TRADE ISSUES IN EAST ASIA

A NEGOTIATOR’S GUIDE TO REGIONAL TRADE AGREEMENTS: CONSIDERATIONS FROM AN EAST ASIAN PERSPECTIVE

POLICY RESEARCH REPORT

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A NEGOTIATOR’S GUIDE TO REGIONAL TRADE AGREEMENTS: CONSIDERATIONS FROM AN EAST-ASIAN PERSPECTIVE

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EXECUTIVE SUMMARY

After a period of unilateral and multilateral trade liberalization, countries in East Asia have increasingly been looking to partners inside and outside the region to build preferential trade relationships. While AFTA – the ASEAN Free Trade Area – has existed since 1992, China’s overture to ASEAN in 2001 is believed to have triggered the proliferation of RTAs seen in the region over the last few years. By 2006, 24 RTAs involving East Asian nations had been signed and 34 more were under negotiation. These developments reflect the continuous increase in the number of preferential trade agreements negotiated globally. Since 1991 a total of 228 RTAs have been notified to the WTO under Article XXIV GATT, an average of 13 per year; in addition 68 agreements under GATS Article V and 15 under the Enabling Clause involving developing countries were notified to the WTO during that same period. This trend is likely to continue as multilateral liberalization under the Doha Round is repeatedly coming to a standstill.

Drawing on existing surveys as well as the legal texts of various agreements, this report maps out the evolving architecture of regional trade agreements concluded by the major trading countries and the countries of East Asia. The report first looks at a group of systemic issues – preferential rules of origin, dispute settlement and trade remedies – and subsequently turns to substantial provisions on market access, intellectual property rights, and competition policy. It also briefly examines the nascent stage of environment and labor clauses. As MFN tariffs continue to fall, tariff reductions are starting to play a less important role in negotiations with the focus increasingly shifting to regulatory issues. Another notable feature of RTAs negotiated today is that their geographical reach has begun to extend far beyond the traditional close proximity of AFTA, EU, or NAFTA – often making the term “RTA” a misnomer.

The proliferation of preferential trade agreements has brought about a tangle of conflicting preferential rules of origin regimes that are threatening to offset gains countries would otherwise receive from such agreements. Further, while RoO regimes in East Asia itself were relatively lax and uniform across products in the past, there has been a move towards product-specific rules in line with global trends. These product-specific rules have the disadvantage that they are more easily influenced by protectionist industry pressures.

Dispute settlement mechanisms in RTAs are essential for effective enforcement of an agreement’s substantive provisions. The scope and procedures of a dispute settlement mechanism vary widely, often reflecting the culture, development status and desired level of economic integration among RTA partners. Key negotiating provisions regarding dispute settlement include: the type of complaints that may be brought, the procedure for establishing an arbitral panel, the time constraints imposed on the dispute settlement process, enforcement methods, and choice-of-forum clauses.

Trade remedies are one area where countries have been reluctant to curtail their rights in regional agreements. Provisions in many RTAs regarding anti-dumping, subsidies/countervailing duties and safeguards under GATT Art. XIX do not significantly deviate from existing WTO rules. The large majority of RTAs create an additional right to use bilateral safeguards against the partner country during the phase-in period of the RTA. Individual RTAs that aim for a high degree of integration may ban the use of some trade remedies; these are however relatively rare.

As for substantive provisions, the following picture emerges: in terms of market access, the vast majority of RTAs are WTO-consistent in “substantially liberalizing” trade between partners within the first ten years of entry into force of the agreement, although a fair amount of
exceptions exist for certain agricultural products, textiles, and garments. These often take the form of prolonged tariff protection as well as special safeguards or tariff rate quotas. Stronger emphasis is being placed on intellectual property regimes by developed countries, particularly by the US, which increasingly demands commitments that go well beyond what has been agreed at the WTO. Competition provisions are included in RTAs to ensure that the welfare gains achieved from tariff and regulatory liberalization are not off-set by anti-competitive behavior. In addition, competition principles are often embedded in other parts of an RTA. Competition disciplines are currently still fairly lax, consisting principally of commitments towards future cooperation, but are gradually becoming more substantive, complex, and legally binding. Finally, with the exception of recent US RTAs, environment and labor clauses are not a notable feature of RTAs.
INTRODUCTION

Approaches to trade liberalization cover an extensive policy space. They stretch from unilateral initiatives to reciprocal arrangements on a multilateral basis to preferential regional and bilateral agreements. East Asia’s engagement in trade liberalization spans the entire spectrum of liberalization approaches. The open regionalism of the 1980s and 1990s has been increasingly complemented with preferential agreements with partners inside and outside the region. In addition, most countries in the region are members of the WTO or are preparing to join. A total of 24 RTAs involving East Asian nations have been concluded, 34 more are currently under negotiation (ADB, 2006), whereby China’s RTA overture towards ASEAN has been described as the trigger for the proliferation of preferential agreements in the region since 2001 (Baldwin, 2006).

All of this is taking place in parallel with deep, market-driven supply side integration among East Asian countries. A large and growing percentage of trade in the region is made up of parts and components and comes as a result of the East Asian production network that has developed since the mid-1980s and that spans almost all countries in the region. Increasingly favorable FDI policies supported this development, so that by 1990, foreign affiliates accounted for 30 to 90 percent of total manufactured exports from middle-income countries in the region (Kharas and Gill, 2006). This extreme interconnectedness in the region is mainly market driven to the extent that the full exploitation of economies of scale and factor price differentials requires extreme specialization of individual countries in terms of stages of production which differ in their labor- and capital intensities (as opposed to the traditional specialization in final products). At the same time, trade in final goods amongst East Asian countries is increasing.

The goal of this report is to establish patterns and directions across a range of issues covered in RTAs today which are relevant for East Asian policy makers. The report hence looks at pertinent systemic and substantial provisions currently included in RTAs: the first half includes chapters on rules of origin, dispute settlement, and trade remedies (all of these are systemic and pin down the credibility of the concessions made: the extent of enforcement, requirements for qualification, and the ease by which a party may opt out); the second half of this report investigates market access provisions and different sets of rules concerning regulatory issues related to intellectual property rights, competition policy, the environment, and labor. Individual provisions from prominent RTAs concluded between East Asian countries and across the rest of the world will be used throughout for illustrative purposes (see Appendix 1 for a list of important RTAs in force and a selection of RTAs under negotiation). The report draws on existing surveys as well as a number of original agreements.

Global View of Trends in RTAs
The pace of RTA negotiations worldwide has significantly increased as the Doha Round has repeatedly come to a standstill. WTO Members notified the conclusion of 30 RTAs in 2004, 18 in 2005 and 19 in 2006 and at that time, at least 70 additional RTAs were already in the negotiation or proposal stage. In comparison, since 1991 the annual average of RTAs notified to the WTO

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1 Notably, freight costs are still high enough to warrant production sharing only between countries which are not too distant (this is not the case with services, on the other hand).
2 For a detailed analysis of market access in services, see Fink and Molinuevo (2007) “East Asian Free Trade Agreements in Services: Roaring Tigers or Timid Pandas”. World Bank Policy Research Paper;
3 To follow prevailing conventions, this report uses the acronym “RTA” (regional trade agreement) to refer to preferential trade agreements in general, regardless of their geographic scope.
under GATT Article XXIV was thirteen. Not only has the number of RTAs increased, the content of RTAs roughly follows the same path of GATT to Uruguay to Doha Round, starting from simple tariff reductions and evolving into comprehensive regulatory regimes.

Tariff reductions play a subordinate role in most modern RTA negotiations. This is especially true for RTAs between high income countries, where tariffs are already extremely low. Tariffs in some developing countries may still be relatively high, such that tariff reductions may play a more significant role in the increasing number of RTAs involving developing countries. Overall, however, the trend is towards increasing inclusion of regulatory issues, concerning areas as varied as intellectual property rights, competition, investment, environment and labor as well as technical cooperation and cultural exchanges.

Some key trends since 2000 in terms of RTA activity include: (i) the EU’s new focus on bilateral market access FTAs and Economic Partnership Agreements (EPAs) with the ACP countries; (ii) US efforts to complement its multilateral activities with bilateral negotiations; (iii) various developing countries’ efforts to negotiate reciprocal bilateral agreements, amongst each other as well as with developed countries (WB 2005 Global Economic Prospects). The first and third points are notable as this stands in stark contrast to the historical use of non-reciprocal preferences offered by developed countries to developing countries under the Generalized System of Preferences.

Another notable feature in the evolution of RTAs is that their geographical reach increasingly extends beyond the traditional close proximity of ASEAN, EU, NAFTA, SACU, and many of the early bilateral RTAs. Indeed, “RTAs are increasingly concluded among geographically non-contiguous countries. The term ‘regional’ may be a convenient shortcut, but can be seen as an incongruity to describe the plethora of cross-regional preferential agreements linking countries around the globe” (Crawford and Fiorentino, 2005). Examples of the geographic reach of recent RTAs include: EFTA – Mexico, Jordan – US, EFTA – Jordan, Canada – Costa Rica, EFTA – Singapore, Chile – EU, Singapore – US, Chile – US, Chile – Korea, Australia – US, Japan – Mexico, Jordan – Singapore, Bahrain – US, EFTA – Korea, and Chile – China. 4

The following developments can be observed from the two major trading powers (EU and US) (WB GEP 2005):

**EU**
Partly related to the collapse of the Soviet Union in 1989 and in an effort to stabilize the region, the EU signed a large number of bilateral agreements in the 1990s. Today the EU has bilateral and regional agreements with over 100 countries, which cover a wide range of issues besides tariff reduction. These agreements take five forms:

(i) **Europe Agreements**: these agreements were concluded with Central and Eastern European countries and were from the beginning geared towards potential accession to the EU. More than other EU bilaterals, these agreements emphasize regulatory convergence to EU standards. They further include issues such as trade in services, common rules of origin and technical standards as well as transition rules for agriculture;

(ii) **Euro-Mediterranean Agreements**: the EU has a large number of Euro-Med agreements with neighboring North African and Middle Eastern countries. The goal is to use these as a basis for a

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4 For the sake of consistency and simplicity, this report refers to various RTAs with the names of the parties listed in alphabetical order.
NAFTA-like free trade area by 2010. To this end, the EU started a process in 1995 of turning some of these agreements into Association Agreements, subsuming existing bilateral agreements. These agreements generally contain clauses on political dialogue, respect for human rights and democracy, provisions regarding intellectual property, services, public procurement, competition rules, state aids and monopolies as well as economic and cultural cooperation.

(iii) **Partnership and Cooperation Agreements**: these were signed with the Western Balkans, Russia and the CIS countries to promote stability and trade;

(iv) **Economic Partnership Agreements**: these agreements replace the non-reciprocal Cotonou Agreement which superseded the Lome Convention of 1975 and which included 77 former colonies in Africa, the Caribbean and the Pacific (this is necessary as the WTO waiver under which Cotonou was established expired in 2007);

(v) **Free Trade Agreements**: these were concluded with Mexico, Chile and South Africa and are under negotiation with the GCC and MERCOSUR. The agreement/negotiations with Mexico and MERCOSUR seem to be a reaction to the conclusion of NAFTA and the FTAA negotiations respectively.

**US**

U.S. activity with respect to bilateral and regional agreements was sporadic until 2002 and limited to deals with Canada and Israel in the 1980s, NAFTA in 1994 and Jordan in 2000. However, since the Trade Promotion Authority was approved in 2002, the US has increasingly made use of bilateral agreements to further its trade interests along with continued efforts at the WTO. It has since then signed bilateral deals with Australia, Bahrain, Central America + Dominican Republic, Chile, Morocco, Oman, Singapore and most recently Peru, Colombia, and Korea. Negotiations with a host of other countries around the world are underway (e.g., Malaysia, Panama, Thailand, and the United Arab Emirates). This development intensified markedly with the collapse of the Cancun Ministerial Meeting in 2003. Key aspects of these agreements are (i) zero tariff bindings for the majority of non-agricultural goods; (ii) exclusion or delayed liberalization of sensitive products; (iii) intellectual property provisions which go considerably further than TRIPS; (iv) investment provisions; (v) services trade; (vi) and labor and environment issues.

This brief introduction provides context for negotiators by illustrating some key macro trends in RTAs. The remainder of this report adopts a much more narrow focus, each chapter examining a specific category of provisions commonly included in RTAs.
Bibliography


CHAPTER 1 – RULES OF ORIGIN

Preferential rules of origin ("RoO") define criteria to determine whether a sufficient amount of product content has been produced in the exporting RTA partner for the product to qualify for preferential tariff treatment. They are necessary to avoid trade deflection associated with preferential trade liberalization where the preferential agreement falls short of a customs union.\(^5\) If the rules are too stringent, however, the resulting compliance costs can neutralize any preference margin granted. Compliance costs will arise from adjustments of production processes in order to fulfill rules of origin requirements as well as the added administrative burden of documenting compliance.\(^6\) The exact nature of the rules of origin attached to a preferential trade agreement is crucial to the success of an RTA because complex RoO schemes may lead to low utilization of tariff preferences and thereby nullify many benefits of the agreements (World Bank, GEP 2005).

The problem of complex rules of origin is compounded in situations where there are many overlapping agreements such as in the case of East-Asia. In negotiating future agreements it will be crucial to ensure that rules of origin regimes attached to the new agreements do not upset the delicate arrangement of trade relations that comes with the system of East-Asian production sharing. This will require a high degree of consistency between regimes, which currently seems difficult as East-Asian countries are being pulled in different directions by large negotiating partners such as the US, the EU and Japan.

The first section will focus on the various elements, used in many different combinations, that create the large number of preferential RoO regimes in place today. Preferential rules of origin can either apply to the trade regime as a whole or to an individual product. Product specific rules define origin according to one of two broad criteria. In order to qualify for origin status, products must either:

- be **wholly obtained or produced** in the exporting country, i.e. they do not contain any components or materials from another country; or
- have gone through a **substantial transformation** in the exporting country, as defined by three main classification components (individual components can be used as a sole criterion or in different combinations with each other):
  - Change in tariff classification (CTC): requires the “chapter”, “heading”, “sub-heading” or “item heading”\(^7\) of the inputs for a specific final product to be different from the chapter/heading/sub-heading/item of the said final product; CTC, in particular change in tariff heading, is one of the two most frequently used criteria for determining origin. In certain cases exceptions are attached to

\(^5\) Rules of origin are necessary where two trade partners liberalize on a preferential basis and have different outside tariffs. Without RoO a third country could avoid the higher of the two outside tariffs by transshipping its goods through the country with the lower tariff. Since customs unions, in contrast, have a common outside tariff, this is not of concern to them.

\(^6\) E.g. Cadot et al (2005) estimate that the compliance costs arising from the rules of origin under NAFTA and the PANEURO system may be as high as 6.8 and 8% of the value of the product respectively, which for many goods exceeds the preference margin; they estimate administrative costs associated with RoO as 1.9% for NAFTA and 6.8% for the PANEURO system. See also OECD (2003) and European Commission (2003).

\(^7\) “Chapter” corresponds to 2 digits in the HS classification, “heading” to 4 digits, “sub-heading” to 6 digits and “item heading” to 8 digits.
CTC that prohibit the use during processing of non-originating materials from a certain sub-heading, heading or chapter;

- **Value content (VC):** sets a maximum level of value added originating in countries outside the preferential agreement (maximum import content – MC); this criterion is sometimes also expressed positively, i.e. as a minimum level of value added to be acquired by the product in the exporting country/region (minimum regional value content – RVC). Value content criteria are used in almost all RTAs, either as a stand-alone condition (in many South-South agreements, e.g. in the African and early East-Asia/Pacific Agreements) or as an alternative to the CTC criterion, e.g. the condition is a change of chapter OR change of heading + specific MC (for example, the European agreements and NAFTA);

- **Technical requirement (TR):** requires a product to undergo specific manufacturing or processing operations prior to being exported. It is often used in European RTAs, NAFTA, and some Latin American agreements and mainly applies to apparel products and chemicals. It has been shown that the TR criterion generally has the highest cost of compliance compared to VC and CT (WB 2005).

In addition to defining product-specific criteria, rules of origin may contain provisions that apply to the entire regime. These can be grouped into “leniency provisions” and provisions which make the agreement more stringent. Leniency provisions generally take one of three forms:

- **De minimis principle:** applies in the case of CTC and TR criteria and determines the maximum percentage of non-originating inputs that can be used without affecting origin. *De minimis* is usually higher in EU RTAs than in those following the NAFTA model, though there are exceptions. MERCOSUR and the African and Asian RTAs generally do not include a *de minimis* provision;

- **Roll-up/absorption principle:** if this principle is applied, inputs that have acquired origin by fulfilling one of the substantial transformation requirements defined above will be considered as originating when used as an input in a subsequent transformation – i.e. the record of shares of originating and non-originating materials in the first stage of processing is not carried forward to the next stage, but instead, once qualified, the input is granted the status of 100% originating. This roll-up principle is used across almost all RTAs.

- **Cumulation principle:** allows producers of one RTA member to use materials from another RTA member as if they were their own thereby preserving the preferential status of the final product. The cumulation principle can be applied in three ways:
  - **Bilateral cumulation:** permits two RTA partners to use inputs *originating* in the other partner as if they were their own;
  - **Diagonal cumulation:** permits countries which are subject to the same set of preferential origin rules to use materials *originating* in any part of the area as if they were their own. The PANEURO system of diagonal cumulation stands out, covering 50 RTAs.
  - **Full cumulation:** an extension of diagonal cumulation, full cumulation permits countries to use materials in advanced stages of processing from any country in the area which is subject to the same preferential rules of origin, even if these materials are *not originating*. The EEA Agreement, EU – South Africa, AFTA and ANZCERTA allow for full cumulation, while Canada-Israel allows for cumulation with the US.
There are further regime-specific criteria that increase the stringency of an RoO regime. These can take the form of:

- An additional list specifying operations that are considered insufficient to confer origin, such as cleaning, assembling or packaging;
- A prohibition of duty drawback, i.e. tariffs on non-originating inputs that are subsequently included in a final product exported to an RTA partner cannot be refunded.

EU RTAs and many RTAs in the Americas explicitly exclude drawback, though some allow for a transition period.

In addition, different origin certification methods will impose different costs on producers thereby affecting the stringency of the RoO regime. Depending on the provisions in the agreement, certification can either take the form of self-certification by exporters – the least stringent method – or be done by an industry association, the exporting country government or a combination of the three. The EU requires a “movement certificate” issued by the exporting country government once an application has been submitted by the exporter; this process is quicker for “approved” exporters that make repeated shipments, because they are effectively authorized by the customs authorities of the exporting country to self-certify; NAFTA, other RTAs in the Americas, and Chile-Korea allow self-certification, while all others require certification by a public body or a private organization approved by the government (Estève and Suominen, 2003). Estimates suggest that the method of certification has a large impact on administrative costs associated with RoO – a study by Cadot et al. (2005) finds those costs to be approximately 2% for NAFTA (which has self-certification), and in the region of 7% for the PANEURO system (which requires government certification) (Manchin and Pelkmans-Balaoing, 2007).

Depending on the stringency of the individual criteria described above as well as the way in which they are combined, RoO regimes will turn out to be more or less restrictive. The theoretical literature has not yet determined an ideal level of restrictiveness which would balance the need to avoid trade deflection with the costs of RoO compliance (Estève and Suominen, 2003). The issue has, however, been analyzed empirically. For the US and EU, it has been shown that the same special interests that tend to influence tariff negotiations, also influence the negotiations of RoO; as a result, when comparing different product-specific schemes across sectors, restrictiveness is generally found to be highest for agricultural products and textiles (Estève and Suominen, 2003). When negotiating new RoO regimes, it will be important for countries to resist protectionist pressures to make RoO more restrictive than necessary.

**RTA Families**

Overall, three families of rules emerge: the EU system which was harmonized in the late 1990s, the regime associated with NAFTA/subsequent US Agreements and the system used in early South-South Agreements. The compatibility between different regimes across the world is very low, which is a considerable obstacle to trade especially for countries that are spokes in several different RTAs. This section presents a survey of the different RoO regimes currently in place.  

EU FTAs

Incompatibility of different rules of origin regimes even within one region was a major issue among EU-FTAs until the old system was replaced by harmonized protocols in 1997. The regime

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8 This section draws on Estève and Suominen (2003) and Garay and de Lombaerde (2004) for the EU and the US; and on Manchin and Pelkmans-Balaoing (2007) for East Asia.
is now known as the PANEURO single-list system and applies to all of the EU’s reciprocal preferential trading agreements. A regime which is very similar to the PANEURO system is in effect for EU preference schemes for developing countries under the GSP and the Cotonou Agreement. EFTA-Singapore and EFTA-Mexico also follow the PANEURO model.

The provisions in the 1997 protocols are extremely detailed, specifying for each tariff heading of the HS what type of transformation should be considered sufficient for non-originating materials to qualify as originating. For approximately 25% of headings, producers have the flexibility to fulfill one of two proposed criteria. The first one is usually CTC, import content or a technical criterion; in cases where there is a second criterion, it generally is an import content condition. In very few cases leniency is added by the fact that even if a CTC at heading or chapter level is required, the use of inputs of the same heading is allowed (the so-called “soft rule of origin”).

The *de minimis* criterion is set at 10% with some exceptions for textiles and apparel products. The PANEURO system further allows for diagonal cumulation, which operates between the EU and the countries of the so-called “pan-Euro-Mediterranean cumulation zone”, which includes Algeria, Egypt, Israel, Lebanon, Morocco, Syria, Tunisia, the West Bank and the Gaza Strip; regional cumulation, which is a specific type of diagonal cumulation, applies to EU regional agreements under the GSP (e.g. vis-à-vis ASEAN). Further, full cumulation is in effect vis-à-vis the EEA, OCT and ACP countries.

All of these efforts made the system much more transparent and reduced the costs of meeting EU origin criteria.

The stringency of the EU RoO for different products is highly negatively correlated with the speed of the tariff phase-out for those products – i.e. the faster the tariff phase-out provided for in a given sector, the less stringent the RoO that apply to this sector (Estevadeordal and Suominen, 2003). This supports the notion that RoO are often used as a second layer of protection for sectors facing strong competition from abroad. EU RoO are most restrictive for fish, vegetable products, textiles and apparel, food and beverages and optics (Estevadeordal and Suominen, 2003).

A new round of consultations on the EU RoO regime was launched in 2003 with the publication of a Green Paper by the Commission and a survey of businesses and regulatory authorities. In light of the conclusions that the current system does not reflect economic realities and is still not sufficiently transparent, more changes to the system can be expected in the near future.

**FTAs in the Americas**

Rules of origin regimes in the Americas are very heterogeneous, the dominant model being that of NAFTA. Four RoO families can be identified in the Americas (Garay and Cornejo, 2002; Estevadeordal and Suominen, 2003); three are grouped around ALADI, NAFTA, and Mercosur/CACM respectively. The fourth group consists of outliers such as the Israel-US and Jordan-US Agreements. The two ends of the spectrum of RoO regimes in the Americas are occupied by early Latin American RoO schemes, which are fairly general and uniform, and by NAFTA-type regimes, which contain a large number of rules that are specific to the tariff item level (e.g. CAFTA and bilateral agreements between US/Canada/Mexico/Chile and another Latin American country).

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9 Since the HS system was not originally designed to be employed in the context of RoO, inputs and outputs of one product category are often included under the same heading. Hence even if a product underwent a transformation, the output may still be classified under the same heading and would therefore technically not satisfy the CTC criterion.

The older schemes for the most part only impose a general rule which applies across all sectors, such as ALADI where the origin requirement is CTC at the heading level or alternatively a minimum RVC of 50%. New generation RTAs such as NAFTA, on the other hand, are generally CTC based and fairly complex since RoO requirements are defined at the product level and include the satisfaction of several, if not all four transformation conditions. Often CTC is combined with an exception, regional value content (generally 50-60%) or TR. Some leniency is introduced by \textit{de minimis} clauses, roll-up, cumulation provisions, and provisions enabling exporters to issue their own origin certificates. As in the case of the EU, a pattern emerges as to which sectors are particularly shielded by NAFTA RoO. These are fish, vegetable products, fats and oils, mineral products, leather goods, and textiles and apparel (Estevadeordal and Suominen, 2003).

Transcontinental RTAs involving countries in the Americas are similar to NAFTA in their sectoral selectivity; examples are Singapore-US, Australia-US, Japan-Mexico and Chile-Korea. Transcontinental RTAs currently under negotiation, such as Mexico-Singapore, Canada-Singapore, and Korea-Mexico are expected to follow a similar pattern. The Israel-US and Jordan-US Agreements are exceptions in that the only criterion imposed is VC.

It is likely that future rules of origin schemes within the Americas, in particular where the US, Canada, Mexico or Chile are involved, will make use of the NAFTA model. The same is true for future agreements between the large American players and countries outside the region, in particular in East Asia.

\textit{East Asia-Pacific FTAs}

Within East Asia, rules of origin schemes used to be fairly general though the trend is one of increasing focus on product-specific rules. First generation RTAs between developing countries in East Asia are similar to RTAs among African countries in that they generally contain fairly loose RoO regimes: all of AFTA, SPARTECA, ECOWAS, COMESA, Namibia-Zimbabwe and GCC have a regime-wide RVC rule between 25% and 50% and most of these regimes add flexibility by specifying alternative RoO based on a uniform CTC criterion, usually requiring a change in heading (Estevadeordal and Suominen, 2003).\textsuperscript{11} Having a CTC rule as an alternative is particularly important in East Asian RoO regimes, as value-added criteria have been difficult to meet for producers due to the extreme fragmentation of production processes among East Asian countries in combination with very low labor costs in the least developed countries in the region. Even though originally not present in AFTA, the CTC criterion was introduced and simplified in the AFTA RoO reforms in 1995 and 2003.

Recently, product-specific CTC criteria are increasingly finding their way into East Asian RoO schemes, including those between developing countries. The China-ASEAN Agreement, for example, until 2006 only contained regime-wide criteria, however negotiations on product specific rules were in the process of being finalized at the time of writing. Other East Asian agreements with product-specific rules are New Zealand-Thailand, Australia-Thailand, Japan-Malaysia, Japan-Singapore, Korea-Singapore, and TRANSEP (NZ, SGP, Brunei and Chile). Product-specific criteria have been gaining importance in East Asian RoO schemes partly as a result of outside interests pushing for them in their RTA negotiations with countries in the region (for example, the US-Singapore Agreement).

\textsuperscript{11} In a few cases, CTC applies as an exclusive rule, e.g. in AFTA for wheat and flour; see Table 1
While “substantial transformation” criteria in East-Asian RTAs are on a trajectory towards increased restrictiveness, almost all RTAs in the region maintain some leniency in their RoO regimes by allowing for cumulation: AFTA RoO allow for full cumulation if the imported input was wholly obtained and partial cumulation otherwise, subject to a minimum ASEAN value content of 20%; in practice, this means that if an input has local value added of less than 40% but the ASEAN content is higher than 20%, the input will not receive the AFTA (CEPT) preferences and a certificate of origin must be completed for the input to qualify for cumulation (Kirk, 2007). The ASEAN-Korea and ASEAN-China Agreements allow for diagonal cumulation, while the bilateral agreements in the region (with the exception of Australia-Singapore) allow for bilateral cumulation (see Table 1). In addition, most agreements in the region allow for roll-up, while duty draw-back features only in AFTA; the certificate of origin has to be issued by the government in all cases, thereby adding to administrative costs. Due to the fragmentation of the production process in East Asia, AFTA further contains special rules regarding trans-shipment of goods.

An important innovation has been the “back-to-back” certificate of origin in the ASEAN-Korea FTA which accommodates entrepot traders like Singapore, by allowing the granting of preferences to re-exports (Manchin and Pelkmans-Balaoing, 2007).

Exceptions to the RoO pattern generally found in the region are the Japan-Singapore RTA which is highly complex, containing a 200-page protocol, and India-Singapore which closely follows the complexities of the NAFTA model. Future RTAs between East Asian countries and the EU are expected to also introduce the PANEURO model into the region (EFTA-Singapore already follows the PANEURO pattern).

In line with the general trend, Australia has recently shifted its strategy regarding rules of origin from a general value-added criterion to CTC requirements. Australia’s early FTAs with New Zealand and Singapore use a 50% value added criterion to define what constitutes a substantial transformation. However, more recently, in its FTAs with Thailand and the US, Australia adopted rules of origin requiring product-specific changes in tariff classification (CTC) (in response to demands by the US). The fact that Australia-New Zealand (ANZCERTA) RoO were adapted accordingly on January 1, 2007 supports the view that this is a clear shift in strategy on the part of Australia. It is hence to be expected that RoO requests in the on-going negotiations with China, UAE, Malaysia and ASEAN/New Zealand will follow a similar pattern.

Overall, it can be expected that the NAFTA model will dominate rules of origin regimes in the Americas, while the PANEURO model will be ubiquitous in the Mediterranean region and former European colonies. As more trans-continental RTAs are being signed between East Asian countries and either the US, Chile, Mexico, Canada (NAFTA model) or the EU (PANEURO model), the two models will start competing in the region and the need for a global regime will become ever more apparent.
Table 1: Rules of Origin in East Asian FTAs

<table>
<thead>
<tr>
<th>Country/Region</th>
<th>Change of Tariff Classification</th>
<th>Value Added Content</th>
<th>Specific Manufacturing Process</th>
<th>Cumulation</th>
<th>Tolerance</th>
</tr>
</thead>
<tbody>
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<td>ASEAN FTA (AFTA)</td>
<td>Yes[1]</td>
<td>Regional (40%)</td>
<td>diagonal</td>
<td></td>
<td></td>
</tr>
<tr>
<td>ASEAN-China (ACFTA)</td>
<td>Yes</td>
<td>Regional (40%)</td>
<td>diagonal</td>
<td></td>
<td></td>
</tr>
<tr>
<td>ASEAN-Korea (AKFTA)</td>
<td>Yes</td>
<td>Regional (40%)</td>
<td>diagonal</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Singapore – Japan (JSEPA)</td>
<td>Yes, product specific</td>
<td>Dom. (60%)</td>
<td>Yes</td>
<td>Bilateral</td>
<td>product specific</td>
</tr>
<tr>
<td>Singapore - New Zealand (ANZSCEP)</td>
<td></td>
<td>Dom. (40%)</td>
<td></td>
<td>Bilateral</td>
<td>10%</td>
</tr>
<tr>
<td>Singapore – Australia (SAFTA)</td>
<td></td>
<td>Dom. 50% (30% for some products)</td>
<td></td>
<td></td>
<td>3%</td>
</tr>
<tr>
<td>Singapore-Korea (KSFTA)</td>
<td>Yes, product specific</td>
<td>45-55%</td>
<td>Bilateral</td>
<td>10%[13]</td>
<td></td>
</tr>
<tr>
<td>Thailand- Australia (TAFTA)</td>
<td>Yes, product specific</td>
<td>40-45%</td>
<td>Yes</td>
<td>Bilateral</td>
<td>10%</td>
</tr>
<tr>
<td>Thailand- NZ (TNZCEP)</td>
<td>Yes, product specific</td>
<td>50%</td>
<td>Yes</td>
<td>Bilateral</td>
<td>10%</td>
</tr>
<tr>
<td>Malaysia-Japan (JMEPA)</td>
<td>Yes, product specific</td>
<td>Dom. 40% (product specific)</td>
<td>Bilateral</td>
<td></td>
<td>Only from ASEAN (product specific)</td>
</tr>
<tr>
<td>Trans-Pacific TRANSEP[14]</td>
<td>Yes, product specific</td>
<td>45-50%</td>
<td>Yes</td>
<td>Diagonal</td>
<td>10%</td>
</tr>
<tr>
<td>Australia – NZ (ANZCERTA)</td>
<td>Yes (as of 2007)</td>
<td>50%</td>
<td></td>
<td>Bilateral</td>
<td></td>
</tr>
</tbody>
</table>


**Recommendations**

_Choosing between basic regimes: value-added vs. CTC_\[15\]

In the past, the _value-added approach_ enjoyed great popularity mainly due to its simplicity and objectivity as all exports are subject to the same rule and the rule is not susceptible to industry pressures as it is applied uniformly across all sectors.

Yet, although seemingly simple on paper, the value added criterion has proven burdensome and non-transparent in practice. The calculation of costs and maintenance of detailed records on production activity turned out to be time-consuming and administratively onerous in particular for smaller manufacturers. Often it is unclear how production costs should be distributed across traded and non-traded goods and hence which part of the cost counts toward the value added.

\[12\] Applicable for textiles and wood-based products, iron & steel as an alternative rule, and for wheat & flour as an exclusive rule.

\[13\] For yarns and fibers used for clothing and textiles products 8% applies; the de minimis rule does not apply to agricultural products or applies with restrictions.

\[14\] Strategic Economic Partnership (SEP); members: Brunei, New Zealand, Chile and Singapore.

needed to qualify for originating status. Another concern is that fluctuations in exchange rates and international prices of raw materials can significantly affect an exporter’s costs, causing uncertainty as to whether a given product will qualify as originating under the value added approach. Finally, implementing the value added approach seems particularly difficult in East Asia, as production processes are highly fragmented and especially the least developed countries in the region are often hard-pushed to reach current value added thresholds.

All of this can help to explain the increasing popularity of the **CTC criterion**, which in many cases was introduced as an alternative to the value-added rule (it mostly exists alongside value-added criteria, although for some products it features as an exclusive rule). While early agreements apply one single CTC rule across the entire range of sectors, the trend toward the adoption of product-specific CTC criteria is very pronounced.

One benefit of the CTC approach is that uncertainty is avoided with respect to fluctuating exchange rates and world prices as well as which portion of production costs will be allowable and which portion will not. The CTC rule is also easier to manage for smaller companies as it requires less record keeping and calculations. Where it is difficult to prove substantial transformation by means of the CTC criterion, the rule can be complemented by a value added test.

A potential danger of using the CTC criterion is that it is susceptible to industry pressures, whenever it is product-specific. Negotiators often come under pressure from domestic lobby groups to make individual CTC criteria and their supplements more restrictive than necessary (e.g. as happened with yarn and textiles in US trade agreements). In addition to inefficiencies in sourcing as a result of this, it also leads to inefficiencies resulting from increased lobbying activity. This issue is, however, not *per se* inherent in the CTC approach, but rather to the adoption of product-specific rules.

Overall, allowing producers to meet alternative criteria for the same product seems to be the most trade-conducive solution, whereby CTC criteria should be set at the heading level. Preferential rules of origin should be as generally applicable as possible, containing only few and well-defined exceptions.

**Ways of simplifying RoO regimes: Harmonization and Cumulation**

The WTO emphasizes that any RoO regime should be “clear and predictable” and the rules structured so as to “facilitate the flow of international trade” and “not create unnecessary obstacles to trade”. This objective is already endangered by the restrictiveness of individual regimes, but the problem is compounded by the current tangle of different overlapping RoO regimes that came in the wake of the proliferation of preferential trade agreements; the current “spaghetti bowl” of rules of origin regimes (Baldwin, 2006) imposes many costs on trading partners and is off-setting some of benefits from liberalization. It adds to administrative costs of producers and may constrain them to export only to certain markets as production structures are not arbitrarily adaptable to the various sets of rules which are often contradictory.

There needs to be a push for a more harmonized system, detangling the set of inconsistent rules currently in existence. This is particularly relevant for East Asia where different trading partners from outside the region are negotiating RoO regimes following very different templates. Harmonization of rules of origin regimes can never be complete, as there will always have to be some room for idiosyncrasies of different negotiating partners, but ensuring a certain degree of

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16 WTO Agreement on Rules of Origin, Preamble
consistency across RTAs should be a prominent consideration in future negotiations. Consistency of the preferential RoO regimes across the world would reduce costs in several ways (Government of Australia, 2007):

- for firms in organizing their production processes to meet the RoO requirements under the different FTAs;
- for all involved in the trade process in obtaining information about the RoO requirements in different FTAs;
- for exporters in requiring the establishment of only one set of administrative procedures of RoO compliance (e.g. record keeping and verification processes); and
- for producers and manufacturers in allowing them to take advantage of economies of scale across FTA partners

Next to harmonization, existing RoO regimes can further be simplified by allowing for extensive cumulation across a web of RTAs, either in the form of full or diagonal cumulation (Brenton and Imagawa, 2005). Full cumulation allows firms to source inputs from a wider range of suppliers in partner countries, whether at arms-length or via outsourcing of parts of the production chain. The former possibility is particularly helpful for low-income countries, whose industrial structure does not necessarily allow them to produce all inputs for a given product.\textsuperscript{17} Given the high administrative costs associated with a full cumulation system, RTA partners may also want to consider introducing a less costly system of diagonal cumulation.

**Conclusion**

In recent years the trend in RoO regimes has been a movement away from simple value-added rules that were applied across the board, towards more restrictive product-specific rules in the form of CTC requirements with supplemental conditions. This partly reflects the increasing dominance of the US regime as well as the fact that more and more governments are subjected to pressures from domestic industry as domestic lobby groups become increasingly well organized. In particular future Asian RTAs may experience such pressures. It will be important for governments to resist these pressures to the greatest extent possible. Overall, the best way to reduce the harmfulness of rules of origin will be to bring down MFN tariffs on a multilateral basis, which will reduce preference margins such that they will eventually become irrelevant.

\textsuperscript{17} There is no evidence in the existing literature that restrictive rules of origin have encouraged the development of integrated production structures (Brenton and Imagawa, 2005)
Bibliography


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CHAPTER 2 – DISPUTE SETTLEMENT

An RTA’s dispute settlement mechanism is critical for the effective implementation and ongoing compliance with the agreement’s substantive commitments. The success of the WTO over the last ten years can be partially attributed to its Dispute Settlement Body that provides its Members with a forum for diplomatic consultations and a two-stage system (a three member panel plus subsequent appellate review) that produces a legally binding decision. The WTO’s capability to provide a binding decision that may lead to the imposition of trade sanctions is one reason the WTO has experienced a surprisingly high level of compliance.

Many RTAs include dispute settlement mechanisms inspired by the structure and procedures of the WTO or the earlier GATT. While most have common features, there is no single, universally accepted model. The sophistication of these mechanisms varies based on a multitude of factors, such as the level of expected economic integration, the scope of commitments subject to dispute settlement, the number of contracting parties, and the amount of resources (human and financial) the parties have available to allocate towards dispute settlement. For example, most bilateral RTAs utilize ad hoc arbitral panels, although some maintain standing tribunals (e.g., EU, COMESA, SACU, and the Andean Community). There is no one-size-fits-all dispute settlement system for RTAs, thus this Chapter does not aim to provide recommendations of specific features.

The goal of this Chapter is to distill the key elements of dispute settlement so negotiators can customize a system tailored to the unique characteristics of their RTA. To achieve this goal, a sample of bilateral RTAs was chosen that represent some of the most recent agreements (including some not yet ratified or fully implemented) where one of the parties is either a developing country or a country in the Asia-Pacific region. In addition, the dispute settlement systems of the WTO, NAFTA, and some other major trade agreements are utilized for purposes of comparison.

The discussion of dispute settlement throughout this chapter focuses on disputes among states. The WTO allows only disputes among Member states, but some RTAs contain provisions for disputes by private parties against governments or other private parties. For example, many RTAs now include mechanisms to settle investor-state disputes—historically these provisions were part of separate agreements commonly known as bilateral investment treaties (“BITs”). The mechanisms provided for investor-state disputes in RTAs are usually separate and structurally different than the mechanism for state-to-state disputes, often resembling standard commercial arbitration or even explicitly requiring arbitration through ICSID or under UNCITRAL rules. Investor-state disputes are usually limited to the substantive commitments in an RTA’s “Investment” chapter. The system to handle investor-state disputes in an RTA may be utilized far more frequently than the system for state-to-state disputes; for example, in NAFTA the Chapter 11 system for investor-state disputes has been used with much greater frequency than the Chapter 18.

A few RTAs provide substantive rights to private investors, but require those investors to bring complaints in domestic courts rather than through the RTA dispute settlement system. Australia explained the existence of such a system in the Australia – US agreement: “[t]his outcome recognises the fact that both countries have robust and sophisticated domestic legal systems that provide adequate scope for investors, both domestic and foreign, to pursue concerns about government actions.” However, the usefulness of such a procedure is dependent on whether international agreements are enforceable by private parties in domestic courts.
The design of dispute settlement mechanisms in international law starts with determining a desired balance between “diplomatic” and “legal” features. The diplomatic features encourage mutually agreeable solutions through consultations, mediation, and conciliation. The legal features rely upon strict rules and binding adjudication. When the old GATT dispute settlement system was modified by the WTO agreements, one of the most significant changes was a shift away from a diplomatic oriented system towards a more legal one. (Pauwelyn, 2005) Similarly, the trend in RTAs is towards more legal features by expanding the coverage and sharpening the “teeth” of dispute settlement.

While the features of RTA dispute settlement mechanisms continue to evolve, any discussion of RTA dispute settlement must recognize its extreme rarity. With the exception of a few larger RTAs, like the EU, NAFTA, MERCOSUR, and the Andean Community, RTA dispute settlement is almost never utilized. Indeed, the WTO remains the prima forum to settle trade-related disputes. Nevertheless, the inclusion of more WTO-plus provisions in RTAs reinforces the need for effective dispute settlement mechanisms.

To examine the key elements of RTA dispute settlement for state-to-state disputes, this Chapter is divided into three areas: (1) the scope of dispute settlement; (2) the procedural aspects; and (3) the choice of forum clause.

The Scope of Dispute Settlement

The scope of RTA dispute settlement is defined both by the substantive commitments subject to dispute settlement and the type of complaints allowed.

The most explicit means of defining the scope of dispute settlement is to exclude certain commitments from dispute settlement. Many RTAs prefer to settle disputes through the WTO for certain subject matters. Chile – China and many US RTAs exclude anti-dumping and countervailing duty actions from RTA dispute settlement, thereby leaving these matters exclusively for WTO dispute settlement. RTAs also tend to include numerous commitments to cooperate in areas such as competition policy, intellectual property, education, labor standards, and environmental issues. These commitments to cooperate are almost always excluded from dispute settlement. In some cases substantive commitments are made in these areas and also excluded from dispute settlement. For example, Australia – Thailand includes substantive commitments in the field of competition policy to provide transparent, non-discriminatory, and comprehensive enforcement of competition laws, but the agreement excludes these commitments from dispute settlement. These types of commitments may be excluded from dispute settlement because they are primarily aspirational, novel, or untested in international trade law.

The other means of defining the scope of dispute settlement is through the type of complaints that may be brought. The main differences among RTAs are whether a complainant may challenge proposed as well as actual measures and whether the RTA allows so-called nullification and impairment (“non-violation”) complaints.

The ability to challenge a proposed measure is allowed in a number of RTAs. For example, the

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19 As explained, infra, NAFTA also includes a distinct Chapter 19 system exclusively for state-to-state disputes regarding anti-dumping and countervailing duties, which has handled a large number of cases.
recent agreement signed (but not yet ratified) between Colombia and the US defines the type of cases that may be brought before dispute settlement:

[T]he dispute settlement provisions of this Chapter shall apply with respect to the avoidance or settlement of all disputes between the Parties regarding the interpretation or application of this Agreement or wherever a Party considers that:

(a) an actual or proposed measure of another Party is or would be inconsistent with the obligations of this Agreement;

(b) another Party has otherwise failed to carry out its obligations under this Agreement.

In contrast, the Bahrain – US agreement signed a few years earlier explicitly states, “[n]either Party may refer a matter concerning a proposed measure to a dispute settlement panel.” Other RTAs do not distinguish between actual and proposed measures: Chile – China applies the RTA’s dispute settlement process where “a Party considers that a measure of the other Party is inconsistent with the obligations of this Agreement or that the other Party has failed to carry out its obligations under this Agreement.”

Certainly there are benefits for complainants who can challenge a measure ex ante before it inflicts any damages, especially because the WTO and most RTAs do not permit compensation for past damages—permissible retaliation and compensation is exclusively on a forward-looking basis. There are costs to allowing challenges of proposed measures though. In many cases, such challenges will be premature, not providing enough facts for a thorough analysis by an arbitral panel. In addition, the challenge of proposed measures could expend resources litigating over a measure that will never be implemented in practice or have the expected harmful effect.

The ability to file non-violation complaints is another significant difference among RTAs in regard to the type of cases subject to dispute settlement. Non-violation cases do not allege a measure of the respondent is inconsistent with any specific obligation of the agreement, but rather a benefit the complainant reasonably expected to receive from the agreement is being nullified through an action of the respondent that is not inconsistent with any specific RTA provision. Non-violation cases are a peculiar and controversial breed with few, if any, analogues outside the trade regime. The WTO allows non-violation complaints; however, such complaints are exceedingly rare, as only two WTO cases included a challenge based in part on a non-violation theory.

When non-violation complaints are allowed in an RTA, they are usually limited to a specific list of subject matters. In CAFTA – DR – US, non-violation complaints may be lodged only in regard to:

Chapters Three through Five (National Treatment and Market Access for Goods, Rules of Origin and Origin Procedures, and Customs Administration and Trade Facilitation); Chapter Seven (Technical Barriers to Trade); Chapter Nine (Government Procurement);

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20 As defined in CAFTA – DR – US, a non-violation complaint is when a “Party considers that any benefit it could reasonably have expected to accrue to it under any provision . . . is being nullified or impaired as a result of the application of any measure that is not inconsistent with this Agreement, the Party may have recourse to dispute settlement. . . .”

Similarly, Korea – Singapore and Chile – Korea permit non-violation complaints, but only for benefits accruing under the sections for National Treatment and Market Access for Goods, Rules of Origin, and Cross Border Trade in Services. Many recent RTAs, including those by China and Japan, do not allow non-violation complaints.

**Procedural Aspects of Dispute Settlement in RTAs**

Most RTAs provide a dispute settlement process that combines features of the WTO with more typical international commercial arbitration. The phases in WTO dispute settlement consist of initial consultations, the request for and establishment of a panel, the panel proceedings (including an interim and final report), possible review by the Appellate Body, and finally a variety of potential enforcement/compliance arbitrations. The chart below illustrates the basic dispute settlement framework at the WTO and some representative RTAs. The most notable differences are the lack of any appellate review mechanism in bilateral RTAs and the inclusion in some RTAs of an intermediate mandatory mediation process with the RTA’s administrative body (e.g., Commission, Joint Committee, or Association Committee).

<table>
<thead>
<tr>
<th>Box 1: Types of Dispute Settlement Tracks</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>WTO</strong></td>
</tr>
<tr>
<td>Consultations</td>
</tr>
<tr>
<td>Panel</td>
</tr>
<tr>
<td>Appellate Body</td>
</tr>
<tr>
<td><strong>China - Chile</strong></td>
</tr>
<tr>
<td>Consultations</td>
</tr>
<tr>
<td>Commission</td>
</tr>
<tr>
<td><strong>Australia - US</strong></td>
</tr>
<tr>
<td>Consultations</td>
</tr>
<tr>
<td>Joint Committee</td>
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<tr>
<td><strong>EU - Chile</strong></td>
</tr>
<tr>
<td>Association Committee</td>
</tr>
<tr>
<td>Panel</td>
</tr>
<tr>
<td><strong>Japan - Singapore</strong></td>
</tr>
<tr>
<td>Consultations</td>
</tr>
<tr>
<td>Panel</td>
</tr>
</tbody>
</table>

*Source: authors’ compilation*

The following discussion separately analyses each of the four phases of dispute settlement in RTAs: consultations/mediation, establishment of the panel, panel proceedings, and compliance/enforcement.
The Consultation/Mediation Phase

Upon initiation of a complaint, the complaining party is often first required to request consultations through a formal statement that sets out with particularity the measures it seeks to challenge and the legal basis. In consultations the parties generally have a duty to negotiate in good faith towards a mutually satisfactory resolution, which often includes an obligation to exchange information and make available its personnel with expertise in the subject matter.

Like the WTO, RTAs set a minimum time for consultations. Thus the parties must engage in consultations for a minimum number of days before either party may decide to move forward in the dispute settlement process—sixty days is the required time period for consultations at the WTO and in many RTAs. Representative of the trend towards a more “legal” approach, some recent RTAs shorten the minimum time required for consultations. For example, Japan – Singapore requires only thirty days of consultations and Chile – Korea requires only forty-five. As explained below, Chile – EU effectively eliminated the mandatory consultations procedure. The question of how much time to devote to consultations depends on whether formal consultations are expected to be useful. There is no data available on the success of consultations in RTAs; however, a recent study on WTO disputes reported “over [forty-four percent] of the disputes in which consultations are requested never reach a panel.” (Leal-Arcas 2007)

At the WTO, if consultations prove unsuccessful, the parties may move directly to establishment of a panel. Some RTAs, such as Chile – Korea and Japan – Singapore, follow this model. Other RTAs require or make optional an intermediate step of mediation or conciliation after the consultations period expires. This mediation process commonly occurs before the administrative body (this body goes by many different names, such as the Commission, Joint Committee, or Association Committee) that oversees many operational aspects of the RTA and also acts as mediator for disputes. RTAs differ on the specific characteristics of this administrative body; it usually consists of a high-ranking official from each party and takes responsibility for supervising implementation of the RTA.

During this mediation process, the administrative body usually may call upon experts, create working groups, and request further information from the parties. This process does not typically produce any binding decisions or recommendations to which a subsequent panel must pay deference. RTAs set a strict timeline for this process, after which if there is no mutually agreed upon resolution, either party may request establishment of an arbitral panel.

An example of an interesting innovation is in Chile – EU, which provides for one pre-panel mediation process before the “Association Committee” and no formal consultations are required. The Association Committee is required to produce a decision, and if necessary recommendations and a timeframe for bringing any measures into compliance with the RTA. If either party is unsatisfied with this decision or the Association Committee takes longer than 15 days, it may request establishment of a panel. There is no provision in the RTA that requires the panel to pay deference to the Association Committee’s decision. By moving quickly to binding adjudication before a panel, this illustrates an aggressively “legal” approach towards dispute settlement in RTAs.

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22 The WTO Dispute Settlement Understanding requires parties to enter consultations for a minimum of 60 days before submitting a request for the establishment of a panel. However, the DSU shortens this period to 30 days if a Member fails to respond to a request for consultations or refuses to enter consultations.
Establishment of a Panel

If the parties are unable to resolve the controversy through consultations or mediation/conciliation, either party has the right to request establishment of an arbitral panel. RTA panels commonly consist of three members, although a few utilize five members (e.g., NAFTA, Canada – Chile). RTAs provide specific provisions for the selection of the panelists, procedures to ensure a panel is constituted even if the parties are unable to agree on selection of the panel members, and a timeframe within which the panel must be established.

The selection of panelists in RTAs is more similar to the process used in commercial arbitration than the WTO. In RTAs with panels that include three members, each party chooses one of the panelists and then a third panelist (the chairperson) is selected by agreement of either the disputing parties or the first two panelists. Differences among RTAs exist in the details, such as whether the parties must choose their panelists from an indicative roster and what contingent arrangements are provided for in case the parties fail to constitute a panel themselves. Table 2 provides some representative examples of the various methods used to select panelists.

As shown in Table 2, the WTO operates quite differently from any of the RTAs and is a valuable reference because the WTO rarely has problems in establishing a panel. The WTO Secretariat maintains an indicative list, composed of individuals nominated by the WTO Members. Upon a request for a panel, the WTO Secretariat nominates three panelists, none of which may be citizens of the disputing parties. There is no requirement, however, that the WTO Secretariat’s nominations come from the indicative lists. A party may only oppose such nominations for “compelling reasons”. If the parties are unable to agree on the panelists, the final decision resides with the WTO Director-General, who will “appoint the panelists, based on substantive criteria, not by lot.” (Pauwelyn, 2004) RTAs, however, face the problem that they do not commonly have panelists from third parties or a neutral entity such as the WTO Secretariat or Director-General to perform these functions.

In a typical RTA process for selecting panelists is the parties have more control in the selection process than at the WTO. Unsurprisingly, this gives each party a panelist it expects will be sympathetic to its side. While this level of control is valuable, it can be criticized for undermining the legitimacy of the panel, as well as putting “too much pressure or decision-making authority on the chair of the panel, the only panelist not appointed by a single party.” (Pauwelyn, 2004) Thus, many RTAs include selection criteria for panelists that include a requirement of independence. Bahrain – US, for example, requires panelists “be chosen strictly on the basis of objectivity, reliability, and sound judgment and have expertise or experience in law, international trade, or the resolution of disputes arising under international trade agreements; [and] be independent of, and not affiliated with or take instructions from, either Party. . . .”
<table>
<thead>
<tr>
<th>Country Pairs</th>
<th>The First Two Panelists</th>
<th>Panel Chairperson</th>
<th>Expected Time</th>
</tr>
</thead>
<tbody>
<tr>
<td>WTO</td>
<td>The WTO maintains an indicative list of panelists nominated by the Members. The WTO Secretariat nominates three panelists, which need not be from the indicative list. The parties may object to the nominees for “compelling reasons” and the WTO Director-General will make the final decision.</td>
<td>10 days (or 30 days if the parties make objections)</td>
<td></td>
</tr>
<tr>
<td>Australia-Thailand</td>
<td>Each party appoints one panelist.</td>
<td>The first two panelists shall designate a chairperson; if the parties disapprove of this designation, they shall consult to jointly appoint the chairperson.</td>
<td>90 days</td>
</tr>
<tr>
<td>Chile – China</td>
<td>Each party appoints one panelist.</td>
<td>The parties shall agree on the chairperson; otherwise the WTO Director-General will select the chairperson.</td>
<td>60 days</td>
</tr>
<tr>
<td>Chile – EU</td>
<td>The Association Committee has a pre-established list of 15 individuals (at least 5, designated as potential chairpersons, must not be a national of either party), the Committee selects the panelists by lot from the list—one from the group proposed by each Party and one from the group of potential chairpersons.</td>
<td>3 days</td>
<td></td>
</tr>
<tr>
<td>Japan – Malaysia</td>
<td>Each party appoints one panelist.</td>
<td>Each party proposes three non-nationals to be the chairperson. The parties shall agree on the chairperson, taking the proposals into account. If the parties fail to agree, they shall request the first two arbitrators to appoint the chairperson. As a last option, the WTO Director-General will appoint the chairperson.</td>
<td>75 days</td>
</tr>
<tr>
<td>Japan – Singapore</td>
<td>Each party appoints one panelist, otherwise the party’s designated legal expert will be appointed.</td>
<td>The parties shall agree on the chairperson; otherwise they shall exchange lists of five proposals and the chair will be selected if any individual is on both lists; if this fails the first two panelists shall agree on the chairperson; as a last option, the chairperson will be chosen by random drawing.</td>
<td>70 days</td>
</tr>
<tr>
<td>Korea – Singapore</td>
<td>Each party appoints one panelist.</td>
<td>The parties shall agree on the chair; otherwise they shall exchange lists of four individuals who are non-nationals, and the chair is selected by lot from these two lists.</td>
<td>70 days</td>
</tr>
<tr>
<td>Bahrain – US</td>
<td>Each party appoints one panelist.</td>
<td>Parties shall agree on the chairperson, otherwise the Party chosen by lot shall select a non-national of that Party to be the chairperson.</td>
<td>65 days</td>
</tr>
</tbody>
</table>

Source: authors’ compilation

A problem identified in some RTAs is the ability of one party to block the establishment of a panel by refusing to cooperate in the selection of panelists. This occurs when panelists must be selected from a pre-existing indicative roster or there is no contingency in case a party fails to make its nominations. For example, a recent working paper by the WTO states in regard to the Chile – EU agreement:

In the FTA with Chile, the possibility of blocking the composition of the panel is an obvious weakness. This occurs because the list of individuals who can serve as arbitrators must be made by consensus through the Association Council. The practice shows that,
despite the specific time frame of six months to constitute this list after the FTA enters into force, more than three years have passed and this list has still not been created.
(Ramirez-Robles, 2006)

A similar criticism has been made of the NAFTA Chapter 20 dispute settlement process, which allows selection from a roster as a contingency if a party fails to nominate its panelist, but there is no alternative if the parties fail to populate the roster. Thus, the US was able to block establishment of a NAFTA panel for more than four years in a dispute brought by Mexico regarding market access for its sugar exports.

To avoid the ability of one party to unilaterally block establishment of a panel, an RTA should contain a contingency method for the appointment of a panelist that is not dependent on actions of either party. Chile – China and Japan – Malaysia utilize a reliable approach by which if either party fails to appoint a panelist, then the WTO Director-General will make the appointment. 23

RTAs also commonly require panelists to be appointed in a specified timeframe. This ensures swift composition of the panel and thus the start of the clock for the panel to conclude its proceedings. This timeframe differs considerably among RTAs, from 3 days in Chile – EU to 90 days in Australia – Thailand.

The Panel Proceedings

RTAs describe the procedures to be followed by a panel. Frequently, however, the RTA will leave to a later date the creation of more detailed rules of procedure for the panel. Within modern RTAs, there are a few notable procedural differences: whether the panel issues an interim report before its final report; whether the panel will accept amicus curiae submissions; whether the proceedings are open to the public or the parties’ submissions are available to the public; and finally the time within which the panel must issue its final report.

At the WTO, a panel will first issue an interim report. The disputing parties then have a chance to submit comments before the panel issues its final report. There are benefits to allowing the parties an additional opportunity to present arguments after learning of the panel’s initial impressions. However, this process has been criticized for being time-consuming and providing no added benefit. For example a Korean law professor states, “the initial report and separate opinion systems are not recommendable because, according to the experience under the WTO . . . the former tends to delay [dispute settlement] with no substantial help in correcting errors or reflecting comments from the disputing parties in the panel report.” (Won Mog Choi, 2004)

Many RTAs adopt the WTO approach of requiring a panel to issue an interim report. Some recent RTAs, such as Chile – EU and Japan – Singapore, eliminate the interim report requirement (requiring a panel to issue only a single, final report). Elimination of the interim report may be justified if it significantly reduces the time of litigation. In most cases, however, the time between the interim and final report is only thirty days. The benefit of the interim report, particularly because RTAs do not include an appellate review, is to give parties one final opportunity to offer comments upon receiving the panel’s initial thoughts.

Most RTAs do not contain a provision allowing a panel to consider amicus curiae submissions from outside entities, like non-governmental organizations. The WTO similarly began by not

23 Resorting to a neutral party, such as the WTO Director-General, has been criticized for unfairly placing an additional burden on such people (Won Mog Choi, 2004), in practice this will rarely happen since this option exists primarily to force the parties into an agreement.
allowing such submissions, but after substantial criticism from the public decided panels will have the discretion to consider such submissions. A few recent RTAs similarly provide panels with the option to consider submissions from outside entities. For example, Korea – Singapore includes the following provision:

the arbitral panel may consider requests from non-governmental entities in the Parties’ territories to provide written views regarding the dispute that may assist the arbitral panel in evaluating the submissions and arguments of the Parties.

While the WTO is moving towards greater transparency in trade disputes by opening panel proceedings to the public (although only two proceedings have so far been open to the public) and requiring parties’ submissions to be made available to the public, RTAs typically retain a high degree of confidentiality for dispute proceedings. Like many RTAs, Chile – China mandates “[t]he hearings of the arbitral panel shall be held in closed session” and makes no reference to providing non-confidential versions of the parties’ submission to the public. To respond to criticisms from the public that RTAs lack sufficient transparency, some US RTAs require at a minimum that “each participating Party’s written submissions, written versions of oral statements, and written responses to a request or questions from the panel shall be public.”

Transparency always involves both costs and benefits. The costs appear in the form of administrative burdens, protection of confidential information, and the interference with the parties’ legal strategies by *amicus curiae* submissions. The benefits of transparency principally arrive in the form of enhanced legitimacy in the public’s eye.

RTAs will usually contain specific timelines for the work of the panel. Commonly, a panel has 90 or 120 days from its establishment to issue its final report. This is significantly shorter than the 180 days allowed for a WTO panel. Some RTAs dramatically reduce the time permitted for panel proceedings. For example, India – Singapore allows only sixty days between the establishment of a panel and issuance of the final report. Sixty days is an incredibly short period for panel proceedings, which increasingly require intensive, complex fact-finding that is crucial to a well-reasoned final report. However, shorter time periods may reflect a premium the parties place on swift resolution of disputes or a desire to conserve resources for other purposes. Notably, the draft Korea – US agreement gives the panel 180 days to present its initial report and then 45 additional days for the final report, a total of 225 days.

The chart below compares the expected time it will take from consultations to a final decision in the WTO and some representative RTAs. The key points one may infer from this chart are: (1) dispute settlement within RTAs will typically result in a final report quicker than at the WTO; (2) in comparison to the WTO, RTAs allow a much longer time period for the selection of panelists; and (3) except for the fairly standard sixty day consultations period, there is no consensus on a proper timeframe for RTA dispute settlement.
Box 2: Dispute Settlement Timeframes in RTAs

<table>
<thead>
<tr>
<th></th>
<th>Days</th>
</tr>
</thead>
<tbody>
<tr>
<td>WTO (1994)</td>
<td>0</td>
</tr>
<tr>
<td>Japan - Singapore (Feb. 2002)</td>
<td>150</td>
</tr>
<tr>
<td>Chile - EC (Oct. 2002)</td>
<td>200</td>
</tr>
<tr>
<td>Chile - US (June 2003)</td>
<td>250</td>
</tr>
<tr>
<td>Australia - Thailand (May 2004)</td>
<td>300</td>
</tr>
<tr>
<td>Australia - US (May 2004)</td>
<td>350</td>
</tr>
<tr>
<td>Singapore - India (June 2005)</td>
<td>400</td>
</tr>
<tr>
<td>Korea - Singapore (Aug. 2005)</td>
<td>450</td>
</tr>
<tr>
<td>Chile - China (Nov. 2005)</td>
<td>500</td>
</tr>
<tr>
<td>Japan - Malaysia (Dec. 2005)</td>
<td>550</td>
</tr>
</tbody>
</table>

**Source:** authors’ compilation

**Compliance & Enforcement**

The realistic threat of trade sanctions at the WTO is a main reason for the high rate of compliance with decision of the DSB. Trade sanctions, in both the WTO and RTAs, may entail compensation paid by the losing party but are commonly imposed by allowing a successful complainant to retaliate by suspending a specified level of benefits accruing to the respondent from the trade agreement. In the WTO, however, when a respondent is reluctant to comply, the complainant may face a labyrinth of procedural hoops before being allowed to retaliate. Leal-Arcas (2007) explains, “[w]hile the losing party is constrained by the detailed series of rules under the DSU, one advantage of the system is that it has a variety of ways to prolong noncompliance.” A losing respondent may, for example, delay compliance by invoking WTO procedures for further arbitrations, some of which may be appealed, regarding the length of the implementation period, the satisfaction of DSB recommendations, and the level of permissible concessions to be suspended.

RTAs first require the parties to promptly implement the recommendations in a panel report. Usually the losing party will be given a short period (20-30 days) to notify the other party how it intends to comply and in what time period. Many RTAs will specify a maximum time for the losing party to comply with the panel’s recommendations (e.g., 12 months in Japan – Singapore). If further disputes arise regarding the manner or time of implementation, the parties are often required to enter into a new round of consultations and then further proceedings before a panel.

A significant difference among RTAs is whether a prevailing party may suspend benefits following the initial panel if it determines the other party has failed to comply, or whether
additional panel proceedings and reports are required to authorize the imposition of any trade sanction. In Japan – Singapore, the prevailing must proceed to a second panel and only suspend benefits if that panel confirms that the other party has failed to comply with the original panel report. In contrast, other RTAs (e.g., NAFTA, Bahrain – US, Chile – Korea) allow the prevailing party to temporarily suspend concessions after the original award if a mutually agreeable solution is not reached; either party may then request consultations and an additional panel to review the level of suspended benefits and any actions taken to comply with the original panel report.

Some RTAs correct for perceived deficiencies in the WTO by allowing a party to request the original panel to make findings on the level of trade effects or provide more precise recommendations. In a number of RTAs, such as NAFTA and Canada – Chile, the parties may request the original panel to include in its findings an assessment of the level of trade effects caused by any measure at issue. Herreros (2003) explains,

>a party can ask the panel to make findings on the level of adverse trade effects of any measure at issue. This constitutes a significant departure from the WTO model, in that a panel mandated to determine the WTO compatibility of a given measure cannot make any quantitative determination of the adverse trade effects of that measure. In the WTO this assessment is made only at a later stage to determine the authorized level of retaliation if and when the WTO member should have put the said measure in conformity with its multilateral obligations has failed to do so.

The benefit of having these findings from the panel is that it eliminates one of the steps a respondent can use to prolong its noncompliance.

An additional option available under some U.S. RTAs is for the losing respondents to pay a monetary assessment in lieu of suspension of concessions. For example, the draft Korea – US agreement provides the respondent with a choice to “pay an annual monetary assessment . . . to the complaining Party,” with the amount decided through consultations or a separate implementation panel proceeding. For disputes under the labor and environmental provisions in US RTAs, monetary assessments are also used but capped at $15 million and paid into a fund administered by the RTA’s Joint Committee for “appropriate labor or environmental initiatives.”

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24 For example, Chile – Korea provides:

>The complaining Party may suspend the application of benefits of equivalent effect to the Party complained against if the panel resolves . . . that a measure is inconsistent with the obligations of this Agreement and the responding Party does not implement the final report within 30 days following the expiration of the time-frame established in such a report . . . The suspension of benefits shall last until the responding Party implements the decision of the panel’s final report or until the Parties reach a mutually satisfactory agreement on the dispute, depending on the case . . . Upon written request of the Party concerned, the original panel shall determine whether the level of benefits suspended by the complaining Party is excessive pursuant to paragraph 1.

Similarly, NAFTA provides if “the Party complained against has not reached agreement with any complaining Party on a mutually satisfactory resolution . . . within 30 days of receiving the final report, such complaining Party may suspend the application to the Party complained against of benefits of equivalent effect until such time as they have reached agreement on a resolution of the dispute.”
Choice of Forum

The use of RTAs’ dispute settlement provisions remains often limited. Thus, precedent from which to evaluate RTA dispute settlement in practice is very sparse. A recent report by PriceWaterhouseCoopers (2006) on ASEAN dispute settlement explains this point and speculates on some possible explanations why ASEAN dispute settlement has never been used:

One striking difference . . . is that whereas some 330 cases have already been filed at the WTO since its formation in 1995 (just a year before the ASEAN DSM was put together), the ASEAN DSM has yet to hear its first case. . . . Experts attribute this underutilization to 3 reasons. Foremost is the fact that not all ASEAN countries have nominated their experts for the DSM Appellate Body (as provided in the new DSM Agreement). Secondly, timeframes are foreseen to be exceptionally long in ASEAN since the deciding body (the ASEAN Economic Ministers) meets only twice a year, which means that the time gap between AEM meetings could be between 90 to 180 days. Finally, there is still no clear established method to effectively determine and implement compensatory relief to an aggrieved party.

Two large RTAs, NAFTA and MERCOSUR, have experienced substantial use of their dispute settlement systems. NAFTA is certainly the RTA with the most active dispute settlement mechanism; however the great majority of cases litigated under NAFTA (more than 100) relate to anti-dumping and countervailing duties, which are handled by a specialized procedure created by NAFTA Chapter 19 that is not typically available in RTAs (Hufbauer, 2004). Aside from Chapter 19, NAFTA’s standard dispute settlement procedure (Chapter 20) has only decided three cases in more than ten years. MERCOSUR has adjudicated approximately twelve cases (two under the current Olivios Protocol and ten under the prior Brazil Protocol). Most of the MERCOSUR cases relate to the “free movement of goods and services” provisions, which do not commonly exist in bilateral RTAs—MERCOSUR is properly classified under the GATT XXIV regime as a “customs union” rather than a simple “free-trade area”. MERCOSUR panels have decided a few cases related to anti-dumping, export subsidies, and safeguards.

At least part of the story explaining why RTA dispute settlement is not commonly utilized is that RTA partners, who are WTO Members, often have a choice of forum. A number of WTO cases were between RTA partners. Many of these cases relate to trade remedy disputes, which RTAs commonly require to be resolved exclusively through the WTO. Other cases brought to the WTO by RTA partners may be the result of differences in the applicable law, such as when the WTO contains substantive commitments not found in the RTA. A few cases have been brought to the WTO where an RTA among the disputing parties contained nearly identical provisions. For example, the US brought a WTO case against Canada’s patent term under the TRIPS Agreement, both TRIPS and NAFTA require a minimum patent protection term of twenty years from the filing date. Canada – Wheat was initiated by a complaint of the US alleging violations of GATT III:4 (national treatment) and GATT XVII (state trading enterprises), each of which is also covered under NAFTA. The US also brought a complaint against Mexican taxes on soft drinks under GATT Articles III:2 and III:4; NAFTA incorporates the language of GATT Article III and thus the case could alternatively have been brought to NAFTA dispute settlement.

The substantial overlap of RTA and WTO commitments means a country may have a choice of two or more forums that have subject matter jurisdiction over a dispute. This creates a variety of problems stemming from the potential of two parallel (or successive) disputes. As a respondent, a country does not want to give a complainant more than one bite at the apple by litigating the same matter before different tribunals. Because public international law does not provide clear rules on preclusion (res judicata and collateral estoppel – legal principles by which deference is granted
to prior decisions of other tribunals on the same matter), adjudication of the same issues by
different tribunals could easily lead to conflicting decisions. RTAs, therefore, contain a “choice of
forum” clause to limit the effect of these problems.

“Choice of forum” clauses exist in roughly three different forms: (1) the complainant may choose
any available forum, but once that choice is made it excludes all other available forums from
future use for that dispute; (2) the complainant is required to use the WTO dispute settlement
process for claims under specific RTA provisions (e.g., anti-dumping and countervailing duty
actions) or for RTA provisions that are equivalent in substance to WTO commitments; and (3) the
complaint must use the RTA system for any claim under specified provisions in the RTA. Table 3
provides examples of “choice of forum” clauses in some RTAs.

| Type 1  | Australia – Thailand: Once a dispute settlement procedure has been initiated between the Parties with respect to a particular dispute under this Chapter or under any other international agreement to which the Parties are parties, that procedure shall be used to the exclusion of any other procedure for that particular dispute. This paragraph does not apply if substantially separate and distinct rights or obligations under different international agreements are in dispute. |
| Australia – US: Where a dispute regarding any matter arises under this Agreement and under another trade agreement to which both Parties are party, including the WTO Agreement, the complaining Party may select the forum in which to settle the dispute. . . . the forum selected shall be used to the exclusion of other fora. |
| Chile – China: Where a dispute regarding any matter arises under this Agreement and under another free trade agreement to which both Parties are parties or the WTO Agreement, the complaining Party may select the forum in which to settle the dispute. Once the complaining Party has requested a panel under an agreement . . . the forum selected shall be used to the exclusion of the others. |

| Type 2  | Chile – EU: (a) When a Party seeks redress of a violation of an obligation under the WTO Agreement, it shall have recourse to the relevant rules and procedures of the WTO Agreement, which apply notwithstanding the provisions of this Agreement. |
| (b) When a Party seeks redress of a violation of an obligation under this Part of the Agreement, it shall have recourse to the rules and procedures of this Title. |
| (c) Unless the Parties otherwise agree, when a Party seeks redress of a violation of an obligation under this Part of the Agreement which is equivalent in substance to an obligation under the WTO, it shall have recourse to the relevant rules and procedures of the WTO Agreement, which apply notwithstanding the provisions of this Agreement. |
| (d) Once dispute settlement procedures have been initiated, the forum selected, if it has not declined its jurisdiction, shall be used to the exclusion of the other. |

| Type 3  | NAFTA: In any dispute… that arises under [the articles or chapters on environment, SPS measures, standards-related measures]… the complaining party may, in respect of that matter, thereafter have recourse to dispute settlement procedures solely under this Agreement. |

Source: authors’ compilation
Some RTAs also extend the scope of this clause to possible conflicts with international agreements other than the WTO. For example, while Australia – US references only trade agreements, more recent US RTA negotiations expand the coverage of the choice-of-forum clause to include all international agreements that the RTA parties have in common. The draft Korea – US agreement applies the choice-of-forum clause to a “dispute regarding any matter [that] arises under this Agreement and under the WTO Agreement, or any other agreement to which both Parties are party . . . .” Australia-Thailand contains similar provisions.

While “choice of forum” clauses should resolve most problems related to potentially duplicative litigation, there is always the risk of a “dispute within a dispute”, particularly given the complexity of disputes and overlapping disciplines in international law.

Another important, yet unanswered, legal question is whether a WTO panel will even recognize a “choice of forum” clause in an RTA. Many argue WTO panels should look exclusively at WTO rules, disregarding entirely any non-WTO law applicable between the parties. A WTO panel has never been asked to rule on this issue, although the panel in Brazil – Poultry did imply it might consider the effects of a “choice of forum” clause in an RTA (Pauwelyn, 2004).

Factors in Choosing the Forum
When a choice of forum is available, the complainant must consider a number of factors, such as applicable substantive law, available remedies, and effectiveness of the dispute settlement process itself.

At first sight, “[r]egional agreements may offer more immediate remedies and thus facilitate effective enforcement of rules, even when WTO dispute settlement remains an alternative” (Woolcock, 2003). Moreover, the Parties should expect greater control over selecting the panelists in an RTA compared to the WTO. However, countries seem to prefer the WTO to resolve disputes that could be adjudicated under an RTA. A number of reasons could explain this choice, including:
- the large and growing body of case law at the WTO provides a more predictable outcome;
- the WTO offers complainants the assistance of other WTO Members acting as third parties (with the rights to file submissions and attend hearings);
- the political cost of non-compliance in the WTO is higher, because of peer pressure and the level of legitimacy achieved by the DSB;
- the global publicity of WTO cases; in contrast, RTAs operate on a much smaller scale with much more limited public awareness.

Conclusion
Although the WTO has been the forum of choice even for RTA partners, this should not diminish attention to dispute settlement provisions in future RTAs. An effective dispute settlement system will help ensure RTA partners receive the expected benefits of their often laborious trade negotiations. Encouraging timely and effective implementation of substantive commitments through the creation of an effective dispute settlement mechanism is as important as the substantive commitments in an RTA. Moreover, dispute settlement under the RTA is expected to increase, as it is the only option for the increasing number of RTA commitments that go beyond existing WTO obligations. Table 4 summarizes the key issues described throughout this chapter in connection with RTA dispute settlement.
| Type of Complaints Allowed & Coverage of Dispute Settlement | Proposed versus Actual Measures  
Non-Violation Complaints  
Exclusion of specific commitments from dispute settlement |
|---|---|
| Pre-panel phase | Time required for consultations  
Inclusion of mediation/conciliation with the RTA administrative body, or other means of alternative dispute settlement mechanisms |
| Establishment of a panel | Timeframe for selection of panelists.  
Use of a panelist roster/indicative list  
Selection process for panel’s chairperson  
Contingency options for panelist selection if the parties fail to agree |
| The panel proceedings | Timeline for panel’s report  
Requirement for an initial and final report  
Consideration of *amicus curiae* submissions.  
Transparency (panel proceedings and parties’ submissions) |
| The compliance/enforcement phase | Temporary suspension of benefits or monetary compensation  
Recommendations by the original panel on the manner and timeframe for implementation  
Findings by the original panel on the level of adverse trade effects |
| Choice of Forum | Require specific provisions to be settled exclusively through the RTA or WTO dispute settlement mechanism  
Allow a choice of forum, while requiring the initial choice to exclude the possibility of any other forum  
The scope of international agreements covered by the choice-of-forum clause |

*Source: authors’ compilation*
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CHAPTER 3 – TRADE REMEDIES

A trade remedy can be defined as a measure which is taken by a government under specified circumstances, withdrawing – or ceasing the application of – its normal obligations under a trade agreement in order to protect certain overriding interests (Hoekman and Kostecki, 2001). The WTO Agreement contains a variety of provisions that can be employed as trade remedies – on the one hand against foreign trading practices and government policies that hurt domestic producers (combating what are seen as “unfair” practices) and on the other hand against unforeseen circumstances, in particular surges in imports due to the negotiated tariff reduction. Of the ten different ways in which WTO rules allow members to withdraw concessions previously made, 25 three have been used extensively. These are anti-dumping measures (AD), countervailing duties (CVD) and safeguards. The former two are generally easier to apply (as they are considered to fight “unfair trade”) than the latter, which is considered to deal with unexpected circumstances arising in the course of “fair trade”.

Anti-Dumping

Dumping, defined in the GATT as “introducing [products] into the commerce of another country at less than the normal value of the products” (GATT 1994, Art.VI), is not itself subject to disciplines under the WTO, since it is an action by private firms rather than governments. Certain individual countries, however, see dumping as a large enough threat to their domestic industries to maintain national anti-dumping legislation, setting out rules and procedures according to which a government can take unilateral action against dumping. WTO members agreed on certain limitations on their national anti-dumping legislation, setting in particular stricter procedural standards for anti-dumping determinations. These disciplines are set out in GATT 1994, Art.VI and the Agreement on Implementation of Article VI of the GATT 1994 (the Anti-Dumping Agreement). Restrictions on anti-dumping actions were fairly lax when the GATT was first put in place in 1947, and while they have become increasingly stringent over the years, some regional trade agreements go still further in limiting national authorities’ discretion when imposing anti-dumping measures; a small subset of RTAs has even gone as far as disallowing anti-dumping measures altogether.

Based on a comprehensive study of 70 major RTAs by Teh and Budetta (2006), the following can be said about the landscape of anti-dumping provisions in RTAs: first, only very few RTAs go as far as disallowing anti-dumping actions against partner countries entirely. Specifically, the prohibition of anti-dumping actions in RTAs seems to occur primarily in the context of ambitious economic integration schemes (e.g., China-Hong Kong, China-Macao, EEA, EFTA, Australia-New Zealand) or between countries which are not direct competitors, such as EFTA-Singapore and Canada-Chile.

Further, just over half of the RTAs in Teh and Budetta’s sample contain provisions that are WTO-plus to varying degrees. The most ambitious attempts to curb anti-dumping actions are found in Latin American RTAs; in particular, the Andean Community and to a slightly lesser

25 The 10 exceptions are anti-dumping, countervailing duties, balance of payments measures, infant industry protection, emergency action on imports of particular products, special safeguards, general waivers (all temporary) as well as general exceptions, national security, and renegotiation or modification of schedules (all permanent).
extent CACM and MERCOSUR, deviate from WTO standards regarding the determination of injury, the initiation and conduct of investigations (in particular with respect to de minimis thresholds), provisional measures, price undertakings, duration and review of actions as well as establishment of regional bodies with the mandate to conduct anti-dumping investigations. Some RTAs involving East-Asia/Pacific partners also contain specific anti-dumping provisions, though only on individual issues (e.g. Australia – Singapore and EFTA – Korea introduce the “lesser duty” rule 26; Australia – Thailand allows price undertakings; and New Zealand – Singapore have special rules regarding de minimis dumping margins and volumes as well as duration and review of measures). Further, while NAFTA anti-dumping standards themselves do not deviate from WTO rules, the functioning of its binational review panels for anti-dumping cases is particularly noteworthy and will be discussed in more detail below.

EU and EFTA RTAs often contain some provisions next to the restatement of anti-dumping obligations under the GATT, though these mainly encourage efforts to consult and negotiate a “mutually acceptable solution” before initiating proceedings, which cannot be classified as being WTO-plus in a major way. EFTA – Korea for example states:

The Parties retain their rights and obligations under Article VI of the GATT 1994 and the Agreement on Implementation of Article VI of the GATT 1994 (hereinafter referred to as the “WTO Agreement on Anti-Dumping”), subject to the following:

(a) The Parties shall endeavor to refrain from initiating anti-dumping procedures against each other. To this end, when a Party receives a properly documented application and before initiating an investigation under the WTO Agreement on Anti-Dumping, the Party shall notify in writing the other Party whose goods are allegedly being dumped and allow for consultations with a view to finding a mutually acceptable solution. The outcome of the consultations shall be communicated to the other Parties.

A third category of RTAs refrain from making any amendments to WTO rules. This is the case for most US RTAs (with the important exception of NAFTA) and those negotiated by Japan.

Overall, it seems that most modern RTAs contain very little in way of detailed provisions on anti-dumping. The general trend in RTAs is to simply reaffirm the parties’ rights and obligations under the WTO rules and to exclude anti-dumping disciplines from the RTA’s dispute settlement mechanism.

**Anti-Dumping under NAFTA**

Amongst the different approaches taken towards anti-dumping in RTAs, NAFTA is exceptional because it creates a unique category of panels to hear exclusively anti-dumping (and countervailing duty) cases. 27 The binational panel system created by NAFTA to review anti-dumping determinations is the most active dispute settlement mechanism of any RTA. NAFTA allows each party to retain its own domestic laws, but rather than challenge an anti-dumping determination through a party’s domestic judicial system, a NAFTA party may ask a Chapter 19 binational panel to review the determination. 28 The role of this panel is to determine whether the

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26 The lesser duty rule states: if the duty that would have to be imposed in order to remove injury is less than the anti-dumping margin, the “lesser duty” will have to be imposed (the same rule exists under WTO law, but is only a best endeavour rule).

27 NAFTA, Chapter 19.

28 NAFTA, Article 1902.
respondent followed its own domestic laws in the anti-dumping determination. The panel may either affirm the determination or remand for further proceedings.\textsuperscript{29}

The NAFTA system is indeed an unusual framework as the panel takes the role of a domestic appellate court and issues binding interpretations of each party’s domestic laws. This has lead critics to argue that Chapter 19 panels – in issuing these interpretations – infringe the sovereignty of the parties. This criticism is slightly weakened, however, by another point that has been debated in the literature and that puts the effectiveness of the process into question: because Chapter 19 panels only have the power to remand,\textsuperscript{30} the structure creates what can often become an endless cycle of remand; this in itself is inefficient, but also implies that the power of the panel to interfere with a party’s domestic laws is ultimately limited. Overall, however, the available evidence indicates that the NAFTA Chapter 19 process has been successful in both reducing the number of dumping petitions filed and the number of affirmative dumping determinations between NAFTA parties.

In weighing the costs and benefits of different approaches to managing trade remedies in an RTA, a unique dispute settlement system such as NAFTA’s imposes significant costs in the form of rules and procedures, maintenance of panel rosters, and administrative staff. These costs may only be worthwhile in situations where the trade flows are significant and the utilization of anti-dumping common among the parties.

Countries with comparatively low-cost manufacturing may have difficulty negotiating any deviations from the WTO rules on anti-dumping. As an alternative, countries could consider the approach of EFTA – Korea, which allows for consultations on contemplated anti-dumping actions and requires imposition of the “lesser duty”. Further, they could push for more “competition” standards in the application of anti-dumping law (see infra Chapter 6 on Competition Policy).

A separate committee for trade remedies within an RTA could be a useful addition to facilitate the exchange of information and conduct annual reviews. For example, the draft Korea – US agreement creates such a committee to “enhance each Party’s knowledge and understanding of the other’s trade remedy laws”; “provide a forum for the Parties to exchange information” on trade remedies; and to discuss “practices by the Parties’ competent authorities in antidumping and countervailing duty investigations.”\textsuperscript{31} Further, having a mechanism for an annual systemic, objective review of any anti-dumping measures may be of particular interest, as it is likely that such a mechanism will considerably shorten the time periods during which goods are subject to increased protection.

**Countervailing Duties**

Countervailing duties are measures to offset the effect of subsidization of foreign producers by their government that materially injures a domestic industry. Both subsidies and countervailing duties are subject to disciplines under the WTO (originally under GATT Art. XVI and VI respectively; and more recently under the Agreement on Subsidies and Countervailing Measures “SCM”). The WTO differentiates between “prohibited” subsidies which consist of export

\textsuperscript{29} NAFTA, Article 1904 (“The panel may uphold a final determination, or remand it for action not inconsistent with the panel’s decision.”)

\textsuperscript{30} NAFTA, Article 1904.

\textsuperscript{31} Korea – US, Article 10.8.
subsidies\textsuperscript{32} and local content subsidies, versus “actionable” subsidies which include all other (specific) subsidies and are permitted a priori but can be challenged.\textsuperscript{33} Before being able to impose a countervailing measure, an investigation must show imports have indeed been subsidized and, in the case of actionable subsidies, that they have caused or threaten to cause material injury to domestic industry. Investigations are conducted at the national level as in the case of anti-dumping, though binding guidelines concerning standards and procedures are contained in the WTO SCM Agreement.

The US, being the largest user of the CVD mechanism, originally grandfathered its national CVD legislation to the GATT when it first acceded (Hoekman and Kostecki, 2001). Under the pressure of countries targeted by the US, the provisions were later modified to include an injury test as laid out in the Code on Subsidies and Countervailing Measures of the Tokyo Round. The legal texts negotiated under the Uruguay Round further clarified issues surrounding subsidies and CVDs.

A caveat that should be kept in mind throughout the discussion that follows is that reducing the scope of CVDs in the context of RTAs is difficult as they are a reaction to countries’ subsidy policies; these in turn are extremely difficult to negotiate in anything but the multilateral forum since by their nature, subsidies cannot be reduced on a preferential basis and their reduction in the context of an RTA would give rise to free-rider problems. As Pascal Lamy, the current WTO Director-General, stated: “There is no such thing as a ‘bilateral’ farmer or fisherman, or a ‘bilateral’ chicken and a ‘multilateral’ farmer or chicken or fish. Subsidies are given to farmers for all their poultry production.”\textsuperscript{34} One case where it may be possible to exclude countervailing duties from the arsenal of trade remedies in an RTA is where integration has reached a level that a common subsidies policy has been agreed upon – this in turn will be easier in cases where the proportion of trade within the RTA is high, such that free-rider problems are reduced.

According to Teh and Budetta (2006) four of the major RTAs disallow countervailing duties entirely. Those four RTAs are China – Hong Kong, China – Macao, EEA\textsuperscript{35} and EFTA\textsuperscript{36}, a group of RTAs that all aim for high levels of integration.

Just over half the RTAs examined by them contain some specific provisions on SCM. These are generally not major deviations from WTO rules with two important exceptions: the first is a set of four RTAs which allow regional bodies to conduct CVD investigations or review procedures; all of them are Western Hemisphere RTAs, including the Andean Community, CARICOM, CACM and NAFTA. The second set of exceptional RTAs when it comes to SCM rules are those that prohibit export subsidies for agricultural products; these include Australia – Singapore, Australia – Thailand, Australia – US, Canada – Chile, Canada – Costa Rica, Mexico – Nicaragua, New Zealand – Singapore, Bahrain – US, CAFTA – DR – US, Chile – US, and Morocco – US. The issue of prohibiting agricultural export subsidies will be discussed in detail in the next section.

Again, as in the case of anti-dumping rules, it is the Latin American agreements which contain the most specific provisions regarding CVDs and subsidies. The Andean Community and most

\textsuperscript{32} Agricultural exports are treated separately, see infra.
\textsuperscript{33} The category of “green light” subsidies, which existed originally alongside the red and yellow light categories was eventually abandoned; it permitted subsidies (i) to research, (ii) in support of disadvantaged regions and (iii) to promote adaptation of existing facilities to new environmental requirements
\textsuperscript{35} Applies only to HS chapters 25-97
\textsuperscript{36} Applies only to HS chapters 25-97
Mexican agreements include special provisions regarding the conditions under which CVDs can be applied as well as the rules regarding their imposition and collection.

Another slight modification of WTO SCM rules is EFTA – Korea, which, similar to its treatment of anti-dumping, requires notification to the other party before initiation of an investigation of any alleged subsidy.

Additional disciplines on subsidies are often found in the competition chapter of an RTA to the extent that the latter have been included in recent agreements (see Chapter 6). Competition chapters in EU and EFTA agreements place considerable emphasis on provisions regarding state aid; this was particularly true for agreements with post-communist accession countries, but also holds for more recent trans-continental RTAs. EU – South Africa, for example reaffirms the rights of the parties under the WTO’s SCM agreement in addition to declaring distortive and unjustified state aid as incompatible with the Agreement in the competition chapter of the RTA: 37

“In so far as it may affect trade between the Community and South Africa, public aid favouring certain firms or the production of certain goods, which distorts or threatens to distort competition, and which does not support a specific public policy objective or objectives of either Party, is incompatible with the proper functioning of this Agreement.

[...] If the Community or South Africa considers that a particular practice is incompatible with the terms of Article 41, and that such practice causes or threatens to cause serious prejudice to the interests of the other Party or material injury to its domestic industry, the Parties agree, where it is not adequately dealt with under existing rules and procedures, to enter into consultations with a view to finding a mutually satisfactory solution. Such consultations will be without prejudice to the Parties' rights and obligations in terms of their respective laws and international commitments.

Either Party may invite the Cooperation Council to examine, in the context of such consultation, the Parties' public policy objectives justifying the grant of public aid referred to in Article 41.”

Ultimately, these provisions indicate more a direction for future RTAs than being fully binding at this stage.

Finally, just less than half of the major RTAs exclude subsidies and countervailing measures from the scope of the agreement, implying WTO disciplines by default. Among them are many agreements involving East-Asia Pacific countries such as AFTA, Japan – Singapore, Japan – Mexico, Australia – US, and Singapore – US.

Overall, as in the case of anti-dumping disciplines, many modern RTAs contain no detailed provisions on subsidies and countervailing measures. Instead the parties' rights and obligations under the WTO rules are reaffirmed and subsidies and countervailing measures disciplines are excluded from any dispute settlement mechanism within the RTA. This practice may change as competition provisions gain increasing prominence in regional agreements.

37 EU – South Africa, Article 41.
Agricultural Export Subsidies

As mentioned above, one notable deviation from WTO subsidies disciplines is sometimes found regarding agricultural export subsidies: at least 11 RTAs explicitly prohibit export subsidies on agricultural products. For example, Australia – Singapore states, “[t]he Parties agree to prohibit export subsidies on all goods, including agricultural goods.” 38 Similarly, Chile – China prohibits the introduction or maintenance of “any export subsidy on any agricultural goods destined for the territory of the other Party.” 39

This contrasts with WTO rules where an exception to the general prohibition of export subsidies in the SCM Agreement exists in the WTO Agreement on Agriculture, which establishes a complex regime for agricultural export subsidies. 40 Simply put, the Agreement on Agriculture creates two tiers of export subsidies – those that are subject to reduction commitments under Article 9 and those that fall outside of the specified export subsidies in Article 9 and thus are not subject to any rules or prohibitions. This complex system has been criticized for being prone to easy manipulation by Members wishing to expand old or create new agricultural export regimes. In order to avoid this problem, a series of RTAs prohibit agricultural subsidies altogether.

Since the elimination of agricultural export subsidies may put an RTA partner at a disadvantage relative to non-parties who maintain WTO-consistent agricultural export subsidies, RTAs sometimes include further commitments to adopt specific measures to counter any effect of subsidized imports from non-parties. US – Morocco provides an example:

“Where an exporting Party considers that a non-Party is exporting an agricultural good to the territory of the other Party with the benefit of export subsidies, the importing Party shall, on written request of the exporting Party, consult with the exporting Party with a view to agreeing on specific measures that the importing Party may adopt to counter the effect of such subsidized imports.” 41

Overall, however, agriculture continues to be an issue that plagues multilateral trade negotiations and remains a sticking point in RTA negotiations. Indeed, “liberalization of agricultural trade remains difficult for the United States, as it does for other developed countries that subsidize their farmers whether domestically, to promote exports, or both” (Weintraub, 2004). To some extent, it appears for the US and the EU that they have chosen RTA partners that do not present significant resistance in the area of agricultural subsidies. 42 In the Korea – US negotiations, agriculture was one of the most sensitive issues and required prolonged, intensive negotiations. 43 Agricultural issues are also a primary reason for the reticence of Japan and Korea to pursue RTAs more aggressively within Asia. 44 Developing countries should thoroughly research and understand the

38 Australia – Singapore, Article 7.
39 Chile – China, Article 12.
40 WTO Agreement on Agriculture, Article 8
41 Morocco – US, Article 3.3.
42 For example, neither Chile nor Singapore, both of which have concluded RTAs with the US and the EU, present serious agricultural problems. “Singapore is not an agricultural producer, and many of Chile’s products are not seasonally competitive with US products.” Sidney Weintraub, Lessons from the Chile and Singapore Free Trade Agreements, in Free Trade Agreements: US Strategies and Priorities (Jeffrey Schott ed., 2004).
44 Moon-Soo Chung, China-ASEAN FTA and Korean FTA Policies, in China-ASEAN Relations (John Wong et al., eds. 2006).
political climate in the agricultural sector of potential RTA partners to determine whether any deviation from existing WTO commitments presents a viable negotiating point.

**Safeguards**

In the WTO Agreement, the general safeguards clause for goods is GATT Art. XIX on Emergency Protection. It confers a right to temporary relief for certain industries in cases where trade liberalization causes or threatens to cause serious injury to domestic producers. In order to ensure this safety valve mechanism is not abused, the conditions under which Article XIX can be invoked were tightened during the Uruguay Round in the Safeguards Agreement.

A government wanting to apply a safeguard will need to show (1) the existence of increased imports of that product, which (2) resulted from unforeseen developments; (3) were the consequence of obligations incurred under the WTO Agreement; and (4) caused or threaten to cause serious injury to domestic producers (GATT Art. XIX para.1a). In order to deter their use further, the Safeguards Agreement requires general safeguards to be imposed on a non-discriminatory basis and compensation paid to affected exporting countries. Should such compensation not be forthcoming, the affected country has the right to retaliate. The Safeguards Agreement further prohibits vertical export restraints (VERs) and similar quantitative measures on the export and import side as a means to counter a surge in imports.

Safeguard measures are the least commonly used of the three main forms of trade remedies. The principal explanation for this is that a country applying safeguard measures must either provide compensation to the countries of affected exporters or settle for the suspension of concessions from those countries.\(^{45}\) The Safeguards Agreement somewhat altered this obligation to provide compensation. A country imposing a safeguard measure has an obligation to consult with affected parties with the aim of negotiating a method of equivalent compensation; if these negotiations fail, affected parties must wait a minimum of three years before imposing any form of retaliation. An additional reason why safeguard measures are less frequently used than anti-dumping and countervailing duties is that safeguard measures only have a lifespan of four years, with the possibility of an extension for another four years based on re-affirmation of the required criteria. Finally, there is also the perception that because safeguards are used to protect domestic industries from what is thought of as “fair trade”, they should be used more sparingly than the remedies available to combat “unfair trade”.

Safeguard provisions in RTAs are mostly bilateral (though some also refer to global disciplines) and are used as an instrument to ease the transition to more liberalized trade with partner countries. According to Teh and Budetta’s (2006) study, four RTAs prohibit the use of bilateral safeguards (Australia – Singapore, New Zealand – Singapore, Canada – Israel, and MERCOSUR) and only three contain no reference to it, while the large majority includes specific provisions. These provisions roughly fall into 3 categories: transition safeguard measures; special safeguard measures for certain sensitive sectors; and clauses regarding the use of global safeguards (safeguard measures taken pursuant to GATT Article XIX).

**Transition Safeguards**

Transition safeguards are designed to allow a country to provide its industry temporary relief from an increase in imports as a result of tariff commitments made under the RTA. Teh and Budetta (2006) point to a notable difference between EU and EFTA-centric agreements versus

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\(^{45}\) GATT Article XIX:2, 3.
those that involve the US, Mexico, Chile, Australia, Singapore or Canada: as regards the latter, safeguard measures can be imposed only for the period of intra-RTA tariff phase-out, while safeguards provisions in EU and EFTA agreements often also allow for the application of safeguards after the phase-out has been completed. Safeguard measures generally take the form of a suspension of the process of tariff reduction or at worst an increase of the tariff up to the MFN level. The duration of the safeguard measure is limited to between 1 and 3 years in most agreements (vs. 4 years in the WTO Safeguards Agreement). The ASEAN-China and ASEAN-Korea Agreements on Trade in Goods are similar to the US-type agreements in that they allow safeguards to be applied only to products which are in the phase-out period; the phase-out, however, extends much longer to 5 and 7 years respectively.

Compensation for transition-safeguards is often quite aggressive. If parties cannot agree on the amount of compensation, the right to retaliation is not restricted. In Australia – US, the party imposing the transition-safeguard must enter consultations within thirty days with the aim of reaching mutually agreeable compensation; if such an agreement is not reached, the adversely affected party may suspend concessions almost immediately after thirty days of consultations.46 Similarly, Japan – Singapore allows a party to suspend concessions after thirty days of consultations.47 Chile – China requires a party to wait at least one year before suspending concession as a result of a transition-safeguard.48 In contrast, the Australia – Thailand agreement, which permits transition-safeguards for a maximum of six years, does not require consultations on compensation or suspension of concessions until a safeguard has been in place for three years.49

| Table 5: Standards for GATT XIX Safeguards and RTA Transition-Safeguards |
|----------------------------------------|----------------------------------------------------------|
| **GATT XIX Safeguards** | **Sample Transition-Safeguards in RTAs** |
| The product must be imported “in such increased quantities, absolute or relative to domestic production” | The product must be imported “in such increased quantities, in absolute terms.” Japan – Singapore, Article 18. Some RTAs also apply the same standard as the WTO: “In absolute terms or relative to domestic production.” Australia – US, Article 9.1; Chile – China, Article 44. |
| The period in which the safeguard is in effect “shall not exceed four years, unless it is extended” for an additional four years upon a complete review, overall the safeguard shall not have a total duration longer than eight years. | A transition-safeguard may be applied for one year, with possible extensions to a maximum of three years. Japan – Singapore, Article 18. For one year, with a possible extension for only one more year. Chile – China, Article 45. For two years, with a possible extension to a maximum of four years. Australia – US, Article 9.2. |
| “The right of suspension [of benefits] shall not be exercised for the first three years that a safeguard measure is in effect, provided that the safeguard measure has been taken as a result of an absolute increase in imports and that such a measure conforms to the provisions of this Agreement.” | The right to suspend equivalent concessions exists if consultations fail after thirty days. Japan – Singapore, Article 18; Australia – US, Article 9.5. |

Source: authors’ compilation

46 Australia – US, Article 9.4.
47 Japan – Singapore, Article 18.
48 Chile – China, Article 49.
49 Australia – Thailand, Article 507.
Table 5 compares the legal standards for the application of a safeguard pursuant to GATT Art. XIX with the legal standards in some RTAs for imposition of a transition safeguard. Overall, the standards for the imposition of transition safeguards are more stringent than the WTO rules for safeguards.

**Special safeguards**

Several RTAs contain special safeguard clauses, generally regarding either agricultural products or textiles and apparel. These can generally be imposed without the need to show injury or the threat of injury, they are applicable after the end of the transition period, and they also often do not require compensation. These special safeguard clauses form part of at least 15 agreements (AFTA, Australia – Thailand, Australia – US, Canada – Chile, Canada – Costa Rica, CEFTA, EU – Chile, EU – South Africa, Chile-Korea, NAFTA, Bahrain-US, CAFTA – DR-US, Chile – US, Morocco – US, and Singapore – US) (Teh and Budetta, 2006).

Australia – Thailand, for example, allows special safeguards for a specified list of agricultural goods, which also includes a timeframe during which a safeguard measure may be applied to that good.\(^{50}\) The special agricultural safeguard measures in Australia – Thailand may be applied simply on a finding that the volume of imports from the other party surpasses a specified trigger level. Moreover, the agreement fails to provide any compensation for the party adversely affected by a special agricultural safeguard measure.

In slight contrast, the Chile – EU agreement, while also allowing special safeguards in a specified list of agricultural products, allows for compensation almost immediately after the safeguard’s imposition.\(^{51}\) The Singapore – US agreement permits a special safeguard on textiles and apparel, with compensation only after the measure has been in place for twenty-four months.\(^{52}\)

**Provisions regarding the application of safeguards pursuant to GATT Art. XIX**

RTAs that permit “transition phase” safeguards usually also contain a provision that retains the parties’ rights to use safeguards pursuant to the WTO Safeguards Agreement. Thus, the “transition phase” safeguards do not eliminate the possibility that a future “global” safeguard would apply among RTA partners, as well as to all relevant products coming from third parties.

Provisions on global safeguards, sometimes with exceptions to one or more provisions of GATT Art. XIX are generally found in non-EU, non-EFTA-centric RTAs (with the exception of EU – Chile) and include Australia – Thailand, Australia – US, Canada – Chile, Canada – Israel, EU – Chile, Mexico – Chile, Mexico – Israel, Mexico – Nicaragua, Mexico – Northern Triangle (Guatemala, Honduras, and El Salvador), Mexico – Uruguay, NAFTA, CAFTA – DR – US, Jordan – US, Singapore – US.

Some RTAs exclude goods from partner countries from safeguard actions under the WTO, unless they contribute significantly to the surge in imports and the injury to domestic industry. One such example is the Australia – Singapore agreement, which states, “[a] Party shall not initiate or take any safeguard measure within the meaning of the WTO Agreement on Safeguards against the goods of the other Party from the date of entry into force of this Agreement.”\(^{53}\)

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\(^{50}\) Australia – Thailand, Article 509.

\(^{51}\) Chile – EU, Article 73.

\(^{52}\) Singapore – US, Article 5.9.

\(^{53}\) Australia – Singapore, Article 9.
Chile – EU permits global safeguards subject to some limited conditions. It reaffirms the rights to take safeguard measures under GATT Article XIX and creates an obligation to notify the RTA’s “Association Committee” to allow it to investigate the circumstances of the safeguard measure with the goal of finding a mutually agreeable solution.\footnote{Chile – EU, Article 92.} One notable deviation from the WTO Safeguards Agreement is that Chile – EU allows the other party to suspend concessions after 18 months, whereas Article 8.3 of the Safeguards Agreement requires an adversely affected party to wait a minimum of three years.

Depending on how the global safeguards provision is applied, it can come into conflict with multilateral disciplines which require general safeguard measures to be applied to all imports. The WTO DSB ruled on this in several instances: to partially resolve (and partially avoid) these issues, the WTO Appellate Body created a principle of “parallelism”, which requires that “the imports included in the determination . . . should correspond to the imports included in the application of the measure.”\footnote{WTO Appellate Body Report, Argentina Safeguards, ¶ 113; WTO Appellate Body Report, US – Wheat Gluten, ¶ 96.} This concept thus allows a Member to exclude its RTA partners from the application of a safeguard measure, on the condition that it does not include imports from those RTA partners in its determination that a safeguard measure is warranted. Notably, however, “parallelism” does not directly answer the question of “whether GATT Article XXIV on regional arrangements can justify a discriminatory safeguard.” (Pauwelyn, 2004) This is the question WTO panels have seemingly declined to address repeatedly, but will likely be forced to address in the near future.

**Negotiating Options Regarding Safeguards**

Countries that are extremely competitive in the export market due to relatively low-cost inputs will often be the main targets of safeguard measures. Indeed, safeguards are primarily a tool of the most highly industrialized countries. A quick look at the safeguards cases before the WTO dispute settlement body confirms this point, as the US is the most frequent respondent in safeguards cases.

The primary option for many developing countries is to avoid imposition of a safeguard by either achieving an increase in the threshold required for an affirmative determination in a safeguards investigation or achieving exclusion from WTO safeguards through an RTA. However, most RTAs incorporate the injury investigation standards of the WTO Safeguards Agreement, which has now become fairly well-settled and universally accepted. Exclusion from WTO safeguards in an RTA is extremely rare, occurring primarily in RTAs among countries of similar economic characteristics and that are attempting a level of economic integration that goes much deeper than the typical bilateral RTA.

Transition-phase safeguard measures are common in many modern RTAs. Countries attempting to limit the negative effects of those measures may attempt to negotiate their exclusion. To the extent this is not feasible, a number of other points could be negotiated that would make their imposition less likely. First, the availability of compensation could be negotiated to allow the suspension of concessions as soon as possible. Second, the allowable duration of a transition-phase safeguard could be limited. And finally, the inclusion of special sector safeguards could be discouraged.

A summary of recommendations for global and transition safeguards in RTAs is provided below in Table 6.
Table 6: RTA Safeguard Measures

<table>
<thead>
<tr>
<th>Recommendations</th>
<th>Model Clauses</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Global Safeguards</strong></td>
<td><strong>Model Clauses</strong></td>
</tr>
<tr>
<td>• Include the right to exclude imports from the other party in a global safeguard measure taken pursuant to GATT Article XIX.</td>
<td>• Each Party retains its rights and obligations under Article XIX of GATT 1994 and the Safeguards Agreement. This Agreement does not confer any additional rights or obligations on the Parties with regard to global safeguard measures, except that a Party taking a global safeguard measure may exclude imports of an originating good from the other Party if such imports are not a substantial cause of serious injury or threat thereof. Australia – US, Article 9.5.</td>
</tr>
<tr>
<td><strong>Transition-Phase Safeguards</strong></td>
<td><strong>Model Clauses</strong></td>
</tr>
<tr>
<td>• Make compensation or suspension of concessions available at the earliest possible date.</td>
<td>• [C]onsultations shall begin within 30 days of the imposition of the measure. If the Parties are unable to agree on compensation within 30 days after the consultations commence, the Party against whose originating good the measure is applied may suspend the application of concessions with respect to originating goods of the other Party that have trade effects substantially equivalent to the safeguard measure. Australia – US, Article 9.4.</td>
</tr>
<tr>
<td>• Limit the permissible duration.</td>
<td>• A party may apply a definitive [bilateral] safeguard measure for an initial period of one year, with an extension not exceeding one year. Regardless of its duration, such measure shall terminate at the end of the transition period. Chile – China, Article 45.</td>
</tr>
<tr>
<td>• Discourage the inclusion of sector-specific special safeguards.</td>
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</tbody>
</table>

Source: authors’ compilation

In negotiating the terms of application of safeguards, it should be kept in mind that safeguards and anti-dumping duties may both be applicable to the same situations. If it becomes more difficult to apply safeguards, this may result in greater resort to anti-dumping duties. The primary benefit for exporters of safeguards is the finite duration, compared with anti-dumping duties that often do not have a definitive sunset date.

Conclusion

Overall, countries have been reluctant to curtail their rights to use trade remedies in regional agreements. Provisions regarding anti-dumping and subsidies/countervailing duties broadly reflect WTO rules in the majority of cases, and along with safeguards under GATT Art. XIX, the large majority of RTAs creates an additional right to use bilateral safeguards against the partner country. There are individual RTAs which aim for a high degree of integration and which ban the use of different trade remedies; these are however the exception rather than the rule. As for RTAs which restrict the use of trade remedies more than the WTO but do not prohibit them entirely, the actual stringency of provisions contained in them seems impossible to judge at this stage; even a minor change in wording can have a large impact on the outcome of litigation, but this will often not become evident until litigation has actually taken place (case law on trade remedies before regional dispute settlement bodies is so far extremely limited, thus it remains difficult to predict the outcome of such cases). As a consequence, the degree to which new provisions in RTAs are WTO-plus continues to be uncertain.
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Bronckers, Marco (2004), “The Special Safeguards Clause in WTO Trade Relations with China: (How) Will It Work?” in *WTO and East Asia: New Perspectives* (Mitsuo Matsushita & Dukgeun Ahn eds.).


The chapter on market access is arguably the most important one in RTAs, as it is here that granted preferences are codified. A preliminary study by the Inter-American Development Bank (IDB, 2006) discusses various issues related to market access disciplines in RTAs, and subsequently provides a quantitative analysis of a wide range of disciplines—such as tariff lowering schedules, non-tariff measures, rules of origin, and customs procedures—in some of the main RTAs around the world. This study provides the basis for this chapter.

Three aspects are important when it comes to market access: (i) the extent of product coverage, (ii) the length of the tariff phase-out period including the final tariff level, and (iii) the ultimate preference margin over third parties. The market access provisions in RTAs are closely governed by WTO disciplines. Art XXIV GATT prescribes three key conditions for trade liberalization in RTA, whereby RTAs between two developing countries are subject to slightly less stringent criteria in that partial liberalization is allowed under the 1979 WTO Enabling Clause. The following rules apply under the WTO:

- **The liberalization effort must cover “substantially all trade”**. A number of definitions of what “substantially all trade” means have been discussed in the literature, the two most prominent being
  - **The quantitative approach**: this approach looks at trade volumes between partners, whereby 80-90% coverage are generally considered sufficient to represent “substantially all trade”. This approach, of course, makes it relatively easy for countries to exclude entire sensitive sectors, a weakness that it is often criticized for.\(^57\)
  - **The qualitative approach**: this approach overcomes the main weakness of the quantitative approach, prescribing that no (major) sector may be excluded from liberalization; however, the boundaries of what constitutes a “sector” remain unclear.
  - An alternative definition of “substantially all trade” uses the percentage of tariff lines being liberalized as a benchmark (generally 95% of all HS tariff lines at the 6-digit level).

- **Liberalization must take place within a “reasonable length of time”**. The tariff phase-out period was limited to a maximum of 10 years in the 1994 Understanding on the Interpretation of Article XXIV. It can be exceeded in “exceptional cases”, whereby the definition of the latter remains unclear, however. WTO Law does not impose conditions on the trajectory of liberalization, i.e. liberalization could be linear or concentrated around certain points during the transition period.

- **Besides tariffs, RTAs should eliminate “other restrictive regulations of commerce” on “substantially all trade”**. The debate here turns on the question which trade policy

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\(^{57}\) Another weakness of this approach is that parties could protect sensitive products by showing that trade volumes in this product are very small, deducing from this minor effects of exclusion from liberalization; this could be misleading if at the time of negotiations protection in the sector is high – while current trade volumes may be low due to this protection, potential trade could be substantial once the sector is liberalized (Scollay, 2005).
instruments should be regarded as restrictive regulations. It has been argued that tariff rate quotas (TRQs), special safeguards (SSGs), non-tariff measures (NTM) and rules of origin (RoO) could be seen as such. In judging the restrictiveness of these measures, it will be important to see whether they are permitted beyond a transition period.

From a social welfare point of view, it is not entirely clear that the requirement for liberalization of “substantially all trade” is optimal. Laird (1999) for example argues that the exclusion of products in which both parties are uncompetitive could in theory be beneficial by limiting the potential for trade diversion. Andriamananjara (2003), on the other hand, supports a stringent enforcement of the “substantially all trade” criterion on the basis of a political economy argument: he points out that an easing of conditions under which sensitive sectors can be excluded under RTAs would make RTAs an even more attractive vehicle for liberalization to the detriment of the multilateral trading system.

**General results**

The IDB’s (2006) preliminary study for a sample of 20 RTAs, involving partners from East Asia/Pacific, the Americas, Europe, North Africa, and the Middle East, finds that:

1) there are important variations in terms of both coverage and phase-out periods among agreements (Figure 1). The differences lie mainly in the number of liberalized product groups and the number of years scheduled to reach the agreed level of liberalization. The spectrum stretches from immediate elimination of all tariffs upon entry into force of the agreement (cf. RTAs involving Singapore) to 20 year phase-out periods with the occasional permanent exclusion.

2) Different countries negotiate different trajectories for their tariff phase-outs or reductions. Trajectories can be either linear or non-linear, often involving “back-loading”. This means the reductions in tariffs are larger towards the end of the transition period (cf. e.g. EU Agreements with South Africa, Morocco and Lithuania); grace periods of up to 10 years within which no tariff liberalization takes place have sometimes been negotiated, e.g. in the EU-South Africa RTA. East-Asian RTAs, on the other hand, are characterized by “front-loading” with the most significant liberalization taking place very shortly after entry into force of the RTA.

3) The majority of RTAs is WTO consistent in that they set out to liberalize 90% of tariff lines within 10 years of entry into force of the agreement (coverage generally reaches 80% after 5 years). While product coverage is similar across agreements after 10 years, there are some outliers, both in terms of countries (generally developing countries) and products (agriculture, textiles and apparel, and footwear). Non-sensitive products such as ores (ch.26), fertilizers (ch.31), pulp of wood (ch.47) and some base metals (ch.81) are liberalized fastest.

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59 There is a debate as to which is the appropriate indicator for the “substantially all trade” condition. Some have argued that an indicator purely based on tariff lines will be misleading (in particular in the early years of the phase-in – IDB, 2006), while an indicator based on trade-weighted tariff lines will be more accurate. Sensitive products can sometimes be confined to a very small number of tariff lines, but may actually cover a much larger amount of trade.
4) Bottom-line results remain if the tariff line indicator is replaced by a trade-weighted tariff line measure: most RTA partners still liberalize 90% or more within the first ten years of the agreement; one RTA party has only committed to liberalize 60% of its trade-weighted tariff-lines and three parties liberalize less than 80% by year ten.

5) Most RTAs seem in compliance with Art XXIV GATT and many are WTO+ in that they include a larger number and/or more specific provisions than either partner has bound under the WTO; however, many RTAs also contain TRQs, special safeguards, and stringent rules of origin, which could fall under the category of “other restrictive regulations of commerce”.

**Measures Accompanying Tariff Liberalization**

The exclusion of few items from the general liberalization schedule may sometimes give a misleading impression as to the real degree of liberalization inherent in an agreement. Several measures have been employed in RTAs to re-introduce some protection, reflected in provisions for Bilateral Emergency Actions (BEA), Special Safeguards Mechanisms (SSG), Tariff Rate Quotas (TRQs) or Tariff Preference Levels (TPRs).\(^{60}\)

Both BEA and SSG are safeguards mechanisms: while the former requires demonstration of significant injury to domestic industry, the latter simply operates on the basis of a price or quantity trigger. Importantly, their application differs further in that BEAs generally remain available after full liberalization has been reached, while SSGs cease to apply after the phase-in period (for example the Australia-Thailand and New Zealand-Thailand RTAs contain such an SSG mechanism). In the case of Australia-US, the SSG mechanism remains in force for beef and certain other agricultural products even after the end of the phase-in period. Japan-Singapore is an

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\(^{60}\) See Scollay’s (2005) survey
exception in that both types of emergency measures are available only during the implementation period.

Often, tariff liberalization is accompanied by quantitative restrictions in the form of tariff rate quotas (TRQs). TRQs are used to give a certain degree of tariff concessions, while at the same time retaining control over quantities. The quotas within which tariff concessions apply are generally expanded during the transition period and cease to exist once phase-in is completed. An exception is the Australia-US agreement where Australian dairy products remain subject to TRQs in the indefinite future.

Tariff preference levels (TPLs) provide access at preferential rates for specified quantities of non-originating products that fail to meet RoO criteria. They are found for example in the Canada-Chile and Canada-Costa Rica agreements regarding textile and clothing products.

In general, countries seem to see various restrictions and extended phase-in periods as substitutes for one another (Scollay, 2005). For example, EU-Morocco, Czech Republic-EU and EU-Lithuania all have phase-in periods of less than 10 years, but exclude large parts of the agricultural sector from complete tariff elimination. Japan-Singapore phases in almost all commitments immediately, but has an overall exclusion rate of more than 5% of tariff lines due to Japan’s exclusion of almost 10% of their products. No permanent exclusions are contained in the Australia-Thailand, New Zealand-Thailand and Chile-US Agreements; however, the percentage of trade subject to TRQs, special safeguards or bilateral emergency measures is significant. Canadian RTAs (with Chile and Costa Rica) also use a mix of prolonged phase-in periods with TRQs and BEAs applicable during the transition period.

The EU-South Africa and Canada-Costa Rica RTAs are an exception in that they have relatively long phase-ins (more than 10 years), while at the same time a high percentage of tariff lines are excluded from liberalization.

An exception at the other end of the spectrum are the RTAs between Australia and Singapore and New Zealand and Singapore which liberalize the entire set of tariff lines immediately upon entry into force of the agreement without retaining exceptions. Singapore generally stands out for phasing-in all of their commitments immediately without introducing off-setting measures (in this sample with respect to Japan, Australia, New-Zealand and the US). Further, Hong Kong, grants all concessions up front in its CEPA with China without the option for recourse to trade remedies.

**Table 7: Comparison of phase-outs and permanent exclusions**

<table>
<thead>
<tr>
<th>Agreement</th>
<th>Partner Country</th>
<th>Last Phase-out period</th>
<th>% imports permanently excluded</th>
<th>% imports subject to &gt;10 yrs phase-out</th>
<th>Other</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Immediate Phase-Out</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Australia-Singapore</td>
<td>Singapore</td>
<td>Immediately</td>
<td>None</td>
<td>None</td>
<td>None</td>
</tr>
<tr>
<td></td>
<td>Australia</td>
<td>Immediately</td>
<td>None</td>
<td>None</td>
<td>None</td>
</tr>
<tr>
<td>New Zealand-Singapore</td>
<td>Singapore</td>
<td>Immediately</td>
<td>None</td>
<td>None</td>
<td>None</td>
</tr>
<tr>
<td></td>
<td>New Zealand</td>
<td>Immediately</td>
<td>None</td>
<td>None</td>
<td>None</td>
</tr>
<tr>
<td><strong>Phase-Out in &lt;10 years</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>China-Hong Kong, China</td>
<td>China</td>
<td>2 years</td>
<td>?</td>
<td>None</td>
<td>?</td>
</tr>
<tr>
<td></td>
<td>Hong Kong</td>
<td>Immediately</td>
<td>None</td>
<td>None</td>
<td>?</td>
</tr>
<tr>
<td>Agreement</td>
<td>Partner Country</td>
<td>Last Phase-out period</td>
<td>% imports permanently excluded</td>
<td>% imports subject to &gt;10 yrs phase-out</td>
<td>Other</td>
</tr>
<tr>
<td>-------------------</td>
<td>-----------------</td>
<td>-----------------------</td>
<td>--------------------------------</td>
<td>----------------------------------------</td>
<td>------------------------</td>
</tr>
<tr>
<td>Japan-Singapore</td>
<td>Japan</td>
<td>Immediately&lt;sup&gt;61&lt;/sup&gt;</td>
<td>2.61 (9.2% of tariff lines)</td>
<td>None</td>
<td>None</td>
</tr>
<tr>
<td></td>
<td>Singapore</td>
<td>Immediately</td>
<td>None</td>
<td>None</td>
<td>None</td>
</tr>
<tr>
<td>Singapore-US</td>
<td>US</td>
<td>&lt;10 years</td>
<td>None</td>
<td>0.01</td>
<td>2% subject to TRQ during phase-out</td>
</tr>
<tr>
<td></td>
<td>Singapore</td>
<td>Immediately</td>
<td>None</td>
<td>None</td>
<td>None</td>
</tr>
<tr>
<td>Jordan-US</td>
<td>US</td>
<td>&lt;10 years</td>
<td>5.30</td>
<td>None</td>
<td>TRQ</td>
</tr>
<tr>
<td></td>
<td>Jordan</td>
<td>&lt;10 years</td>
<td>9.33</td>
<td>None</td>
<td>None</td>
</tr>
<tr>
<td>Chile-Mexico</td>
<td>Mexico</td>
<td>6 years</td>
<td>None</td>
<td>None</td>
<td>Restrictions on less than 100 items</td>
</tr>
<tr>
<td></td>
<td>Chile</td>
<td>6 years</td>
<td>None</td>
<td>None</td>
<td>Restrictions on less than 100 items</td>
</tr>
<tr>
<td>Chile-EU</td>
<td>EU</td>
<td>10 years</td>
<td>None&lt;sup&gt;62&lt;/sup&gt;</td>
<td>None</td>
<td>TRQ; phase-out of ad valorem only if have ad v. and specific duty; 50% MFN rather than elimination;</td>
</tr>
<tr>
<td></td>
<td>Chile</td>
<td>10 years</td>
<td>None&lt;sup&gt;63&lt;/sup&gt;</td>
<td>None</td>
<td>TRQ</td>
</tr>
<tr>
<td>EU-Lithuania</td>
<td>EU</td>
<td>&lt;10 years</td>
<td>0.01</td>
<td>None</td>
<td>?</td>
</tr>
<tr>
<td></td>
<td>Lithuania</td>
<td>&lt;10 years</td>
<td>None</td>
<td>None</td>
<td>?</td>
</tr>
<tr>
<td>Czech Republic-EU</td>
<td>EU</td>
<td>&lt;10 years</td>
<td>0.06</td>
<td>None</td>
<td>?</td>
</tr>
<tr>
<td></td>
<td>Czech Republic</td>
<td>&lt;10 years</td>
<td>None</td>
<td>None</td>
<td>?</td>
</tr>
<tr>
<td><strong>Phase-Out in 10 years or more for at least one partner</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>EU-Morocco</td>
<td>EU</td>
<td>12 years</td>
<td>12.76&lt;sup&gt;64&lt;/sup&gt;</td>
<td>None</td>
<td>?</td>
</tr>
<tr>
<td></td>
<td>Morocco</td>
<td>12 years</td>
<td>5.19</td>
<td>21.63</td>
<td>?</td>
</tr>
<tr>
<td>EU-South Africa</td>
<td>EU</td>
<td>10 years</td>
<td>1.77</td>
<td>0.9&lt;sup&gt;9&lt;/sup&gt;</td>
<td>Reviews of commitments, TRQ</td>
</tr>
<tr>
<td></td>
<td>South Africa</td>
<td>12 years</td>
<td>None&lt;sup&gt;66&lt;/sup&gt;</td>
<td>32.40</td>
<td>Reviews of commitments</td>
</tr>
<tr>
<td>Chile-US</td>
<td>US</td>
<td>12 years</td>
<td>None&lt;sup&gt;67&lt;/sup&gt;</td>
<td>2.94</td>
<td>2.1% subject to TRQs/quantity triggers during phase-out</td>
</tr>
<tr>
<td></td>
<td>Chile</td>
<td>12 years</td>
<td>None&lt;sup&gt;68&lt;/sup&gt;</td>
<td>0.55</td>
<td>0.2% subject to TRQs/ 1.2% subject to trigger price provisions during phase-out</td>
</tr>
<tr>
<td>Canada-Costa Rica</td>
<td>Canada</td>
<td>None</td>
<td>None</td>
<td>None</td>
<td>BEA, TPL</td>
</tr>
<tr>
<td></td>
<td>Costa Rica</td>
<td>15 years</td>
<td>1.82</td>
<td>5.32</td>
<td>BEA, TPL</td>
</tr>
<tr>
<td>Chile-Korea</td>
<td>Korea</td>
<td>16 years</td>
<td>None</td>
<td>0.01</td>
<td>None</td>
</tr>
<tr>
<td></td>
<td>Chile</td>
<td>13 years</td>
<td>4.01</td>
<td>20.80</td>
<td>None</td>
</tr>
<tr>
<td>Canada-Chile</td>
<td>Canada</td>
<td>6 years</td>
<td>0.16</td>
<td>None</td>
<td>BEA, TPL</td>
</tr>
<tr>
<td></td>
<td>Chile</td>
<td>18 years (?)</td>
<td>10.52</td>
<td>6.97</td>
<td>BEA, TPL, TRQ</td>
</tr>
</tbody>
</table>

---

<sup>61</sup> 0.1% have a phase-out of 10 years  
<sup>62</sup> 0.38% quota restrictions  
<sup>63</sup> 0.03% quota restrictions  
<sup>64</sup> 12.58% of imports see only partial elimination of quantitative restrictions  
<sup>65</sup> Decision pending on 0.79% of trade volume; conditional liberalization on 9.36%  
<sup>66</sup> Decision pending on 12.81% of trade volume  
<sup>67</sup> Sugar will not be fully liberalized by the end of the implementation period  
<sup>68</sup> Sugar will not be fully liberalized by the end of the implementation period
<table>
<thead>
<tr>
<th>Agreement</th>
<th>Partner Country</th>
<th>Last Phase-out period</th>
<th>% imports permanently excluded</th>
<th>% imports subject to &gt;10 yrs phase-out</th>
<th>Other</th>
</tr>
</thead>
<tbody>
<tr>
<td>Australia-US</td>
<td>US</td>
<td>18 years</td>
<td>0.82</td>
<td>15.57</td>
<td>BEA for textile and apparel products; TRQ; SSG indefinitely for beef;</td>
</tr>
<tr>
<td></td>
<td>Australia</td>
<td>10 years</td>
<td>None</td>
<td>None</td>
<td>BEA for textile and apparel products</td>
</tr>
<tr>
<td>Australia-Thailand</td>
<td>Thailand</td>
<td>20 years</td>
<td>None</td>
<td>5.42</td>
<td>10 items subject to SSG; SSG and TRQ only during phase-out</td>
</tr>
<tr>
<td></td>
<td>Australia</td>
<td>&lt;10 years</td>
<td>None</td>
<td>None</td>
<td>None</td>
</tr>
<tr>
<td>New Zealand-Thailand</td>
<td>Thailand</td>
<td>20 years</td>
<td>None</td>
<td>25.89</td>
<td>10 items subject to SSG; SSG and TRQ only during phase-out</td>
</tr>
<tr>
<td></td>
<td>New Zealand</td>
<td>&lt;10 years</td>
<td>None</td>
<td>None</td>
<td>None</td>
</tr>
</tbody>
</table>

**Source:** data from Scollay (2005)

**RTA Market Access “Families”**

RTAs cluster into families by world region (Asia, Europe, the Americas) and trade hubs (US, EU, Singapore) when it comes to coverage of main market access disciplines. There is marked variation across families. Models of market access provisions are often exported from e.g. the Americas through trans-continental RTAs with partners in Asia and the Western Hemisphere. Market access provision can be grouped into three general approaches (+Singapore), each associated with one of the major RTA families (IDB, 2006):

**Basket approach: US**
Under this approach, products are divided into baskets, each with its own time-frame and trajectory toward complete elimination; phase-out is sometimes eased by the use of TRQs and there are certain permanent exceptions to preferential treatment. However, this is the exception rather than the rule and even sensitive products such as sugar mostly receive increasing in-quota quantities.

**Sector approach: EU/EFTA**
Under this approach, all industrial products fall under a general tariff elimination schedule. Agricultural and/or fish and/or processed agricultural products, on the other hand, benefit from exceptions as laid out in separate annexes or complex protocols; the latter have varying structures, sometimes defining end-point preference margins, introducing TRQs or scheduling a phased reduction of tariffs to a final level which is not necessarily zero. EFTA agreements follow the EU model in having separate schedules for fish and agriculture next to the general tariff elimination schedule, which are in addition country-specific.

The EU-Chile agreement is a move away from the pattern described above in that it establishes a single schedule for each party which contains all products; however, some of the complexity remains in that the schedule still contains measures such as TRQs.
**Preferential tariff approach: LAIA, Bangkok Agreement**

The tariff reduction program focuses on the end-point preferential tariff on the basis of a positive list. Additional preferences are granted to less developed partner countries.

**Immediate full liberalization without exceptions or remedies: Singapore**

As pointed out above, Singapore stands out for phasing-in all of their commitments immediately without introducing any off-setting measures.

**Special Products: Agriculture and Textiles**

**Tariff treatment**

Probably unsurprisingly, the sectors subject to the greatest numbers of exceptions are agricultural and fisheries products as well as textiles and apparel (only about 10% of RTAs have sectoral measures besides agriculture and textiles). Figure 2 and Figure 3 show the average percentage of liberalized tariff lines and the standard deviation across 34 RTA partners for individual chapters across agreements 5 and 10 years after entry into force of the RTA. Grey dots indicate agricultural goods and black dots represent industrial goods. This detailed analysis confirms the general impression that agricultural goods still receive significant protection under RTAs: agricultural chapters generally see the least liberalization on average and also have the widest dispersion of tariff levels across RTAs. In particular, dairy produce (ch.04), sugars, cocoa and cereals (ch’s 17, 18 and 19) and footwear (ch.64), see liberalization of 60% or less by the fifth year and 65% or less by the tenth year (in terms of tariff lines). EU agreements account for some of the observed wide variation of preferential tariffs for agricultural goods. For example in the EU-South Africa Agreement, liberalization is postponed or not scheduled at all as with certain live animals, meat, dairy and sugar products.

![Figure 2: Distribution of Liberalization by RTA Parties in Chapters, Year 5](image)

*Source: IDB (2006)*
Figure 3: Distribution of Liberalization by RTA Parties in Chapters, Year 10

Agriculture was a major issue in the Australia-US as well as the Chile-Korea RTA. In the latter, high barriers previously imposed by Korea were hardly relaxed by the agreement and a final resolution of the issue was left to the negotiations under Doha. In the case of Australia-US, both countries had already committed to substantial liberalizations under the WTO, such that further concessions were difficult to come by. On the US side, the most sensitive product, sugar was completely excluded from the agreement, while two others, beef and dairy products will be subject to TRQs for a period of 18 and 17 years respectively. Further, beef will benefit from special safeguards even beyond the transition period. Australia’s sensitive goods, on the other hand do not benefit from any exclusions, and only a small percentage of other goods qualify for bilateral emergency actions.

Probably contrary to expectations, there is considerable movement in the textile chapters between the 5- and 10-year benchmarks, while dairy and sugar see little additional liberalization. Overall, differences across parties in agriculture, textiles and apparel largely disappear ten years into the agreement.

Special Provisions

Of the 42 RTAs in the sample, 32 have special provisions on agriculture and 16 on textiles. RTAs in the Americas often feature many special provisions for agriculture, while EU agreements introduce special treatment for agricultural goods through separate tariff liberalization schedules. EU agreements further do not contain prohibitions on agricultural export subsidies. Asia-Pacific agreements generally do contain a provision (often a prohibition) on export subsidies as well as stipulations on cooperation among the parties. This should not distract from the fact, however, that some exclude several agricultural goods completely from liberalization (e.g. Japan-Singapore, see Table 8 below).

Regarding textiles special disciplines are less common and are generally only found in US, Canadian and EU RTAs, often containing provisions on safeguards and emergency actions as well as stringent RoO provisions.
Conclusion

Despite some important differences in terms of liberalization schedules and trajectories, RTAs across the world have many common features when it comes to market access provisions. In particular, tariff liberalization commitments largely seem to converge after 10 years to a level that is consistent with GATT Art.XXIV’s standard of “substantially all trade”.

The literature has yet to come to a conclusion as to the economic significance of these results, making it difficult to draw out implications for future negotiations at this stage.

Table 8: Selected Market Access Provisions

<table>
<thead>
<tr>
<th>Region/Country</th>
<th>Approach</th>
<th>Provisions</th>
</tr>
</thead>
<tbody>
<tr>
<td>AFTA</td>
<td>Negative list</td>
<td>Products are categorized into 5 groups: Inclusion List, Temporary...</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Tariffs on all products in the Inclusion Lists of Brunei, Indonesia...</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Tariffs on all products in the Inclusion Lists of Cambodia, Laos...</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Exclusions:</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Exclusion list is allowed (for such reasons as protection of national...</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Temporary Exclusion Lists and the Sensitive Lists: all products on these...</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Exclusions:</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Japanese exclusion list contains: meat and...</td>
</tr>
<tr>
<td>CER</td>
<td>Negative list</td>
<td>Singapore-New Zealand: all tariffs are immediately bound at 0%</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Singapore-Australia: all tariffs are immediately bound at 0%</td>
</tr>
<tr>
<td></td>
<td>Positive list</td>
<td>Singapore-Japan: tariffs are immediately bound at 0%</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Japan: 77% of total tariff lines (equal to 6,938 tariff lines) to be bound</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Exclusions:</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Japanese exclusion list contains: meat and...</td>
</tr>
<tr>
<td>China-Hong Kong, China</td>
<td>Phase-out:</td>
<td>Hong Kong (China): all tariffs are immediately bound at 0%</td>
</tr>
<tr>
<td></td>
<td></td>
<td>China: 7381 tariff lines were immediately bound at 0%, all others...</td>
</tr>
<tr>
<td>China-ASEAN TIG</td>
<td>Positive list</td>
<td>China: 7381 tariff lines were immediately bound at 0%, all others...</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Early Harvest Program: applies to...</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Note: Tariffs on all products will be reduced, but not all will be...</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Normal track: Tariffs on all products under the normal track...</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Sensitive track: products are...</td>
</tr>
</tbody>
</table>

51
not more than 100 tariff lines of ASEAN-6 and China (of not more than 150 tariff lines of newer ASEAN) will have their tariffs reduced to not more than 50% by 2015 (2018).
Exclusion lists are allowed under the EHP

<table>
<thead>
<tr>
<th>Country Pairs</th>
<th>Exclusions</th>
</tr>
</thead>
<tbody>
<tr>
<td>Korea-ASEAN TIG</td>
<td>Exclusion lists are allowed under the EHP</td>
</tr>
<tr>
<td>Thailand-Australia</td>
<td>Phase-out: tariffs to be gradually reduced or eliminated.</td>
</tr>
<tr>
<td>Thailand-New Zealand</td>
<td>Phase-out: tariffs to be gradually reduced or eliminated.</td>
</tr>
<tr>
<td>India-ASEAN</td>
<td>Exclusions (negotiations are still ongoing):</td>
</tr>
<tr>
<td>Americas</td>
<td>India is asking for rubber, pepper, tea, coffee and palm oil to be excluded from the agreement;</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>NAFTA</th>
<th>Negative list approach</th>
</tr>
</thead>
<tbody>
<tr>
<td>Chile-Canada</td>
<td>Negative list approach</td>
</tr>
<tr>
<td>Chile-Mexico</td>
<td>Negative list approach</td>
</tr>
<tr>
<td>Region</td>
<td>Country(s)</td>
</tr>
<tr>
<td>--------</td>
<td>------------</td>
</tr>
<tr>
<td>6 year phase-out (1998-2004)</td>
<td><strong>Exclusions:</strong>&lt;br&gt;Chile: seafood (lobster, shrimp, prawn), dairy products, wheat, barley, sugar, oils (palm, sunflower, safflower, olive, sesame), tobacco, fuel oil, worn clothing/textile articles&lt;br&gt;Mexico: seafood (lobster, shrimp, prawn), dairy products, wheat, barley, sugar, oils (palm, sunflower, safflower, olive, sesame), tobacco, fuel oil.</td>
</tr>
<tr>
<td>Chile-US</td>
<td>Negative list approach&lt;br&gt;Phase-out: 12 years (85% goes to 0% immediately; most trade will have 0% within 4 years)&lt;br&gt;Special provisions on tariffs on wine (Chile to lower tariff to US level), cars (Chile to phase out luxury tax over 4 years) and used goods (Chile to eliminate immediately the surcharge of 50% on used goods). Sugar and sugar-containing products will not be fully liberalized by either party by the end of the implementation period.</td>
</tr>
<tr>
<td>Europe/Mediterranean</td>
<td></td>
</tr>
<tr>
<td>EU-Czech Republic</td>
<td>Phase-out:&lt;br&gt;<strong>Industrial products</strong> (excluding textiles and clothing): according to different timetable; overall within 10 years&lt;br&gt;<strong>Textiles and clothing:</strong> progressive elimination of tariffs, but retention of quantitative restrictions&lt;br&gt;<strong>Agricultural products:</strong>&lt;br&gt;EU: reduces tariffs, but maintains TRQ; further, maintenance of minimum import prices on certain soft fruits for processing; retain right to levy tariffs on the agricultural component of certain industrial products.&lt;br&gt;Czech Republic: some agricultural products remain subject to tariffs and quantitative restrictions; retain right to levy tariffs on the agricultural component of certain industrial products.</td>
</tr>
<tr>
<td>EU-Lithuania</td>
<td>Phase-out:&lt;br&gt;<strong>Industrial products</strong> (excluding textiles and clothing): quick phase-out&lt;br&gt;<strong>Textiles and clothing:</strong> no complete elimination of barriers&lt;br&gt;<strong>Agricultural products:</strong>&lt;br&gt;EU: quantitative restrictions mostly eliminated; retain right to levy tariffs on the agricultural component of certain industrial products.&lt;br&gt;Lithuania: quantitative restrictions mostly eliminated; retain right to levy tariffs on the agricultural component of certain industrial products.</td>
</tr>
<tr>
<td>EU-Morocco</td>
<td>Negative list for industrial products, positive list for agriculture and fisheries products;&lt;br&gt;<strong>Industrial products:</strong> 12 years; industrial products defined more widely than in other agreements&lt;br&gt;EU: retain right to levy tariffs on the agricultural component of certain industrial products (mostly processed foods); with this exception have a complete elimination of tariffs and quantitative restrictions on industrial products&lt;br&gt;Morocco: retain right to levy tariffs on the agricultural component of certain industrial products; undertake to eliminate reference price system; short list of 50 excluded products; Morocco given the right to suspend obligations for reasons such as infant industry protection;&lt;br&gt;<strong>Agricultural products:</strong>&lt;br&gt;EU: Commitments in 176 agricultural products, mostly fruit, vegetables and fruit juices; TRQ continue to apply in many cases; quantity triggers for some; some vegetables subject to agreed entry prices; further, commitments on 30 fisheries products; TRQ on sardines&lt;br&gt;Morocco: commitments in 50 agricultural products, which in no case require the total elimination of tariffs</td>
</tr>
<tr>
<td>Transcontinental</td>
<td></td>
</tr>
<tr>
<td>Singapore-EFTA</td>
<td>Negative list approach for general trade in goods chapter.&lt;br&gt;Positive list approach for EFTA bilateral agreements on agricultural products. &lt;br&gt;Note: The trade in goods chapter covers industrial and processed agricultural products, including fish and marine products, while basic agricultural products are covered by bilateral agreements, additional to the main agreement. &lt;br&gt;Singapore: tariffs are immediately bound at 0%&lt;br&gt;EFTA: all tariffs on industrial products are eliminated except for a few products on the exclusion list, such as casein, albumin, dextrin and glue, and fatty acids and acid oils; some tariff concessions for processed agricultural products from each EFTA state (the concessions are indicated in annex of the main agreement). For basic agricultural products, concessions are governed by the bilateral agreements. &lt;br&gt;Phase-out: No phase-out period, but rather one time tariff concessions on the date the agreement enters into force.</td>
</tr>
<tr>
<td>Singapore-US</td>
<td>Negative list approach &lt;br&gt;Note: Market access for textiles and apparel is separated from market access for goods chapter.</td>
</tr>
</tbody>
</table>
Singapore: tariffs are immediately bound at 0% (both for general goods and textiles/apparel)
US: goods: 92% of tariffs are bound at 0% immediately and the rest are phased out over 8-10 years; textiles and apparel products: most bound at 0% immediately, except for certain kinds of wool which have a 4-year phase-out period.

**Phase-out: Tariff reduction modalities for the US:**
- Immediate duty-free (A)
- 4 equal annual reductions, duty-free at year 4 (B)
- 8 equal annual reductions, duty-free at year 8 (C)
- 10 equal annual reductions, duty-free at year 10 (D)
- Products already duty-free, continuing to receive duty-free (E)

The products in category D include some agricultural products such as mushrooms, onions, garlic, canned tuna and skipjack in oil, and frozen orange juice. Polycarbonates, footwear, hotel/restaurant ware, vehicles for transport of goods are also categorized in D.

<table>
<thead>
<tr>
<th>Chile-Korea</th>
<th>Negative list approach</th>
</tr>
</thead>
<tbody>
<tr>
<td>Chile: 77.5% of exports bound at zero immediately, 88.4% bound at zero after 5 years, 97% after 7 years</td>
<td></td>
</tr>
<tr>
<td>Korea: 66.7% of export bound at zero immediately, 83.7% bound at zero after 5 years</td>
<td></td>
</tr>
</tbody>
</table>

Chile maintains 5 phase-out lists: immediate phase-out and phase-out after 5, 7, 10 (including grapes) and 13 (including textiles, steel, new tires with 5 years grace period) years respectively

Korea maintains 6 phase-out lists: immediate phase-out and phase-out after 5, 7, 9, 10 and 16 years

**Exclusion lists:**
- Korea: 21 products on exclusion list, rice being the most important
- Chile: 54 products on exclusion list, including fridges, washing machines and rethreaded tires as well as certain agricultural products

<table>
<thead>
<tr>
<th>EU-Chile</th>
<th>Positive list approach</th>
</tr>
</thead>
<tbody>
<tr>
<td>97.1% of exports bound at 0% after 10 years</td>
<td></td>
</tr>
</tbody>
</table>

End result: 100% of industrial trade, 80.9% of agricultural trade and 90.8% of fisheries trade to be bound at 0%

**Industrial goods:**
- EU: 2 categories: (1) immediately; (2) by 2006
- Chile: 3 categories: (1) immediately; (2) by 2008; (3) by 2010

**Agricultural goods:**
- Evolution Clause: 3 years after entry into force of the agreement, parties will examine product by product the possibility of deepening tariff concessions

<table>
<thead>
<tr>
<th>EU-Mexico</th>
<th>Negative list approach</th>
</tr>
</thead>
<tbody>
<tr>
<td>Industrial goods:</td>
<td></td>
</tr>
<tr>
<td>EU: bind 100% at 0% by Jan 2003</td>
<td></td>
</tr>
<tr>
<td>Mexico: bind 100% at 0% by Jan 2007</td>
<td></td>
</tr>
</tbody>
</table>

| Agricultural goods: |
| EU: bind 80% at 0% by 2010 |
| Mexico: bind 42% at 0% by 2010 |

| Fisheries: |
| EU: bind 100% at 0% by 2010 |
| Mexico: bind 89% at 0% by 2010 |

**Exclusion:**
- EU retains right to impose MFN or GSP specific duties on yoghurt, buttermilk, curdled milk and cream, margarine, certain sugar confectionary, malt extract and prepared foods obtained by swelling or roasting cereals
- Limitations on Mexico’s ad valorem duties on sugar confectionary and sorbitol in aqueous solution

<table>
<thead>
<tr>
<th>EU-South Africa</th>
<th>Negative list approach</th>
</tr>
</thead>
<tbody>
<tr>
<td>Phase-out for both industrial goods and agriculture:</td>
<td></td>
</tr>
<tr>
<td>South Africa: 12 years</td>
<td></td>
</tr>
<tr>
<td>EU: 10 years</td>
<td></td>
</tr>
</tbody>
</table>

**Exclusions:**
- EU: some dairy products, sugar products, confectionary, biscuits, breads, prepared foods; some unprocessed and semi-processed foods, including live animals, dairy and cereals; cheese and wine
- South Africa: meat products, dairy products, cereals, sugar, ice cream, flax, some fisheries products

**Sources:**
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CHAPTER 5 – INTELLECTUAL PROPERTY RIGHTS

Intellectual property rights (“IPR”) are exclusive rights granted to creators of expressive works or inventors to control the subsequent use of their productions. The five most important categories of IPR are: (i) copyright (protecting expressive works); (ii) trademarks (protecting brand names); (iii) geographical indications (protecting origin denominations); (iv) patents (protecting inventions); and (v) marketing exclusivity rules (protecting data) (Abbott, 2006). They are relevant to areas as varied as public health, education, industrial policy, traditional knowledge, biodiversity, biotechnology, internet, entertainment, and media. Countries which have traditionally been exporters of knowledge-intensive or creative goods have seen it in their interest to ask importing countries to implement intellectual property regulations in order to guarantee the protection of the knowledge or creative content of their products abroad, thereby turning IPR into a trade issue. While initially WIPO (the World Intellectual Property Organization) had the mandate to set basic global IPR standards, the linking of IPR to trade eventually led to a shift in forum from WIPO to the WTO. Proponents of stronger intellectual property rights endorsed this cross-linkage of issues, as inclusion of IPR into the global trade framework allows for stronger enforcement under the WTO Dispute Settlement Understanding.

Intellectual property rights were first formally introduced into the global trade system with the conclusion of the Uruguay Agreement in 1995, which founded the WTO and contained in Annex 1C the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS). Recognizing that the effects of intellectual property rights will differ depending on the development status of a country, obligations under TRIPS are being phased in according to a staggered schedule. For developed countries the Agreement entered into force on January 1, 1996, while on January 1, 2000, most obligations became binding for developing countries; the exception was pharmaceutical patent protection, which was delayed until the beginning of 2005 for the majority of developing countries. For least developed countries, the transition period lasts until 2016 with the possibility of a further extension.

Aiming to become innovators and producers of high-technology goods as well as consumers of high-quality goods and services, intellectual property rights will become increasingly important in East Asian countries on both the demand and the supply side. Maskus (2004) notes that as consumers demand higher quality products, it will be in the interest of East Asian enterprises to place growing emphasis on developing brand-name recognition and a reputation for quality. Enforcement of trademarks and copyrights will be instrumental. In turn, access to foreign technology as well as product innovation efforts within the region will greatly benefit from appropriate patent legislation.

Economic Rationale for IPR Protection

The basic trade-off when it comes to intellectual property rights is that between consumer welfare and incentives for knowledge creation. As Chin and Grossman (1988) state, “a fundamental tension exists between the social desirability of widespread dissemination of available know-how and the need for society to provide adequate rewards to purveyors of new information”. Knowledge has the characteristics of a public good, meaning that once created, it can be used by everyone at no or little marginal cost. However, private agents will have little incentive to invest in the creation of new knowledge in a world where their invention will immediately become freely available. Recognizing this trade-off, most governments therefore give limited market
power to knowledge creators (in the form of patents, copyrights etc.), accepting the loss of static efficiency in favor of preserving incentives (Chin and Grossman, 1988).

So far, the literature has not yet established a theoretically ideal level of IPR stringency. Evidence concerning the effect of intellectual property rights on innovation and growth (both through own innovation and technology transfer embedded in FDI) remains ambiguous (Abbott, 2006). Quantification of effects is difficult, partly because certain aspects of IPR legislation are conceptually not well understood (Fink, 2005). What is clear, however, is that effects depend strongly on the development level of individual countries.

**IPR and Trade**

In the context of international trade, tensions arise because developed countries are for the most part the holders of intellectual property rights, while developing countries are primarily consumers. This situation is particularly problematic in sectors related to health care and education. Price mark-ups created by intellectual property rights may lead to a situation where the poor are no longer able to afford health care or education as a result. Fink (2005) points out that the costs to consumers arising from pharmaceutical patents will differ from country to country and depend on such factors as the purchasing power of patients and the coverage of drug expenses by health insurance programs. In the case of copyrights, costs and benefits seem less clear. “Fair-use” exemptions in IPR law for educational or research purposes are important in this context.

On the other hand, an area where developing countries could equally be the holders of intellectual property rights and therefore benefit from the associated rents is geographical indications. Achieving recognition for products unique to their country or region could earn producers in developing countries significant premia. Many developing countries are acting on this realization, breaking up the usual pattern of the main DDA negotiating alliances: the coalition in favor of a stronger regime on geographical indications includes countries as varied as the EU, Kenya, India, Sri Lanka, Switzerland and Thailand (Fink and Maskus, 2005).

**WTO Disciplines**

The WTO TRIPS Agreement contains extensive obligations for intellectual property protection. The nature of TRIPS obligations is unique among all the WTO agreements, because they are mostly affirmative, rather than negative which is how most of the WTO trade regime is built. In contrast to negative obligations, which require a Member to simply refrain from taking certain actions (e.g., MFN and national treatment), affirmative obligations require a Member to enact and enforce specific legislation. TRIPS contains the familiar negative obligations like MFN and national treatment, but the real heart of TRIPS is the extensive affirmative obligation to enact specific legislation to protect the holders of intellectual property rights, as well as additional provisions to effectively enforce these rights through administrative, judicial, and border actions.

The substantive TRIPS provisions require each Member to grant specific rights to holders of copyrights, trademarks, geographical indications, industrial designs, patents, and layout-designs of integrated circuits.69 These obligations include, *inter alia*, providing patent and copyright protection for a specified number of years, including specialized copyright protection for

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69 See TRIPS, Part II.
computer programs, and establishing a system for the legal protection of geographical indications. The Agreement further establishes rules governing the grant of compulsory licenses and defines the scope of patentable inventions. The extent of these substantive obligations required many Members to completely overhaul their domestic IPR regimes.

TRIPS, however, does not only require Members to legislate specific legal protections for IPR. Members must also ensure that legal rights guaranteed by TRIPS are effectively enforced. Towards this aim, TRIPS requires Members to enact specific legal procedures related to evidence, injunctions, damages, and criminal sanctions, for the enforcement of IPR rights. In addition, TRIPS Article 41 requires Members to make available this system of enforcement measures in a manner “so as to permit effective action against any act of infringement.” However, the qualifying paragraph in Article 41 states:

> It is understood that this Part does not create any obligation to put in place a judicial system for the enforcement of intellectual property rights distinct from that for the enforcement of law in general, nor does it affect the capacity of Members to enforce their law in general. Nothing in this Part creates any obligation with respect to the distribution of resources as between enforcement of intellectual property rights and the enforcement of law in general.

Reichman (1997) explains the implications of this qualifying paragraph of TRIPS Article 41:

> these safeguards [in TRIPS Article 41:5] immunize member states from any further duty to provide foreign rights holders with a higher quality legal product than that which the domestic courts and administrative agencies would normally mete out to local protagonists in similar circumstances.

This paragraph provides protection for Members, especially for developing countries, that enact all the necessary legislation required by TRIPS but due to resource constraints are unable to effectively enforce all of TRIPS.

A number of WTO cases have been brought under TRIPS. All of these cases related to the substantive obligations under TRIPS. One was a successful challenge to the EU regime for granting protection to foreign holders of geographical indications. Another case under TRIPS related to US regulations regarding trademarks used by businesses confiscated by Cuba. A few other cases related to patent protection: the US successfully argued a complaint against India’s patent application system for pharmaceutical and agricultural chemicals; the EU prevailed in a challenge to Canada’s regime that allowed the stockpiling of generic drugs; and the US also won a challenge to the patent term provided by Canada.

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70 TRIPS, Articles 42-50.
RTAs and BITs as a new forum to move beyond TRIPS

As the heated debates at the WTO indicated that no consensus was likely on an IPR regime stronger than TRIPS in the foreseeable future, IP exporters started using RTAs and bilateral investment treaties (BITs) as vehicles to introduce more stringent IP laws into the legislation of strategic trade partners. The US is the country that has made use of RTAs and BITs to this end the most. Strong IPR rules also feature heavily in EU RTAs, though the emphasis in terms of issues is different. Provisions contained in US and EU agreements with other countries are likely to affect East Asian countries even if they do not conclude an RTA with either: unlike tariff concessions, changes in IPR rules do not fall under the MFN exception granted by Article XXIV of the GATT, i.e. IPR concessions cannot be made on a preferential basis. Changes in the legislation of EU and US RTA partners will therefore be effective vis-à-vis all trade partners.

The requirement to extend IPR commitments in RTAs to all WTO Members on an MFN basis is especially important given most RTAs now include at least some new commitments that go beyond TRIPS. The inclusion of IPR in RTAs is generally accomplished through three different approaches, which may be roughly categorized as the Cooperation Approach, the EU Approach, and the US Approach.

- Cooperation Approach – cooperation with no dispute settlement enforcement.
- The US Approach – requires accession and implementation of pre-existing international IPR agreements, along with the inclusion of specific substantive provisions that go above and beyond those in TRIPS (“TRIPS-Plus”), enforceable through the RTA’s dispute settlement process.
- The EU Approach – requires accession, implementation, and effective enforcement of existing international IPR agreements, enforceable through the RTA’s dispute settlement process.

The Cooperation Approach

Given the extensive commitments in TRIPS and the difficulty many WTO Members have with implementation and enforcement of TRIPS, it is not surprising that many RTAs do not go beyond promises to cooperate. These cooperation arrangements, however, should not be underestimated as they provide a useful opportunity for countries to share knowledge and experience in a field in which some may not have significant experience. The Cooperation Approach may also include the creation of a committee to oversee implementation of the IPR section, discuss specific IPR-related issues, and make recommendations to the RTA’s ruling committee.  

The US Approach

For the US, strong IPR rules are a key market access interest. The Trade Promotion Authority operates under the objective emanating from the domestic law to negotiate IPR provisions in RTAs that “reflect a standard of protection similar to that found in US law”. Fink and Reichenmiller (2005) outline obligations found in US bilateral agreements, which generally go beyond TRIPS standards in order to get closer to current US legislation. Tighter provisions are

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76 See e.g., Japan – Thailand DRAFT RTA, Article 143.
found in particular with respect to (i) protection of patents and pharmaceutical test data; (ii) copyright protection; (iii) geographical indications; (iv) trademarks and (v) enforcement. Further, bilateral investment treaties (BITs) have been used to introduce TRIPS-plus IPR rules in FDI receiving countries.

IPR provisions in the different US bilateral agreements are fairly similar overall, however, some variations arise from adaptation to different development situations and a desire to make IPR provisions increasingly more ambitious. Regarding restrictions on compulsory licenses, the US made stronger demands on their high-income partners, Australia and Singapore than other RTA partners. In Chile, the pressure exerted by the local pharmaceutical industry led to the preservation of greater flexibilities regarding compulsory licenses than in the case of CAFTA countries. In general, the US has become more ambitious in their demands over time, such that the more recent CAFTA-DR, Bahrain and Morocco agreements are noticeably more restrictive than earlier ones (Abbott, 2006).

Recent US RTAs are extremely detailed and require numerous substantive commitments geared to bringing its RTA partners’ intellectual property laws up to the level of the US. The Chile – US agreement, which contains an IPR section of thirty-two pages, provides a useful illustration. This agreement requires both parties to ratify a number of existing international IPR agreements, such as the Patent Cooperation Treaty (1984), the International Convention for the Protection of New Varieties of Plants (1991), the Trademark Law Treaty (1994), the Convention Relating to the Distribution of Programme-Carrying Signals Transmitted by Satellite (1974), the Patent Law Treaty (2000), the Hague Agreement Concerning the International Registration of Industrial Designs (1999), and the Protocol Relating to the Madrid Agreement Concerning the International Registration of Marks (1989). In addition, the Chile – US agreement also contains detailed provisions on trademarks, geographical indications, patents, and enforcement of IPRs. Furthermore, the Chile – US agreement subjects all the IPR provisions to the RTA’s dispute settlement mechanism.

The specific IPR provisions in US RTAs generally focus on adding to TRIPS in a few particular areas, with special emphasis on “the strategic interests of the United States in the IPR field [that] are close to those of the pharmaceutical, agrochemical, entertainment, and software industries” (Vivas-Eugui & Spennemann, 2006). Extending patent protection for pharmaceuticals, particularly in the case of unreasonable delays in the patent approval process, is one notable contribution of US RTAs with Singapore, Chile, and Australia. Compulsory licensing of patents is another area addressed by the most recent US RTAs. While TRIPS allows Members to issue compulsory licenses with only minimal requirements (e.g., first attempting negotiations with the patent holder, payment of royalties to the patent holder, and use of the license “predominantly for the supply of the domestic market”), US RTAs significantly curtail a party’s use of compulsory licenses to only those instances where it is ordered as a remedy for anticompetitive conduct, provided exclusively for public non-commercial use, or in instances of national emergency. An additional patent issue addressed in recent US RTAs is the ability to patent certain plants (and animals). TRIPS provides Members discretion in this area, allowing Members to “exclude from patentability . . . plants and animals other than micro-organisms.” This is an area of concern particularly for developing countries, because the potential patentability of plants may raise concerns regarding appropriation of traditional knowledge by biotechnology firms.

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77 Singapore – US, Article 16.7.7; Chile – US, Article 17.9.6; Australia – US, Article 17.9.8.b.
78 Singapore – US, Article 16.7.6; Australia – US, Article 17.9.7.
79 TRIPS, Article 27.3.
Table 9 illustrates how US RTAs demand TRIPS-plus commitments in regard to patents, copyrights, and IPR enforcement.

<table>
<thead>
<tr>
<th>Patents and Pharmaceutical Test Data</th>
<th>TRIPS Commitments</th>
<th>US RTA Additions</th>
</tr>
</thead>
<tbody>
<tr>
<td>Patent Terms</td>
<td>The patent term shall extend at least twenty years from the filing date.</td>
<td>Extends the patent term for delays in the approval process.</td>
</tr>
<tr>
<td>Generic Drugs</td>
<td>No obligation.</td>
<td>Prohibits marketing of generic drugs during the life of the patent.</td>
</tr>
<tr>
<td>Pharmaceutical Test Data Availability</td>
<td>Requires patent approval data to be protected from “unfair commercial use”.</td>
<td>Protects patent approval data from any use by unauthorized parties for at least five years.</td>
</tr>
<tr>
<td>Parallel Importation</td>
<td>WTO members have discretion whether to permit parallel imports of patented drugs.</td>
<td>Allows the patent holder to block parallel imports.</td>
</tr>
<tr>
<td>Patents for Plants &amp; Animals</td>
<td>Allows each Member discretion.</td>
<td>Requires patent availability for plants and animals.</td>
</tr>
<tr>
<td>Compulsory Licensing</td>
<td>Permits compulsory licensing after negotiations with the patent holder and subject to “adequate remuneration”.</td>
<td>Limits compulsory licensing to national emergencies, public non-commercial use, and as a judicial remedy for anticompetitive conduct.</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Copyrights</th>
<th>Life of author + 50 years</th>
<th>Life of author + 70 years</th>
</tr>
</thead>
<tbody>
<tr>
<td>Copyright Term</td>
<td>Life of author + 50 years</td>
<td>Life of author + 70 years</td>
</tr>
<tr>
<td>Technological Circumvention</td>
<td>Not covered.</td>
<td>Requires penalties for circumvention of technological features used to protect copyrighted works.</td>
</tr>
<tr>
<td>Public Domain</td>
<td>Not covered.</td>
<td>Places the burden of proof on the defending party to show that a work is part of the public domain.</td>
</tr>
<tr>
<td>Parallel Importation</td>
<td>No explicit right to block parallel importation of unauthorized copies.</td>
<td>Allows a copyright holder to block importation of unauthorized copies made outside the other Party’s territory.</td>
</tr>
</tbody>
</table>

| Enforcement                          | Implicitly allows a defense for lack of sufficient resources to effectively enforce IPR. | Does not allow resource constraints to be used as a defense for failure to adequately enforce IPR. |
|--------------------------------------| Requires fines adequate to compensate the rights holder. And criminal sanctions for willful infringements. | Requires fines regardless of any injury to the rights holder. And expands the range of actions subject to criminal sanctions. |

*Sources:* Fink & Reichenmiller (2005); Abbott (2006)
Development implications of US Approach

In light of the fact that different development levels require different stringencies in terms of IPR laws, the US objective of passing on their own standards to all trade partners with whom they negotiate a bilateral agreement seems problematic.

Provisions regarding the protection of patents and pharmaceutical test data go far beyond TRIPS and even though they are not legally in contradiction to the Doha Declaration on TRIPS and Public Health, they are at odds with the spirit of the Agreement. As a slight remedy, some agreements contain side letters of shared understandings that the IP chapters do not affect their ability to “take necessary measures to protect public health and promote medicines for all”.

In individual cases, IPR standards have been propagated in RTAs by US negotiators, despite the fact that they are seen as controversial in their application in the domestic context (e.g., the regulatory review exception, which allows third party use of patented technology for research and experimentation, and parallel imports of patented products). In still others, such as the restriction of use of confidential data in national emergencies, the RTAs impose obligations which would never as a practical matter be enforced within the United States – and rightly so from a public health standpoint as most would argue (Abbott, 2006).

Abbott (2006) also argues, development implications arise from the fact that:

within the United States the law establishes a particular balance between the interests of IPRs holders and consumers. Most U.S. IPR rules are formulated in terms of general principles, with limitations and exceptions to them. The FTAs negotiated by the United States largely reflect the general rules of application, though not in all cases. What the FTAs do not adequately reflect is the interplay between rule, limitation and exception that establishes the balance. This is of special importance in areas such as public health regulation where incomplete familiarity with the flexibility inherent in the U.S. system may lead its trading partners to conclude that restrictive implementation of the FTAs is required. Differences in the capacity of the United States and many developing countries to create and manage legal infrastructure may lead to a disparity in the way FTA rules are implemented. In the negotiating process, developing countries should carefully consider whether the capacity of their domestic legal and regulatory system will permit them to balance interests as does the United States. It is probably unwise to accept commitments that will strain domestic capacity and which may lead to the application of rules in a more restrictive manner than the agreements require. If commitments are accepted, developing countries should pay careful attention to implementing them in a way which properly reflects the domestic public interest.

Unless developing countries are effectively enabled to legislate appropriate checks and balances, they may find themselves with substantially stricter intellectual property and related regulatory systems than the United States. The critical lesson for developing countries accepting IPRs commitments in FTAs with the United States is that U.S. IPRs law is replete with exceptions to the general rules, in many cases elaborated in considerable detail. If developing countries accept obligations in the FTAs, they must also be prepared to implement a significant level of exceptions so as to create a reasonable balance within their own law. If they do not implement these exceptions, they will find themselves not only with TRIPS-plus levels of IPRs protection, but also with U.S.-plus levels of IPRs protection.

Enforcement under US RTAs

Even though detailed obligations on enforcement are contained in TRIPS, the Agreement does not create an obligation “with respect to the distribution of resources as between enforcement of

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80 For a detailed account, see Fink and Reichenmiller (2005)
intellectual property rights and the enforcement of law in general.” This is, however, an obligation that the US has been pushing in their bilateral agreements. In particular, these agreements constrain the institutional flexibility of countries when it comes to IPR enforcement. Agreements state explicitly that “resource constraints cannot be invoked as an excuse for not complying with the agreement’s enforcement obligations”. Further, while TRIPS requires border measures against counterfeit goods only in the importing country, most US bilaterals mandate measures to be taken both by importers and by exporters (in some cases, these requirements also apply to goods in transit).

US bilaterals further mandate the imposition of stronger deterrents against infringements. The standard required by TRIPS consists of the imposition of fines adequate to compensate IPR holders for monetary damages suffered. US agreements aim to make enforcement more effective by requiring (i) as part of all agreements civil and administrative procedures leading to the imposition of fines in the case of copyright piracy and trademark counterfeiting independent of the actual damages suffered by the rights holder; and (ii) in some agreements criminal procedures and remedies, which under TRIPS is required only in the case of willful trademark counterfeiting and copyright piracy on a commercial scale. Many US bilaterals push this standard further by defining more explicitly the scope of infringement acts subject to criminal procedures, including copyright piracy with a significant monetary value, but not necessarily for financial gain.

In terms of implications for future negotiations, Fink and Reichenmiller (2005) argue that countries will have to accept that IPR will remain a priority on the US negotiating agenda; however, as indicated by varying negotiating outcomes, negotiating partners were able to incorporate their own more defensive interests in individual cases, particularly with respect to public health issues.

Recent Developments
In May 2007, an agreement between the US House of Representatives Ways and Means Committee and USTR was reached to loosen certain provisions regarding pharmaceuticals in the Peru and Panama RTAs. According to the agreement, the new standards are also to be incorporated into the RTA with Colombia. These developments have been interpreted by some as a potential shift in US policy. Changes are to be made with respect to provisions on five issues: (i) data exclusivity periods for clinical test data, (ii) patent extensions due to delays in marketing approval, (iii) the linkage requirement between drug regulatory agencies and patent issues, (iv) side letters on public health, and (v) amendments of the IPR chapter based on economic development.

The changes in the data exclusivity provision will shorten the time period required for a generic to enter the market, by shortening in certain cases the period during which clinical test data may only be used by the innovator. As regards patent extension to compensate for delays during the marketing approval process for pharmaceutical products, the provision is weakened considerably by changing the wording from “a party shall extend” to “a party may extend the term of a patent”.

In addition, the Peru and Panama RTAs will no longer have a linkage requirement between drug regulatory agencies and patent issues, doing away with the much debated requirement that “the drug regulatory agency withhold approval of a generic until it can certify that no patent would be violated if the generic were marketed”. There is a slight claw-back of this concession to the extent that the RTA text now contains a requirement for certain procedural rules and remedies to be put in place for adjudicating potential patent infringement or validity disputes. This should, however, not distract from the fact that overall, the balance of the provision changes in favor of the generics manufacturer.
Importantly, the side letter on public health, which is currently included separately in US RTAs, is to be made part of the actual text of the RTA, giving greater legal weight to various commitments made under the Doha Declaration on Public Health. Finally, the Agreement suggests including provisions for a periodic review of the IPR chapter with room for future negotiations that could bring about amendments in the case of improvement in the level of economic development of the RTA partner.

**Other RTAs using the US Approach**

The US is not the only country to use this approach. While not nearly as detailed, Japan – Malaysia and Japan – Thailand contain a number of explicit TRIPS-plus commitments. This includes provision of “adequate and effective legal remedies against the circumvention of effective technological measures that are used by authors, performers or producers of phonograms in connection with the exercise of their rights” and against any person knowingly, inducing, enabling, or facilitating infringement of copyrighted works by removing or altering electronic rights management information. This is the same protection provided in the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty, as well as a main commitment required in US RTAs. Indeed, protection against circumvention of technological measures used to protect copyrighted works, while not an obligation in TRIPS, is a common commitment now in EU, Japan, and US RTAs.

**The EU Approach**

The EU’s most recent trade strategy paper (“Global Europe: Competing in the World – A contribution to the EU’s growth and job’s strategy”) identifies intellectual property as one of the keys to European competitiveness. Stronger IPR provisions, especially IPR enforcement along the lines of the EU Enforcement Directive, are one of the key RTA issues. It is suggested that IPR enforcement provisions be included in RTAs with an emphasis on reducing IPR violations, in particular the production and export of counterfeit goods. The strategy also lays out the objective to strengthen IPR enforcement in countries with which no preferential agreement exists or will exist in the near future.

The EU approach to IPR in RTAs has often been discounted or overlooked, particularly in comparison to the US approach, which is often maligned for being TRIPS-plus. However, the EU approach, albeit more in the spirit of multilateralism, effectively requires its RTA partners to assume many IPR commitments beyond those in TRIPS, and thus should also receive the label of TRIPS-plus.

Chile – EU for example, requires the parties to accede to “and ensure an adequate and effective implementation of” a number of international IPR agreements. These agreements are:

- The Nice Agreement Concerning the International Classification of Goods and Services for the Purposes of Registration and Marks
- The WIPO Copyright Treaty
- The WIPO Performances and Phonograms Treaty
- The Patent Cooperation Treaty
- The 1971 Strasbourg Agreement Concerning International Patent Classification

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81 The Japan-Thailand EPA has been signed but not yet ratified.
83 Chile – EU, Article 170.
Further, the Chile – EU agreement does not exclude the IPR provisions from the RTA’s dispute settlement mechanism. However, given these substantive obligations extend no further than accession and effective implementation of specified international IPR agreements, it is not yet clear how effective enforcement through the RTA’s dispute settlement mechanism will be. The obligation to ensure effective implementation of these agreements could be a basis for substantive remedies, although litigation under inherently ambiguous language like “adequate and effective implementation” is always highly speculative. Table 10 below shows some of the TRIPS-plus commitments in the IPR treaties incorporated into Chile – EU.

<table>
<thead>
<tr>
<th>Table 10: TRIPS-Plus Commitments in IPR Treaties Incorporated into Chile – EU</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>The Nice Agreement Concerning the International</strong></td>
</tr>
<tr>
<td><strong>Classification of Goods and Services for the</strong></td>
</tr>
<tr>
<td><strong>Purposes of Registration and Marks</strong></td>
</tr>
<tr>
<td>Requires adoption of an established classification system for</td>
</tr>
<tr>
<td>the registration of trademarks.</td>
</tr>
<tr>
<td><strong>The WIPO Copyright Treaty</strong></td>
</tr>
<tr>
<td>Adds the right to control distribution of copyrighted literary</td>
</tr>
<tr>
<td>and artistic works; adds the right to authorize commercial</td>
</tr>
<tr>
<td>rental for works embodied in phonograms; requires “adequate</td>
</tr>
<tr>
<td>legal protection and effective legal remedies against the</td>
</tr>
<tr>
<td>circumvention” of technological measures used to protect</td>
</tr>
<tr>
<td>copyrighted literary and artistic works.</td>
</tr>
<tr>
<td><strong>The WIPO Performances and Phonograms Treaty</strong></td>
</tr>
<tr>
<td>Requires “adequate legal protection and effective legal</td>
</tr>
<tr>
<td>remedies against the circumvention” of technological measures</td>
</tr>
<tr>
<td>used by performers or producers of phonograms to protect</td>
</tr>
<tr>
<td>their copyrighted works.</td>
</tr>
<tr>
<td><strong>The Patent Cooperation Treaty</strong></td>
</tr>
<tr>
<td>Allows patent applications in any of the Contracting Parties</td>
</tr>
<tr>
<td>to be filed as international applications, which will be</td>
</tr>
<tr>
<td>subject to an international search by the International</td>
</tr>
<tr>
<td>Searching Authority and international publication, and if</td>
</tr>
<tr>
<td>successful allows a patent application to obtain protection</td>
</tr>
<tr>
<td>simultaneously in a large number of countries.</td>
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<tr>
<td><strong>The 1971 Strasbourg Agreement Concerning International</strong></td>
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<tr>
<td><strong>Patent Classification</strong></td>
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<tr>
<td>Creates an international classification system for patents</td>
</tr>
<tr>
<td>that Parties must use as a principal or subsidiary</td>
</tr>
<tr>
<td>classification system for labeling patents.</td>
</tr>
<tr>
<td><strong>The Convention for the Protection of Producers of</strong></td>
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<tr>
<td><strong>Phonograms Against the Unauthorized Duplication of</strong></td>
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<tr>
<td><strong>their Phonograms</strong></td>
</tr>
<tr>
<td>Requires Contracting Parties to protect producers of</td>
</tr>
<tr>
<td>phonograms from any of the other Contracting Parties against</td>
</tr>
<tr>
<td>the importation of unauthorized duplicates.</td>
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<tr>
<td><strong>The Locarno Agreement Establishing an</strong></td>
</tr>
<tr>
<td><strong>International Classification for Industrial Designs</strong></td>
</tr>
<tr>
<td>Requires Contracting Parties to use the International</td>
</tr>
<tr>
<td>Classification for Industrial Designs as a principal or</td>
</tr>
<tr>
<td>subsidiary classification system.</td>
</tr>
<tr>
<td><strong>The Budapest Treaty on the International</strong></td>
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<tr>
<td><strong>Recognition of the Deposit of Micro-organisms for the</strong></td>
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<tr>
<td><strong>Purposes of Patent Procedure</strong></td>
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<tr>
<td>Creates an international system for the deposit and</td>
</tr>
<tr>
<td>recognition of micro-organisms for the purpose of patent</td>
</tr>
<tr>
<td>protection.</td>
</tr>
<tr>
<td><strong>The Trademark Law Treaty</strong></td>
</tr>
<tr>
<td>Establishes uniform maximum procedures for tm applications.</td>
</tr>
</tbody>
</table>

*Source: authors’ compilation*
As Table 10 demonstrates, the IPR treaties in Chile – EU may require substantial changes to a country’s intellectual property application, classification, and protection regimes. Moreover, some of the IPR treaties in Chile – EU are not universally accepted. In Asia, for example, a number of prominent trading countries are not members of the WIPO Copyright Treaty (e.g., Australia, China, Korea, India, and Thailand).\(^{84}\) A country should be particularly wary of the EU approach because it effectively integrates these IPR treaties into the RTA, thus allowing enforcement of these IPR treaties through the RTA’s dispute settlement mechanism, regardless of what type of enforcement mechanism exists in the IPR treaty itself.

Another area in which the EU extracts TRIPS-plus commitments is geographical indications. The EU is probably the greatest beneficiary of protection for such designations as Champagne and Roquefort cheese. Most of the EU’s bilateral activity in GIs occurs outside of RTAs through specialized agreements that usually address exclusively wine and spirits.\(^{85}\) These agreements go beyond the TRIPS requirement for geographical indications in a number of ways: enhanced protection, automatic protection for GIs in a list attached to the agreement, and the elimination of the exceptions allowed by TRIPS Article 24.\(^{86}\)

**EU approach vis-à-vis developing countries**

Vis-à-vis developing countries, the EU RTA strategy emphasizes deepening the implementation of TRIPS, ensuring recognition of geographical indications and obtaining commitments for the ratification of various multilateral treaties administered by WIPO. In the case of the EU’s Association Agreement with Chile, for example, the Agreement stresses the need to “ensure adequate and effective protection to intellectual property rights in accordance with the highest international standards, including effective means of enforcing such rights provided for in international treaties” (Roffe, 2004). The strongest IP related provisions in the Agreement concern the reciprocal protection of geographical indications of wines and spirits, including the issue of homonymous GIs.\(^{87}\) With respect to GIs, the Chile – EU Agreement can be seen as TRIPS-plus.

**Japanese Agreements**\(^{88}\)

The increasing importance of production networks in East Asia has led to strong interdependencies between countries in the region in terms of trade and FDI. Japanese industry has, however, in the past expressed concern about the level of intellectual property protection in markets other than the US and the EU. As pointed out in the 2006 Annual Report of the Japanese Patent Office (JPO), Japan sees the underpinnings of IP regimes in many important trading partners as fragile, as reflected in significant delays in examinations and large amounts of counterfeit products. Japanese companies are concerned that patent infringement cases will increase as they shift their development of industrial technologies to countries such as China and

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\(^{85}\) Examples of such agreements exist between the EU and Chile, Mexico, South Africa, and Australia.

\(^{86}\) David Vivas-Eugui & Christophe Spennemann, *The Treatment of Geographical Indications in Recent Regional and Bilateral Free Trade Agreements*, UNCTAD/ICTSD Project on Intellectual Property and Sustainable Development (May 2006)

\(^{87}\) In this case, it was decided that protection shall be given to both geographical indications, making clear on the label the actual origin of the wine.

\(^{88}\) Based on Japanese Patent Office (JPO) 2006 Annual Report
South Korea. The Japanese government is reacting to these concerns by taking a pro-IPR negotiating stance at the WTO and WIPO.

Where the multilateral negotiations are falling short of desired outcomes, Japan is supplementing its IP strategy by requesting the introduction and reinforcement of regimes in the framework of RTAs and Economic Partnership Agreements (EPAs). Very broadly, Japan’s bilateral negotiations aim to put in place programs to ensure (i) the sufficient protection of intellectual property; (ii) increased transparency of the systems; and (iii) stronger enforcement, all with consideration of the situation of the negotiating partner (see Table 11 for details on individual IP chapters in Japanese agreements). IPR also features in Agreements with Thailand and the Philippines, as well as in the negotiations with ASEAN as a bloc, South Korea, Indonesia, Chile and Brunei Darussalam. Japan is further pursuing its IP interest under the APEC framework, where an Intellectual Property Rights Expert Group (IPEG) was established and mandated with carrying out activities in accordance with the new Collective Action Plan (CAP) formulated in 2001 in response to the full implementation of the TRIPS Agreement. In the framework of IPEG, the JPO recently introduced the Patent Prosecution Highway and called for an APEC Anti-Counterfeiting and Piracy Initiative.

**Latin-American IPR Strategy in RTAs**

Latin American RTAs, such as the one between Chile and Mexico and Chile and CAFTA (Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua) are very brief on the issue of IPRs, placing most emphasis on the mutual recognition and protection of geographical indications. Often this is confined to only a few products, e.g. Chile recognizes Mexico’s Tequila and Mezcal, while Mexico agrees to protect Chile’s Pisco, Pajarete and Vino Asoleado (Roffé, 2004). The Chile – Mexico Agreement also contains a chapter on trademarks that goes beyond TRIPS in several aspects.

**Conclusion**

Certainly, IPR has become one of the main sticking points for RTA negotiations, particularly in negotiations between a developed and developing country. A strategy for developing countries in RTA negotiations over IPR is difficult to formulate. First, the most difficult aspect of formulating a strategy towards IPR is the lack of any concrete guidance on whether stronger intellectual property rights are beneficial for developing economies. Second, any strategy is highly dependent on what a country can receive in return for agreeing to enhanced IPR protection. Countries negotiating IPR in the context of trade agreements should be aware of the fact that concessions made with respect to IPR law are permanent, while market access preferences given in turn will be eroded as the trading partner concludes more RTAs and progress is made under the multilateral framework; in other words, countries should be careful about concessions made in return which are only temporary in nature. Also because TRIPS does not provide for an exception from the MFN principle for RTAs (and as a practical matter), IPR concessions will generally be made vis-à-vis the rest of the world thus benefiting all trading partners, not just a specific RTA partner.

The most benign of the TRIPS-plus commitments are certainly those related to international classification and administration systems. Generally, these do not require any substantive change in the level of IPR protection, but rather provide an established streamlined process that may be useful for developing countries to adopt in any event.
## Table 11: Selected IPR Agreements

### East Asia and Pacific

**AFTA**
- ASEAN Working Group on Intellectual Property Cooperation is working on establishing a regional filing system on trademarks and patents including industrial design and identifying areas for harmonization of ASEAN laws on trademarks.
- Cooperation regarding: copyright and related rights, patents, trademarks, industrial designs, geographical indications, undisclosed information and lay-out designs of integrated circuits.

**New Zealand – Singapore**
- Reaffirms obligations under WTO TRIPS.

**Australia – Singapore**
- Reaffirms obligations under WTO TRIPS.
- Cooperation on eliminating trade in goods which infringes IPR in particular regarding trademarks.

**Japan – Singapore EPA**
- Agreement to increase cooperation regarding IPR, e.g. information sharing and joint training initiatives.
- Focus of cooperation: e-commerce, patents, trade secrets, trademarks, copyrights and related rights as important areas for cooperation.
- Key provisions of Agreement: simplifying the patent procedure for applications that are made in both Japan and Singapore; increasing transparency by linking intellectual property information search portal of the IP Office of Singapore with the database of the JPO.

**Japan – Malaysia EPA**
- Focus of agreement: speeding up the patenting process including preferential examination track for certain applications; protecting trademarks well-known in other countries in order to prevent trademark counterfeiting; adds designs published via the Internet before the filing date to the information which could deny novelty.

**China – ASEAN**
- No IP provisions currently, however, cooperation shall be extended to IPR in the final Agreement.

### Transcontinental

**Singapore – US**
- Reaffirms obligations under WTO TRIPS and implementation of WIPO Copyright Treaty.
- Focus of the agreement: IP protection in the digital age.
- Work towards better legal tools for enforcing IP rights.

**Japan – Mexico EPA**
- Main concern is with geographical indications: commit to mutually protect geographical indications for spirits as set out in the TRIPS Agreement.
- Joint Statement regarding eradication of the sale of counterfeit and pirated goods.
- Joint Statement also acknowledges the importance of the Protocol Relating to the Madrid Agreement Concerning the International Registration of Marks in the global protection of trademarks, which Mexico had not yet ratified.

**Chile – Korea**
- Reaffirms obligations under TRIPS.
- IPR Chapter contains provisions on: trademarks, GIs and enforcement as well as a consultative mechanism for IP.

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CHAPTER 6 – COMPETITION POLICY

Even though it was taken off the negotiating table at the WTO, competition policy provisions are playing an increasing role in regional trade agreements. Of the around 300 RTAs currently in existence, more than 100 contain commitments regarding competition policy. Approximately 80% of these were negotiated over the last decade and generally belong to the group of RTAs that aim for deeper integration, including services and investment liberalization (UNCTAD, 2005). An extensive study by UNCTAD on the development impact of competition provisions concludes that “competition provisions at the regional level can act as a major complement to the current efforts to develop an open, rules-based, predictable, non-discriminatory trading system, with a fair distribution for all developing countries” (UNCTAD, 2005).

In particular, competition policy is likely to become increasingly important in East Asia, as the new market economies in the region are strengthening their foundations and the region moves toward deeper forms of integration. The ever closer economic integration of the region has triggered a wave of cross-border mergers and acquisitions, which will need to be regulated internationally if integration gains are not to be dissipated by growing market power of a few dominant companies. Competition policy will also be important in facilitating and safeguarding competition in sectors that have historically been highly concentrated, either due to state monopolies or oligopolistic family ownership structures. Even if not directly owned by the government, East Asian industries were generally subject to substantial government intervention and the governments’ role in allocating resources necessitated many administrative barriers, which in turn raised entry barriers and promoted monopolistic structures (Chang, 2005).

Countries in the region are responding to recent developments by adopting and implementing competition law, most recently Thailand, Indonesia and Singapore. China started a process of adopting antitrust law after its WTO accession. Japan and Korea have well established competition regimes. According to Chang (2005), specific provisions were mostly imported and adapted to regional needs from more experienced competition legislators such as the EU or the US. Adaptation for example took the form of additional provisions aimed at curbing concentration of economic power (e.g. Korea introduced measures such as a prohibition on cross-shareholdings, restrictions on the total amount of shareholding in other companies and restrictions in the exercise of voting rights in finance and insurance companies).

Multilateral efforts

Early attempts to make competition policy part of a multilateral framework can be found in the draft of the Havana Charter, which was, however, superseded by a much leaner GATT in 1947 without commitments regarding competition policy. The United Nations Set of Multilaterally Agreed Equitable Principles for the Control of Restrictive Business Practices sets out a number of voluntary guiding principles. Even though the current set of WTO legal texts do not contain a chapter explicitly dedicated to competition, several of the WTO agreements embody competition principles. Examples are GATS Art. VIII and IX (regarding monopolies/exclusive suppliers and anti-competitive practices that may restrict trade in services), Art. 11:3 of the Agreement on Safeguards (prohibits members from encouraging or supporting the adoption of non-governmental measures equivalent to voluntary export restraints, orderly marketing arrangements or other governmental arrangements prohibited under Art. 11.1) and TRIPS Art.40 provides authority for Members to take measures against anti-competitive practices relating to the
licensing of intellectual property rights (Anderson and Evenett, 2006). And the language contained in a WTO Reference paper on the prevention of anti-competitive measures adopted by basic telecommunications providers has subsequently been incorporated into several RTAs. Since 1996, there exists a Working Group on the Interaction between Trade and Competition Policy at the WTO.

**Economic rationale for including competition chapters in regional agreements**

Regional integration according to “trade principles” (with political economy-motivated exceptions to commitments such as anti-dumping, countervailing duties and safeguards provisions) leaves governments with considerable room to maneuver by allowing the protection of domestic industry under predefined circumstances. “Competition principles” on the other hand are much more stringent in this respect, aimed purely at ensuring competition without prejudice to the nationality of the company. Integration according to competition principles therefore makes regional integration much more binding.\(^\text{89}\)

Properly enforced, competition provisions in international trade agreements will ease market access by breaking up monopolistic structures and subsequently maintaining competition in the importing country. The instruments used to achieve this are monopoly and “abuse of dominant position” provisions, constraints on anti-competitive horizontal and vertical agreements, and merger regulations. Competition policy in trade agreements – if allowed to supersede trade principles – will lower barriers to entry by applying more stringent standards against government interference with low-price imports. Predatory pricing provisions, for example, could replace the loose standards found in current anti-dumping legislation.

Anderson and Evenett (2006) suggest three further arguments as to why it is beneficial to have competition policy at the regional level in particular. First, there are two sources of positive spill-overs that justify collective action against anti-competitive practices, such as cartels: (i) especially in cases where there is established cooperation between enforcement authorities, “public announcements of cartel enforcement in one country tend to stimulate enforcement efforts in other countries”; (ii) investigation and prosecution of international anti-competitive practices is facilitated if countries are enabled “to access information about the nature and organization of the arrangement from another jurisdiction that has successfully completed an investigation” (Clark and Evenett, 2003). Second, prosecution of international anti-competitive practices in different countries may lead to inter-jurisdictional conflicts in enforcement if there is no agreement among countries as to the applicable principles (e.g. different approaches to assessing liability and imposition of different remedies against Microsoft). Finally, as argued by Birdsall and Lawrence (1999), codification of reform in international agreements can facilitate domestic reforms by providing a means of overcoming the resistance of particular domestic constituencies (Anderson and Evenett, 2006).

**Scope and content of RTA competition provisions**

Competition provisions are generally included in regional trade agreements with the aim of guaranteeing that welfare gains achieved from tariff and regulatory liberalization are not off-set

\(^{89}\) Anderson and Evenett (2006) define competition principles as “even-handed adjudication of business practices based on their contribution to economic efficiency and/or consumer welfare”, whereas trade principles are associated with mercantilist interests.
by anti-competitive practices originating in either the public or the private sector of the trading partner. Early regional agreements embodying competition principles include the Treaty of Rome (1957) (as developed by subsequent jurisprudence and amended by the Treaty of Nice in 2000), as well as NAFTA and ANZCERTA.

The focus here is on RTA competition chapters, however, Anderson and Evenett (2006) point out that competition principles are not necessarily confined to the actual competition chapter, but are often also embedded in other parts of the agreement. Countries are increasingly signing separate bilateral competition agreements or memoranda of understanding (MoUs) on competition policy matters. In addition, more than 20% of RTAs with competition provisions cite provisions in other agreements as additional sources of the members’ bilateral competition policy obligations (e.g. Euro-Med Agreements refer to Articles 81 and 82 of the EU Treaty, the New Zealand – Singapore RTA refers to APEC principles, the Australia – US RTA refers to several previous bilateral competition agreements between the two parties).

Solano and Sennekamp (OECD, 2006) as well as Teh (2006) conduct an extensive investigation of competition provisions in 85 and 70 RTAs respectively. The large majority of RTAs seems to be referring to anti-competitive behavior, in one way or another, reaching from very loose definitions (e.g. in New Zealand – Singapore or Japan – Mexico) to prohibitions in very specific terms (e.g. CARICOM). Specifically, the following pattern emerges from the two studies for eight identified sub-provisions:

1) **Provisions relating to the adoption and application of competition law:** the large majority of RTAs with competition policy provisions oblige members to adopt/apply measures that regulate anti-competitive behavior at the national level (Teh, 2006). Only very few RTAs require the establishment of competition authorities. Enforcement at the supra-national level is found in the EU, CARICOM, the Andean Community, MERCOSUR, CEMAC and UEMOA (OECD, 2006).

2) **Provisions setting out different degrees of cooperation and coordination of competition law enforcement bodies:** The scope of cooperation between national competition authorities (where they exist) covers a wide spectrum. Cooperation provisions generally contain all or a subset of the following obligations:

   - General cooperation;
   - Notification regarding enforcement measures;
   - Exchange of information provisions (sometimes specifying what type of information is to be shared); this is one of the cooperation provisions most frequently found, but in some cases, mainly RTAs involving Eastern European countries, it extends only to information sharing regarding state aid;
   - Consultation on competition policy in general and enforcement in particular;
   - Negative comity: parties commit to consider in their enforcement activities information that may affect important interests of the other party; this obligation is included in only very few RTAs;
   - Positive comity: one party to the agreement can ask the other party to take enforcement action; like negative comity, this provision is not often found in competition chapters of RTAs

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90 Competition principles are often found in sector specific chapters concerning telecoms services, transportation, or financial services, or in provisions dealing with state-owned enterprises or monopolies, and government procurement chapters.
Box 3: Strength of competition commitments

| 1) best endeavors in cooperation | Shallow obligations |
| 2) legally-binding cooperation | |
| 3) positive and negative comity | |
| 4) resort to dispute resolution | |
| 5) supra-national authority acting on private entities | |
| 6) limitations to trade remedies | Deep obligations |

Source: UNCTAD (2005)

Overall, the large majority of agreements provide for some form of cooperation. Cooperation provisions can be broadly placed into three categories:

- Cooperation and coordination: this applies to the majority of RTAs, particularly US agreements; cooperation takes the form of consultation, notification and a certain degree of information sharing;
- Positive comity: this provision is so far only found in a handful of RTAs, amongst them the EU – South Africa RTA
- Regional competition authority: this arrangement is found only in regional groups with very close economic ties, i.e. the Andean Community, the EEA and MERCOSUR; cooperation can take the form of cross-border surveillance, investigations and imposition of measures to curb anti-competitive behavior

3) Provisions regarding different types of anti-competitive behavior:

Anti-competitive agreements: Most competition chapters in RTAs contain provisions regarding anti-competitive agreements. Rules are sometimes stated in very general terms (EU – Jordan) and sometimes with very specific provisions regarding price-fixing, bid-rigging, output restrictions and quotas, as in the case of the Canada – Costa Rica RTA (OECD, 2006).

Monopolization / abuse of dominant position: Approximately ¾ of the major RTAs contain provisions with respect to monopoly situations (both public and private), generally allowing monopolies but usually requiring them to act “in accordance with commercial considerations” (Teh, 2006). In several cases, the provisions concerning state monopolies and enterprises are subjected to dispute settlement at the same time that private anti-competitive practices are excluded from dispute settlement (Anderson and Evenett, 2006). OECD (2006) points out that these types of provision are not necessarily found in the competition chapter, but for example in the case of Latin American agreements, they are included in the telecoms chapter or in the Japan – Singapore agreement in the services chapter.

State aid/subsidies: whether the agreement refers to state aid or subsidies seems to depend on the legal tradition of the partners. EU RTAs are the only ones that place considerable emphasis on substantial provisions regarding state aid within the competition chapter; these are seen as particularly relevant vis-à-vis formerly communist EU-accession countries. Agreements which refer to subsidies generally place these provisions in a separate subsidies chapter, rather than directly under the competition heading.

Anti-competitive mergers: Rules regarding M&A activity are contained in only a few RTAs, most prominently, Australia – Thailand, Australia – Singapore, Canada – Costa Rica, EU – Mexico, EEA and EFTA – Mexico. Often, anti-competitive mergers are mentioned simply as
part of a list of practices that parties aim to prevent or curtail; only the EEA seems to contain detailed references to mergers (OECD, 2006).

4) **Provisions concerning non-discrimination, due process, and transparency in the statement and application of competition law:** the large majority of chapters simply contain definitions of these concepts in the context of competition policy. Anderson and Evenett (2006) point out that these three principles are generally also contained as horizontal provisions in the overall agreement and are potentially applicable to the same issues. It is therefore important to look at non-discrimination, due process and transparency in light of the overall RTA framework.

5) **Provisions to exclude the use of anti-dumping measures against companies in partner countries:** a detailed analysis of trade remedies provisions, including anti-dumping measures is provided in Chapter 3. In the context of competition policy, the interaction between trade remedies and competition principles is important. Both aim to prevent “unfair” pricing practices by individual companies: while trade remedies (in particular anti-dumping measures) place more emphasis on the interests of domestic producers, competition principles are aimed at safeguarding the interests of consumers and overall efficiency.

Economically, there is a strong case to eventually replace trade remedy provisions with competition policy provisions. Viner’s (1923) often quoted argument that the only valid use for anti-dumping measures is to fight predatory pricing (Holmes et al, 2006), implies replacing the current rather loose standards for the determination of dumping with the more stringent actionable criteria found in competition law with regard to predatory pricing (see Table 12 for a comparison of several anti-dumping/competition standards).

Politically, the case is not as clear cut. Many countries see anti-dumping provisions as integral to building domestic support for trade liberalization and as a crucial safety valve once the agreement is implemented. Hoekman (1998, quoted in Holmes et al., 2006) makes the point that anti-dumping duties are aimed at off-setting a much broader range of “unfair” behavior (including special tax regimes and industry specific regulations) than just predatory pricing strategies by individual firms; therefore, the stronger RTA partner can only be expected to give up anti-dumping provisions once all other potentially disadvantageous regulations are harmonized. The bilateral negotiating history of the EU confirms this observation: the Commission has emphasized on several occasions that competition law in place in the partner country by itself is not sufficient to end contingent protection; only the full implementation of the *Acquis Communautaire* (the legal texts of the EU) will allow this (e.g. the EU – Poland Europe Agreement, the EU – Turkey Customs Union or the EU – Croatia Stabilization and Association Agreement). Similar observations apply with respect to countervailing duties.

Provisions excluding the use of anti-dumping measures can be found in a handful of agreements: the EU, ANZCERTA and Canada – Chile amongst others.
Table 12: Anti-Dumping and Competition Laws: A Rough Comparison

<table>
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<tr>
<th></th>
<th>Anti-Dumping</th>
<th>Competition</th>
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<tr>
<td><strong>Objectives</strong></td>
<td>Basic – Protects competitors (domestic).</td>
<td>– Protects competition.</td>
</tr>
<tr>
<td></td>
<td>Actual – Protects domestic competitors from foreign competitors.</td>
<td>– Generally no distinction between domestic and foreign competition.</td>
</tr>
<tr>
<td><strong>Initiation</strong></td>
<td>Actions can only be initiated by executive branch and the relevant industry.</td>
<td>– In addition, private litigants can initiate proceedings.</td>
</tr>
<tr>
<td><strong>Administration</strong></td>
<td>Partly/mostly by the executive branch/commerce or foreign trade ministry appeals through courts</td>
<td>– Subject to full supervision by courts.</td>
</tr>
<tr>
<td><strong>Standards</strong></td>
<td>Injury – Requires only showing that unfair practice “contributed” to material injury above the so-called minimum injury level (i.e. de minimis).</td>
<td>Injury – Requires direct causation and showing of unreasonable restraint of trade or substantial lessening of competition.</td>
</tr>
<tr>
<td></td>
<td>Pricing – No requirements on intent.</td>
<td>Pricing – Requires showing of predatory intent with respect to pricing aimed at competitors.</td>
</tr>
<tr>
<td></td>
<td>– Does not require showing of selling below-cost.</td>
<td>– Requires showing of below-cost pricing and capability of recoupment.</td>
</tr>
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</table>

Source: Spinager (2002)

6) **Provisions concerning the circumstances and conditions under which recourse to trade remedies (such as anti-dumping measures, countervailing duties and safeguards) are permitted:** many agreements contain general provisions regarding this issue, but very few actually disallow such measures (see chapter 3 for a detailed discussion).

7) **Provisions concerning dispute settlement procedures specifically for competition-policy related matters:** Dispute settlement provisions in RTAs fall into three categories: (i) exclusion of competition provisions from the general dispute settlement mechanism; (ii) consultation; and (iii) arbitration. Notification and consultation regarding potentially anti-competitive situations is provided for in the majority of RTAs, though only 1/3 of RTAs subject competition provisions to formal dispute settlement under the RTA (Teh, 2006). This could be seen as indicative of a certain tentativeness with which competition provisions are included in regional agreements. Amongst the RTAs that carve out competition policy completely from the reach of the RTA dispute settlement mechanism are: NAFTA, Australia – Singapore, Australia – Thailand, Canada – Chile, Canada – Costa Rica, Chile – EU, EFTA – Singapore, Japan – Singapore, Chile – Korea, Chile – Mexico, and Japan – Mexico. While Singapore – US also excludes most of the competition policy chapter from the RTA’s dispute settlement, the provisions on designated monopolies and government enterprises are subject to dispute settlement.

8) **Provisions regarding Special and Differentiated (S&D) treatment, such as flexibility and progressivity:** Three categories here are (i) flexibility of commitments; (ii) technical assistance and capacity building; and (iii) transition periods. A detailed analysis of the agreements shows that competition provisions in RTAs contain little S&D treatment in the sense of non-reciprocity. Generally, S&D only takes the form of technical assistance and various forms of cooperation (e.g.
Negotiating positions by level of integration and development

Using descriptive statistics, Cernat (2005) tests seven hypotheses regarding the relationship between the integration/development characteristics of partner countries and the nature of the competition provisions found in agreements between them. He shows that RTAs characterized by a higher level of trade integration are more likely to contain competition provisions: 75% of association agreements (mainly EU partnership agreements) have such provisions, while only 40% and 20% respectively of bilateral and plurilateral RTAs contain them. The corollary that RTAs with a higher level of integration are more likely to contain competition policy provisions that ensure the coherence between trade and competition objectives (e.g. exclude anti-dumping measures) is, however, rejected.

Concerning the relationship between the development status of partners and competition policy embedded in the agreement, statistical analysis suggests the following: the large number of North-South agreements containing consultation and notification provisions may be an indication that the developing country negotiating position vis-à-vis industrialized countries is one that emphasizes cooperation on anti-competitive practices affecting developing countries. Cernat (2005) emphasizes that this should be a priority for developing countries as they are particularly vulnerable to anti-competitive practices by multinationals headquartered in industrialized countries, in particular cartels and cases of abuse of dominant position (often created through mergers which combine subsidiaries in various markets). According to one study, cartel costs on developing countries could be as large as $80 billion, which for the year it was calculated amounted to 6.7% of all developing country imports or 1.2% of their combined GDPs. Countries faced with such anti-competitive behavior should aim to include RTA provisions on notification, exchange of confidential information and positive comity, thereby committing competition agencies in industrialized partner countries to safeguarding competition in developing countries’ markets.

Industrialized partners’ priorities in North-South agreements seem to be focused on adoption and implementation of national competition laws in developing countries (in the form of soft-convergence or direct harmonization). South-South agreements aiming at deeper integration seem to include more competition commitments in their legal texts than shallower initiatives; there are however, large uncertainties about the actual implementation of agreements (e.g. CARICOM, which has a strict de jure regime, but implementation has been lagging); overall, approximately 65% of South-South agreements contain competition provisions.

Finally, while almost all RTAs involving transition economies contain disciplines on state aid (often with S&D treatment), no provisions containing disciplines on anti-dumping measures or countervailing duties – which presumably would be in the interest of the transition economies – were found in the agreements.

RTA families

The OECD (2006) study identifies two broad families of provisions grouped around the US and EU templates respectively. They attach many caveats, however, stating that patterns apply only
on a very generalized level. Agreements not associated with either the EU or the US, generally do not easily fit into either category, nor do they form separate groups in themselves.

US and Canadian agreements are characterized by their emphasis on voluntary cooperation of competition authorities, with only three of the US’s nine competition chapters in force subjecting competition commitments to dispute settlement under the RTA.

EU agreements are different in that competition commitments are included in nearly all EU RTAs and are much more binding. EU RTAs emphasize harmonization of competition law sometimes hand-in-hand with the establishment of supra-national agencies. In terms of substance, the EU is the only major negotiator that systematically asks for state aid provisions to be included in its agreements. EFTA competition chapters are very similar to those of the EU, though they do not include state aid disciplines.

The OECD study further identifies several agreements where there is overlap between “families”; this applies mostly to trans-continental RTAs, such as Chile – Korea, Chile – EU, EU – Mexico, EFTA – Mexico as well as Korea – Singapore (OECD, 2006).

The most minimal provisions on competition policy are found among East-Asian countries. For example Japan – Singapore contains only a few brief aspirational provisions, such as each party agrees to “take measures . . . appropriate against anti-competitive activities, in order to facilitate trade and investment flows between the Parties and the efficient functioning of its markets,” and some unspecific commitments to cooperate. As with other RTAs, Japan – Singapore excludes the competition policy section from dispute settlement. The RTA between Australia and Thailand goes a bit further than Japan – Singapore, as it contains commitments related to procedural protections in the enforcement of competition laws (“transparency, timeliness, non-discrimination, comprehensiveness, and procedural fairness”) and agreements for future consultations and review. However, these provisions are similarly excluded from dispute settlement.

Table 13 below illustrates some common principles by showing the main competition-related provisions in 10 recent RTAs.

<table>
<thead>
<tr>
<th>Table 13: Competition Policy in Representative RTAs</th>
</tr>
</thead>
</table>
| **Australia – Thailand** | **Substantive & Procedural:** “Each Party shall promote competition by addressing anti-competitive practices in its territory, and by adopting and enforcing such means or measures as it deems appropriate and effective to counter such practices.”
| | • Requires the Parties to ensure that all businesses are subject to generic or sectoral competition laws, with exemptions allowed if transparent.
| | • Enforcement shall be consistent with the principles of transparency, timeliness, non-discrimination, comprehensiveness, and procedural fairness.
| | **Cooperation:** Agrees to cooperation through exchange of information, notification, consultation, and coordination of enforcement.
| | **Enforcement:** Establishes a system for consultations and review, but excludes all competition policy from RTA dispute settlement. |
| **Chile – China** | **None** |
| **Chile – EU** | **Substantive:** Requires the Parties to apply their respective competition laws to avoid impairment of the benefits of liberalization under the Agreement.
| | • Requests the Parties to give particular attention to anti-competitive conduct resulting from single or joint dominant positions.
| | **Notification:** Obligates the Parties to notify the other Party of enforcement activities that are likely to have a substantial affect on the other Party’s interests and to allow the other |

91 Japan – Singapore, Article 103.
<table>
<thead>
<tr>
<th>Cooperation</th>
<th>Enforcement</th>
</tr>
</thead>
<tbody>
<tr>
<td>Party to consult with relevant competition authorities.</td>
<td>Excludes from RTA dispute settlement.</td>
</tr>
<tr>
<td><strong>Cooperation</strong>: The Parties agree to cooperate through notification, consultation, and exchange of information.</td>
<td></td>
</tr>
<tr>
<td><strong>Enforcement</strong>: Excludes from RTA dispute settlement.</td>
<td></td>
</tr>
</tbody>
</table>

**Japan – Malaysia**

**Cooperation**: Provides for general cooperation, subject to each country’s available resources.

**Enforcement**: Excludes from RTA dispute settlement

**Japan – Singapore**

**Substantive**: The Parties agree to take appropriate measures against anti-competitive activities, in accordance with their own laws.

**Cooperation**: Agreement to cooperate, as further specified in the Implementing Agreement.

**Enforcement**: Excludes from RTA dispute settlement

**Chile – Korea**

**Notification**: The Parties agree to notify each other of enforcement activities likely to have a substantial effect on the other Party’s interest.

**Cooperation**: Agreement to cooperate in the exchange of information, notification, and consultation.

**Enforcement**: Excludes from RTA dispute settlement

**Korea – ETFA**

**Substantive & Notification**: The Parties agree to apply their respective competition laws and to notify and exchange information regarding relevant enforcement activities.

**Enforcement**: Upon request, the Parties will enter consultations to facilitate elimination of anti-competitive practices.

**India – Singapore**

None

**Korea – Singapore**

**Substantive & Procedural**: Defines anti-competitive practices as horizontal agreements, misuse of market power, vertical arrangements, and mergers & acquisitions.

- Requires enforcement against anti-competitive practices to be transparent, timely, non-discriminatory, and procedurally fair.
- Competitive Neutrality—the parties shall not provide any competitive advantage to government-owned businesses.

**Cooperation**: Subject to future negotiations.

**Enforcement**: Obligates the Parties to enter consultations at request of the other Party. Excludes from RTA dispute settlement

**Peru – US**

**Substantive & Procedural**: “Each Party shall adopt or maintain national competition laws that proscribe anticompetitive business conduct and promote economic efficiency and consumer welfare, and shall take appropriate action with respect to such conduct.”

- “Each Party shall maintain an authority responsible for the enforcement of its national competition laws. The enforcement policy of each Party’s central government competition authorities is not to discriminate on the basis of the nationality of the subjects of their proceedings.
- Each party shall ensure a person’s right to be heard and present evidence, as well as an “independent” tribunal to review any sanctions or remedies.

**Notification**: The Parties agree to provide notification of cases affecting interests of the other Party.

- Promote transparency by providing, upon request of the other Party, information regarding enforcement activities, state enterprises & designated monopolies, export associations.

**Enforcement**: Excludes from RTA dispute settlement, with the exception of provisions related to designated monopolies & state enterprises.

Source: authors’ compilation

**Conclusion**

The particular nature of appropriate competition provisions in RTAs will be different depending on the envisaged depth of economic integration and the development objectives of individual countries. Cost-benefit analysis regarding the introduction of competition policy is very complex: benefits will depend on the structure of the domestic and foreign industry as well as the state of the wholesale and consumer markets in both countries as this will determine the benefit of eliminating anti-competitive practices; however, probabilities of successfully addressing such practices are unclear. Benefits beyond correction of anti-competitive practices are also difficult to predict: while a transparent merger regime may encourage more efficiency enhancing mergers,
too many unknowns are involved to predict actual benefits. Costs, on the other hand are slightly easier to gauge and will depend on the current competence of the competition authority and potentially overlapping commitments in other RTAs. Countries lacking appropriate institutions should insist on S&D treatment in this respect (UNCTAD, 2005).

Although the UNCTAD report states “[d]iversity, it would seem, is the dominant attribute of RTA provisions on competition law and policy”, a few common principles can nevertheless be extracted. First, most of the substantive law commitments are purely aspirational, as they contain almost no specific content and generally emphasize only an obligation to enforce one’s own existing laws. Second, the most concrete commitments relate to procedural due process, transparency, and non-discrimination. Third, cooperation appears to be the main emphasis of competition provisions in RTAs. And finally, demonstrating the amorphous content of competition policy provisions, RTAs almost uniformly exclude these provisions from a binding dispute settlement process. All of these seem to suggest that the depth of integration in most RTAs is only moderately ambitious; however, precedents – which could be drawn on for future negotiations – exist for almost all desired levels of integration.
Bibliography


CHAPTER 7 – ENVIRONMENT & LABOR

The WTO rules contain no specific provisions relating to environmental or labor issues. For a long time WTO Members have been negotiating various possible approaches to environmental issues, but no concrete agreement appears imminent. With regard to labor issues, the WTO delegated responsibility for international labor regulations to the International Labor Organization (“ILO”).

Currently substantive commitments in these areas only exist in US RTAs. However, a recent poll by The Chicago Council on Global Affairs and WorldPublicOpinion.org found that a majority of people in both developed and developing countries support the inclusion of at least some minimum standards for labor and environment in trade agreements. For example, this poll found 84 percent of Chinese favor labor standards in trade agreements and 85 percent favor the inclusion of environmental standards.  

Despite the status of environmental and labor issues in the multilateral arena, both are explicit trade negotiating objectives that the US Congress requires the United States Trade Representative to pursue in RTA negotiations:

  to ensure that trade and environmental policies are mutually supportive and to seek to protect and preserve the environment and enhance the international means of doing so, while optimizing the use of the world's resources;

  to promote respect for worker rights and the rights of children consistent with core labor standards of the ILO . . . and an understanding of the relationship between trade and worker rights.

The current political climate in the US makes more stringent labor and environmental standards in RTAs almost a prerequisite for approval of future RTAs. Thus, at least for the US, environmental and labor issues are always major sticking points in RTA negotiations. And as the recently concluded Peru – US agreement illustrates, new and creative provisions in these areas should be expected.

Table 14 and Table 15 show the extent of labor and environmental commitments in US RTAs, as well as how US RTAs are virtually alone on these issues in the world of RTAs (the Peru – US agreement is used here to show the most recent provisions used in US RTAs, however, many prior US RTAs also contain substantive commitments in these areas).

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94 “Democrats have criticized the free trade pacts with Colombia and Peru for not containing an enforceable commitment to abide by core international labor standards — such as freedom to organize and bargain collectively.” Reuters New Service, Lawmaker Rejects USTR Proposal on Trade Pacts (Mar. 5, 2007) (discussing the response of the United States Congress to proposed free trade agreements with Peru, Colombia, and Panama).

95 U.S., Korea Announce Eighth FTA Round; Major Issues Unresolved, Inside U.S. Trade (Feb., 16, 2007) (reporting remaining difference in the negotiating groups on environment and labor).
Table 14: Labor Provisions in Representative RTAs

<table>
<thead>
<tr>
<th>RTA</th>
<th>Provisions</th>
</tr>
</thead>
<tbody>
<tr>
<td>Australia – Thailand</td>
<td>None</td>
</tr>
<tr>
<td>Chile – China</td>
<td>Agreement to enhance cooperation through the Memorandum of Understanding on Labor and Social Security Cooperation.</td>
</tr>
<tr>
<td>Chile – EU</td>
<td>Agreement to cooperate in the promotion of ILO’s labor standards and a list of labor-related priorities.</td>
</tr>
<tr>
<td>Japan – Malaysia</td>
<td>Cooperation under a Sub-Committee on Cooperation in the field of “education and human resource development”.</td>
</tr>
<tr>
<td>Japan – Singapore</td>
<td>Cooperation in human resources development.</td>
</tr>
<tr>
<td>Chile – Korea</td>
<td>None</td>
</tr>
<tr>
<td>Korea – ETFA</td>
<td>None</td>
</tr>
<tr>
<td>India – Singapore</td>
<td>None</td>
</tr>
<tr>
<td>Korea – Singapore</td>
<td>Cooperation in Human Resources Management and Development</td>
</tr>
</tbody>
</table>
| Peru – US                  | **Substantive:** “Each Party shall adopt and maintain in its statutes and regulations, and practices thereunder, the following rights, as stated in the *ILO Declaration on Fundamental Principles and Rights at Work and its Follow-Up (1998)* (ILO Declaration): (a) freedom of association; (b) the effective recognition of the right to collective bargaining; (c) the elimination of all forms of compulsory or forced labor; (d) the effective abolition of child labor and, for purposes of this Agreement, a prohibition on the worst forms of child labor; and (e) the elimination of discrimination in respect of employment and occupation.”  

A Party “shall not fail to effectively enforce its labor laws . . . through a sustained or recurring course of action or inaction.”**  

**Domestic Enforcement:** “A decision a Party makes on the distribution of enforcement resources shall not be a reason for not complying with the provisions of this Chapter. Each Party retains the right to the reasonable exercise of discretion and to *bona fide* decisions with regard to the allocation of resources between labor enforcement activities among the fundamental labor rights enumerated . . . , provided the exercise of such discretion and such decisions are not inconsistent with the obligations of this Chapter.”  

Each party guarantees individuals appropriate access to tribunals for enforcement of labor laws. Such tribunals shall respect due process, be open to the public, provide the opportunities to submit arguments and evidence, and not entail unreasonable charges or delays. Decisions of such proceedings must be made in writing with stated reasons, made reasonably available to the public, and based on evidence presented during the proceedings.  

- Remedies shall be available for enforcement of labor rights.  

**RTA Administration and Enforcement:**  
- Creation of the Labor Affairs Council  
- Creation of a Labor Cooperation and Capacity Building Mechanism  
- The RTA dispute settlement mechanism is available only for alleged violations that a Party failed to comply with the obligation to enforce its own laws.  
- Either party may enforce the labor provisions through the general dispute settlement mechanism, although unique consultations and procedural requirements apply.  

*Source:* authors’ compilation
<table>
<thead>
<tr>
<th>RTA</th>
<th>Provisions</th>
</tr>
</thead>
<tbody>
<tr>
<td>Australia – Thailand</td>
<td>None</td>
</tr>
<tr>
<td>Chile – China</td>
<td>Agreement to enhance cooperation through the Environmental Cooperation Agreement.</td>
</tr>
<tr>
<td>Chile – EU</td>
<td>Agreement to cooperate in a variety of environmental areas.</td>
</tr>
<tr>
<td>Japan – Malaysia</td>
<td>Cooperation under a Sub-Committee on Cooperation in the field of “environment”.</td>
</tr>
<tr>
<td>Japan – Singapore</td>
<td>None</td>
</tr>
<tr>
<td>Chile – Korea</td>
<td>None</td>
</tr>
<tr>
<td>Korea – ETFA</td>
<td>None</td>
</tr>
<tr>
<td>India – Singapore</td>
<td>None</td>
</tr>
<tr>
<td>Korea – Singapore</td>
<td>Separate memorandum of understanding regarding cooperation in regard to natural gas technologies and environmental protection.</td>
</tr>
</tbody>
</table>
| Peru – US                | **Substantive:** Subject to each Party’s right to establish its own domestic levels of environmental protection, the Parties shall provide for and encourage high levels of environmental protection.  
- Each Party must fulfill its obligations under 7 specified multilateral environmental agreements.  
- “A Party shall not fail to effectively enforce its environmental laws . . . through a sustained or recurring course of action or inaction”  

**Domestic Enforcement:** “The Parties recognize that each Party retains the right to exercise prosecutorial discretion and to make decisions regarding the allocation of environmental enforcement resources with respect to other environmental laws determined to have higher priorities. Accordingly, the Parties understand that with respect to the enforcement of environmental laws and all laws, regulations, and other measures to fulfill a Party’s obligations under the covered agreements, a Party is in compliance . . . where a course of action or inaction reflects a reasonable, articulable, *bona fide* exercise of such discretion, or results from a reasonable, articulable, *bona fide* decision regarding the allocation of such resources.”

Each party shall ensure domestic proceedings are available to provide sanctions or remedies for violations of environmental laws. Such proceedings shall be transparent and comply with due process of law.  
- Each party shall provide interested persons with appropriate and effective remedies.  
- Each party shall encourage the use of incentive-based mechanisms for environmental protection.  

**RTA Enforcement:**  
- Creates the Environmental Affairs Council.  
- Each Party shall promote public awareness by making its environmental laws available to the public; accommodate requests from persons of either Party for information on implementation of

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<th>Source: authors’ compilation</th>
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</table>

While it does not appear likely that RTA negotiations with countries other than the US will entail significant emphasis on substantive labor or environmental standards, a useful recommendation for developing countries is to insist on clauses that “recognize the differences that exist among countries in terms of economic development, institutional capacity and economic and social priorities. . .”.  

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97 Sebastian Herreros, *Chile-Canada Free Trade Agreement*, in *Regionalism, Multilateralism, and Economic Integration* 190 (Gary P. Sampson & Stephen Woolcock, eds. 2003) (discussing such clauses in the environmental agreement associated with the RTA between Canada and Chile).
### Annex – Selected RTAs in force and Agreement

<table>
<thead>
<tr>
<th>Agreement</th>
<th>Entry into force (signed)</th>
<th>...under negotiation</th>
</tr>
</thead>
<tbody>
<tr>
<td>EU Treaty</td>
<td>Jan 1, 1958</td>
<td>Australia-Japan</td>
</tr>
<tr>
<td>CACM</td>
<td>Oct 12, 1961</td>
<td>Andean Community-EU</td>
</tr>
<tr>
<td>Caricom</td>
<td>Aug 1, 1973</td>
<td>Andean Community-US</td>
</tr>
<tr>
<td>GCC</td>
<td>May 25, 1981</td>
<td>ASEAN-EU</td>
</tr>
<tr>
<td>CER</td>
<td>Jan 1, 1983</td>
<td>ASEAN-India</td>
</tr>
<tr>
<td>MERCOSUR</td>
<td>Nov 29, 1991</td>
<td>ASEAN-Korea</td>
</tr>
<tr>
<td>AFTA (CEPT)</td>
<td>Jan 28, 1992</td>
<td>Australia-China</td>
</tr>
<tr>
<td>CEFTA</td>
<td>March 1, 1993</td>
<td>Bahrain-Singapore</td>
</tr>
<tr>
<td>NAFTA</td>
<td>Jan 1, 1994</td>
<td>Brunei-Japan</td>
</tr>
<tr>
<td>SAFTA</td>
<td>Dec 7, 1995</td>
<td>Cambodia-Japan</td>
</tr>
<tr>
<td>Canada-Israel</td>
<td>Jan 1, 1997</td>
<td>Canada-Korea</td>
</tr>
<tr>
<td>Canada-Chile</td>
<td>July 5, 1997</td>
<td>Canada-Singapore</td>
</tr>
<tr>
<td>Andean Community</td>
<td>Jan 31, 1993</td>
<td>Central America-EU</td>
</tr>
<tr>
<td>India-Sri-Lanka</td>
<td>(1998 with plans to upgrade into CEPA)</td>
<td>China-GCC</td>
</tr>
<tr>
<td>Mexico-Chile</td>
<td>Aug 1, 1999</td>
<td>China-Iceland</td>
</tr>
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<td>SADC</td>
<td>Sep 1, 2000</td>
<td>China-India</td>
</tr>
<tr>
<td>Singapore-New Zealand</td>
<td>Jan 1, 2001</td>
<td>China-Japan</td>
</tr>
<tr>
<td>Canada-Costa Rica</td>
<td>Nov 1, 2002</td>
<td>China-Korea</td>
</tr>
<tr>
<td>Singapore-Japan</td>
<td>Nov 30, 2002</td>
<td>China-MERCOSUR</td>
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<td>EU-Chile</td>
<td>Feb 1, 2003</td>
<td>China-New Zealand</td>
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<td>Singapore-EFTA</td>
<td>Jan 1, 2003</td>
<td>China-SACU</td>
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<td>ASEAN-China (Framework)</td>
<td>July 1, 2003</td>
<td>China-Singapore</td>
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<td>Thailand-Bahrain</td>
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<td>(China)</td>
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<td>China-Macau (China)</td>
<td>Jan 1, 2004</td>
<td>EU-MERCOSUR</td>
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<td>Jan 1, 2004</td>
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<td>US-Chile</td>
<td>Jan 1, 2004</td>
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<td>April 1, 2004</td>
<td>Indonesia-Japan</td>
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<td>Sep 1, 2004 (goods)</td>
<td>Japan-Korea</td>
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<td>Japan-Laos</td>
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<td>January 1, 2005</td>
<td>Japan-Vietnam</td>
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<td>Australia-US</td>
<td>January 1, 2005</td>
<td>Korea-US</td>
</tr>
<tr>
<td>China-Chile</td>
<td>Nov 18, 2005</td>
<td>Kuwait-Singapore</td>
</tr>
<tr>
<td>Mexico-Japan</td>
<td>April 1, 2005</td>
<td>Malaysia-US</td>
</tr>
<tr>
<td>Chile-New Zealand-Singapore-Brunei</td>
<td>June 3, 2006</td>
<td>Mexico-Singapore</td>
</tr>
<tr>
<td>Singapore-India CECA</td>
<td>August 1, 2005</td>
<td>New-Zealand-Thailand</td>
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<td>Thailand-New Zealand</td>
<td>July 1, 2005</td>
<td>Pakistan-Singapore</td>
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<tr>
<td>Singapore-Korea</td>
<td>(Aug 4, 2005)</td>
<td>Panama-US</td>
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<td>China-Pakistan</td>
<td>EHP: Jan 1, 2006</td>
<td>Peru-Singapore</td>
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<td>US-CAFTA-DR</td>
<td>March 1, 2006</td>
<td>SACU-US</td>
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<td>(Dec 13, 2005)</td>
<td>Shanghai Cooperation Organization</td>
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<td>Korea-ASEAN</td>
<td>(Aug 5, 2006 (TIG Agreement))</td>
<td>Singapore – Sri Lanka</td>
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<td>Japan-Philippines</td>
<td>(Sep 9, 2006)</td>
<td>Singapore – UAE</td>
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<td>Japan-Thailand</td>
<td>(Finalized / Feb 3, 2007)</td>
<td>Thailand-US</td>
</tr>
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<td>UAE-US</td>
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