCOSUR has been extended until at least 2006.
3. For a thorough discussion of the advantages and drawbacks of the three main methods for determining origin, see the survey by the WTO Secretariat “Rules of Origin Regimes in Regional Trade Agreements”, Job No (01)/131 of 17 September 2001.
4. We refer here exclusively to EU preferential rules.
5. Similar language is to be found in NAFTA and all other RTAs negotiated by Canada since.
6. Similar language is to be found in NAFTA or Canada-Chile.
7. NAFTA rules on textiles use a “triple transformation” test, instead of the “double transformation” test (covering only the immediate inputs and not the whole production process) used in the Canada-US FTA. Canada, whose apparel production was quite dependent on third country inputs, has negotiated tolerance quotas, based on essential inputs shortages in their market.
8. See “Rules of Origin in Regional Trade Agreements”, WTO Job No. (01)/131, paragraph 34.

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