



DIRECTORATE-GENERAL FOR EXTERNAL POLICIES
POLICY DEPARTMENT



**Comparing
international
trade policies:
the EU,
United States, EFTA and
Japanese PTA strategies**

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DIRECTORATE-GENERAL FOR EXTERNAL POLICIES OF THE UNION

DIRECTORATE B

POLICY DEPARTMENT

STUDY

**COMPARING INTERNATIONAL TRADE POLICIES:
THE EU, UNITED STATES, EFTA AND JAPANESE
PTA STRATEGIES**

Abstract

This paper assesses the substance of EU preferential trade agreements compared to those of the United States, EFTA and Japan. The topic is important because of the growth of PTAs but also because PTAs are destined to remain at centre stage. The debate on PTAs is not therefore about whether and how they might grow in importance but rather how they reflect trade policy preferences of the parties and how preferential and multilateral approaches will interact. While PTAs can promote liberalisation in particular sectors and help generate economic growth, preferential liberalisation will always be second best to multilateral liberalisation on an MFN basis because of the trade and investment diversion inherent in preferential deals. In this light, the paper proposes policy recommendations for the EU, covering, first, the broad objectives and desired outcomes of EU trade policy in general, second, the overall framework of EU PTA policy; and third, specific, sectoral, goals of EU PTA policy.

This study was requested by the European Parliament's Committee on International Trade.

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EXECUTIVE SUMMARY

The Central Role of PTAs

Given the central role now played by PTAs this paper assesses the substance of EU preferential agreements compared to those of the United States, EFTA and Japan. The topic is important because of the growth of PTAs – with 379, mostly bilateral agreements, now in force compared with just 30 in 1990 - but also because PTAs are destined to remain at centre stage. PTAs have attained critical mass; more trade now takes place on a preferential basis than under multilateral, MFN, conditions. In the face of slow progress multilaterally, preferential agreements will continue to be motivated by the pursuit of speed in improved market access and of deeper integration through the inclusion of issues like investment and competition, currently off the multilateral trade agenda. Domestically, countries will seek to use the selectivity of PTA membership and coverage to address the political economy of trade liberalisation's concentrated costs and dispersed gains. And internationally, major players, like the EU and US, will continue to use PTAs to shape international rules for trade and investment and bolster their global political and strategic goals.

The central role of PTAs is evidenced by the EU's engagement in the TTIP and by its pursuit of an agreement with Japan. EU participation in PTAs is likely to be bolstered, and perhaps for some legitimised, by the tendency for EU PTA partners to become more diverse. The United States, for its part, is likely to continue the pursuit of an aggressive "competitive liberalisation" strategy, pursuing all avenues open to it: unilateral, bilateral, plurilateral and multilateral. And in the Asia-Pacific region, we are witnessing a strengthening and consolidation of PTA activity, through the Regional Comprehensive Economic Partnership (RCEP) (ASEAN plus Australia, China, India, Japan, Korea and New Zealand) and across the Pacific, through the Trans-Pacific Partnership (presently, Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, the United States and Vietnam).

The debate on PTAs is not therefore about whether and how they might grow in importance but rather how they reflect trade policy preferences of the parties and how preferential and multilateral approaches will interact. It is also important to view PTA policy of the EU as a whole and not consider each PTA that comes to the Parliament in isolation. This paper therefore considers how the substance of EU PTAs has been evolving. It does so by building on some earlier comparative work in order to assess recent trends in the policy of the EU and the other countries considered.

EU, US, EFTA and Japanese Approaches to PTAs

The EU approach to PTAs has until recently, and in contrast with that of the United States, been more 'flexible', meaning less than full coverage of tariffs and a positive list approach to establishment and cross border services commitments. But recent PTAs suggest evidence of greater ambition. The EU approach to rules of origin reflects a desire to promote regional supply chains, which are important for developing countries. On trade remedies the EU sticks fairly close to WTO rules, but has included the lesser duty rule for dumping in PTAs. The EU seeks the inclusion of the 'Singapore issues' (investment, government procurement, competition and trade facilitation) in all recent PTAs, with the exception of the interim EPAs with less developed ACP states. In investment the establishment of EU exclusive competence for foreign direct investment (FDI) means that the EU can now negotiate comprehensive investment provisions in its PTAs. In government procurement the EU pushes for Government Procurement Agreement (GPA) like provisions in PTAs, although with some flexibility and providing for asymmetry in commitments with developing country partners. Competition has also featured in recent PTAs, in a way that tends to be stronger and less hortatory than US PTAs. In trade facilitation, EU PTAs - which provide a basis for consultation rather than substantive

commitments – are less specific than US agreements, which provide for sanctions in the event of violation.

In intellectual property rights protection the EU has broadly matched US PTAs, but includes greater recognition of developing country interests on topics such as genetic and traditional knowledge. But here much will depend on how these largely non-binding provisions are applied. The EU takes efforts in Technical Barriers to Trade and Sanitary and Phytosanitary measures more seriously than does the US or Japan, for example, through the use of more TBT sector committees and interpretative provisions in SPS. With regard to human rights and sustainable development the EU now includes a standard human rights clause in all PTAs and peer review based provisions on labour and environmental aspects of sustainable development.

Flexibility has provided scope for asymmetry in EU PTAs with developing countries, but it remains to be seen how EU PTAs will reflect the policy aim of 'differentiation.'

The US PTA policy forms part of the broader explicit competitive liberalisation strategy. The US seeks uniform provisions at a high “gold standard”, meaning almost 100% tariff elimination in goods, ambitious negative listing and transparency rules in services as well as pioneering the prohibition of local presence requirements. On the Singapore issues the United States has been able to obtain the comprehensive investment provisions of NAFTA in almost all its agreements. In government procurement, the United States has used PTAs to extend GPA-type rules. But in both investment and government procurement, as in services, the US has held back from commitments of its own at the sub-federal level. The US has been a driving force behind TRIPS-plus provisions in PTAs, introducing higher standards on most topics, but TBT and SPS issues have been a lower priority for the US and here it tends to rely on WTO provisions. WTO disciplines in TBT and SPS are also limited to federal government entities with only best endeavours provisions covering the largely industry-based system of standards and conformance assessment in the US. Finally, US PTAs seek to address a perceived race-to-the-bottom in labour and environmental standards and provide, ultimately, for penalties for non-compliance with internationally agreed norms, it needs to be acknowledged that while undoubtedly WTO-plus, these provisions are not necessarily “better”, nor without risk of protectionist capture.

EFTA's approach to PTAs shares many of the features of EU policy. However, not having the leverage of the EU EFTA has not always been able to match the comprehensive scope of EU PTAs. Since its initiation in the early 1990s in response to the EU agreements with Central and East European and the EuroMed partners, EFTA has become more activist in PTA negotiations, particularly in respect of Asia. The content of EFTA PTAs is much less WTO-plus than those of the EU or US. There is also a risk to the coherence of EFTA's PTA policy as members sign bilateral accords individually with third parties.

Japanese PTA motivation for PTAs was to facilitate regional supply chains in South East Asia and to address a fear of being left out as the US and EU moved to negotiate more and more PTAs. The initial PTAs were not very extensive in scope, except when they sought to match agreements such as NAFTA, which resulted in trade diversion against Japanese trade. In time however, Japan has become more and more ambitious in PTAs and now seeks to negotiate comprehensive trade and economic partnerships. Compared to the US and the EU however, the scope of the two Japanese PTAs analysed in this study remained less extensive with few WTO-plus provisions on TBT/SPS, IPRs, government procurement etc. This suggests a measure of inconsistency that goes beyond flexibility, in that the content of PTAs, for example, alternates between positive and negative listing of services and establishment, lacks a consistent treatment of domestic tariff schedules and switches between hard and soft rules of origin.

The Economic Impact of PTAs

For the EU, United States and EFTA – but not for Japan - there is clear evidence of a positive relationship between PTAs and the flows of trade and investment between signatories. Even recent agreements, such as the PTAs that the EU and US have, respectively, with Korea show this link. EU-Korea appears to have helped EU exports and trade growth that would otherwise have been more adversely affected by the economic slowdown post 2008, while US-Korea appears to have stimulated strong, counter-cyclical growth in trade in transport equipment.

PTAs are seen to generate both trade creation (as partner country production displaces higher-cost domestic production) and trade diversion (as partner country production displaces lower-cost imports from the rest of the world), though the recent wave of PTAs have been trade creating on a net basis and welfare-improving for member countries. Studies are consistent in finding relatively modest welfare gains and bigger proportionate gains for the smaller partner country. However, the modelling results need to be interpreted with care. The modelling approaches used are not well suited to capture scale effects arising from the reduction of non-tariff barriers, pro-competitive action and stimulus to innovation and productivity, and hence tend to underestimate the intra-industry responses and dynamic adjustment to economic integration. Similarly, the assumption in much modelling work of a fixed supply of labour will tend to understate the potentially large gains from the increased mobility (under Mode 4 liberalisation) of service providers.

It should also be noted that, in terms of the impact of PTAs through trade-related structural adjustment, while trade shifts will impose strains, and opportunities, in specific areas, the corollary of the overall modest impact on GDP is that the overall structural impact of PTAs is likely to be relatively modest when compared with other developments such competition from China and other emerging economies, exchange rate re-alignment or changes in product design in response to environmental challenges.

Recommendations for the EU

While PTAs can help promote liberalisation in particular sectors, as this paper has sought to demonstrate, preferential liberalisation will always be second-best to multilateral liberalisation on an MFN basis because of the trade and investment diversion inherent in preferential deals. There is clearly a risk that the rise of PTAs will frustrate multilateral efforts: first, by creating vested interests on the part of preference holders against, preference-reducing, MFN liberalisation; second, by locking in incompatible regulatory structures; and third, by capturing the ground vacated by the DDA, as with investment, competition and government procurement, and so reducing the attractiveness and feasibility of a grand bargain at the multilateral level. Whether this scenario is played out or whether a genuine complementarity is established between preferential and multilateral approaches is essentially a matter of policy choice

The policy recommendations in this study are presented with a progressively increasing degree of specificity, looking at: first, the broad objectives and outcomes of EU trade policy; second, the overall framework of EU PTA policy; and third, specific, sectoral, goals of EU PTA policy.

At the broadest level, the European Parliament should ensure that EU trade and investment policy reflects the balance of four key outcomes: improved EU access to major markets to ensure jobs and growth; a strengthened unitary and open multilateral trading system; a firmer basis for sustainable development; and the progressive integration of developing countries into the international economy.

In order to ensure that EU policy with respect to preferential trade agreements is consistent with, and supportive of, the above broad goals, a number of priorities are recommended.

- **Encouraging multilateral liberalisation** in order to foster the complementarity between PTAs and the multilateral trading system. The European Parliament should ensure that the EU holds to its policy of support for multilateralism, which is in the long-term interest of all WTO members, especially the small and developing economies. To this end the EU should not give up on efforts to negotiate multilateral agreements, should redouble efforts to make progress at the 9th WTO Ministerial Conference in Bali and to further the DDA negotiations in a pragmatic and flexible fashion. It should support discussion on 21st century issues within the WTO in a non-negotiating context in order to seek consensus. Only by ensuring the WTO retains relevance for current and future trade issues will it be possible to maintain a credible WTO system.
- **Applying flanking measures** in parallel with PTA implementation in order to cope with the inevitable structural adjustments associated with trade and investment liberalization. The welfare-enhancing trade creation associated with PTAs, though it may bring net gains to growth and employment, will nevertheless cause economic and social disruption as domestic production is displaced. Policies of trade-related structural adjustment - such as active labour market policies - will be needed to accommodate these changes. In addition, supplementary technical assistance and development aid may be needed in the case of some developing country partners.
- **Ensuring that PTAs reflect a policy of differentiation** between agreements with established developed economies, emerging market developing countries, middle-income developing countries and small states and less developed economies. This is relevant for all elements of PTAs but especially with regard to commitments in tariffs, establishment, cross-border supply of services and government procurement;
- **Continuing to foster regional integration** through region-to-region PTAs. This would require more patience in negotiating and supporting region-to-region agreements and a willingness to resist calls for bilaterals in response to what the EU's international competitors do. At the least it would mean ensuring that bilateral PTAs negotiated with countries that are seeking regional integration do not undermine the prospects for that regional integration.
- **Ensuring that PTAs facilitate the 'multilateralisation'** of liberalization and trade rules, along the lines suggested below.

Consistent with this broad framework for PTA policy, the INTA Committee should consider the following concrete proposals that the European Parliament should seek to advance:

1. **Avoid making too many sectoral exceptions** from the scope of EU liberalisation commitments, particularly with regard to tariff and services commitments. Exceptions carry a number of dangers. They reduce the potential for welfare gains through trade creation. And they risk a mutual scaling down of ambition to the point where the PTA has little impact on promoting reform and the game is not worth the candle. On the other hand, the EU should continue to accept asymmetric commitments with developing countries, within a broad interpretation of GATT Art. XXIV and GATS Art. V, that balance the benefits of open markets for development with other development interests, such as the generation of tariff revenue;
2. Continue to **provide regional cumulation for rules of origin** and press ahead with the reform of RoO in order to promote regional integration and facilitate regional supply chains. The EU should also seek convergence between the preferential rules of the major blocs (EU, US, Japan etc). Convergence in preferential rules of origin will also foster intra-industry trade (identified

here as a feature of EU PTAs) which generates less structural upheaval as displaced workers can more readily move to a different branch of the same industry;

3. Incorporate **comprehensive investment provisions** into PTAs, made possible by the granting of exclusive competence for investment to the EU in the Lisbon Treaty. This will better reflect the new reality of trade and investment as complements not substitutes, and provide an opportunity for the EU to shape international investment policy and to reduce the number of potentially conflicting PTAs and BITs;
4. Make full use of the various committees and sub-committees available to **ensure that the PTAs are fully and adequately implemented** in areas such as TBT/SPS, competition, as well as sustainable development. In such areas of policy the adoption of a text represents only the beginning of what has to be a continuous process. The European Parliament should play a full and active part in this process;
5. Ensure, in the area of **intellectual property rights**, that PTAs reflect a suitable balance between the protection of owners of intellectual property and the interests of consumers and producers in developing economies. This balance is best defined multilaterally so PTAs should not be used to project regulations that favour one side or the other;
6. Support PTAs that include **government procurement** provisions as they are of potential mutual benefit to parties both developed and developing, but ensure that such provisions are progressive. This means for example, providing for explicit special and differential treatment for developing and least developed economies as in the recent revised GPA. Dealing with government procurement in PTAs is likely to be a more fruitful policy approach for the EU than the introduction of a reciprocity clause;
7. Develop the **transparency provisions for PTAs** within the WTO with a view to developing agreed codes of practice for PTAs to complement Art XXIV GATT and GATS V and ultimately a 'multilateralisation' of preferences and rules;
8. Seek specific opportunities to **'multilateralise' the provisions of PTAs** by, for example: using the cumulation provisions of rules of origin to encourage the importation of goods and services from non-partner countries, as well as from partners, in order to foster global value chains; encouraging transparency provisions, which by their nature have multilateral application, in the implementation of regulatory reform; avoiding regulatory 'projectionism' whereby PTAs are used to promote an approach that is incompatible with multilateralism; and seeking opportunities to harmonise PTA work on trade facilitation with parallel efforts at the multilateral level as a possible DDA deliverable.

1. INTRODUCTION

This paper provides a comparative study of the substance of preferential trade agreements (PTAs) as a resource in assessing EU PTA policies and agreements. There has been much debate about the role of preferential trade agreements and their impact on the international trading system. There has also been a great deal written about the reasons countries or the EU have opted to negotiate PTAs. The INTA Committee of the European Parliament has also considered a number of EU agreements and negotiations. But there has been less attention to what the substance of PTAs tells us about trends in the trade policy of the EU and other major trading powers. PTAs are now the dominant instrument of trade policy, so any assessment of EU trade policy needs careful analysis. At issue for the EU is whether the PTAs being negotiated and concluded by the EU reflect the desired balance between EU policy aims in trade and investment. These can be derived from the treaty provisions, but in concrete terms they centre on (a) access to major markets, especially those with growth potential, to ensure jobs and growth (b) the maintenance of a unitary open and ideally multilateral international trading system, (c) sustainable development and (d) the progressive integration of developing countries into the international economy.

TAs are also the instrument of choice of the EU's 'strategic partners' in international trade such as the United States (US), Japan, and EFTA. These countries shape the international environment within which EU policy has to be made. In the case of the US and Japan the EU is also negotiating bilateral agreements, so it is important to know whether the approach of these countries to PTAs is compatible with the EU approach and or interests. This study therefore compares the substance of EU PTAs with those of the US, Japan and EFTA. It builds on earlier research in order to assess any trends in the respective policies over time (Heydon and Woolcock, 2009). The study provides the basis for understanding the substance of existing or future PTAs negotiated by the EU, how the EU approach relates to existing multilateral agreements and that of the EU's strategic partners. Chapter 2 discusses the general trends in PTAs. Chapter 3 provides a summary comparison of the EU with the PTA approaches of its 'strategic partners'. Chapter 4 then looks in detail at the various PTA policies. On the surface many PTAs appear very similar. This is because they are all based on approaches and rules developed over decades within the OECD and adopted in the WTO. But buried in the detail are differences that can have important implications for specific sectors or sub-sectors of the EU economy, represent the seeds of policy divergence that can undermine the prospects of maintaining a genuine open multilateral trading system in the future or represent problems and impediments to the conclusion of bilateral agreements between the EU and its strategic partners.

2. RECENT TRENDS IN PREFERENTIAL TRADE AGREEMENTS (PTAs)

2.1 PTAs now shape international trade policy.

For most countries, PTAs have become the centrepiece of their trade policy.¹ Moreover, where the WTO is struggling to deal with conventional market access issues, recent PTAs have become comprehensive covering all access issues as well as more and more rules. A number of current PTAs such as the Trans-Pacific Partnership (TPP) and the Transatlantic Trade and Investment Partnership (TTIP) have the explicit aim of shaping international trade and investment rules.

North-South PTAs still represent the bulk of agreements, and these are based essentially on reciprocity. Asymmetric commitments are more common in South-South than in North-South agreements (Heydon, 2008). There has also been a trend towards cross-regional and bilateral ² with the latter accounting for 80% of all PTAs notified and in force and 94% of those signed or under negotiation. Even if the major North-North PTAs currently being negotiated should come to pass, most PTAs will be bilateral, North – South agreements.

2.2 The Motivations behind PTAs

There have always been multiple objectives in negotiating PTAs. These objectives range from fairly narrow commercial objectives to broad economic and trade systemic objectives to support for security and foreign policy aims. Among the range of objectives shaping PTA policies including those of the EU are:

- facilitating the flow of goods and services through international supply chains;
- ensuring market access in the short to medium term at a time when multilateral negotiations are making no progress;
- responding to PTAs negotiated by other parties that threaten trade diversion or loss of markets;
- reaping regional economies of scale and/or scope in order to enhance international competitiveness;
- consolidating trade and investment relations with growth markets or growing regions of the world economy;
- shaping international trade and investment rules so as to ensure compatibility between these and the domestic regulatory framework;
- ensuring compatibility between PTAs and the multilateral trading system;
- promoting norms and standards, such as sustainable development, human rights, international environmental standards etc.;
- supporting foreign policy and security interests.

These objectives inevitably contain inherent tensions and incompatibilities. Some are short term commercial interests, others longer-term interests of the economy as a whole or of the international system. Others again are less commercial and more normative or political. The EU like other major trading powers must seek a balance between these objectives in its PTA policy.

¹ As of 31 July 2013, 575 PTAs had been notified to the WTO. These are almost all free trade agreements with only 1% as customs unions.

² While only 12% of PTAs notified to the WTO and in force are cross-regional, the number rises to 43% for agreements signed or under negotiation, and to 52% for those at the proposal stage

Recent trends in PTA policies suggest the following factors have come to dominate.

- a pursuit of speed and flexibility in negotiation of market access especially at a time when the outcome of multilateral negotiations in the Doha Development Agenda remains uncertain. This is reflected in the burgeoning of PTA negotiations as the DDA has languished and is reflected in the EU policy shift in 2005/6 towards an active PTA strategy. After a hiatus in US trade policy from roughly 2005 to 2012 the US has returned to a more active policy and one that is vigorously pursuing the competitive liberalization strategy developed in the late 1990s and early 2000s (Evenett and Maier, 2007).
- an equally short-term aim of matching preferential access gained by other parties. This is reflected in the EU in the conclusion of agreements with Korea (to match KORUS) and other agreements.
- a concern, especially on the part of the EU and US to conclude agreements that are ambitious in both the scope of issues covered and in the sharing of liberalisation commitments among the Parties. For the EU this means seeking the inclusion of the 'Singapore issues' (investment, competition, government procurement and trade facilitation) in PTAs.
- associated with this enhanced scope is a desire to shape international trade rules that has in particular been expressed by policy makers in the US and EU;
- a clear desire to ensure access to markets with potential growth. This is reflected in the focus on South and South East Asia in the policies of the EU, US (Transpacific Partnership) as well as EFTA and Japan (more for reasons of value chains);
- there appears to be less priority given to promoting regional integration indeed the proliferation of cross-regional agreements may even be weakening regional integration and diluting intra-regional trade patterns (Fiorentino et al. 2006).³ This is reflected in EU policy towards ASEAN as well as some ACP regions, although the EU has negotiated successfully with Central America;
- there is some evidence of efforts to promote norms and standards. In the EU this comes in the form of the inclusion of human rights and sustainable development provisions in its PTA policy. But tensions with commercial aims has meant that these provisions are often less binding than market access commitments. For the EU norms established in the treaties, such as the progressive integration of developing countries into the world economy and the eradication of poverty still shape EU PTA policy vis-à-vis the ACP;
- all major WTO members provide rhetoric support for multilateralism and for the WTO, arguing that their PTA strategies are consistent with the WTO. When PTAs were negotiated parallel to multilateral negotiations, such as CUSFTA and NAFTA during the Uruguay Round, there was a high degree of consistency and synergy between the two levels (Woolcock, 2007). But the current proliferation of PTAs and little or no advance at the multilateral level poses more of a danger that PTAs will take divergent paths. Comprehensive PTAs between systemically important WTO members also suggests a shift away from support for a multilateralism that is inclusive of all WTO members.
- finally, support for foreign policy aims remains a background factor in PTA policies. In the case of the EU recent PTA initiatives have been more focused on commercial or economically strategic partners than security or foreign policy. The EU however, still sees PTAs as a means of promoting economic and thus political stability among its Near Neighbours and Mediterranean

³ While the EU, with its successful process of widening and deepening, can be seen as an exception to this proposition, EU experience is unique and, with its high degree of supranational authority, unlikely to be replicated elsewhere (see Baldwin, 2008). This is certainly the lesson that tends to be drawn in Asia.

region. US promotion of the Transpacific Partnership also underpins the 'pivot to Asia' foreign policy aims of the US Administration. In the case of EFTA there is no common foreign policy objective to pursue and in the case of Japan foreign policy factors have tended to complicate PTA policy, by for example limiting the scope for regional agreements within East Asia. in the face of growing Chinese influence.

3. COMPARISON OF THE SUBSTANCE OF PTAs

3.1 Summary overview of PTAs

The European Union's approach to PTAs has to date been characterised by a relatively 'flexible' approach compared, for example, to the USA. This has found expression in the EU's coverage of tariffs in PTAs, which has excluded relatively more (agricultural) tariff lines, and the positive list approach to establishment and cross-border services. But recent PTAs suggest evidence of greater ambition, no doubt in part shaped by a desire on the part of EU business interests to match US or other PTAs. The EU approach to rules of origin also shows signs of flexibility in that reform for trade with least developed and some developing countries is introducing a simplified system compared to the detailed rules that still apply to developed economies. On trade remedies the EU sticks fairly close to WTO rules, but has included the lesser duty rule for dumping in PTAs.

Frustrated in the WTO in its efforts to promote the Singapore issues the EU has ensured these are included in all recent PTAs, with the exception of the interim Economic Partnership Agreements (EPAs). In investment the establishment of EU exclusive competence for foreign direct investment (FDI) means that the EU can now negotiate comprehensive investment provisions in its PTAs, although the PTAs that have actually been (provisionally) applied and thus covered in this study were negotiated before such competence was established. The first PTA with comprehensive investment provisions covering liberalisation and protection will be EU – Canada when it is finally agreed. Asymmetry or flexibility is built into the hybrid or positive list scheduling for establishment. In government procurement also the EU pushes for provisions in PTAs that are equivalent to those in the WTO's Government Procurement Agreement (GPA), with some differentiation according to the level of development of the PTA partner on rules as well as asymmetric commitments in the schedule of entities covered. The EU has also succeeded in including some provisions on competition in recent PTAs.

Protection of intellectual property rights (IPR) has been a feature of the post Global Europe strategy (European Commission, 2006) and the EU has broadly matched the standards of IPR protection in US PTAs, the only major difference being more recognition of genetic and traditional knowledge and a greater emphasis on the needs of developing countries, but here much will depend on how these provisions are applied. The EU's domestic experience with non-tariff barriers and the need for comprehensive provisions on SPS and TBT, means that it takes efforts in this field, including the promotion of agreed international standards, more seriously than does the United States or Japan, though again, there is flexibility. The EU has included WTO – plus provisions on TBT (sector committees in EU Korea) and SPS (procedural details on how to apply WTO principles) .

The flexible approach adopted to date means it has been difficult to identify a clear EU model PTA. The scope of agreements has varied and sometimes fallen short of what would be more economically beneficial extensive coverage. But as noted above the more recent PTAs suggest a trend towards greater uniformity. A positive side of EU flexibility is that it has provided scope for asymmetric

provisions favouring the EU's developing country partners. Just how the EU applies this flexibility in the future will be important in shaping the EU's policy of differentiation in trade with developing countries.

EFTA's approach to PTAs shares many of the features of EU policy. In the formative stages of EFTA's PTA policy, the agreements with Central and East European states after 1991 and the EuroMed agreements after 1995 were designed to ensure that EFTA's interests were not undermined by the EU agreements. EFTA has subsequently become activist in PTA negotiations, but when one views the substance of the agreements they are much less WTO-plus than those of the EU or US. Often EFTA – PTAs are limited to market access agreements covering tariffs and services. The rather diverse interests of the EFTA parties and the lack of common policies on agriculture in particular, means that individual members negotiate separate bilateral schedules with major trading partners. The relative absence of provisions on rules is a characteristic of EFTA PTAs. Given the European Economic Area (EEA) and the bilateral agreements between the EU and Switzerland that apply the *acquis communautaire* to most policy areas in EFTA, this means the EFTA PTAs do not offer alternative rules to those of the EU. EFTA does however, offer a less 'rules-heavy' model for PTAs. This probably goes a good way to explaining why EFTA is often able to negotiate agreements faster than the EU.

The United States approach to PTAs has to date has been characterised by a policy of seeking uniform provisions in PTAs and a high – self-declared - "gold standard". In pursuit of its "gold standard" US PTAs are WTO-plus, in many respects. On the central issue of tariffs, this means almost 100% tariff elimination on the US part, at least in the case of industrial products, although some agreements fell short of this, such as the PTA with Australia on agriculture. The US-Colombia agreement also seems to provide somewhat more 'flexibility'. This is important because welfare gains to parties to PTAs will be higher the more comprehensive is the product coverage of the agreements, but developing countries have sought less than full reciprocity in trade. In rules of origin the NAFTA model has one of the most complex sets of specific rules, which has a restrictive impact on trade and the US has not offered much regional cumulation. In the case of commercial instruments, US PTAs are generally not WTO-plus and no PTA partner of the US has succeeded in introducing tighter definitions on anti-dumping rules, such as on the use of a lesser duty rule or national interest criteria. Bilateral safeguard measures in US PTAs do however, have tighter time limitations than those found in the WTO.

In services, the United States has pioneered the prohibition of local presence requirements, consistently supported greater transparency through negative listing, and gone beyond the GATS in rulemaking in critical sectors such as financial services and telecommunications.

But there is no GATS-plus liberalization in sensitive sectors such as air transport or governmental services and there is a pronounced tendency for the United States to use negative-list reservations to exclude services measures maintained at the sub-national level.

The United States has been able to obtain the comprehensive investment provisions of NAFTA in almost all its agreements.⁴ In government procurement, the United States has used PTAs to extend the number of its trading partners that effectively comply with plurilateral Government Procurement Agreement (GPA)-type rules. But in both investment and procurement as in services it has held back from commitments of its own at the sub-federal level.

The US has been a driving force behind TRIPS-plus provisions in PTAs, introducing higher standards on most topics, but TBT and SPS issues have been a lower priority for the US and here it tends to rely

⁴ US trade strategy has also included efforts to push for a plurilateral agreement on services in the shape of the International Agreement on Services.

on WTO provisions. WTO disciplines in TBT and SPS are also limited to federal government entities with only best endeavours provisions covering the largely industry-based system of standards and conformance assessment in the US. Finally, where US PTAs seek to address a perceived race-to-the-bottom in labour and environmental standards and, ultimately, to impose penalties for non-compliance with internationally agreed norms, it needs to be acknowledged that while undoubtedly WTO-plus, these provisions are not necessarily “better”, nor without risk of protectionist capture.

Japanese PTA motivations tend to centre more on market access considerations and are based on facilitation of regional supply chains, a fear of being left out, dissatisfaction with progress in the WTO and pursuit of deeper integration. . A primary aim of the PTA negotiations with Switzerland was an increase in Japanese exports of electronic goods, while also strengthening the protection of IPRs. Japan, has until recently been relatively less aggressive and thus less successful than the United States in implementing ambitious market opening PTAs.

3.2 EU PTA Policy

3.2.1 Motivations

EU motivations share much in common with those of the other countries considered. Looking, selectively, at EU PTAs that are either ongoing or forthcoming, we see three broad, and partly overlapping, motivations. First, there is the pursuit of *market access gains* from PTAs with major players: forthcoming with the United States and Japan, and ongoing with Canada and India. Second, are the PTAs with developing countries that have a *development and stronger foreign policy* dimension: including those with four Euromed countries (Egypt, Jordan, Morocco and Tunisia), with four countries in South East

Asia, with countries of the Andean Community and Central America, and with the ACP countries through the Economic Partnership Agreements that are under negotiation. Thirdly, there is the objective of eventually striking region-to-region agreements for broad *geo-political reasons*: with ASEAN in Asia, with MERCOSUR in South America, and with the East African Community and the Southern African Development Community in Africa. In summary, compared with the EU PTAs presently in force (Korea, Colombia - Peru, Mexico, Chile, and South Africa) what we see is a greater emerging diversity in EU PTA partners, many of whom are either much larger or much smaller than existing partners.

3.2.2 A summary of sectoral characteristics: Strength of commitments and differentiation

In this section the principal points of comparison for EU policy will be the benchmarks set by US PTAs and, where appropriate, by the WTO.

Tariffs: There is a clear trend towards the elimination of all industrial tariffs, either immediately or after a fairly short transition (i.e. 6 years) by the EU. This is within the general interpretation of the 'reasonable period' required in GATT Art XXIV and broadly the same as the US, EFTA and Japan. There remain some exceptions however, and in some cases protection is provided in the form of longer transition periods. US liberalisation covers more tariff lines and in many cases is close to 100%, but uses longer transition periods (up to 18 years) when it wants to provide some degree of continued protection. At the same time the US expects its PTA partners to do the same, which by and large they have. As a result there is little asymmetry favouring the US's PTA partners. The EU and EFTA have

similar approaches in that they have close to 100 % coverage of industrial tariffs, but exclude more tariff lines in agriculture, EFTA more so than the EU.⁵ On the other hand, the EU and EFTA have accepted more asymmetry in industrial tariff liberalization, allowing developing countries more 'policy space' in their sensitive sectors. This remains the case even though EU PTA partners that previously had unilateral tariff free access to the EU are now being asked to conclude reciprocal liberalisation agreements. Japan has in the past excluded rather more industrial tariff lines than the others, but its recent PTAs suggest a clear move towards greater coverage.

Rules of origin: the EU and EFTA use the same common set of specific rules. The EU is moving towards a differentiated approach to RoO with full specific rules for developed economies and a reformed, simpler approach to developing countries. Intermediate countries such as Colombia and Peru are offered the prospect of progressive reform. The EU is generous in offering considerable scope for diagonal or regional cumulation, where the US and Japan offer only bilateral cumulation. In the past US RoO were 'more liberal' by including more scope for private origin declarations, but the EU is also moving quite rapidly towards exporter declarations and approved exporters. There is of course no WTO rule on preferential rules of origin.

Trade remedies: provisions on safeguards, anti-dumping and countervailing duties in the PTAs negotiated by EU, EFTA, US and Japan are in their general scope all very much in line with existing multilateral rules. There are WTO-plus provisions in some PTAs, but these could be seen as improvements or clarifications on vague GATT/WTO provisions that provide discretion in the use of remedies. Nevertheless there are some detailed differences in how much discretion there is to respond to the concerns of (defensive) interests injured by liberalisation or 'unfair' trade. With regard to bilateral safeguard measures the EU appears to have a slightly longer period before compensatory withdrawal of concessions by a PTA partner becomes a cost for the EU. On the other hand, the US has not moved on anti-dumping and so retains more discretion here while the EU (and some EFTA) PTAs include the lesser duty rule and (for the EU) public interest criteria. Japan and EFTA stick very much to the existing WTO rights and obligations.

Services. EU PTAs can be characterised as having relatively ambitious provisions dealing with the liberalisation of trade in services. EU-Korea is GATS-plus and KORUS-plus, such as for certain aspects of trade in telecommunications, transport and environmental services. EU-Korea is noteworthy in providing for a panel of experts to rule on abuse of the prudential carve-out in financial services (an area identified as a priority in forthcoming EU-US PTA negotiations). However, as for all EU PTAs EU-Korea is less ambitious than KORUS in its use of hybrid rather than negative listing of liberalisation commitments. Unlike KORUS EU – Korea also has no provision for the right of non-establishment and excludes audio-visual (another likely point of contention in EU-US negotiations) and health and education services. Both EU and US PTAs' treatment of services continues to contain entity exceptions: for the EU in the form of fairly minor detailed exclusions for (mostly new) individual Member States and for the United States in exclusions at the sub-federal level. How these exclusions balance out in practice depends on the sector. In comparison with Japan, EU PTAs continue to have more coherence in the approach to listing and more ambition in seeking improved market access. EFTA agreements raise a different and broader issue of coherence linked to the tendency for individual EFTA Members to seek bilateral accords with third parties.

Investment. In comparison with US PTAs, including KORUS, the EU agreements studied in detail continue to be less ambitious in the area of investment in having no overarching provision for post-

⁵ EFTA members negotiate separate schedules for agricultural products, so there can be a variation between them, but in general all EFTA countries retain significant protection of agriculture.

establishment investment protection other than for investment carried out under Mode 3 in trade in services. The Lisbon Treaty extension of exclusive EU competence for FDI came too late for the EU-Korea and EU-Colombia –Peru negotiations. Post-establishment protection thus continued to be dealt with in separate Member State bilateral investment treaties (BITs); there are 19 EU BITs, for example, with Korea. EU agreements also lack the detailed provisions found in US PTAs for investor-state dispute settlement.⁶ Looking ahead, the negotiations between the EU and Singapore, Canada and India will be the first to be conducted after the Treaty of Lisbon. As a result they are expected to include comprehensive investment provisions covering both liberalisation (i.e. establishment) and protection. EFTA tends to follow the EU in its treatment of investment in PTAs. Thus EFTA's agreements with both Korea and Colombia provide for post-establishment national treatment of mode 3 delivery (commercial presence) of scheduled services but for investment protection they broadly rely on separate bilateral investment treaties. The coverage of investment in Japan's PTAs varies. It was more extensive than the EU in the case of Chile, but less extensive in the more recent PTA between Japan and Vietnam.

Competition. In the area of competition policy, EU agreements tend to be stronger and less hortatory than US PTAs, due to the general US opposition to anything approaching binding international standards on competition. EU-Korea thus identifies specific anti-competitive practices – notably, cartels, abuse of dominance and anti-competitive mergers – as being incompatible with the agreement. In contrast, KORUS simply requires that any designated private monopolies and state enterprises act in a manner not inconsistent with the obligations of the agreement. EU PTAs include competition provisions within the services section, such as requirements against anti-competitive cross-subsidisation in the telecommunications sector and provide for positive comity in PTAs with developed partners that requires the competition authority of the other Party to “address” any specific concerns raised by the EU Commission. In PTAs with developing partners the EU mostly offers cooperation and capacity building. The EFTA PTA treatment of competition policy is broadly similar to that of the EU. Japan's PTAs tend to have competition provisions that lack specificity and firm commitments. Thus while Japan-Vietnam makes some advance on Japan-Chile, both agreements have weaker provisions on competition than those of the EU.

Trade facilitation. All of the agreements examined provide a framework for cooperation that seeks to ensure that Parties comply with their respective customs laws and regulations and with relevant international agreements, notably the Kyoto Convention. It appears, however, that the EU PTAs - which provide a basis for consultation rather than substantive commitments – are less specific than US agreements in providing for civil penalties and criminal sanctions in the event of violation.

Government procurement. EU PTAs look for GPA equivalent or GPA plus provisions in all but PTAs with less developed partners. Where both Parties are GPA signatories (as in EU-Korea) they do so by extending the scope of procurement. In EU-Korea this was achieved by including build and operate public works concessions and other contracts not covered in the GPA. Where the partner country is not a GPA signatory, the PTA is GPA-plus in the sense of extending the framework rules of the GPA to that non-signatory. Moreover, the EU-Colombia – Peru PTA, unlike US-Colombia, covers all municipal agencies, opening up the possibility of bidding for public works. Some US agreements are more ambitious in seeking lower thresholds at which contracts become subject to the disciplines of the agreement.⁷ The US PTAs with developing economies also apply the Non-Binding APEC Principles on Government Procurement to all their procurement that is outside the scope of the GPA. In line with

⁶ As discussed below this will of course change with the post-Lisbon PTAs being negotiated by the EU.

⁷ The 2012 revision of the GPA has however, overtaken some of these GPA – plus provisions by including them in the revised schedules.

previous US policy in PTAs, KORUS only covers central government bodies (Annex 17 A) and therefore appears to add little to the GPA in which 37 States agree to schedule some procurement.⁸ EFTA PTAs' approach to government procurement is, again, comparable with that of EU agreements. However, unlike EU-Korea, EFTA-Korea offers no advance on the GPA whether in the coverage of entities and sectors or in the thresholds applying to contracts. Japan's PTA with Chile has GPA-plus features, but it is GPA-minus insofar as Japan excludes 13 entities that are covered in its GPA commitments and Japan-Vietnam has no firm commitments on government procurement.

Intellectual property rights: Broadly speaking the US PTAs provide for the most extensive and detailed provisions aimed at protecting IPRs although on substantive points the EU matches these in most instances. The EU extends the TRIPs by including more protection for Geographic Indications (GIs) in the form of registers rather than as part of trademark protection. The wording of the EU PTA provisions on IPR also reflects a greater recognition of the need to balance the protection of IPRs with development interests and technology transfer. Although these provisions are generally best endeavours and so dependent on implementation. EFTA and Japanese PTAs rely far more on the existing TRIPs provisions and provide very little additional procedural measures.

TBT and SPS: In the case of both TBT and SPS measures all PTAs reaffirm the parties' obligations and commitments under the respective WTO agreements. The PTAs reiterate the principles set out in the WTO agreements, such as transparency and notification of new technical regulations or SPS measures and endorse the use of international standards, mutual recognition and equivalence as well as cooperation in specialist committees. The WTO – plus nature - of EU PTAs in particular – consist of strengthening implementation of these principles. For example the annexed provisions of the EU – Colombia - Peru PTA (based on the precedent of the EU – Chile text) details how WTO principles of equivalence, regionalization, recognition etc. should be implemented in practice. Most PTAs are WTO-plus in providing for a specialist committee to implement TBT and SPS provisions. In the case of north-south PTAs, where the agreements are generally much less detailed, joint committees provide a channel for cooperation and provision of technical assistance. In the EU – Korea PTA there are also four sector specific committees and one (for cars) in KORUS. In the SPS texts there is little evidence of the differences between the US and the EU/EFTA over risk assessment in agricultural bio-technology. All the PTAs commit the parties to the WTO SPS agreement, which is rather more science-based than the EU would like. The EU PTA with Colombia – Peru refers to precaution, but there is also the general commitment to the WTO SPS Agreement and its interpretation of precaution.

Environment. Both EU and US PTAs have extensive and strong provisions on the environment. In seeking to compare the relative strengths of the two recent respective agreements with Korea, it might be said that EU-Korea is stronger in that it is focused on environmental requirements per se while KORUS needs a link to trade and investment effects to become effective. For example, non-compliance with national environmental regulations in order to gain a competitive advantage. On the other hand, KORUS has a more forceful implementation mechanism in the shape of sanctions and recourse to the dispute settlement provisions of the PTA when violations of the environmental (or labour) provisions have been deemed to occur. Moreover, KORUS is more specific, when invoking GATT Article XX, in describing what "danger to human, animal or plant life" might actually mean. Japan's agreements have only minimal reference to the environment, as do those of EFTA. There are, however, provisions on biodiversity and access to genetic resources in EFTA-Colombia that are not

⁸ The GPA consists of a framework agreement of rules and then bilateral schedules, so the scheduling of commitments by the 37 US states is not with Korea, but with parties, such as the EU that offer more in terms of reciprocal commitments.

found in the earlier EFTA agreement with Korea, either as a reflection of particular concerns of Colombia or of a growing awareness of these issues in the interval between the two agreements.

Labour standards. When comparing the EU and US agreements with Korea, exactly the same issue – per se focus versus the availability of sanctions – seen in relation to the environment arises with respect to labour standards. Concerning the risk of protectionist capture, the EU-Korea PTA has a number of important qualifications: that labour standards should not be used for protectionist purposes; that it is not the intention to harmonise standards; and that the comparative advantage of the Parties should in no way be called into question. EFTA agreements are essentially hortatory in respect of labour rights, although there are more references to such rights in EFTA-Colombia than in EFTA-Korea. Consistent with Japan's earlier agreements, neither Japan-Chile nor Japan-Vietnam contains substantive provisions on labour standards.

Institutional provisions: All PTAs now include a form of joint committee to monitor and promote implementation as well as bilateral dispute settlement provisions. Most PTAs also include the establishment of specialist sub-committees for a number of issues. Generally speaking the EU PTAs tend to include more committees, as illustrated by the EU – Korea agreement. It is also common practice to see sub-committees as a form of substitute for detailed procedural rules. Thus EFTA and Japanese PTAs include very little text on issues such as IPR, but set up a sub-committee to promote cooperation. Bilateral dispute settlement mechanisms are tending to move towards WTO – type panels or arbitral committees and away from the more 'power -based' consultation or political resolution of disputes in joint committees. Such bilateral dispute settlement is however, excluded for those parts of PTAs that incorporate WTO agreements, such as anti-dumping or general as opposed to bilateral safeguards.. This reduces the potential for conflicting interpretations of common principles and it is found in all comprehensive PTAs.

3.2.3 Asymmetry

In the past it could be argued with some confidence that the EU provided more 'flexibility' and thus more scope for asymmetry in its PTAs. The more recent trends question whether this can still be argued. In looking in detail at the EU and US PTAs with Colombia, this distinction seems no longer to apply.⁹

3.2.4 The Impact of PTAs

- For the recent set of PTAs negotiated by the EU, US, EFTA and Japan it is too early to make any clear judgement on their impact;
- Past experience with PTAs suggests that the PTAs the EU has negotiated with partners such as Korea, Colombia, Peru and Central America (the cases studied here) have ensured the EU has not lost market share rather than gaining increased market share for the EU;
- What recent figures are available for trade in goods between the EU and recent PTA partners suggest no major shifts in the share of trade. This suggests that the EU has held its own with equivalent, competing agreements concluded by the US, EFTA and Japan.
- There is some evidence, from EU – Korea and EU – Colombia of effects on FDI in anticipation of PTAs.

There are broadly two ways of measuring the economic impact of preferential trade agreements: ex-post measurement, either as simple observation of trade and investment data or as econometric

⁹ See chapter 4 for a comparison of asymmetry provisions in EU and US PTAs.

modelling of that data; and ex-ante measurement in the form of computable general equilibrium (CGE) modelling. Each of these will be considered in turn.

3.2.4.1 Ex-post Measurement

Observation: Established Agreements

Looking first at earlier EU PTAs, for which data necessarily exist there is some evidence of trade and investment effects associated with EU PTA *implementation*. On the basis of data over time and flows expressed in relative terms, this is reflected, for example, in EU goods trade with Mexico. After suffering significant trade diversion effects from NAFTA when EU exports to Mexico dropped significantly (by around 30%) in 1994, EU exports only regained lost ground in 2000 when they jumped (by 34%) at the time of the entry into force of the Free Trade Agreement between the EU and Mexico. Chilean goods exports to the EU also increased following PTA implementation in February 2000 (climbing from 2.6 bn Euro in 1999 to 3.4 bn in 2000 and 3.7 bn in 2001)(Eurostat, trade data); and EU services exports to Egypt increased, following signature of the Association Agreement in 2001.

Earlier US PTAs also demonstrate some evidence of a linkage between trade and investment flows and *implementation*. For example, in the three years following the implementation of the US-Chile agreement in January 2004, US exports to Chile, as a percentage of US total exports, grew by 63% and imports by 62%. (the share of US trade with Chile as a percentage of total US trade increased by about 60%) In the ten years following the implementation of NAFTA in 1994, US service exports to Mexico, as a percentage of total US service exports, increased by 34%. This followed two years of declining exports prior to the PTA. And US FDI outflows to Mexico increased by 10% in real terms in the ten-year period following implementation of NAFTA.

For EFTA there seem to be few discernible trends but there is also the added problem that trade with PTA partners (apart from the EU of course) represents a relatively small percentage of EFTA exports and imports. Overall, EFTA trade with PTA partners (other than the EU) rose 8.1% between 1992 and 2002, compared with only 0.7% with the rest of the world. Within this trade, EFTA imports of goods increased more than EFTA exports, because of the asymmetric liberalisation provisions of the agreements. Even where aggregate trade did not increase, trade in products that were subject to significant liberalisation did increase. For example, while Swiss trade with Mexico relative to the rest of the world fell from 2002 to 2005, exports of pharmaceuticals and watches, each subject to tariff dismantling, grew strongly. This observation highlights the importance of product specificity in seeking to identify trends related to PTA activity.

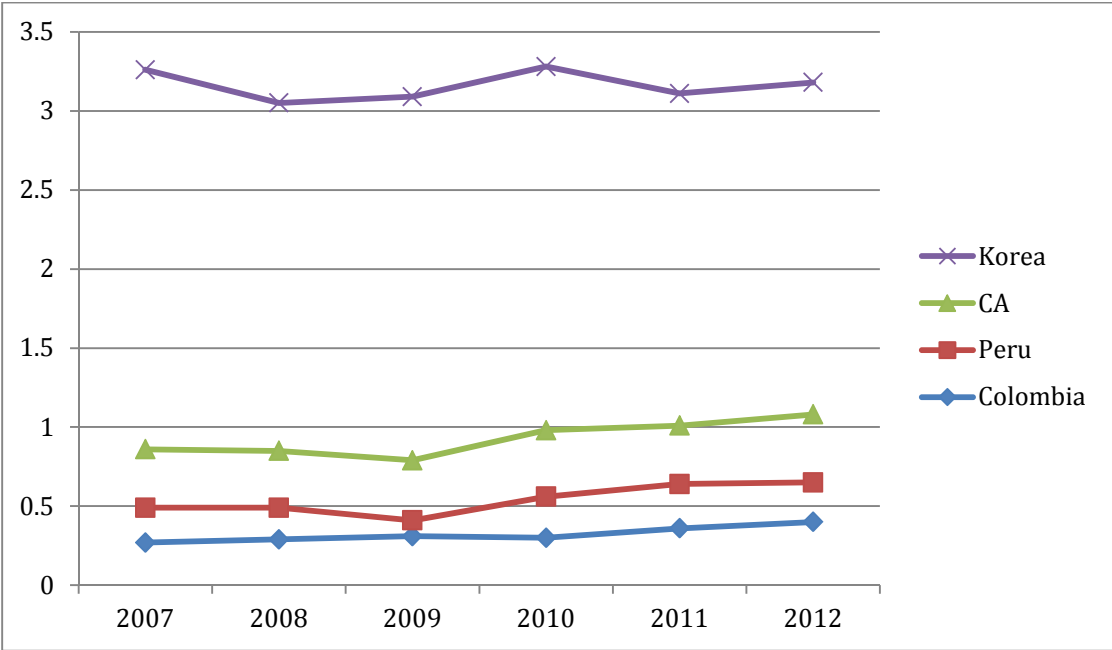
Unlike US and EU experience, Japan's earlier PTAs appear to have had a negligible effect on flows of trade and investment, the possible exceptions being Japanese exports to Mexico, which rose 53% in real terms between 2004 and 2006, and Singapore's FDI in Japan. Nor is there a discernible pattern in trade and investment in anticipation of PTAs.

There may also be a linkage between trade and investment activity and the *announcement* of PTA negotiations, though this is not easy to substantiate as one off investment decisions can have a significant effect on FDI flows especially when there are small economies involved. Investment activity could increase, on the part of efficiency-seeking investors, in anticipation of improved resource allocation flowing from freer trade. Trade flows themselves might increase as a result of the increased legal certainty of the trading regime that a PTA would bring, and through greater market awareness generated by the announcement of negotiations. Therefore negotiations may lead to increased trade and investment as companies anticipate potential future benefits.

Observation: Recent Agreements

The focus of this study is on recent agreements signed by the EU, US, Japan and EFTA. Unfortunately, however, the very immediacy of these agreements makes it difficult to assess, ex-post, their economic impact. For the recent PTAs negotiated by the EU implementation is either too recent (Peru 1 March 2013), is only occurring now (in Central America only some parties have ratified) or is too soon to identify any clear trends, especially with regard to services and investment where data are only available with a lag. This is important because much of the trade gains (i.e. increased balance of trade) for the EU in recent PTAs has been predicted to come in the services sector. The position for investment is similar. In the case of Korea, provisional implementation occurred in July 2011 only. The EFTA PTAs with Colombia and Peru entered into force in 2011. Only EFTA-Korea (2006) and EFTA-Colombia (2008) are more long standing. The US agreements with Korea, Colombia, Peru and Central America – DR although negotiated earlier were not ratified by the US until later. The Japan – Chile agreement on goods was adopted in September 2007 and the Japan – Vietnam agreement was negotiated between 2006 and 2009. In terms of the EU's more recent agreements therefore it is simply too early to make any firm judgement on the ex-post effects of PTAs. The only thing that may be picked up in trade figures is an anticipatory effect resulting during negotiations. One simple metric here as with any ex-post measurement would be to assess whether there has been any growth in the share of bilateral trade in anticipation of a PTA. But again there are complications because many of the agreements were negotiated at the same time. Thus the EU negotiated with Korea in part in response to KORUS. Likewise the EU and US both negotiated with Central America and Colombia at around the same time. In the literature it has been argued that PTAs are negotiated in order to defend existing market access and effectively anticipate trade diversion. If this is the case the parallel negotiations of PTAs by other countries will have at least in part neutralised any anticipatory effects of EU PTA negotiations.

Figure 3.1 Share of total goods trade (exports and imports) in all EU trade of recent PTA partners of the EU



Based on Eurostat data

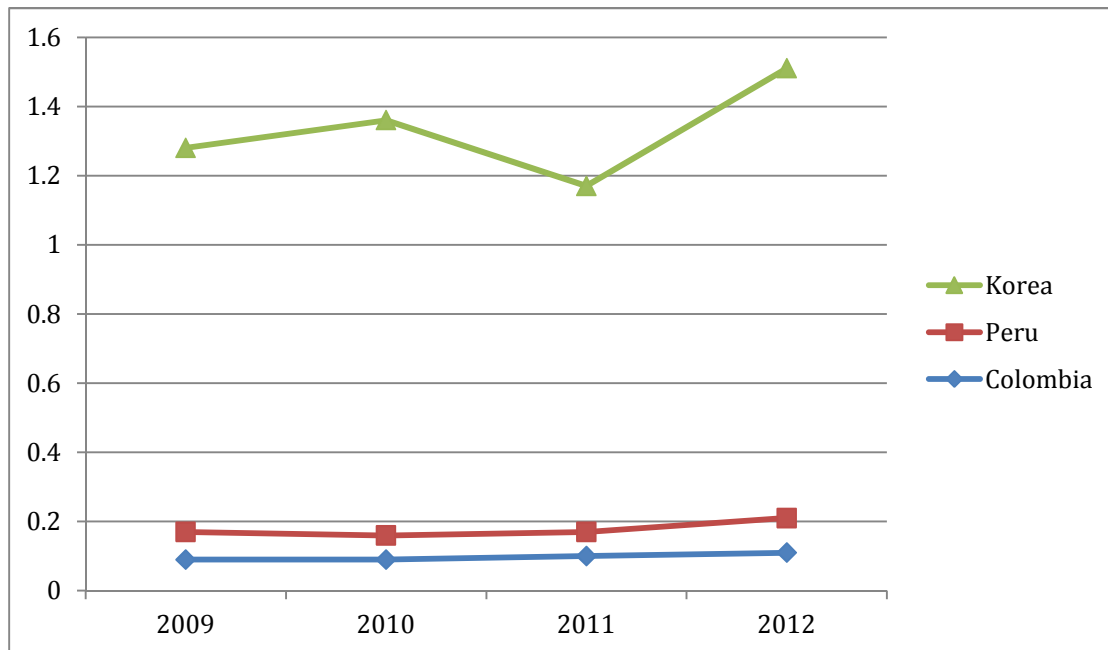
In terms of the EU –Korea PTA for which some initial data are available, there has been an increase in bilateral trade in goods up from Euro 67 bn in 2010 to Euro 75.6 bn in 2012 despite the generally

poor macro economic climate. This suggests that the PTA helped EU exports and trade growth that would otherwise have been more adversely affected by the economic slowdown post 2008 or that the PTA helped the EU maintain its share of trade with Korea in the face of Korea's PTAs with other countries such as the USA. Market access in the Korean market, especially in services, depends on investment and EU FDI into Korea increased from 1.2 bn Euro in 2009 to 2.5 bn in 2010 and 2011 with a steady increase in the EU stock of FDI in Korea up to Euro 39 bn in 2010.¹⁰ Korean investment in the EU also leapt from 1.6 bn Euro in 2009 to 3.9 bn in 2010 as Korean companies established more production facilities in the EU, although this was not sustained in 2011. This could provide some support for the view that FDI flows increase in anticipation of the greater market access and lock-in effects of PTAs.¹¹ But the PTA has not led to an increase in the share of bilateral trade.

Figure 3.1 suggests there may have been an increase in trade in anticipation of PTAs with Colombia – Peru and Central America as their share in total EU trade increased around the time the negotiations were underway. Figures for services trade are only available for Colombia in recent years and these show little change. In 2011 however, there was a big jump in Colombian investment in the EU to Euro 2.3bn , which although probably a one off may have been in anticipation of the PTA. The EU figures for trade in goods with Colombia, Peru and Central America are however, very similar to those for EFTA and the US, which suggests that factors other than PTAs, such as economic growth in the region explain the increased shares in trade.

Figure 3.2 tends to confirm that PTAs have not had any major impact on the shares of trade in goods with EFTA's trading partners. The even smaller share of some of the PTA partners concerned however should be taken into consideration.

Figure 3.2 Share of total goods trade (exports plus imports) of recent EFTA PTA partners in EFTAs total trade



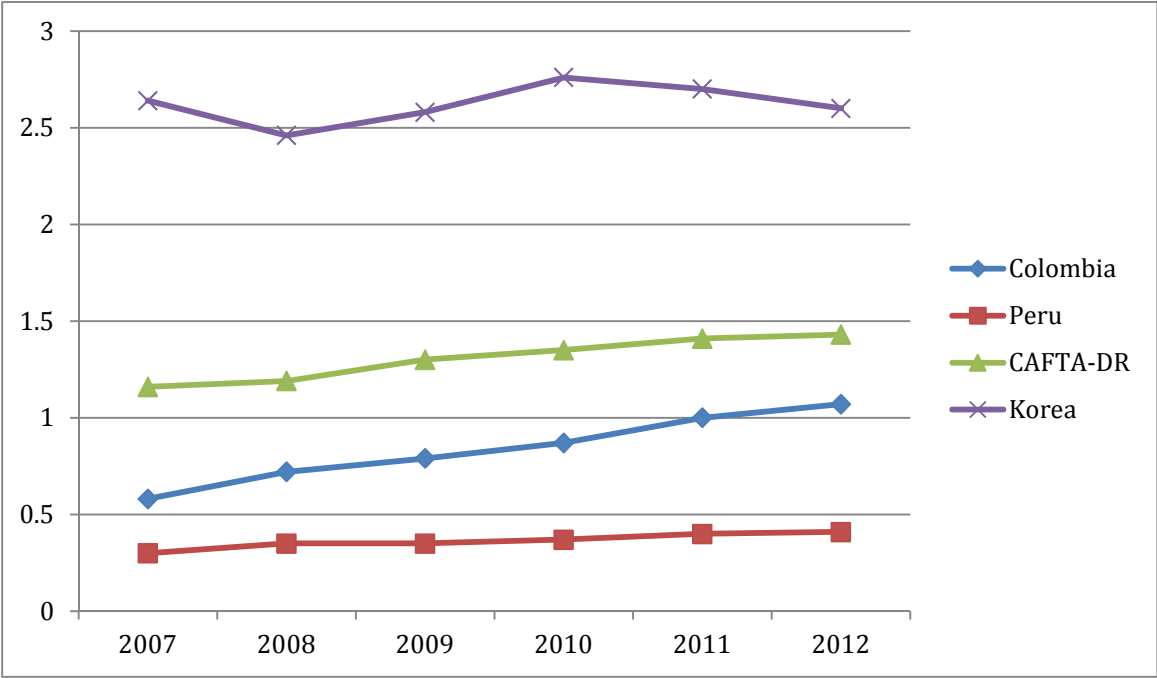
The difficulty of getting meaningful ex-post data for recent PTAs is further illustrated by the case of the US-Korea agreement. In the twelve month period after KORUS was finally negotiated (in December 2010) US exports to Korea increased by some 12% and imports from Korea by 16%.

¹⁰ <http://trade.ec.europa.eu/doclib/html/111834.htm>

¹¹ For more details on the early impact of the EU Korea FTA see European Parliament 2012.

However in the subsequent twelve-month period, early in which KORUS entered into force (on 15 March 2012), US exports to Korea actually fell by some 2% and imports rose by only 4%. Latest data (for the first 5 months of 2013 compared with the corresponding period in 2012) show a further fall in US exports to Korea of 10% and a rise in imports of 6%. The overall figures for trade in goods in figure 3.3 show this increase in trade as the PTA is negotiated but a subsequent decline in Korea's share of total US trade. In line with the EU and EFTA, US trade with Colombia, Peru and Central America has shown a relative increase, but it is by no means certain that this is due to the negotiation of the PTAs.

Figure 3.3 Shares of US PTA partners as percentage of total goods trade



Source US Census Bureau: Foreign trade <http://www.census.gov/foreign-trade/balance/>

The story is different, however, at a disaggregated level. In the twelve-month period when KORUS entered into force and when overall US exports fell and imports were sluggish, US exports of transportation equipment to Korea rose by 22% and imports from Korea by 20%. Trade in transport equipment is of course a sector that is expected to be strongly affected by the PTA. A longer run of post-PTA data combined with econometric analysis would be needed to draw firm conclusions, but this tentative observation would seem to confirm the proposition that at the sectoral or product level PTAs can have significant impact.

Ex-post modelling

Beyond simple ex-post observation, it is also possible to undertake ex-post modelling. Such ex-post models seek to measure trade creation and diversion by taking actual statistical data of intra-agreement trade flows and controlling for factors influencing trade (such as geographical size and distance). The standard way to control for other effects is via an econometric model, usually a gravity model or a growth regression. The limitations of such approaches are that they are static, cannot capture the interplay of variables, do not establish causality (in the case of regressions) and are of limited use for policy evaluation because policy changes themselves change the model. As with simple observation, they also suffer from lack of data in the case of recent agreements.

Overall, the findings of ex-post modelling produce a fairly mixed picture, indicating that some PTAs boosted intra-block trade significantly, while others did not. There is some evidence that external trade is smaller than it might otherwise have been in at least some of the groupings, but the picture is mixed enough that it is not possible to conclude whether trade diversion has been a major problem. In addition, these studies do not reach any definitive answer on the welfare impact of PTAs. Most of the studies using growth regressions suggest that PTAs have had little impact on economic growth (Heydon and Woolcock 2009).

3.2.4.2 Comparison with Ex-ante Measurement

Prior to negotiating PTAs the EU has commissioned ex-ante assessments of the likely effects in order to assess the costs and benefits of PTAs. So this raises the question of whether the ex-ante studies proved to be accurate. Such ex-ante estimates of the effects of PTAs use computable general equilibrium (CGE) models that take account of the interaction of variables, such as the effects of growth in GDP and other factors on trade, and that can also measure economy-wide effects.

Broadly, the conclusions from ex-ante studies have been that the recent wave of PTAs should have resulted in only weak trade diversion and had net trade-creating and welfare-improving effects. However, the variation in estimated simulated economic gains is wide, depending on the model used. In models assuming perfect competition, the combined effect of trade diversion and trade creation typically gives very small welfare gains. However, CGE models of imperfect competition with increasing returns to scale suggest that the pro-competitive effects of PTAs might be more significant especially for OECD countries. These models increase the estimated gains considerably for the EU and NAFTA.

The remainder of this section will examine a number of ex-ante studies undertaken in respect of the PTAs that the EU and United States have undertaken with Korea – where size would suggest potentially significant gains – and with Colombia-Peru. The ex ante predictions are selectively tested against available ex-post data.

For EU-Korea various studies were broadly consistent in finding that the overall gains would be significant but not large for Korea and modest for the EU. Copenhagen (2007) thus found that a comprehensive PTA (with extensive provisions but less than totally free trade) would yield a GDP increase of 1.01% (Euro 4.3 billion) for Korea and 0.03% (Euro 2.2 billion) for the EU. Some 70% of EU gains were to be attributable to the liberalisation of trade in services with EU exports increasing by 40-60% in the areas of wholesale and retail trade, transport services, communications, financial services and other business services. This is something that cannot be assessed as services liberalisation is likely to take longer than the removal of tariffs. Figures for commercial services in EU Korean trade are only available for 2011. These show a growth in EU services exports and thus the EU surplus in services to Euro 4.5 bn. EU trade gains predicted in machinery (SITC 74) have also been reflected in a growth in EU exports of 26% between 2010 and 2012 (with a growth in the EU surplus in this sector of 33%). For Korea, motor vehicles were to account for 40% of the total increase in EU25 imports from Korea. While Korean exports have increased (from Euro 3.8 bn in 2010 to 5.8bn in 2012) the Korean surplus appears have stabilised at around Euro 2.4bn as Korean FDI has led to increased production in the EU. As argued in a European Parliament report on the topic in October 2011, the EU – Korea PTA therefore appears to be broadly in line with ex-ante predictions and has probably contributed to a more mature balanced commercial relationship between the EU and Korea.¹²¹³

¹² <http://trade.ec.europa.eu/doclib/html/111834.htm>

¹³ See European Parliament 2011 The EU Korea Free Trade Agreement: One year after its entry into force,

Turning to US-Korea, USITC (2007), which does not allow for services trade, estimated a growth effect on US GDP of 0.1% (\$10.5 billion). US goods exports were estimated to grow by some \$10 billion, primarily in agricultural products, machinery, electronics, and transport equipment including passenger motor vehicles, and US imports by some \$6.5 billion, mainly in textiles, apparel, machinery, electronics and passenger motor vehicles and parts. KEI (2007), which included service effects, found an increase in US GDP of 0.14%. And KIEP (2005) estimated a gain in Korean GDP of up to 0.59% under static analysis and 2.27% under dynamic analysis (taking account of productivity and investment effects). Given the more recent ratification of KORUS it is unfortunately too early to say what effects there have been on the structure of US – Korean trade, but as noted above bilateral trade as a share of US total trade appears to have been in decline after 2010. This may be something KORUS will redress. And, as also noted above, sectors subject to liberalisation, like transport equipment have shown strong intra-industry growth.

With regard to EU-Colombia-Peru, D-G Trade (2009), which assumes all Andean Community countries will sign the PTA, finds negligible income effects on the EU, with GDP increasing by less than 0.1% under a dynamic analysis. The biggest potential Andean gainers are Bolivia and Ecuador, which have of course not negotiated agreements with the EU, with GDP increases of up to 2%. Effects on EU trade were estimated to be minor and Colombian exports were predicted to grow by between 6% (static) to 10% (dynamic). As predicted, exports of agricultural products have grown, at least in the case of Colombia and Peru. Investment flows to the Andean countries were expected to increase significantly, with a rise of up to 1.5% in gross output attributable to augmented FDI flows. In this regard it is too early to judge the effects on investment.

For US-Colombia, CRS (2012), drawing on a USITC study, found negligible effects on US income, GDP increasing by less than 0.05%. The welfare gains for Colombia were also estimated to be small, but larger than those for the United States. US exports were predicted to increase by 13.7% (but ranging between 2.4% and 44% in other studies), with gains in rice and dairy products, chemical, rubber and plastic products, machinery and equipment, and motor vehicles and parts. US imports are estimated to rise by 5.5%, concentrated on sugar, crops and dairy products. In a separate study, IIE (2006) finds that the PTA would have a significant trade diversion effect, reducing Colombian imports from third countries by 9%.

In summary, the ex-ante studies are consistent in finding relatively modest welfare gains, bigger proportionate gains for the smaller partner country and a strong intra-industry element in the trade gains. To date it is too early to say whether they have accurately predicted trends in trade growth and patterns as the studies tend to be based on the anticipated full period of implementation of PTAs and for all the PTAs studied here implementation has if at all only just begun. However, there is nothing in the recent trade figures to suggest that the estimates are not broadly plausible. The modest gains in welfare – notwithstanding often significant, if selective, impact on trade flows - are in part a reflection of the tendency to exclude sensitive sectors from liberalization commitments and partly a reflection of the fact that trade is only one determinant of economic growth. The modelling results need, however, to be interpreted with caution. The measurement techniques used to assess the ex-ante impact of PTAs can both overstate and understate the potential gains.

There are a number of ways in which CGE modeling will overstate potential gains.

- The understandable practice of focussing assessments on the impact of PTAs on the signatories to the agreements tends to understate the impact of negative effects on third parties.
- The usual exclusion from the baseline scenario of the effects of other agreements in the pipeline will tend to overstate the gains from a pending PTA.

- Whether the letter of a negotiated agreement is observed in practice will depend critically on the way in which the agreement is implemented. For example, in any agreement with Korea, the outcome will depend on the willingness and ability of the Korean government to reform the practices of the Chaebols. In any agreement with the United States the outcome will depend on the extent of sub-federal commitments.
- And the realisation of potential gains from market opening will also depend on the supply capacity of the exporting company. This cannot be assumed to be perfectly elastic.

However, and perhaps more importantly, ex ante modelling will in other ways understate potential PTA gains. The modelling approaches used are not well suited to capture scale effects arising from the reduction of non-tariff barriers, pro-competitive action and stimulus to innovation and productivity, and hence tend to underestimate the intra-industry responses and dynamic adjustment to economic integration. Similarly, the assumption in much modelling work of a fixed supply of labour will tend to understate the potentially large gains from the increased mobility (under Mode 4 liberalisation) of service providers.

Finally, it might be observed that, in terms of the impact of PTAs through trade-related structural adjustment, while trade shifts will impose strains, and opportunities, in specific areas, the corollary of the overall modest impact on GDP is that the overall structural impact of PTAs is likely to be relatively modest when compared with other developments such competition from China and other emerging economies, exchange rate re-alignment or changes in product design in response to environmental challenges.

4. SECTORAL ANALYSIS

The chapter provides a detailed comparison of PTA provisions on a sector-by sector-basis.

4.1 Tariffs

Tariffs are the first issue to be considered when assessing the scope and depth of any PTA and thus the degree of preference. Tariff preferences are of course WTO – plus in the sense that they reduce tariffs below the level of the MFN bound rate in the WTO. Article XXIV of the GATT requires PTAs to cover ‘substantially all trade (SAT)’. There remains no agreement in the WTO’s Committee on Regional Trade Agreements (CRTAs) on the definition of SAT. Suggestions range between 80% and 100% of all trade, with developing countries seeking more flexibility. The questions to be addressed are therefore: what the coverage of tariff liberalisation is for the EU, EFTA, US and Japan; what are the trends; is there variation from PTA to PTA (creating the famous spaghetti bowl (Bhagwati, 1991) effect)?

Availability of Information

Although tariff barriers are generally seen as being the more transparent form of protection compared to non-tariff or regulatory barriers, providing an answer to the questions above is far from straightforward. Assessing the degree of preference requires a detailed comparison of applied or multilaterally bound tariffs on a line-by-line basis with the preferential tariff. This was beyond the scope of the current study. The approach adopted was to consider the preferential tariffs of the EU, US, EFTA and Japan as set out in the various texts of the PTA agreements. This still requires a time consuming process of identifying which tariff lines are liberalised by any agreement, which are excluded and which are subject to partial liberalisation or tariff rate quotas (TRQs). Unfortunately the information provided by the various parties is not standardised, making the scope and sector

coverage of agreements often opaque. There is also no consensus on the measure for coverage and depth of tariff preferences in PTAs. For example, should coverage be determined by the number of tariff lines for which tariffs are reduced to zero as a result of a PTA, or should the measure be the percentage of trade at zero tariffs? (WTO, 2002; pg2) The different methods produce different results. What account should be made of reduced tariffs or the use of tariff rate quotas?

The approach adopted in this study has been to measure the percentage of tariff lines covered on the basis of the texts of the agreements at the HS 8 digit level. This approach is broadly in line with previous WTO work (WTO, 2002) and the WTO provides data on the preferential tariffs in PTAs for many, but unfortunately not yet all PTAs.¹⁴ This approach does not take account of the trade between the parties in each sector, so that removal of tariffs has equal weight regardless of the volume of trade in the product concerned. Methods of measurement that take account of trade will, on the other hand tend to overstate the importance of lines where tariffs are not in place or not restrictive.

4.1.1 The European Union

The European Union binds 100% of tariff lines in the WTO at a trade weighted average bound (and applied) MFN tariff of 2.8%. The EU maintains a higher level of tariff protection on agricultural goods, for which the trade weighted average MFN applied tariff, is 9.9% and just over 11% of EU agricultural imports are covered by special safeguards.¹⁵ Among the most supported and protected sectors are beef, sheep, goats, poultry, dairy, rice, barley, various fruits and vegetables, rice sugar, wine and tobacco.

Preferential trade agreements of the EU are open with respect to industrial goods and defensive on agricultural goods. The agreements typically use a short negative list for industrial goods in the EU schedule, excluding less than one per cent of tariff lines. By contrast, sections of the EU agricultural schedule have been excluded from reduction or liberalisation, allowing for the protection of key CAP products such as beef, poultry, dairy, olive oil, rice barley, wheat, rye, sugar and wine. The trend in EU PTAs appears to be a consolidation of 100% tariff liberalisation for industrial products and perhaps a trend towards greater liberalisation in agricultural tariffs. The PTA with Korea liberalises almost all tariffs across the board within transition periods of less than 7 years. But this may not be an indicator of future trends given that Korea exports few agricultural products. Having said this the PTA with Colombia and Peru, liberalises all but a few sectors (bananas and shrimps being the main exceptions). Bananas account for 18% of Colombian exports to the EU and shrimp about 1%. In the case of Peru bananas account for less than 1% of exports. Based on the methodology used here the figures for EU Colombia-Peru are likely to be very similar to those for EU Korea because few tariffs lines are excluded, but with bananas accounting for 18% of Colombian exports by value the EU position on agriculture would look much less liberal. It should be remembered that the EU offered more or less tariff free access to these countries as well as the ACP states under its GSP scheme. So the PTA guaranteed permanent tariff free access for Colombia – Peru. The EU also offers tariff free access for LDC exporters under unilateral preference schemes.

¹⁴ See for example

http://www.wto.org/english/tratop_e/region_e/rta_participation_map_e.htm?country_selected=GBR&sense=g for the EU data.

¹⁵ <http://rtais.wto.org/UI/PublicSearchByMemberResult.aspx?MemberCode=918&lang=1&redirect=1>

Table 4.1 The coverage (in percentage) of HS 8 tariff lines for imports into the European Union from various PTA partners

PTA partner	All Products			Agriculture			Industrial Products		
	Ex	Part	Full	Ex.	Part	Full	Ex.	Part	Full
South Africa (1995)*			55			27			61
Chile (2003)	6	4	90	25	17	58	0.3	0	99.7
Korea (2011)	0.3	0.2	99.5	1.5	0.5	98.0	0	0	100

Source: compiled by the authors from data taken from the text of each PTA covered

* figures from WTO 2002; annex 2 for comparison

Ex = number of tariff lines excluded

Part = number of tariff lines partially excluded

Full = number of tariff lines fully included

Asymmetry in EU agreements differs for the industrial and agricultural sections of the partners' tariff schedules. While tariff line coverage is symmetrical for industrial goods, partner countries are typically allowed a long transition periods. On agriculture, by contrast, the EU's Southern partners do not always benefit from full liberalisation. The right to convene discussions of sensitive agricultural sectors is extended to both parties and there is scope for bilateral safeguard actions as discussed in section 4.3.4 below. Having said this the trend seems to be towards more liberalisation even in agriculture.

4.1.2 The United States

The United States maintains a relatively low level of MFN tariffs. The trade weighted average bound MFN tariff for the US was 2.5% in 2012 (4.5% for agriculture and 2.0% in industrial goods) (WTO). Special safeguards are applied on 4.5% of agricultural products. Industries with the highest level of MFN tariff protection include dairy (10.5%), canned tuna (11.6%), apparel (11.1%), and footwear and leather products (10.7%). Tobacco, sugar, beef, peanuts and cotton have also traditionally been protected.¹⁶

American PTAs are characterized by fairly consistently comprehensive liberalisation of tariff lines by both parties. In agreements such as NAFTA, US Chile, US Korea and US Colombia more or less 100% of tariff lines in the American schedule were liberalised entirely by the end of the transition period. While two to three percent of American lines were subject to tariff rate quotas, all such quotas were eliminated by the end of the transition period. American agreements are thus highly WTO-plus with regards American tariff elimination, albeit from a low initial level of tariff protection. In the PTA with Chile, the U.S. also made use of reference prices and quantities for a small number of U.S. tariff lines

¹⁶ Rates are ad valorem equivalents as calculated by the International Trade Commission ITC, from *The Economic Effects of Significant U.S. Import Restraints*, USITC Publication 3701, p. xvii www.usitc.gov/publications/332/pub3701.pdf

(0.5% of the American schedule) as a trigger for safeguard measures. All such measures were forbidden after a transition period.

Table 4. 2 The coverage (in percentage) of HS 8 tariff lines for imports into the United States from various FTA partners

PTA Partner	All Products				Agriculture				Industrial Products			
	Ex	Part	Full	TRQs	Ex	Part.	Full	TRQs	Ex	Part	Full	TRQs
*Canada (1988)	n.a.	n.a.	100	n.a.	n.a.	n.a.	98	n.a.	n.a.	n.a.	100	n.a.
*Mexico (NAFTA 1993)	n.a.	n.a.	90	n.a.	n.a.	n.a.	87	n.a.	n.a.	n.a.	91	n.a.
Chile	0	0	100	1.8	0	0	100	10	0	0	100	0.05
KORUS	0	0	100			0.5	99.5				100	
Colombia	n.a.	n.a.	99 approx		n.a.	n.a.	n.a.	n.a.			100	

Source: compiled by the authors from data taken from each of the PTAs

* figures from WTO 2002; Annex 2 for comparison

Ex = number of tariff lines excluded from liberalisation;

Part = number of tariff lines partially excluded;

Full = number of tariff lines fully included (i.e. liberalised)

TRQs = tariff lines subject to tariff rate quotas or other quotas

The US 'gold standard' thus brings the US well within the current range of definitions of SAT and explains why the US is pressing for 100% or near full coverage. However, not all U.S. PTAs have been as strictly liberalizing. The US-Australia PTA (2004) allowed the U.S. to maintain duties after the transition period on sensitive agricultural tariff lines. Duties will remain on some U.S. beef, dairy, cotton, peanut and horticultural product tariff lines. The U.S. also placed tariff-rate quotas on some dairy products, which will increase indefinitely by a fixed percentage but will not be removed completely. Australian agricultural tariffs, on the other hand, were fully liberalised. On ratification, the U.S.-Korea PTA will also include important exclusions, but mostly on the Korean side.

The percentage of lines in the agreements with long transition times was relatively small: at least 79% of American tariff lines were liberalised immediately in each of the agreements, and at least 92% of lines were liberalised within 6 years. US PTAs closely scrutinised in the study are also characterized by comprehensive tariff elimination by trade partners and asymmetry in tariff reductions favouring the US's PTA partners is either zero or very nearly so. American PTA partners generally did not make more extensive use of longer transition times than the U.S., and partners introduced fewer tariff rate quotas as a percentage of tariff lines in all of the studied agreements. The exception is with the less developed partners where there are generally longer transition periods. This is a pattern also found in the EU draft EPAs for example. Approximately 34% of Moroccan lines had transition times of over 8 years—a significantly greater figure than for the American schedule—and transition times of 18, 19 and 25 years were allowed in a limited number of cases.

The United States' PTA tariff schedules are presented as comprehensive lists, specifying line-by-line tariff treatment in both countries' schedules. The U.S. used the same format for all of the agreements studied, and designated tariff rate quotas for similar sectors. Southern trade partners conformed to the American style of tariff schedules in all of the agreements analysed.

4.1.3 EFTA

With average applied MFN tariffs ranging between 7.8 and 8.6%, the EFTA countries individually maintain higher average tariffs than the EU, US or Japan. Trade weighted averages being at around 3.5% overall but between 30 and 40% for agriculture and 1-2% for industrial products. Norway and Iceland each bind their agricultural lines at an average of greater than 109%.¹⁷ EFTA countries also protect agriculture through the use of special safeguards covering 37% for example in the case of Switzerland. The EFTA countries enter into trade agreements as a group, but negotiate agricultural schedules independently and do so for primary agricultural products on a bilateral basis. Within the common free trade agreement, all partners to the agreement provide a Protocol detailing positive-list treatment of processed agricultural goods. In parallel to the main agreement, each of the EFTA member countries then executes a bilateral agreement with the partner country on primary agricultural goods. Treatment of tariff lines varies between and within the agricultural annexes, and includes ad valorem tariff elimination, specific duty elimination, EU-compatible treatment, currency-denominated tariff reductions, and deductions from the existing MFN level. As a result, while industrial treatment is shared by all of the EFTA countries and their partners, the agricultural tariff coverage varies by EFTA member. This study has analyzed the agreements from the perspective of Switzerland or Norway depending on the availability of preferential tariff schedules for the PTAs on the WTO website.¹⁸

Like the PTAs of the European Union and Japan, EFTA agreements are liberal on industrial goods and defensive on agricultural goods. Industrial tariffs are eliminated with a short positive list of excluded goods; in the investigated agreements, those lists included dairy-related products and animal feeds. With large portions of the agricultural schedules excluded entirely (see Table 4.3), EFTA agreements afford extensive protection for sensitive agricultural products, including beef, dairy, cereals, milling products, animal and vegetable fats and oils, sugar products, cocoa products, and others. There does not appear to be a trend towards greater liberalisation.

Table 4.3 The coverage (in percentage) of HS 8 tariff lines for imports into EFTA (Switzerland or Norway were taken as a proxies for EFTA)

PTA partner	All Sectors				Agricultural Products				Industrial Products			
	Ex	Part	Full	TRQs	Ex	Part	Full	TRQs	Ex	Part	Full	TRQs
* Israel	n.a.	n.a.	79	n.a.	n.a.	n.a.	23	0	0	0	100	
Chile	17	5	78	0	48	18	34	0	5	0	95	
Korea	5	1	94	n.a.	23	3	74	n.a.	0	0	100	

Source: compiled by the authors from data taken from the text of each PTA covered

* figures from WTO 2002; Annex 2 for comparison

Ex = number of tariff lines excluded

Part = number of tariff lines partially excluded

Full = number of tariff lines fully included

TRQs = tariff lines subject to tariff rate quotas or other quotas

¹⁷ All EFTA figures from WTO Statistics Database, www.stat.wto.org

¹⁸ <http://rtais.wto.org/UI/PublicSearchByMemberResult.aspx?MemberCode=756&lang=1&redirect=1>

As in EU agreements, partner countries are allowed the extensive use of longer transition times for the elimination of industrial goods, a consistent source of asymmetry favouring Southern partners. That said tariff line coverage for both industrial and agricultural goods was highly symmetrical. The extensive treatment of agricultural lines by both parties in EFTA agreements means that the agricultural agreements do not afford significantly greater lenience for Southern partners. In terms of trends it is difficult to assess on the basis of the figures for Korea, which is not typical in that it does not export agricultural products to any extent. The data for Norway Korea that were available show a move towards liberalisation, but this cannot be expected to prevail in PTAs with countries that are more competitive in agricultural products.

4.1.4 Japan

Japan binds 99.6% of tariff lines in the WTO at an average MFN rate of 2.1% trade weighted tariff, with 11.2% for agriculture and 1.3% for industrial products, indicating lower protection for industrial goods but higher protection for agriculture than the EU or US.¹⁹ While agriculture accounts for only 1.1% of Japanese GDP,²⁰ Japan has been defensive in its approach to agricultural tariff liberalization. The simple average MFN rate for agricultural products of 23.5%. Japan provides high tariff protection for dairy, vegetables, milling industry products, sugar products, and footwear, and often uses large non-ad valorem tariffs to do so. Japan also maintains tariff rate quotas on dairy, rice, barley, wheat, silk-related products, and edible fats and starches, often with peak duties on out-of-quota rates.²¹

Japan's willingness to liberalise through PTAs has increased over time. In the 2002 Japan-Singapore PTA, Japan's first—Japan took a highly defensive approach excluding 81.5% of its agricultural schedule (over 1600 lines), and 7.2% of industrial lines. Moreover, of the relatively few Japanese agricultural lines that were included in the agreement for duty-free treatment, 97.5% had already been bound at zero in the Uruguay Round, rendering the agricultural schedule largely meaningless. The Japan-Chile PTA, released in March of 2007, took the form of a comprehensive list (rather than the schedule listing only some sectors) and liberalised more of the agricultural tariff lines and 98.3% of industrial tariffs. The Japan Viet Nam PTA on the other hand does not seem to have maintained the momentum. As table 4.4 shows there is if anything less liberalisation in this later agreement. Tariff liberalisation is also spread over 15 years for some sectors.

Table 4.4 The coverage (in percentage) of HS 8 tariff lines for imports into Japan from selected PTA partners

PTA partner	All Products				Agriculture and Fishery				Industrial Products			
	Ex	Part	Full	TRQs	Ex	Part	Full	TRQs	Ex	Part	Full	TRQs
Singapore (2002)	24	0	74	0	82	0	18	0	7	0	93	0
Chile	12	0.5	88	0.5	48	2	50	2	2	0	98	0
Viet Nam	14	n.a	86	n.a	47	n.a.	53	n.a	3.5	n.a	96.5	n.a

Source: compiled by the authors from data taken from the text of each PTA covered

Ex = number of tariff lines excluded

Part = number of tariff lines partially excluded

Full = number of tariff lines fully included

TRQs = tariff lines subject to tariff rate quotas or other quotas

¹⁹ http://stat.wto.org/TariffProfiles/JP_E.htm

²⁰ WTO Trade Policy Review 2002, WT/TPR/S/107, p. 55

²¹ WTO Trade Policy Review 2002, WT/TPR/S/107, pp. 55-56

Due to Japan's relative defensiveness, Japan's PTA partners were more liberal in agricultural and industrial goods, and used fewer quotas (where quotas were used) than Japan. Singapore and Chile respectively liberalised 26% and 7% more of their domestic schedules. While the longer transition periods used in more recent Japanese agreements have often been extended to both parties, the asymmetry in the most recent agreement with Thailand allowed Japan the longer maximum transition period (16 years, versus 11 years for Thailand). The existing asymmetry in Japanese agreements thus provides greater lenience for Japan than for its partners. With the 2005 agreement with Mexico, Japan shifted to a comprehensive list approach, and extended transition times to as long as 11 years; more recent agreements with Malaysia, Chile, Thailand and Viet Nam include transitions of up to 16 years.

4.2 Rules of Origin

Rules of origin are central to PTAs because without an ability to determine origin there can be no preference. The detail involved soon leads policy makers to seek simple explanations and solutions, but these are not readily available and modification of RoO can effectively reverse liberalisation by creating trade costs and undo efforts to facilitate international supply chains.

There are only general principles specified in multilateral rules, such as origin being determined by products being 'wholly' produced (such as in the case of ores or commodities the most restrictive criterion) or 'substantially' transformed in a country or customs territory to impart origin status. Just how 'substantial transformation' is defined depends in practice on which of three broad models of preferential RoO is used: the European Union model, the US or NAFTA model and a third model that tends to find more application in Asia and in developing countries. As a general rule, the more developed the economy the more complex the rules of origin tend to be.

Criteria: There are three general criteria used to determine the originating status of products: change of tariff heading (CTH), value content/added (VC) and technical requirements (TR). Change of tariff heading means that origin is established when the work undertaken within the country concerned results in a change of tariff heading. This change can be at the 4 digit, 6 digit or 8 digit level. CTH at the 2 digit level requires more transformation than at the 8 digit level and is therefore in general more restrictive. Value content is when the value added exceeds a set percentage that can be anything from 25% to 70%, but is typically around 40%. The higher the value content the more restrictive the RoO. The third criterion specifies processes that have to be carried out in the country concerned for the product to achieve originating status. To add to the complexity of the rules they may sometimes require two criteria to be satisfied, or alternatively and less restrictively, they may offer alternatives. Developed economies like the EU and US have detailed specific rules of origin in which the criteria will vary from product to product. When the EU and US rules differ, as they often do, this creates the famous spaghetti bowl or in the case of Asia the noodle bowl effect. When origin rules deviate from an otherwise regular pattern, by requiring higher value content or specific processing this generally represents a restriction on trade. Certain sectors, such as in textiles and clothing, are characterized by more complex rules (such as sequential changes of tariff headings from yarn to thread, thread to cloth and cloth to clothing) that have been used to provide strong incentives for preferential suppliers to use yarns and fibres from the hub country – even if sourcing from this location is more expensive/ less efficient. When compliance with RoO can account for up to 5% of production costs they become more important than tariffs in many manufacturing sectors.

In the literature it is often argued that preferential rules of origin should be simplified in order to ensure that they do not represent barriers to trade. But simplification is not always so easy. On the face of it the VC criterion appears simple, but compliance may require costly audit trails to prove

conformity. Table 4.5 provides one indication of the degree of restrictiveness of origin rules depending on the methods used.

Much of the text of protocols to PTAs on RoO concerns the detail of the form of certification and procedures to be followed. For the most part these are broadly common to all agreements, although as in the case of other aspects of PTAs, the procedural measures tend to be more detailed and specific in EU and US PTAs. But the real detail in RoO comes in the form of the specific rules for each product.

Proof of origin can take a number of forms. The method used most in the past was the issuing of certificates of origin (OC) by the authorities of the exporting country. This represents a trade cost and requires reasonably developed capacity in the country concerned. Exporter declarations (ED) or sometimes statements by the importers (as in the case of the US) accompanying shipping documents or invoices provides a less costly alternative. A third form of proving origin is by means of certification by approved exporters (AE), which also reduces the costs of customs clearance and processing. But importing authorities also wish to be confident that the declarations are correct, so all rules of origin systems also include provision for the authorities of the importing country to verify that the exporters are correctly monitoring the working of goods when certifying origin status. The trend in recent years has been towards a greater acceptance of exporter declarations and approved exporters.

Cumulation: is when the value-added or working of a good in a country is cumulated (added) to that of the final exporting country when it comes to proving origin. There are three types of cumulation, bilateral, diagonal and full cumulation. Bilateral cumulation concerns the two parties to a PTA, so that goods originating in one country are first exported to the PTA partner where further value is added before the good is re-exported back to the first country. This is the most common form of cumulation. Full cumulation applies when the value of goods from any source can be used to prove origin. This is clearly seldom used as it undermines the preference. The most important form of cumulation is diagonal cumulation. This applies for example, when goods originating in Colombia are exported to Peru where they are further worked and then exported to the EU. With diagonal cumulation the value added in both Colombia and Peru is cumulated to prove origin. Regional cumulation is when goods in any country in a region can be cumulated. Such regional cumulation facilitates regional supply chains and thus could be said to promote regional integration.

Duty drawback; is another means of facilitating or even promoting supply chains. This is the reimbursement of duty (tariffs or import taxes) on inputs imported into a country that are used in the production of an assembly or product that is finally exported. Duty drawback has been used by the US in NAFTA, but the EU has traditionally not provided for duty drawback. One final provision worth mentioning concerns *de minimis* rules that allow a certain percentage of non-originating products in any final product without this affecting the origin of the final export.

Table 4.5 - Typology of rules of origin

Coverage	Criteria	Secondary criteria	Tertiary criteria	Rough indication of restrictiveness 5 most restrictive, 0 liberal
Product specific	Wholly obtained			5
	Substantial transformation	CTH	Chapter (CTC)	4
			HS 2	
			Heading (CTH)	3
			HS 4	
			Sub-heading (CTS)	2
			HS 6	
		Item (CTI)	1	
		HS 8-10		
		VC	Domestic/regional value content	High VC means more restrictive ranges 25 – 60 typical
				2-3
			Import value	
			Value of parts	
		TR		3-4
General provisions	Deminimis %			Liberalising effect
	Roll-up absorption			Liberalising effect
	cumulation	bilateral		4
		diagonal		2
		full		0
drawback			Liberalising effect	
Administration	certification	Private/supplier		2
		Public/govt.		4

Based on Garay and Lombaerde 2004, author amendments

4.2.1 The European Union

The PanEuro approach dates from 1997 when the EU standardised the rules used for its various PTAs with the EEA, Switzerland and the accession states in Central and Eastern Europe. In 2003 it was agreed to apply the PanEuro approach to the whole of the Euro-Med region in an attempt to promote intra-regional trade. The PanEuro approach forms the basis of the EU's (and EFTA's) RoO in its subsequent PTAs.

While harmonised across the various EU (and EFTA) agreements the PanEuro system is still complex. In 60% of cases it uses CTH (HS 4 level change of tariff heading) but in 25% of cases there is also a value content criterion. Some 20% of products require technical requirements. A reform in preferential rules of origin for trade with developing countries has been initiated with the reform of the GSP rules of origin, which have moved to adopt a uniform value content rule. The EU therefore

maintains the full set of specific rules for PTAs with developed economies such as Korea but is applying the 'simplified' system for the GSP. The simplified system is also envisaged for Economic Partnership Agreements (EPAs) with the ACP but only in the future. For middle ranking developing countries, as illustrated by the PTA with Colombia – Peru, the EU has required the use of the standard, specific rules, but initiated a process of reform in which rules of origin will be simplified progressively, sector by sector.

In terms of proof of origin the EU has moved from a system based on certification by competent authorities in the exporting country with the option of invoice declarations (for example in the EU Mexico agreement), to a system that included approved exporters.²² In the EU Korea agreement there is a choice between supplier declarations for small value shipments (of below Euro 6000) or approved exporters, with powers for the importing authorities to verify of course. In the case of EU –Colombia Peru there is a choice of all three methods.

EU rules of origin are perhaps most distinctive in their application of cumulation. Following the practice of diagonal cumulation for the whole ACP region, the EU includes full cumulation with the EEA and diagonal/regional cumulation in many of its PTAs, largely because this serves the EU policy aim of promoting regional integration as well as facilitating value chains. There is only bilateral cumulation with developed economies, such as Korea. With the Colombia-Peru PTA the EU provides for cumulation within the Andean Community, even though not all members are signatories to the agreement, but 'on application by one of the parties' there is also scope to extend cumulation to other regions with which the EU has concluded PTAs, such as Central America (including Mexico but not of course the US or Canada) and any countries in Latin America that conclude PTAs with the EU (i.e. Mercosur etc.). The condition for such regional cumulation is that the rules of origin are the same.

The EU agreement with Korea provides for duty drawback. This is an innovation for the EU which has previously not included drawback in any PTA. This has been an important issue for the EU automobile sector in particular which has expressed concern about Korean automobile exporters gaining a further competitive advantage over car firms producing in the EU as a result of this provision (European Parliament, 2010). As a result specific monitoring provisions were added to the EU – Korea PTA (Protocol on Rules of Origin Art 14) for cars imports, and there are provisions allowing one party to the agreement to consult with a view to limiting duty drawback if, for example, there is a change in sourcing patterns after the entry into force of the agreement. There is also a review of the drawback provisions as a whole after 5 years. The EU PTA with Colombia- Peru contains no duty drawback.

The PanEuro framework provides for a 10% *de minimis* rule, but there are exclusions to this in particular for textiles and clothing.

4.2.2 The United States

The US uses a NAFTA model, which is effectively applied to the US-Korea and US – Colombia PTAs. NAFTA contains some of the most complex RoO using the full range of criteria shown in Table 4.5. Some 70% of products use multiple criteria (families) for defining origin. CTH at HS 4 level is used for 45% of all products, but in only 17% of products is CTH the only criterion. In 17% there is one other criterion and in 7% two other criteria. The more restrictive change of tariff heading at the 2 digit level (CHC) criterion is used in 42% of cases (for 25% of products by itself). The more liberal CTI HS 8 level is used for change of tariff rules in just 6% of cases. Value content (of 50 or 60%) is used in 30% of cases and technical requirements in 43% of cases. There are also specific RoO for sensitive products such as

²² The importer is liable for any false declaration or incorrect certification and must pay the full tariff unless any irregularity is corrected within 30 days.

textiles and clothing in particular. Here NAFTA uses the infamous yard forward rule mentioned above, which in effect provides a captive market for US producers of textiles. (Cadot, 2004)

The US approach to RoO with less developed countries with which the US has little merchandise trade has been simpler in that it makes use of a 35% VC rule for most products, for example the agreement with Bahrain.

The NAFTA model has long used self-certification by exporting countries or statements by importers. If there are questions as to the validity of the certificate than partner officials (private sector) can make inspections in the host country. The NAFTA model provides for a 7% *de minimis* rule, but only bilateral cumulation and roll up and duty drawback is precluded five years after the agreement.

4.2.3 EFTA

The EFTA PTAs largely follow the PanEuro model in RoO. The framework provisions for EFTA PTAs are also more or less the same as the PanEuro approach, but with a number of specific changes. First, the EFTA states negotiate agriculture (HS Chapters 1-24) separately and thus determine their own rules of origin for these sectors in which wholly obtained would tend to figure prominently. For Chapters 82-92 that were negotiated by EFTA as a group there are also complex rules of origin. For the other chapters the EFTA offers a choice between CTH and VC (at 50%) as for example in the Korea PTA.

Table 4.6 Outline of rules of origin provisions in PTAs

Regimes	Selectivity	CTC	CTH	CTS	CTI	ECT	VC	TR	Drawback	Admin	Cum	De Minimis
Pan Euro	SS		x				X+	x	no	OC, ED	Bil, Diag/regional	10%
EU Korea	SS		x				X+	x	Yes, review after 5 years	ED, AE	Bilat	10%
EU Col-Peru	SS		x				X+	x	no	OC, ED, AE	Diag	10%
NAFTA	SS	x	x	x	x	x	X++	x	first 5 years	ID,	Bilat	7%
US Korea	AB	v	v			v	X+++	x	first 5 years	ID	Bilat	10%
US Colombia	AB		v				X+++			ID	Bilat.	10%
Japan-Chile	SS	x	x			x	X++	v		OC,	Bilat	10%
Japan-Viet Nam	SS	x	x			x	X++++	v		OC	Bilat	10%

OC origin certificate by public body
ED exporter declaration
AE approved exporter
ID importer declaration

CTC change of tariff heading at HS 2 level
CTH change at HS 4 level
CTI change at HS 6 level
CTS change at HS 8 level
ECT exceptions for particular products

SS = sector specific
AB = across the board
x = used extensively
v = less used
X+ = MC 30-50%, ex works
X++ = RVC 50-60% (60 FOB, 50 cost prod.)
X+++ = MC 30-70%; RVC 25-35%

X++++ = RVC 45-55%
X+++++ = RVC 45-55%
X++++++ = RVC 35%
Pub = certification predominantly by customs/public bodies
Priv = certification by private agents including exporter
Cum = cumulation (bilat=bilateral; diag=diagonal; f=full)
De Min = de minimis rule

Source: Garay and Lombaerde, Dec 2004. Based on Estevadeordal and Suominen modified by the authors.

4.2.4 Japan

In general, Japan Economic Partnership Agreements (EPAs) usually combine a CTH and a VC for processed and manufactured goods. VC differs according to the partner (VC 40% for Viet Nam with CTH at the 4 digit level, and VC 60% for Singapore). The nature and thus restrictiveness of the RoO appear to depend on the economic capabilities of the partner. For example, Chapter 24 (tobacco) of the Japan-Mexico PTA specifies a 70% VC and does not allow cumulation - a result of pressure from domestic lobbying interests - compared to 60% VC and cumulation with Singapore or 40% with

bilateral cumulation with Viet Nam. Chapter 86 (transport equipment) specifies CTH plus a 65% RVC for road vehicles in the Japan-Mexico PTA, but only a CTH rule for Singapore. Clothing (Ch 61-62), however, is more restrictive in the Singapore agreement as it requires a CTH plus 60% RVC, as opposed to only CTH with Mexico. Japan does not provide for alternative (either/or) methods for proving origin.

Japan tends to use official certification of RoO. In the Japan – Mexico FTA certificates of origin have to be issued by the competent governmental authority or its designees in the exporting country. If there is doubt as to the accuracy of the origin claim the importing authority may request a verification visit to the exporting country. This is similar to the NAFTA model (verification visits – although they are conducted privately), whereas the Pan-Euro model does not allow for such verification visits.

4.3 Commercial Instruments

4.3.1 Introduction

The PTAs considered include four kinds of trade remedy. The most important for this study is bilateral safeguards, which feature in all agreements. Some agreements also include an additional bilateral agricultural safeguard provision and most, but not all include provisions on 'global safeguards', anti-dumping and subsidies and countervailing measures, which tend to simply adopt existing GATT provisions. Indeed, even the bilateral safeguards draw on the WTO text for safeguards.

Bilateral safeguards enable parties to a PTA to either *suspend liberalisation* or reintroduce tariffs up to the MFN tariff or the MFN tariff that prevailed at the time preferential liberalisation began. The *criterion* for applying bilateral safeguards draws on GATT practice so that action is justified when imports cause or threaten to cause serious injury. The procedures used in the assessment of such injury also draw in all cases on those set out in GATT Art XIX and Arts 3 and 4 of the Uruguay Round Agreement on Safeguards and most PTAs incorporate these procedural measures directly. The procedural measures also include transparency requirements to notify PTA partners of any investigations and/or provide information on the assessment of injury and other factors. The period for which bilateral safeguards can be applied is usually 2 years, but there is often scope to extend this to a maximum of 3-4 years if there is evidence of the industries that benefit making efforts to adjust to the increased competition. Bilateral safeguards can also only be applied during the transition to liberalisation. In cases of emergency, provisional safeguards can be introduced without the completion of all detailed assessment. In all but one of the PTAs studied such provisional safeguards can be taken for 200 days (the same as in GATT Art XIX). All PTAs provide for compensatory withdrawal of concessions when a bilateral safeguard is applied if the party applying the safeguard does not offer or agree to compensation in the form of greater concessions. Some countries (including the EU) also include *bilateral agricultural safeguards* which are generally limited to a specific number of 'sensitive' agricultural products listed in schedules. Agricultural safeguards of this kind can be taken when triggers, such as scheduled quotas, are exceeded and there is only an obligation to notify the other party after they have been applied. Some PTAs provide for *global Safeguards* but these tend to simply reaffirm existing rights and obligations under Art XIX of the GATT or Art 5 of the Agreement on Agriculture. All PTAs prohibit duplication of safeguard measures (i.e. application of both a bilateral and a global safeguard) and the use of bilateral dispute settlement on global safeguards, anti-dumping or countervailing duties where these provisions simply apply WTO rules, so

that there is not conflict between WTO and bilateral settlement rules, although the KORUS stresses that they still provide binding rights under the agreement.²³

Almost all PTAs (including the EU) *allow for anti-dumping and countervailing duties* under WTO rules against preferential partners. Some agreements are however, WTO-plus in that they add provisions such as *public interest* (an assessment of user and consumer interests), the use of the *lesser duty rule* (duty to remove injury or dumping whichever is the lesser) and *de minimis*. As anti-dumping and SCVD are covered by WTO rules, all PTAs considered also exclude these provisions from bilateral dispute settlement. *Institutional provisions* provide for recourse to the over-arching joint/trade committees in the case of disputes and some agreements, such as the EU and US agreements with Korea, provide for *specific trade remedy committees*, which reflect a certain expectation that there will be some use made of remedies. Some PTAs, in particular the EFTA PTAs, include a general review after a number of years of the remedy rules and whether they are needed (for example in the EFTA – Korea PTA).

4.3.2 Comparison of the approaches

There are only minor differences across the various PTAs. In most cases there is a remarkable similarity between the agreements and a very close link to multilateral agreements. Although small differences in the text can be important, differences in application are likely to be far more important and on this front it is rather early to judge with regard to the more important PTAs.

The EU provides for a longer maximum period for bilateral safeguards. The norm in the EU and US agreements is for a 2 year period for any bilateral safeguard, but the EU then seeks scope for a further 2 years up to a maximum of 4 years in its agreements (Korea and Colombia-Peru). The US Korea agreement provides for a maximum of 4 years but US –Colombia only 3 years. EFTA appears to seek only a 3 year maximum period, while for Japan it varies between 3 and 4 years.²⁴ In all cases the extension of the bilateral safeguard is linked to some evidence of adjustment by the injured industry, but none of the agreements specify how adjustment should be evaluated or measured, so the assumption must be that the link to adjustment will not provide a major hurdle for extensions of the safeguard.

The EU PTAs provide less scope for remedies in a number of respects compared to the US. In EU PTAs compensatory measures can be taken after two year (Both EU-Korea and EU Colombia – Peru). The existing GATT Art XIX provides for a lag of 3 years before compensation can be taken.²⁵ As the US, EFTA and Japanese texts reaffirm rights and obligations under Art XIX it appears to mean that the lag before compensation can be taken (as opposed to agreed) is longer, thus enhancing the scope to apply 'cost-free' bilateral safeguards.

Another aspect in which the EU has less scope is anti-dumping. The EU PTAs include *the lesser duty rule*, as does the EFTA agreement with Korea. The US, in line with its policy on anti-dumping makes no reference to the lesser duty rule. The EU also has best endeavours wording on the use of *public interest* criteria. Again US PTAs make no reference to this. EFTA has a best endeavours provision in its

²³ Note that in NAFTA Art. 1904 provides each party with the right to replace judicial review of final anti-dumping or countervailing duty determinations by a bi-national panel review. Art.802 of NAFTA also states that when a country that is a party to NAFTA takes a safeguard action, its NAFTA partners shall be excluded from the action, except where their exports of the good in question (a) account for 'a substantial share' of imports (among the top 5 suppliers) and (b) contribute importantly to a serious injury or threat thereof.

²⁴ 3 years in Japan-Singapore; 4 years in Japan Mexico; and 5 years in Japan-Malaysia. In the agreements with Malaysia and Singapore, tariff rate quotas and quantitative restrictions are not considered permissible safeguard measures.

²⁵ Again much depends on how the instruments are used. Parties to PTAs can agree to offer compensation and can do so immediately if they wish. So the fact that texts differ may be less important than how they are applied.

agreement with Korea to refrain from applying anti-dumping actions and will review the need to retain scope for AD on preferential trade between the parties. Japan makes no reference to anti-dumping in its PTA agreements so it will simply apply Art VI of the GATT.

PTAs have little to say on countervailing duties and all reaffirm rights and obligations under the WTO Agreement. Some EU PTAs have provisions on subsidies (see section on competition below). The only point worth mentioning is agricultural export subsidies. The PTAs with Colombia and Peru all have provisions restricting agricultural export subsidies. In the case of the EU this relates only to products covered by the EU liberalisation schedule (Art 32 EU Colombia-Peru PTA). For the US it appears to be a general prohibition (Art 2.16 US Colombia) as it is for EFTA – Colombia (Art 3.4). In each case Colombia is able to take countervailing action if subsidies are applied. The agreements with Colombia (and Peru) also allow for the Colombian and Peruvian price band system to continue and reciprocally for the EU entry price and EFTA price compensation provisions to remain.

Asymmetric Provisions: EU agreements provide some asymmetric treatment in favour of developing countries. EU PTAs with DCs such as with the Euromed partners and with ACP states in the draft of final EPA agreements allow for 'infant industry' safeguards in the form of an asymmetric extension of the scope to apply bilateral safeguard measures for the DC party for up to 10 years when 'infant industries' are threatened. EFTA, such as in the EFTA-Morocco agreement, also offers the same scope to increase customs duties to protect its infant industries, or certain sectors undergoing restructuring or facing serious difficulties, particularly where these difficulties produce important social problems. No significant asymmetric provisions relating to trade remedies have been identified in the agreements of the United States or Japan.

4.4 Services

4.4.1 Introduction

The pursuit of deep integration is a dominant feature in the evolution of PTAs. This is nowhere more apparent than in the tendency for PTAs to include provisions dealing with trade in services, leading to commitments in respect of often sensitive areas of domestic regulation in sectors such as health and education that frequently go beyond those undertaken in the framework of the WTO, whether through the application of "negative listing" or through stronger undertakings on mode 4 delivery of services (via the short-term movement of service providers).

Underlying the pursuit of the liberalisation of trade in services within PTAs is the expectation that the potential gains from services opening are likely to be significantly greater than the gains from goods liberalisation – with particular gains accruing to developing countries (Roberts and Heydon 2012, page 171).

Where services liberalisation is achieved through increased regulatory transparency this will bring benefits to all parties, not only to the signatories of the PTAs in question; the benefits are thus, in a sense, multilateralised. However, this does not preclude the preferential application of regulatory reform in the framework of a PTA, whether in the provision of market access or of national treatment.

4.4.2 European Union

As noted earlier, EU PTAs are relatively ambitious in services even though they use a positive list approach. EU-Korea uses a GATS-based, positive list, structure but goes beyond GATS commitments and in some areas beyond KORUS by giving EU companies access to direct provision of cross-border satellite services, to certain auxiliary air transport services and to treatment of non-industrial waste. Unlike US-Korea, it also deals with aspects of maritime transport (LSE Consortium 2012a). The PTA will

give EU suppliers access to construction activity without a sub-contracting requirement and participation in the Korean express delivery market. It will also improve both market access and national treatment for EU lawyers (mode 4) and law firms (mode 3). One notable element is the introduction of a panel of experts to rule on abuse of the prudential carve out in financial services. Coverage extends to central, regional and local government entities. And Parties shall not impose maximum percentage limits on foreign shareholdings unless explicitly specified Annex 7-A. This provision can be seen as recognition of the particular importance of Mode 3 delivery, especially for the EU (CEPS 2007).

The usual exclusions, however, still apply, notably in audio-visual (unlike KORUS) and maritime cabotage. For the EU, health and education services cover “only privately funded services”. However, “the participation of private operators (is) subject to concession” and possibly an Economic Needs Test (ENT)(Annex 7-A-2). Numerous small exclusions under negative listing apply for the new Member States as in other EU PTAs. Among Korean reservations, cross-border provision of architectural services requires commercial presence in Korea, and retailing of second-hand cars is subject to an ENT. And both the EU and Korea maintain an MFN exemption for differential treatment deriving from an economic integration agreement to which they belong. In the case of the EU, however, this applies only where the integration agreement has higher levels of obligation than those found in EU-Korea. According to one commentator, this would apply to the case of EU-EFTA cooperation (Ahn 2010).

One particular provision– also found in EU-Colombia-Peru - may need careful watching: that nothing should be construed to prevent measures “necessary to protect human, animal or plant life and health” (Art.7.50) [cf GATT Art XX]

The EU-Colombia-Peru accord (provisionally applied from March 2013) is a GATS-based agreement with positive listing. It is quite ambitious, with commitments from Colombia and Peru that go beyond their GATS undertakings, including on mode 4, and what they have offered in other PTAs (LSE Consortium 2012b). Improved access for EU service providers is expected in engineering, printing, financial and professional services, maritime transport and telecommunications. Liberalisation commitments cover central, regional and local governments and authorities. The Parties undertake not to apply customs duty on electronic commerce. Extensive commitments in telecommunication services cover competitive safeguards, obligations of major suppliers, interconnection, scarce resources, universal service and cooperation between regulatory authorities (Articles 141-150). In the EU-Colombia text, value added telecommunication services are expressly covered. And in financial services, as with the EU-Korea agreement, the other Party is allowed to provide any new service also provided by local suppliers (Article 156). However, the usual exceptions apply, including audio-visual, maritime cabotage and air transport services. All three Parties apply extensive conditions on mode 4 delivery covering professional and educational qualifications, length of stay, nature of remuneration, and economic need. For the EU, numerous national reservations often apply, including, for example, on permitted forms of establishment again primarily in new member states. And access to health and education services is constrained in the same way as in EU-Korea.

The PTA contains a measure of asymmetry via the provision (Article 107) acknowledging “differences in the level of development of the Parties” and the reservation by Colombia permitting preferences to disadvantaged minorities and ethnic groups (Annex VII). Colombia will only permit the establishment of bank branches four years after entry into force of the agreement.

4.4.3 United States

Trade in services is among those areas where the US would claim to be setting a “gold standard” in its PTAs. Thus KORUS (signed June 2007 and (renegotiated) December 2010 entered into force 15 March

2012) shares many of the positive features of EU-Korea, with improved access expected, for example, for US service providers in the fields of law, finance and insurance. In telecommunications, two years after entry into force US companies will be able to own up to 100% Korean telecom providers. And the agreement provides for the recognition of educational and other standards “through harmonization or otherwise” and either by agreement or by autonomous action (Article 12.9).

KORUS, goes beyond EU-Korea in a number of respects. It uses a negative listing approach, and has ratcheted commitments such that when new services appear they are automatically covered in the PTA unless listed as an exception (CRS 2013). KORUS also provides for the right to non-establishment in the cross-border supply of a service (Article 12.5), another GATS-plus provision. And the agreement contains commitments in the area of audio-visual with Korea undertaking to increase the US quota for foreign broadcasts (KEI 2011). The agreement by Korea to decrease Korean TV content quotas for film and animation and to increase the allowable content from a single country will also benefit non-US providers.

Like EU-Korea, KORUS does not cover air services or services supplied in the exercise of government authority. Beyond this, however, individual States will use negative list exceptions, as they have in all previous US PTAs, to exclude certain services from the scope of the agreement. It is not clear at present how restrictive these exceptions will be in practice.

US-Colombia (signed November 2006, entered into force 15 May 2012) shares many of the strengths, and weaknesses, of KORUS. It also follows the US practice of seeking reciprocity from its developing country partners. Under the agreement, Colombia thus agrees to go beyond its WTO commitments in a number of respects, dropping the requirement that US companies recruit Colombian nationals to provide professional services (CRS 2012) and that branches be established for the cross-border delivery of a service. Colombia undertakes to phase out market access restrictions in cable television and to provide access to US suppliers of portfolio management services. It has also accepted provisions preventing the subsidization of express delivery services (Annex 11-D).

At the same time, however, US-Colombia does contain provisions with an element of asymmetry that are not found in KORUS. In a Side Letter on State Measures, the United States undertakes, in the interests of transparency, to review measures requiring permanent residence or citizenship applied by five states and the District of Columbia in a range of service subsectors, including nursing and paramedics. The PTA also provides that when Colombia allows a US bank to establish a branch in Colombia the capital assigned to the branch can be brought into Colombia and converted into local currency (Annex 12.15). Finally, and going beyond the field of services, the PTA establishes a Committee on Trade Capacity Building to help Parties (other than the United States) to implement the agreement and adjust to more liberalised trade (Article 20.4).

4.4.4 EFTA

With particular application to services trade liberalisation (given its contribution to overall potential gains), it should be noted at the outset that the coherence of EFTA as a negotiating partner is being challenged as pressure mounts for individual EFTA members to negotiate separate bilateral deals with major trading nations. For example, a PTA between Switzerland and Japan entered into force on 1 September 2009. And on 15 April 2013, a PTA was signed between Iceland and China. The motivation for these bilateral agreements comes partly from the pursuit of preferential market access on the part of individual EFTA members and partly from the particular interests of the negotiating partner. It is thus understood that, in the case of Switzerland-Japan, Japan was reluctant to extend the PTA to EFTA because of the strong offensive interests of Norway and Iceland in fisheries (Heydon and Woolcock 2009).

Nonetheless, EFTA has succeeded in concluding recent agreements, exemplified by those with Korea and Colombia. EFTA-Korea (entered into force 1 September 2006) follows a GATS positive list approach and replicates the appropriate GATS articles in respect of key provisions (market access, national treatment, domestic regulation, movement of natural persons, monopolies and exclusive service suppliers and transparency). Separate annexes deal with specific commitments, MFN exemptions, mutual recognition, telecommunication services and co-production of broadcasting services. EFTA-Korea does, however, expand the GATS framework in some areas. For example, in telecommunications services (Annex X) the agreement includes provisions dealing with scarce resources, minimum interconnection obligations and interconnection with dominant suppliers. In financial services, GATS-plus provisions are found in the further elaboration of prudential carve-outs and in the incorporation of transparency rules set by international organisations such as the Bank for International Settlements. The agreement also goes beyond the GATS in the area of mutual recognition, with Parties required to encourage relevant bodies to develop mutually acceptable standards for the authorisation and licensing of service suppliers. Among the MFN exemptions listed are certain audio-visual services in conformity with the EC Television broadcasting Directive and measures aimed at promoting Nordic cooperation through, for example, the provision of loans and financial assistance for investment projects and exports.

The agreement, in line with the GATS, does not provide for the right of non-establishment and does not deal with either emergency safeguards or subsidies.

EFTA-Colombia, which entered into force 1 July 2011, like EFTA-Korea, uses a positive-list approach, with provisions for MFN, national treatment and market access based on the GATS text. But again, the agreement goes beyond the GATS in a number of areas, including in financial and telecommunications services, the mutual recognition of qualifications and in provisions dealing with movement of natural persons (mode 4). In its schedule, Colombia goes beyond its GATS commitments in, for example, entry and temporary stay of technical visitors, engineering, architecture, technical testing and analysis, distribution, environmental services, finance, insurance and logistics. The usual exclusions apply, including air services and services supplied in the exercise of governmental authority. And as with EFTA-Korea, the agreement does not provide for the right of non-establishment or deal with emergency safeguards or subsidies.

4.4.5 Japan

Japan's PTAs have tended to use a mixed approach to the listing of services commitments. Agreements in Asia have adhered to a positive-list formula while those in Latin America have – like NAFTA and NAFTA-based agreements - generally used a negative-listing framework.

Japan-Chile, (entered into force September 2007), thus has a negative-list framework but with positive listing in financial services. The PTA provides an interesting point of comparison with agreements signed between Japan and four Asian partners (Indonesia, Malaysia, Philippines and Thailand), concluded at roughly the same time and all using a positive-list approach. In its services provisions, Japan-Chile, like the Asian agreements, matches the GATS insofar as it has national treatment commitments and covers both domestic regulation and rules of origin (denial of benefit). Also like the Asian agreements, and the GATS, Japan-Chile does not have provisions on emergency safeguards or subsidies. Unlike the Asian agreements, however, Japan-Chile is GATS-plus in having a separate chapter on government procurement and, like NAFTA-based PTAs, provision for the right of non-establishment. However, the right of non-establishment is in practice seriously diminished by the presence of numerous Reservations, by both Japan and Chile requiring commercial presence in several sectors (Annex 6). Moreover, Japan-Chile is GATS-minus, unlike the Asian PTAs, in that it does

not provide an overarching market access undertaking of non-discrimination in the application of quantitative restrictions, apart from in the case of (positively-listed) financial services. This latter point underlines the fact that negative-list PTAs, while offering regulatory transparency and locking-in of the regulatory status quo (Sauvé and Mattoo 2011), do not necessarily offer stronger disciplines. Finally, Japan-Chile is less ambitious than two of the Asian PTAs (Indonesia and Philippines) in that it does not match the provisions in those agreements providing specific Mode 4 opportunities for nurses and health care workers. This distinction may in part arise from particular geographic and historical links between the Asian Parties.

Japan-Chile has an element of asymmetry insofar as Chile reserves the right to adopt or maintain any measure denying Japanese investors or service suppliers any rights or preferences provided to indigenous peoples (Annex 7, Article 7).

Japan-Vietnam (entered into force in October 2009) like Japan's other agreements in Asia adopts positive listing and has provisions with over-arching market access commitments (Article 59 and Annex 5), national treatment (Article 60 and Annex 5), domestic regulation (Article 65) and rules of origin/denial of benefit (Article 70). Also like Japan's other agreements in Asia, there is no provision dealing with emergency safeguards (other than reference to pending GATS negotiations) or with subsidies. Nor, unlike Japan-Chile, is there the right of non-establishment, and Japan's schedule frequently calls for commercial presence as a condition for cross-border delivery. The usual exclusion of air transport and maritime cabotage applies. However, some sensitive sectors are covered. For Japan this includes market access liberalisation of all four modes for audio-visual, higher education and environmental services and mode 3 liberalisation of primary and secondary education. Vietnam offers mode 3 liberalisation of audio-visual, higher education and environmental services, and liberalisation of all but mode 4 for hospital and medical services.

The PTA has two elements of asymmetry. First is the allowance for Vietnamese nurses and health workers to work in Japan. Entrance conditions, however, are strict and in 2011 only 11% of pre-selected nurses from Indonesia and the Philippines (under their respective PTAs) passed the language test (bilaterals.org.). Second, Vietnam has a number of MFN exemptions in audio-visual in order to "preserve and promote the cultural identity of countries with which Vietnam has long-standing cultural links" (Annex 6).

For convenience, some of the key characteristics of the agreements discussed are summarized in table 4.7. While almost all the agreements show WTO-plus characteristics, it is perhaps significant that the only feature common to all agreements is the exclusion of sensitive sectors.

Table 4.7 Treatment of Services in Selected PTAs

PTA	Listing	WTO+Sector commitments		Sub-central commitments	WTO+Mode 4 commitments	Right of Non-establishment	Sensitive-Sector exclusions	MFN Exceptions	Asymmetric Provisions
		MA	NT						
EU-Korea	positive	✓	✓	✓	✓	×	✓	✓	×
EU-Colombia-Peru	positive	✓	✓	✓	✓	×	✓	NA	✓
US-Korea	negative	✓	✓	limited	NA	✓	✓	NA	×
US-Colombia	negative	✓	✓	limited	NA	✓	✓	NA	✓
Japan-Chile	negative	×	×	NA	×	✓	✓	NA	✓
Japan-Vietnam	positive	✓	✓	NA	✓	×	✓	✓	✓
EFTA-Korea	positive	✓	✓	NA	×	×	✓	✓	NA
EFTA-Colombia	positive	✓	✓	NA	✓	×	✓	NA	NA

Source: compiled by authors

NA: not available

MA: Market Access

NT: National Treatment

4.5 Investment

4.5.1 Introduction

As with services, the inclusion of investment provisions in PTAs is a reflection of the pursuit of deep integration. Such inclusion can also be seen as recognition that with the advent of the global value chain, investment and trade are increasingly seen as complements rather than as substitutes and that, accordingly, the liberalisation of investment is best achieved within the framework of a PTA, covering both trade and investment, rather than in a bilateral investment treaty, dealing only with investment.

With investment having been withdrawn from the Doha Development Agenda, at the instigation of developing countries, PTAs with strong investment provisions are automatically WTO-plus in the sense of going beyond the piecemeal treatment of investment in various WTO agreements.

While the liberalisation of investment within PTAs can bring benefit to all potential investors there is clear evidence that investment provisions in PTAs lead to a significant increase in the flows of FDI between the signatories (Leshner and Miroudot 2006).

A conundrum related to investment is why developing countries are prepared to undertake commitments on FDI within the framework of PTAs, including some of the PTAs being studied here, when they are not prepared to do so in the framework of the WTO. One possible explanation is that such provisions are seen as signalling devices in order to attract FDI. Alternatively they may be seen as a price developing countries are prepared to pay in return for improved market access, on a preferential basis, to the partner country; another explanation is that commitments on investment

undertaken within a PTA, unlike a WTO-wide agreement, are less likely to trigger action under the WTO dispute settlement mechanism.

4.5.2 European Union

Historically, the limited coverage of investment in EU PTAs has been due, in part, to the fact that FDI did not fall under European Union competence. Even EU-Chile (2003), which was seen as a new departure, was silent on post-establishment investment protection, other than for commercial presence (mode 3) in trade in services. Beyond that, EU-Chile proposed the conclusion of bilateral investment treaties (BITs) between Chile and individual EU Member States, where appropriate (Article 21). The context changed with the Lisbon Treaty which extended exclusive EU competence to foreign direct investment from December 2009. Prior to the application of the Lisbon treaty little changed. .

EU-Korea was negotiated before the extension of exclusive EU competence to FDI. The EU – Korea agreement includes pre establishment national treatment, in other words the right of establishment for services and all forms of investment in chapter 7. Non-services investment is therefore covered but dependent, as was the case for mode 3 in services, on positive listing of coverage and a hybrid system for exclusions within covered sectors. In general establishment rights are extensive with exclusions only in the same sensitive sectors as for services. EU-Korea continues the move to panel-based dispute settlement (in all sectors) (Article 14.4) and – again in the services area - grants national treatment to investment conducted under mode 3 in scheduled sectors (Article 7.12). But beyond this, there is still no overarching provision on post-establishment investment protection, unlike that found in KORUS. Rather, investment protection is taken up in the 19 separate BITs signed between EU Members and Korea. The EU-Korea PTA does, however, provide for a review of the investment legal framework, consistent with the Parties' commitments to international agreements, no later than three years after the entry into force of the PTA. The Parties are to assess and address obstacles to investment, with a view to deepening the provisions of the Services chapter of the PTA "including with respect to general principles of investment protection" (Article 7.16). For pre-establishment investment the Parties undertake to impose no restrictions on direct investments made between them (Article 8.2).

EU-Colombia-Peru likewise includes establishment in a general provision Title IV covering services and industrial establishment. There are the common general exclusions for audio-visual and air and maritime transport. There are also limitations on establishment in the utilities sector (water and power). There are also provisions that provide scope for policies to protect economically disadvantaged minorities or ethnic groups such as indigenous peoples and related social objectives in Colombia and Peru where land ownership and use have been sensitive issues. The EU Colombia-Peru PTA provides for panel-based dispute settlement (Article 302), national treatment of investment in scheduled service sectors (Article 113) and a review of the investment legal framework no later than five years after the entry into force of the agreement and subsequently at regular intervals (Article 116).

Looking ahead, the negotiations between the EU and Singapore, Canada and India will be the first to be conducted after the Treaty of Lisbon. As a result they are expected to include comprehensive investment provisions covering both liberalisation (i.e. establishment) and protection. The investment protection provisions are likely to be in line with those offered by recent Member State BITs, as these have shaped the negotiating mandate of the EU in the absence of a developed EU model investment agreement. As such they are likely to offer free capital transfers (subject to a safeguard in cases of crisis), investor – state dispute settlement, de facto expropriation in line with most US PTAs. At issue remains some of the detail on the standards of investment protection and

whether the EU PTAs will follow the Member State BITs approach of containing only general principles for fair and equitable treatment and national treatment or whether these will be linked to international norms. There are also questions concerning 'right to regulate' provisions and transparency in cases of arbitration where the NAFTA model for investment is more developed or detailed than the Member States' BITs have been.

4.5.3 United States

Following a well established pattern in US PTAs, KORUS has strong provisions on investment. All forms of investment are protected under the agreement, including enterprises, debt, concessions and similar contracts, and intellectual property. The PTA grants national treatment to investors and investments of the other Party with respect to "establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of investments" (Article 11.3). The PTA also provides for minimum standards of treatment (Article 11.5) and has specific sections on expropriation and compensation, transfers, performance requirements, and composition of senior management and boards of directors. KORUS also deals extensively with investor-state dispute settlement with provisions for access to both the ICSID and UNCITRAL.

In addition, in the PTA's preamble the Parties agree that "foreign investors are not hereby accorded greater substantive rights with respect to investment protections than domestic investors under domestic law". This provision reflects one of the negotiating objectives of the Trade Act of 2002 to ensure "that foreign investors in the United States are not accorded greater substantive rights with respect to investment protections than US investors in the United States."

US-Colombia like KORUS has strong investment provisions, based largely on US law. The USTR website characterises the agreement as levelling the playing field by enabling US investors in Colombia to enjoy the same standards they, and Colombian investors, enjoy in the United States – enshrined in post-establishment national treatment. Indeed, in recognition of political circumstances in Colombia, the PTA provides, unlike KORUS, for non-discriminatory treatment to investors and investment in respect of losses suffered because of armed conflict or civil strife (Article 10.6). At the same time, as a small element of asymmetrical treatment in favour of the weaker partner – and in addition to the Committee on Trade Capacity Building mentioned earlier – the PTA applies tighter rules in respect of any restructuring of US, as compared with Colombian, public debt (Annex 10-F Public Debt). There is no equivalent provision in KORUS.

4.5.4 EFTA

EFTA tends to follow the EU in its treatment of investment in PTAs. The EFTA-Korea PTA thus provides for post-establishment national treatment for mode 3 delivery (commercial presence) of scheduled services (Annex VII). Beyond this, investment protection more broadly is covered in a separate bilateral investment treaty signed between Korea and, collectively, Iceland, Liechtenstein and Switzerland. Similarly, EFTA-Colombia provides for post-establishment national treatment for mode 3 delivery of scheduled services, with investment more broadly covered in separate BITs.

4.5.5 Japan

As in other sectors, there is a marked lack of consistency among Japan's PTAs in their treatment of investment – some with relatively strong features, others very weak.

Japan-Chile is a NAFTA-inspired agreement with national treatment provisions on a negative-list basis, with a positive list for financial services. Under investment protection, the PTA covers fair and equitable treatment, free transfer of funds, expropriation and compensation and dispute settlement.

Dispute settlements are treated through ad hoc consultation and arbitration in the case of state-state disputes and through international arbitration or referral to the ICSID or UNCITRAL in the case of investor-state disputes. In common with other PTAs of Japan, the agreement includes provisions that prohibit performance requirements (Article 77). In the case of Japan-Chile, as with Japan's agreements with the Philippines and Mexico, these provisions go beyond those of the TRIMs agreement.

Japan-Vietnam, in contrast, is very weak in its coverage of investment. Non-discriminatory market access and national treatment of investment are dealt with for services delivered under mode 3, commercial presence, but the agreement is otherwise silent on investment, with no overarching references to either investment protection or performance requirements. It is conceivable that the coverage of investment could be widened as a result of deliberations foreshadowed under improvement of the business environment (Chapter 11), cooperation (Chapter 12) or dispute settlement (Chapter 13) but this is unlikely and investment matters are likely to be dealt with in the framework of the Japan-Vietnam Investment Liberalisation, Promotion and Protection Agreement of 2004. The weakness on investment in the Japan-Vietnam PTA stands in contrast with the strong investment provisions in other of Japan's PTAs, not only in Latin America, such as those with Chile and Mexico, but also with Japan's PTAs with Malaysia and the Philippines and is evidence of a persisting inconsistency as between Japan's different preferential trade agreements.

Table 4.8 Treatment of Investment in Selected PTAs

PTA	Pre-estab. NT	Post-estab. Protection	Sensitive Sector Exclusion	Dispute Settlement	Asymmetry
EU-Korea	✓	×	✓	✓	×
EU-Colombia-Peru	✓	×	✓	✓	✓
US-Korea	✓	✓	✓	✓	×
US-Colombia	✓	✓	✓	✓	✓
EFTA- Korea	✓	×	✓	✓	×
EFTA-Colombia	✓	×	✓	✓	✓
Japan-Chile	✓	✓	✓	✓	×
Japan-Vietnam	×	×	×	×	×

Source: authors

4.6 Competition

4.6.1 Introduction

Competition provisions in PTAs are evidence of the pursuit of deep integration. They are also a reflection of the fact that a reduction, or even elimination, of trade barriers will not guarantee market contestability in the presence of competition policy failings in the form of the abuse of dominance or restricted access to networks.

As with provisions dealing with investment, competition provisions in PTAs will be WTO-plus to the extent that competition policy has been withdrawn from the DDA.

And again, as with investment, the same arguments can be advanced to explain why developing countries are prepared to make competition commitments in PTAs but not in the WTO. An additional factor in the case of competition, however, is that PTAs often provide a useful framework within which aid and technical assistance can be provided to the less advanced partner in order to establish, or strengthen, a competition authority and competition culture.

The rigour of application is an important factor for all PTA provisions. In the case of competition provisions, however, it is a crucial element, as will be seen with respect to agreements involving Korea.

4.6.2 European Union

As noted earlier, in the area of competition, EU agreements tend to be stronger and less hortatory than US PTAs. Thus, while the EU Korea agreement does not advance greatly on the 2009 bilateral agreement on cooperation in the field of competition between the EU and Korea, it nevertheless contains a number of useful disciplines. The PTA:

- Establishes a framework of cooperation between the Parties, including provision for a Party to require the other to “address” specific concerns (Article 11.6).
- Requires the Parties to have both competition laws and a competition authority (Articles 11.1 and 11.3).
- Embodies agreement that cartels, abuse of dominance and anti-competitive mergers are incompatible with the agreement (Article 11.1).

In terms of cooperation between competition authorities the EU Korea PTA provides for positive comity, in other words in addition to general cooperation between the Commission and Korean competition authorities, either party can request the other to investigate cases of restrictive practices that affect competition in the other party.

Two other specific provisions are also worthy of mention. The PTA, in the chapter on trade in services, requires that appropriate measures shall be maintained to prevent major telecommunications suppliers engaging in anti-competitive cross-subsidisation (Article 7.30). And the agreement (Chapter 11) contains a best endeavours provision seeking disciplines on certain types of subsidies that are considered particularly distorting – a provision that the EU has not always been successful in incorporating in its PTAs (LSE 2012a). However, the provision, while it may bring a welcome improvement in transparency, applies only to trade in goods and excludes subsidies in agriculture and fisheries. It remains to be seen whether the PTA will have traction against anti-competitive behaviour on the part of Chaebol in the Korean market.

EU-Colombia-Peru is broadly comparable with EU-Korea in its treatment of competition policy. Like EU-Korea, it requires that Parties shall introduce or maintain appropriate measures for the purpose of preventing anti-competitive cross-subsidisation in telecommunications services (Article 141). In two respects it might be regarded as somewhat weaker than EU-Korea: anti-competitive practices are regarded only as “inconsistent” with the agreement (rather than as “incompatible” in EU-Korea); and there is no broad subsidy discipline in the competition chapter. Against this, however, EU-Colombia-Peru is stronger than EU-Korea in that the Parties are required not simply to “address” concerns but to “initiate enforcement activities” against them (Article 261.5). Looking ahead, it will be interesting to see whether the EU will be able in its PTA negotiations with other developing countries to maintain the provision, contained in EU-Colombia-Peru, requiring the Parties to have both competition laws and competition authorities.

4.6.3 United States

KORUS provisions on competition policy (Chapter 16) are somewhat weaker than those found in EU-Korea. While broadly similar in providing a framework for cooperation and in requiring Parties to have competition laws and authorities, KORUS, unlike EU-Korea, does not identify specific anti-competitive practices as being incompatible with the agreement but rather simply requires that any designated private monopolies and state enterprises act in a manner that is not inconsistent with the obligations under the agreement (Articles 16.2 and 16.3).

In contrast, competition aspects of the provision of telecommunications services (Chapter 14) are, like EU-Korea, more specific and less hortatory, including with respect to access to networks, interconnection and the avoidance of anti-competitive cross-subsidisation.

As might be expected, US-Colombia, which resembles US-Korea, is weaker in its general competition provisions than EU-Colombia-Peru. Though it requires the Parties to have competition laws and authorities (Article 13.2), like US-Korea it does not identify specific anti-competitive practices as being incompatible with the agreement but rather requires only, in very general terms, that any designated private monopolies and state enterprises act in a manner that is not inconsistent with the obligations under the agreement (Article 13.5).

4.6.4 EFTA

Overall, EFTA PTAs' treatment of competition policy tends to follow the approach taken by the EU. EFTA-Korea notes that anti-competitive conduct may frustrate benefits arising from the agreement. It makes specific mention of abuse of dominance and exclusive rights and provides that the Parties undertake to apply their respective competition laws with a view to removing anti-competitive business conduct. The agreement requires that the Parties notify each other of enforcement activity and that, on request, competition authorities shall enter into consultations to facilitate the removal of anti-competitive business conduct (Article 5.1).

There are no specific provisions dealing with competition in the telecommunications sector. And, as always, the test of the competition provisions in the PTA will rest with their implementation. The provisions of EFTA-Colombia are broadly comparable with those of EFTA-Korea.

4.6.5 Japan

Japan's PTAs have tended to be particularly weak in their treatment of competition policy. This is evident in the Japan-Chile agreement which provides a framework for cooperation but beyond that lacks specificity and firm commitments. There is no provision enabling a Party to request the other to take action, no provision requiring Parties to have competition laws and a competition authority and no reference, even in general terms, to anti-competitive measures that would be considered inconsistent with the obligations of the agreement.

In its general chapter on competition policy (Chapter 10), Japan-Vietnam follows the weak precedent of Japan-Chile. However, in the chapter on trade in services (Chapter 7), Japan-Vietnam has two competition provisions not found in the agreement with Chile. First, each Party is to ensure that any monopoly supplier in its area does not act in a manner inconsistent with the commitments under this chapter (Article 67). Second, if a Party has reason to believe that a monopoly supplier of the other Party is so acting it may request the other Party to provide information on the relevant operations (Article 67). Moreover, Japan-Vietnam contains a section on competitive safeguards in Japan's schedule of commitments in telecommunications (Annex 5) requiring that appropriate measures shall be maintained to prevent anti-competitive practices such as anti-competitive cross-

subsidisation and the withholding of information. This requirement is repeated in a Reference Paper on basic telecommunications (Annex 5, page 902). It remains to be seen whether the stronger provisions in Japan-Vietnam point to a trend in Japan's preferential trade agreements.

4.7 Trade Facilitation

4.7.1 Introduction

Growing recognition of the importance of trade facilitation is the result of two factors: first, an appreciation of the very large potential gains in both welfare and efficiency from improved customs services and, second, the realisation that enhanced trade facilitation is a key factor in the maintenance and strengthening of global value chains (Grainger 2012).

Trade Facilitation has for some time been identified as a potential DDA deliverable, outside of a single undertaking. In this respect, the widespread practice of including trade facilitation provisions in PTAs can be seen as a potentially important complement to multilateral action insofar as the improvements to customs services within a PTA can, by their nature, only be applied on an MFN basis.

4.7.2 European Union

As noted earlier, there is a basic similarity in the treatment of trade facilitation in the PTAs of the four trading blocs being considered here. They all provide a framework for cooperation that seeks to ensure that the Parties comply with their respective customs laws and regulations and with relevant international agreements. It seems, however, that EU PTAs are less specific than US agreements that provide for civil penalties and criminal sanctions in the event of violation.

EU-Korea and EU-Colombia-Peru, like earlier EU PTAs, contain rules on matters such as customs clearance, customs cooperation and confidential data handling. The texts are based on the Kyoto Convention (the International Convention on the Simplification and Harmonisation of Customs Procedures, 1999) and outline a framework for consultation rather than substantive commitments. To the extent that customs improvement measures are taken, they will by their nature have MFN application. Indeed, the stated objective of EU-Korea is to promote customs cooperation on a bilateral and multilateral basis (Article 6.1).

4.7.3 United States

US-Korea and US-Colombia each seek to promote cooperation to ensure compliance with the Parties' respective customs laws and regulations, including through provisions for civil penalties and criminal sanctions in the event of violation. The agreements each have a specific provision requiring the Parties to adopt procedures to facilitate express delivery services.

4.7.4 EFTA

EFTA-Korea provides that the Parties are to assist each other in verifying the authenticity of origin declarations. Any dispute is to be dealt with by the Sub-Committee on Customs and Origin Matters. It is also provided that each Party shall provide penalties for failure to comply with obligations under the agreement and customs authorities "may" cooperate in the harmonisation and simplification of customs procedures (Annex 1). EFTA-Colombia has broadly similar provisions, with trade facilitation dealt with by a Sub-Committee on Rules of Origin, Customs Procedures and Trade Facilitation.

4.7.5 Japan

Japan-Chile and Japan-Vietnam each have a chapter on customs procedures providing for implementation in accordance with respective laws and regulations of the Parties and for the expedition of customs clearance. Both agreements provide for action in the event of a breach of domestic laws or regulations, Japan-Chile through the imposition of penalties, Japan-Vietnam through access to administrative or judicial review.

4.8 Government Procurement

4.8.1 Introduction

Another topic taken out of the DDA, government procurement offers the opportunity for PTAs to be WTO-plus. In this case, however, the benchmark is the plurilateral WTO Government Procurement Agreement (GPA). PTAs, including those considered here, tend to go beyond the WTO either by extending government procurement disciplines to non-signatories of the GPA or by extending the scope of commitments beyond those of the GPA. As will be seen, however, uncertainty arises in the case of entity coverage, where the scope of PTAs is not always GPA-plus. With public procurement representing some 10-25 % of countries' GDP, the stakes are high.

4.8.2 European Union

EU policy on public procurement in PTAs has changed since 2006 with the adoption of the revised PTA strategy as elaborated in the Global Europe statement. This identified access to public procurement as a PTA priority, along with more effective enforcement of IPRs and the promotion of competition and investment provisions in PTAs.

EU-Korea embodies the provisions of the GPA, to which both Parties are signatories. In applying the GPA, Korea waived the right to special and differential treatment under the revised GPA agreement. And the PTA is GPA-plus in opening up procurement opportunities to public works concessions and Build-Operate-Transfer contracts not covered by the GPA.

EU-Colombia-Peru represents a significant step towards the adoption of GPA-type commitments by middle-income developing country partners of the EU. The agreement includes a national treatment commitment (Article 175), GPA-type rules, bid challenge, dispute settlement, a ban on offsets and the establishment of a specialist joint committee. For Colombia and Peru the PTA covers a substantial number of central government agencies. Moreover, for Colombia, unlike the US-Colombia PTA, the agreement covers all municipal agencies, opening up opportunities to bid for public works. EU-Colombia-Peru also includes a number of asymmetric provisions. The text, in recognition of Columbia's particular circumstances, stipulates that the agreement "does not apply to procurements under programs of reintegration to civil life as a result of peace processes, to aid persons displaced due to violence, to support those living in conflict zones and general programs resulting from the resolution of armed conflict". The EU undertakes to provide assistance to potential tenderers from Andean countries (Article 193). And the agreement provides for cooperation and exchange of experience in matters such as regulatory frameworks, capacity building and technical assistance, and institution strengthening (Article 193). The EU also offers asymmetry in the shape of near GPA coverage of entities providing potential access for Andean suppliers to a much larger market than that represented by Colombia or Peru for EU suppliers.

The question is whether this model can be extended to the PTAs currently under negotiation, notably with Canada, whose federal government has so far been unable to commit the Canadian Provinces to

international procurement disciplines, and India, one of the major opponents of inclusion of procurement rules in the WTO and a non-signatory to the GPA. Recent research has focused on the question of how open procurement markets are and whether the EU market is more open than others (Messerlin 2013, Messerlin and Miroudot 2012). Whatever, the outcome of this debate an extension of procurement rules leading to more contestable markets via PTAs is likely to be a better way forward than the threat of a “reciprocity clause” currently under consideration in the EU.

4.8.3 United States

The United States too is a signatory to the WTO Government Procurement Agreement and KORUS reaffirms the GPA. The PTA, however, expands the criteria to cover more business, lowering the threshold at which procurement contracts become subject to the disciplines of the agreement from \$203,000 in the GPA to \$100,000. Under KORUS the Parties also confirm their “desire and determination to apply the APEC Non-Binding Principles on Government Procurement to all their government procurement that is outside the scope of the GPA” (Article 17.1) (CRS 3013). For the United States, the GPA applies to contracts tendered by 79 US federal government agencies plus contracts tendered by the 37 US States that have agreed to be bound by the GPA. It is not clear whether these 37 States will also be bound by KORUS. Korea for its part has agreed to add 9 central and sub-central agencies to the scope of KORUS beyond the 42 that are bound by the GPA.

The PTA with Colombia serves to bring the latter, a non-signatory to the GPA, into the disciplines of government procurement. It opens up the Colombian government procurement market to US firms, giving non-discriminatory treatment in bidding on procurement by 28 Colombian central government agencies, 32 sub-central agencies and a number of state-owned enterprises. The agreement preserves the US right to set aside contracts for small and minority businesses, and clarifies that requirements can be inserted into government contracts requiring suppliers to comply with generally applicable labour laws.

As an element of asymmetry, the agreement allows Colombia the possibility of a higher threshold for the procurement of construction services. And, like EU-Colombia-Peru, the agreement contains an exception for procurement related to programs dealing with civil strife (Annex 9.1).

4.8.4 EFTA

EFTA-Korea simply recognises that the WTO GPA governs the rights and obligations of the Parties with respect to government procurement (Articles 6.1-6.3 and Annex XII). There is no indication of any advance in the coverage of entities and sectors or of changes to thresholds beyond what is stipulated in the GPA. It is however recognised that there may be opportunities for an early harvest as a result of discussions between the Parties in the framework of negotiations aimed at amending the GPA.

As Colombia is not a signatory to the GPA, EFTA-Colombia opens up the possibility for EFTA suppliers to bid for government contracts in Colombia, estimated to represent some 6% of GDP (SECO 2011). With the exception of financial services and some privatised activities, all services are covered. EFTA suppliers have non-discriminatory access if the estimated value of the contract exceeds the GPA-based thresholds specified in Annex XIX to the PTA. In recognition of the different levels of development of the Parties, the threshold applying to Colombia in respect of utilities is lower than the threshold applying to EFTA suppliers. Covered Colombian entities include 28 central agencies, 10 public entities and all departments and municipalities. The PTA provisions cover national treatment and non-discrimination (Article 7.4), procedures for tendering (Article 7.10), technical specifications (Article 7.8), contract award criteria (Article 7.14) and bid challenge (Article 7.17).

4.8.5 Japan

Japan-Chile serves to bring Chile, a non-signatory to the GPA, into the disciplines of government procurement. The PTA adheres to GPA principles and contains commitments in respect of national treatment (Article 137), criteria for technical specifications (Article 140), transparency (Article 143) and challenge procedures (Article 149). The agreement prohibits offsets (Article 139) and provides for the establishment of a Committee on Government Procurement. Japan's coverage of goods and services is the same as for the GPA, while Chile covers all goods and services except financial services (dealt with under positive listing). The PTA is GPA-plus insofar as Japan has a lower threshold than in the GPA for certain transactions. It is GPA-minus, however, in the coverage of entities. While Chile has extensive coverage of both central and municipal agencies, Japan excludes 13 entities that are covered in its GPA commitments, including the Japan National Oil Company, Japan Tobacco Inc. and Nippon Telegraph and Telephone (Annex 14).

As further evidence of the variability among Japan's PTAs, Japan-Vietnam has no firm commitments on government procurement, providing only that the Parties will endeavour to enhance transparency in government procurement and implement government procurement measures in a fair and effective manner (Article 106). No reference is made to the GPA, of which Vietnam is an observer, though not negotiating accession.

Table 4.9 Summary comparison of procurement provisions in PTAs

PTA	Coverage at sub-central level	Asymmetry favouring less developed party	GPA equivalent transparency	Bid challenge	Technical cooperation or S&DT provisions	Joint Committee
EU - Korea	yes	no	yes	yes	no	yes
EU Colombia - Peru	yes	yes	yes	yes	yes	yes
EFTA - Korea	yes	no	yes	yes	no	
EFTA- Colombia	yes	yes	yes	yes		
KORUS	yes	no	yes	yes	no	
US Colombia	yes	yes	yes	yes		
Japan - Chile	yes	yes	yes	yes	no	yes
Japan-Vietnam	no	no	no	no	no	no

Source: compiled by authors

4.9 Intellectual Property Rights

Many recent bilateral preferential trade agreements are TRIPs-plus in that they extend the scope of provisions included in the TRIPs agreement. The PTAs elaborate on TRIPs in terms of objectives and substantive measures, but the most important TRIPs-plus elements are those that seek to promote the application of provisions set out in the TRIPs agreement. These elaborations of IPR provisions through PTAs generally strengthen protection of IPRs, but they also reflect the evolution of the debate on trade and IPR in that they reaffirm the WTO decisions in the form of the Doha Declaration

on TRIPs and essential medicines of 2001 and the 2003 Decision. Recent PTAs negotiated by the EU and EFTA refer to the need for balance between the interests of development and protection of IPR as stated aims of the relevant chapters in agreements. The EU PTAs also provide recognition of rights and obligations under the Convention of Biodiversity and the need to protect genetic and traditional knowledge as well as IPRs.

4.9.1 The elements of IPR provisions in PTAs

General provisions and objectives

In most cases the IPR provisions in PTAs reaffirm or complement existing international agreements on IPR. This applies in particular to the 1994 TRIPs agreement, but also to a number of existing international conventions on copyrights, patents etc. The IPR chapters in PTAs set out the objective of protecting intellectual property rights, but some also recognise the aim of balancing the protection of IPRs with the need for transfer of technology. Provisions on the latter are however best endeavours only.

Copyright

Copyright protection covers literary and performance rights. The TRIPs agreement requires parties to comply with the Berne Convention (1971) and requires parties to provide protection for copyrights for the life of natural persons for at least 50 years. Rights for broadcast materials should be at least 20 years. TRIPs-plus provisions in PTAs have tended to take the form of longer periods of protection of at least 70 years after the life of natural persons in the case of US and EU PTAs and/or more detailed requirements implementing such protection under national laws.

Trademarks and geographic indications

Trademark protection is required in the TRIPs agreement for terms of at least 7 years. The TRIPs agreement reaffirms the Paris Convention on Trademarks of 1967. TRIPs-plus provisions in this area relate also to the term of protection, which is 10 years in the case of US PTAs, but is not extended in the EU, EFTA or Japanese PTAs. In the case of TRIPs and US and Japanese PTAs trademark protection is also used to cover Geographic Indications (GIs). Specific protection for GIs can be provided in the form of a requirement to establish registers of protected GIs and procedures for adding GIs to any register. In the case of EU PTAs there is greater emphasis placed on such protection.

Industrial designs are covered by the TRIPs with a 10 year period of protection.

Patents are an important area of IPR protection covered by the TRIPs. At issue here has been the compatibility of patent protection with the need for the provision of essential medicines or the need for governments to be able to respond to national emergencies. This debate led to the adoption in 2001 of the Doha Declaration on TRIPs and essential medicines and the 2003 Decision of the WTO General Council on measures to facilitate the supply of essential medicines to developing countries (henceforth the Doha Declaration and the 2003 Decision). The protection of genetic materials or traditional knowledge has been an objective of developing countries that have sought to counter efforts to patent products based on such knowledge. Some PTAs reflect the developments in this field subsequent to the adoption of the TRIPs by, for example, reference to rights and obligations under the Convention on Biodiversity (CBD) that reflects these concerns. Another issue is patent life and whether there are provisions to either extend or restore effective patent life for pharmaceutical products when testing results in a shorter effective protection. A further issue concerns data exclusivity or when data used in clinical or other trials to test products can be made available to producers other than the owner of the patent. Agreements may provide that no other product may be licensed using such data for a specific period.

Enforcement

The TRIPs Agreement requires both civil and criminal (at least for copyright and trademarks) enforcement measures as well as border (control) measures to check the importation and flow of illegal products. The TRIPs allows for suspension of customs clearance for 10 days. Parties may exclude small quantities and non-commercial quantities in personal luggage are not covered.

Special and Differential Treatment

TRIPs provided for transition periods for developing and least developed countries. The PTAs tend to provide for S&DT in the form of best endeavours provisions on technology transfer or the promotion of innovation (the latter implying less redistribution to developing countries).

Institutional provisions

Just as there is a TRIPs Council to monitor and promote the application of the TRIPs Agreement so some PTAs include specialist committees on IPR. Unlike the case of TBT/SPS and commercial instruments where WTO provisions are applied in an analogous fashion to the reaffirmation of the TRIPs agreement in PTAs, the IPR provisions in PTAs do generally fall under the specific PTA dispute settlement disciplines.

Table 4.10 Summary of TRIPs-plus provisions in PTAs

TRIPs	EU-Korea	EU-Colombia Peru	US Korea	US Colombia	EFTA Korea	EFTA Colombia	Japan Chile	Japan Viet Nam
Existing conventions	x	x	x	x	x			
Copyright	x	x	x	x				
Trademarks			x	x				
Geographic Indications	x	x						
Patent life	x	x	x	x	x	x		
Genetic and traditional knowledge	x	x						
Data exclusivity	x	x	x	x				
Industrial designs	x				x			
Internet domains			x	x				
Civil enforcement	x	x	x	x				
Criminal enforcement	x	x	x	x				
Border measures								
S&DT		x		x		x		
Sub-committee		x					x	x

Source: compiled by authors

4.9.2 The European Union

This summary focuses on the EU agreements with Korea and Colombia – Peru, but draws on analysis of earlier agreements with Mexico, Chile and Egypt. The EU agreements are TRIPs-plus in a number of respects. They tend to match the US PTA commitments in terms of substantive provisions, but the US PTAs go further in providing more extensive procedural measures aimed at ensuring effective implementation. EU PTAs also go further towards recognizing the interests of developing countries through reaffirmation of technology transfer aims, qualifications of TRIPs and inclusion of protection of genetic resources and traditional knowledge.

EU PTAs are TRIPs-plus in the field of copyrights through the requirement that parties to the EU-Korea and EU-Colombia-Peru agreement are required to offer protection for up to 70 years after the life of natural persons. With regard to trademarks there is no extension from the TRIPs 7 years, but the Korea and Colombia PTAs make compliance with the Trade Mark Treaty of 1994 an obligation in the case of EU – Korea and ask for best endeavours for Colombia and Peru. The EU now includes separate provision for the protection of GIs. In the case of EU – Korea however, this takes the form of recognition that each party's legislation provides such protection.²⁶ In the case of EU-Colombia- Peru there is a requirement to provide protection. In each case there are lists of GIs covered and scope to add new GIs to these lists. In the case of Colombia-Peru a special Sub Committee on GIs is established to help facilitate this extension.²⁷ With regard to *industrial designs* the EU – Korea agreement offers protection up to 15 years compared to the 10 years of the TRIPs, but EU Colombia-Peru provides only for best endeavours to offer at least 10 year. However, as TRIPs requires signatories to provide 10 years, the TRIPs-minus EU Colombia-Peru provision does not seem to apply.

With regard to *patents* the EU-Korea PTA states that the parties shall extend patent life for up to 5 years, on application, to compensate for protection lost during approval procedures, such as for new pharmaceutical products. This is TRIPs-plus as TRIPs makes no reference to this. The EU-Colombia-Peru agreement however only states that the parties may compensate. Both EU-Korea and EU-Colombia-Peru provide for data exclusivity. In the case of EU-Korea for at least 5 years for pharmaceuticals and at least 10 for new plants and in the case of EU-Colombia-Peru 'normally' 5 and 10 years respectively. Both EU - Korea and EU-Colombia-Peru reaffirm the 2001 Doha Declaration and the 2003 Decision.. In the EU - Korea PTA this comes in the section on patents, but in the EU-Colombia-Peru it comes under the principles of the agreement and therefore appears to be given greater emphasis. Both agreements also recognize the case for protecting generic and traditional knowledge (Art 10.36/37 for Korea and Art 201 for Colombia-Peru). The agreement with Korea provides for a review to ensure work of the Intergovernmental Commission on Genetic and Traditional Knowledge and Folklore and the Convention on Biodiversity is reflected in the agreement and the EU-Colombia-Peru reaffirms rights for indigenous producers under the CBD.

²⁶ EU has used such agreements to eliminate the exceptions granted in Article 24 of TRIPS, which allows for the continued use of GIs that had been used in good faith for a period of time before TRIPS. The requirement of 'reciprocal' or 'mutual' protection for GIs in EU Korea as well as in previous agreements such as those with Mexico and Chile eliminates the ability of domestic authorities to decide that certain uses of GI do not 'mislead the public' sufficiently to infringe upon rights holders. In the EU Chile agreement all trademarks deemed in violation of EU GI had to be cancelled within 12 years for domestic use, within five years for use for export, and immediately upon entry into force for small quantity exports. There is provision for 'traditional expressions' only in the PTA with Chile because of its apparent specificity to wine. Similar regulations can be found in the EU PTA with South Africa, another major wine producer. This is a major TRIPS-Plus regulation, as 'traditional expressions' do not qualify as GI under TRIPS.

²⁷ In the past the protection of Wines and Spirits was not always sought as part of EU Association Agreements. But there is an Agreement for the Protection of Wine and Spirits included in an Annex of the agreement with Chile, the Agreement for the Protection of Spirit Drinks with Mexico is a separate document.

The *enforcement provisions* in recent EU PTAs are broadly in line with the TRIPs provisions on civil and criminal enforcement and *border measures* to suspend circulation of goods that infringe IPRs.

4.9.3 The United States

The US PTAs extended the TRIPs at an early date through NAFTA and PTAs with Singapore, Chile, Morocco, Bahrain, Peru, etc.²⁸ and tend to have a clear focus on protection of IPRs

Copyrights protection was at first based on the 50 years of TRIPs in NAFTA but subsequent agreements with Singapore, Chile, Peru, Colombia and Korea have all extended this term to a minimum of 70 years.²⁹ *Trademark* protection in KORUS and US – Colombia is also - at 10 years - longer than that provided in TRIPs (7 years). US PTAs include detailed provisions for the creation of an efficient and transparent trademark registration process, comprising electronic applications, refusals of protection to be written and reasoned, and the opportunity for interested parties to contest decisions.³⁰ US PTAs strengthen the protection of well-known marks, and eliminate a loophole in TRIPs that allowed countries to require that the generic name of a pharmaceutical product be displayed larger than the trademark name (Article 20 of TRIPs).³¹ Trademark protection is also used to cover GIs as the US opposes specific GI provisions or registers. US PTAs do on the other hand provide protection for satellite signals and internet Domain Names although in the case of US Colombia this is only 'in principle'.

With regard to *patents* KORUS provides for the restoration of patent life if there are 'unreasonable' delays of more than 4 years in registration, but this is 5 years in the case of Colombia. US PTAs have all been used to clarify the vague terminology of Article 39 of TRIPs, which merely stated that undisclosed data for the approval of pharmaceutical products or agricultural chemicals should be protected. After NAFTA US PTAs have all required a period of protection of 5 years for such data concerning pharmaceutical products and 10 years for agricultural chemicals.³² Recent US PTAs prohibit the registration of any pharmaceutical product that uses clinical data from a protected supplier for 3 years, or 5 years for other data, and 10 years for new agricultural chemicals. This prevents 'bolar provisions' that allow for the use of technology from a patented pharmaceutical to aid in the production of generic versions. Some US PTAs also prohibit the parallel importation of pharmaceutical products – a practice allowed under the international exhaustion provisions of TRIPs.³³ The patent protection provisions in US PTAs are generally more detailed than those in EU PTAs and there is no reference to generic or traditional knowledge or the CBD in the sections on patents.

Enforcement provisions appear to be broadly in line with the TRIPs although again the provisions, especially on civil actions are more detailed. US PTAs contain careful legal wording in order to better define TRIPs provisions on *civil enforcement* that were left vague and difficult to enforce. For instance, US PTAs attempt to preclude the possibility of 'innocent infringement' by excluding the TRIPs wording that punishable infringement must be done 'knowingly, or with reasonable ground to know'. In contrast, US PTAs simply state that 'in judicial proceeding, the judicial authorities shall have the

²⁸ The foundation for this analysis comes from: Pugatch, Meir Perez. "The international regulations of IPRs in a TRIPs and TRIPs-plus world" in *Trade and Investment Rule-making* edited by Stephen Woolcock. United Nations University Press, Tokyo, 2006 and Roffe, Pedro. *Bilateral Agreements and a TRIPs-plus World: the Chile-US Free Trade Agreement*. TRIPs Issues Paper 4, Quaker International Affairs Programme. Ottawa, 2004.

²⁹ US-Singapore 16.4:4, US-Chile 17.5:4, US-Morocco 15.5:5, US-Bahrain 14.4:4, and US-Peru 16.5:5

³⁰ Articles 14.2:7 to 14.2:9 of US-Bahrain offer a good example of the standard system of registration.

³¹ Article 15.2:3 of US-Morocco offers a good example of this provision, which is nearly identical in all US PTAs.

³² See, for example, US-Morocco 15.10 or US-Peru 16.10.

³³ US-Singapore 16.7:2 and US-Morocco 15.9:4.

authority to order the infringer to pay the right holder³⁴, without any qualifications as to what type of infringement occurred. TRIPS-Plus provision also includes (i) the option for pre-established damages to be paid to rights holders, in excess of losses, in order to provide a deterrent for future infringement,³⁵ (ii) the destruction of infringing goods in civil proceedings, despite the domestic law of most countries only allowing such action in criminal proceedings,³⁶ (iii) the extension of civil proceedings to *all* IPR, not just those mentioned in the agreement, (iv) the destruction of any materials used in the infringement – whereas TRIPS holds that materials can only be destroyed if the ‘predominate use’ is for infringement,³⁷

Border Measures:

Since the implementation of TRIPS, US PTAs have progressively tightened the requirements on border control. Although TRIPS only requires *ex officio* action for the importation of infringing goods, the PTA with Singapore requires such action for the importation and exportation of infringing goods, as well as cooperation in cases of infringing goods found in transit. All subsequent agreements have explicitly required *ex officio* action for infringing goods imported, exported, and in transit.³⁸

Criminal Proceedings: The most notable provisions in US PTAs include, the right of authorities to initiate legal action without the need of private complaint,³⁹ forfeiture of assets traceable to the infringing activity,⁴⁰ and the need for criminal proceedings in the absence of wilful wrongdoing.⁴¹

In terms of *S&DT* there is recognition of the Doha Declaration on TRIPs and essential medicines towards the end of what are extensive chapters on IPR in US PTAs and a reference to the promotion of innovation and technical development in the US-Colombia PTA, but no use of the term technology transfer.

4.9.4 EFTA

The provisions on IPRs in EFTA PTAs are much less comprehensive. Rights and obligations under TRIPs are reaffirmed as are obligations under existing international conventions on IPR. There are relatively few areas in which EFTA PTAs go beyond TRIPs. Provisions on copyright and trademarks are as in TRIPs and there are no specific provisions on GIs, although the EFTA - Korea PTA has a rendezvous clause for future discussions on GIs.

There is a longer protection for *industrial design* in EFTA – Korea of 15 years. EFTA has progressively strengthened its protection for industrial designs starting with 5 years. The 15 years now applies in most EFTA PTAs, but EFTA-Colombia refers only to an ‘adequate term’ of protection, suggesting there may be some asymmetric provisions in PTAs with developing countries.

The restoration of patent protection of ‘up to 5 years’ due to curtailment by delays in the marketing approval process is TRIPs-plus although the wording of the EFTA-Colombia PTA is weaker in that the parties ‘may’ act to restore patent life. The agreements with Singapore and Chile also require TRIPs-plus extension of patent life.⁴²

³⁴ See, for example, US-Singapore 16.9:8 or US-Morocco 15.11:5.

³⁵ See, for example, US-Bahrain 14.10:7 or US-Oman 15.10:7, which establishes a maximum penalty of three times the assessed injury.

³⁶ See, for example, US-Chile 17.11:12 (a) or US-Oman 15.10:10 (a).

³⁷ Compare TRIPS Article 46 to US-Oman 15.10:10 (b).

³⁸ Compare US-Singapore 16.9:19 and, for example, US-Peru 16.11:23.

³⁹ See, for example, US-Peru 16.11:27 (d).

⁴⁰ See, for example, US-Bahrain 14.10:27 (b).

⁴¹ See, for example, US-Bahrain 14.10:28.

⁴² EFTA-Singapore Article 3 (b)(i), EFTA-Chile Article 3 (b), and EFTA-Korea Article 2 (b).

Data protection has been for 5 years for information concerning pharmaceuticals and 10 years for agricultural chemicals in past agreements with Chile as well as with Colombia.⁴³ But the PTA with Korea refers to 'an adequate number of years in line with domestic legislation.'

4.9.5 Japan

No recent Japanese agreements have contained anything significantly TRIPs-plus in IPR. The only real TRIPs-plus provision is the establishment of specialist committees on IPRs with broad remits to cooperate and potentially develop more common rules.

4.10 Technical Barriers to Trade

Technical barriers to trade can take the form of mandatory technical regulations that must be complied with for goods to be sold; standards, which while voluntary may still form a de facto impediment to trade or may be used as proving compliance with technical regulations; and conformance assessment in the sense that methods of testing for conformance with regulations or standards may discriminate against imported products. As tariff barriers are removed within PTAs TBTs assume greater importance. As new regulations or standards are produced the whole time dealing with TBTs is, unlike removing tariffs, an ongoing process. How the provisions on TBTs are applied following the adoption of TBT agreement is therefore of vital importance. This section only discusses the provisions in PTAs so must be complemented by an assessment of how the provisions are applied. In practice there have to date been few TBT disputes within PTAs, but this is probably due to the fact that these are relatively recent and the focus has been on ensuring tariffs are removed.

4.10.1 The main elements of TBT agreements

Reaffirmation of WTO rules as in the WTO Technical Barriers to Trade Agreement of 1994 is the practice in all PTAs and certainly all those covered. Some PTAs, and in particular the agreements negotiated by the EU and US are 'WTO-plus' in the sense that they seek to implement the principles (such as transparency and cooperation set out in the TBT Agreement) more effectively. In other words they are WTO-plus in terms of process but do not set new norms or standards.

Coverage of commitments on TBT varies between PTAs. The coverage may be full for central government bodies, with only best endeavours wording for sub-central or non-governmental bodies. It should be recalled that standards are determined sometimes in government bodies, sometimes in quasi-public standards agencies (as in Europe) or in the private sector (as is often the case in the US). The WTO TBT Agreement differentiates between central government which is covered by firm obligations on, for example, national treatment, and sub-central or non-governmental agencies where central government merely agrees to make best endeavours to ensure that these other parties comply with rules on non-discrimination or disproportionate action.

The *scope* of provisions can vary with some PTAs including extensive provisions and articles, some of which largely duplicate the existing WTO provisions, and other PTAs including very sparse reference to TBT.

The substantive provisions cover *technical regulations* where the main objective of PTAs is to enhance the provision of information on new technical regulations, provide scope for interests in the PTA partner to comment on any draft regulation and ensure that regulators consider such comments. This can be done, for example, by requiring regulators to respond to comments.

⁴³ EFTA-Chile Article 4.

International standards provide a means of showing conformity with regulatory requirements, so promoting their use facilitates trade and how standards are decided is important. The PTAs considered tend to differ in terms of emphasis.

There is no consensus or no single model for how best to ensure *conformance assessment*. The WTO TBT Agreement sets out broad principles that should apply to conformance assessment but there is nothing on what methods (i.e. accreditation, mutual recognition of test results, acceptance of equivalence, suppliers declarations etc.) should be used.

Marking and labelling is in theory also covered by the WTO TBT Agreement, but this is one of those areas where there has been a good deal of activity as regulatory agencies seek to provide consumers with information on which to make informed choices. Some PTAs therefore include provisions on marking and labelling in the sense of seeking to clarify and elaborate on the WTO provisions.

Institutional elements in PTAs take the form of Sub-Committees to deal with potential TBTs within the bilateral or regional setting. As the barriers can arise at any time with new regulations or standards or changes in practice specialist committees are seen as a means of dealing with these. There is also a trend in some PTAs to introduce sector specific committees to deal with TBTs. Specialist sub-committees (the overarching PTA Trade Committee) are also used to promote cooperation and/or convergence of regulations and standards. There is also the question of whether disputes in the field of TBTs should be subject to PTA specific dispute settlement or to WTO dispute settlement.

4.10.2 Comparison of approaches

Use of WTO TBT rules: all the PTAs considered confirm compliance with the WTO rules. This means national treatment obligations with regard to (mandatory technical regulations) and conformance assessment. The EU appears to go a bit further than the other PTAs in seeking to improve on the application of the WTO rules. The US in its agreements with Korea and Colombia reaffirms the WTO TBT Agreement and the EFTA and Japanese agreements seem more to apply the WTO rules as they have far fewer (in the case of EFTA) or no (as in the case of Japan) WTO-plus provisions.

Coverage is comprehensive in the EU agreements in the sense that there is no reference to weaker rules for non-central government regulating bodies or standards-making entities. However, this would seem to apply only to WTO-plus provisions since the recognition of the WTO TBT Agreement means that sub-central bodies are only covered by best endeavours provisions.

In the PTAs signed by the US the Federal government agrees to coverage for itself but can make no more than best endeavours to ensure that the 'sub-federal level body immediately below the federal government' complies. In other words US PTAs restate the position maintained in the WTO negotiations by the US that the US states are not bound by PTAs signed by the US and bodies below the level of the states least of all.⁴⁴ Standards making in the US is seen as essentially a market-led function and most standards are determined by industry level associations. In standards making the US therefore commits only to take 'reasonable measures' to ensure that non-governmental standards making bodies (in the US case industry level bodies) comply.⁴⁵

In the case of EFTA and Japan coverage is again determined by the WTO Agreement

⁴⁴ This is the practice established in Art 903 NAFTA and has determined the limited scope for the TBT Agreement in terms of coverage.

⁴⁵ On standards the rules are essentially the non-binding Guidelines for Standards Making Bodies in annex 3 of the 1994 WTO Agreement, as elaborated subsequently.

Scope: as the EU PTAs tend to seek to improve on the application of the WTO TBT Agreement principles the scope of the TBT provisions in PTAs tends to be greater than in the US PTAs. As covered below the recent EU PTAs also include provisions on marking and labelling which the US does not seek in its agreements. Japan includes little more than a restatement of its commitment to apply the WTO TBT Agreement.

It is perhaps worth pointing out that the EU approach to TBTs in PTAs is less ambitious than its internal rules based on mutual recognition and common standards. This was particularly the case in the past when most EU preferential agreements were with ACP or neighbouring states that could not be expected to satisfy the conditions for mutual recognition. In PTAs with its near neighbours in North Africa the EU had been content with a general objective of harmonisation to the European standards and practice (Art 40 EU – Morocco 1996). When the circumstances are right this is intended to lead to mutual recognition agreements (Art 40 (2) EU – Morocco) (in the first instance electrical goods, machinery and construction equipment).

More surprisingly perhaps was the relative weakness of the TBT provisions in the EU – Chile agreement, which is in other respects seen to be a ‘model’ for future EU PTAs. This offers little more than a menu of various possible approaches, including the promotion of regional and international standards, mutual recognition and equivalence. (Art 87 EU – Chile). The general lack of provisions in the PTA has however not stopped the EU negotiating a mutual recognition agreement with Chile on wines in 2003.

In more recent PTAs the EU has become more ambitious, in particular in the PTA with Korea because there was a concern that tariff liberalisation would open the EU market for Korean goods while TBTs keep the Korean market closed for EU goods. Similar concerns will also shape the negotiations with Japan.

Cooperation: as a general principle is supported by both the EU and US. This can take various form of ‘horizontal’ level cooperation in for example a sub-committee on technical barriers to trade or in ‘vertical’ level cooperation in sectoral committees. Cooperation can also take the form of technical cooperation and capacity building.

Once again the EU appears to have more developed provisions if one compares recent PTAs. For example, the sector agreements in the EU Korea PTA for automobiles, machinery and chemicals represent a departure from past practice in which there had been sector level negotiations on mutual recognition agreements (for example, even in EU –US relations), but no standing sector committees to promote cooperation. The US – Korea PTA includes a sector committee on automobiles only but this looks more like an ad hoc measure rather than a model for future agreements.

Technical Regulations: all of the EU, EFTA and US PTAs have the aim of ensuring effective information and transparency on new technical regulations. All refer to the desirability of providing this information electronically and to giving interests in the other party to a PTA 60 days to comment on new proposals. The EU-Colombia –Peru agreement stretches this to 80 days where possible to reflect the special difficulties developing countries have complying with new regulations.

In terms of access to the consultation process the EU PTAs (with Korea and Colombia-Peru) allow for economic operators in the other party to participate, but do not offer full national treatment as the US does in all aspects of TBTs, in other words in the response to technical regulations, standards and conformance assessment. This is WTO-plus and is a practice that was established in NAFTA and applied in earlier US PTAs with middle income (Chile) and developing countries (e.g. Morocco). This comes close to a policy of ‘a seat at the table’ as the US has sought in the past. But it must be

remembered that the US only offers national treatment of third country economic interests for federal level procedures and can only 'recommend' the practice for non-governmental bodies.

Recent EU and US PTAs also include a requirement for the regulatory bodies to respond to comments made by parties from third countries. In the case of the EU this is 'on request'. In the case of the US there are similar provisions. More generally the approach adopted in US PTAs is that the parties are encouraged to accept the other party's regulations as equivalent, and if they are not for the regulatory agency to explain why they are not. This aim of *equivalence* by the competent bodies in the importing country was also established in NAFTA Art 904. The competent body in the importing country retains discretion to reject equivalence, but must then explain why. The approach to conformance assessment (Art 906.6 NAFTA) also applies the same approach. This approach is organic in that the expectation is that equivalence will be achieved through the general application of best practice and dialogue without significant institutional provisions. The US expects its PTA partners to follow a similar approach, as illustrated by the US-Chile (and US-Singapore agreements). As a result Chile and Singapore have included the option of equivalence in their other agreements, such as the Trans-Pacific Strategic Economic Partnership agreement of November 2006.⁴⁶

Standards: all agreements as well as the WTO TBT Agreement urge the parties to adopt international standards, but there are general exceptions 'where these are not appropriate'. The EU in its recent PTAs with Korea and Colombia – Peru has sought to reinforce the application of the (voluntary) Code of Conduct for Standards-Making Bodies in Annex 3 of the 1994 WTO TBT Agreement. To this end it envisages the use of bilateral cooperation at the national (or regional) levels.

The US PTAs oblige parties to use international standards (again this is unlikely to apply to private standards bodies), but like the WTO TBT text they provide considerable scope not to adopt such standards, if these are seen to be ineffective or inappropriate. In the past the US has not been a great endorser of international standards as it has seen them as being shaped by European public interests. Given the general antipathy towards agreed international standards on the part of the US, such measures cannot be expected to result in much pressure for more effective international standards. The US PTAs have emphasized the need to ensure that international standards making is open, impartial and effective as set out in the WTO decision applying Articles 2 and 5 of the TBT Agreement and the Annex on the Code of Conduct for Standards-making Bodies.⁴⁷

Conformance assessment: in comparison to the mutual recognition approach of the *acquis communautaire*, the EU approach to conformance assessment in international agreements has moved towards a more flexible approach. This was due to a recognition of the difficulties in negotiating mutual recognition agreements (of test results) with third countries. Thus the EU favours the application of international standards and now accepts a range of different forms of conformance assessment. This is now in line with the US approach. Both the EU and US and EFTA recognize a range of conformance assessment methods. These are the same (mutual acceptance of results, accreditation, conformance assessment by designated bodies, recognition of test results, voluntary conformance assessment and suppliers declaration). The order in which these are listed in the PTAs varies but it is not clear that one can read much into this.

Marking and labels: the EU PTAs with Korea and Colombia –Peru appear to be seeking to promote a more effective application of WTO principles to marks and labels. These agreements provide an innovation by including specific provisions on labelling such as the fact that there should be no

⁴⁶ The EU – Chile agreement provides a choice between mutual recognition and equivalence as the means of addressing TBTs.

⁴⁷ G/TBT/1/REV 8 2002.

requirement to get approval of labels prior to their use provided they provide the requisite information. There are also provisions that seek to ensure that where unique identification numbers are required for suppliers these should be supplied promptly by regulating bodies.

Institutional provisions: As mentioned above all the PTAs considered included special TBT sub-committees except those negotiated by EFTA. These are likely to provide an important means of ensuring that new TBTs are not created and help promote convergence between countries.

Recent PTAs have also introduced TBT coordinators, as in the case of the EU – Korea PTA for example, who will have the job of ensuring that the various forms of cooperation and information exchange actually function.

Co-operation, technical assistance and information exchange on TBT issues. As with the other core entities this benefits the less developed partner, but also provides a means of promoting one's own standards. The US generally spends less on such support than the EU or Japan (only \$3.4m between 2001 and 2005 compared to \$29 m for the EU and \$9.6m for Japan).⁴⁸ Generally speaking the US PTAs have weaker bilateral institutional machinery for cooperation than the EU or other core entities. In recent PTAs there has been a shift towards establishing 'TBT coordinators' (e.g US Morocco Art 7.7 and Annex 7a and the same articles in US-Bahrain) in each of the parties to deal with disputes, rather than establishing joint committees. This reflects a preference for a lighter institutional framework compared to the EU, for example, which generally establishes a specific Joint Committee for TBT (and SPS) in addition to any general Association Council.

4.11 Sanitary and Phytosanitary Measures (SPS)

SPS measures are those taken to restrict the trade of products that can pose a threat to human, animal or plant life or health. With increase growth in food and food products SPS measures have assumed a growing importance and are now included in one form or another in all PTAs. For the most part the approach to SPS measures is similar to that adopted in the TBT provisions of such agreements. All recent PTAs reaffirm rights and obligations under the existing WTO SPS Agreement and therefore retain a common set of principles. But some PTAs, and in particular those negotiated by the EU (since the EU Chile FTA) include what can be seen as means to further the application of the WTO principles, so could be seen as WTO-plus in a procedural sense. As all PTAs hold to the WTO principles on SPS measures there is a broad similarity between them, but differences in policy can be found in detailed provisions that could affect how the SPS provisions in PTAs are implemented. As for TBTs implementation of the agreements and the procedures provided for in PTAs is the key issue.

4.11.1 The elements of SPS rules in PTAs

Right to act: the WTO SPS Agreement of 1994 grants WTO members the right to act to control imports that threaten human, animal or plant life or health (Art 2). As all PTAs investigated reaffirm the WTO rights and obligations this right is retained by all parties, subject to the obligation not to use such powers as arbitrary means of restricting trade.

Harmonisation: SPS provisions also encourage the use of agreed international standards, namely those of the Codex Alimentarius (Codex), the International Organisation of Epizootics (IOE) and the Plant Protection Council (PPC). The WTO Agreement states that SPS measures that use such standards can be assumed to conform with the SPS Agreement. Standards higher than agreed international standards are possible (Art 3 SPS Agreement) but only when scientifically justified.

⁴⁸ <http://tcbdb.wto.org> cited in OECD 2007 pg 20

Equivalence: of SPS controls can also be encouraged. The SPS Agreement encourages the acceptance of equivalence when the exporting party objectively demonstrates that products are safe (i.e through conformity with international standards). As a quid pro quo agreements tend to envisage scope for the competent authorities in an importing country 'reasonable' access for verification of the testing by the exporting party. For this purpose there may be provisions on *Control, Inspection and Approval*.

Risk assessment: has been the subject of controversy in international trade with some WTO members, such as in particular the European Union, stressing the need for the application of the precautionary principle due to the history of regulatory failure in the 1980s and 1990s (e.g. BSB) while others, such as the USA in particular that emphasizes scientific methods and views the precautionary principle with suspicion. The WTO SPS Agreement provides for precaution (Art 5) in which temporary restrictions are permitted when scientific evidence is not available, but the party taking such action must seek more evidence and make use of (scientific) evidence available in other countries. So the WTO SPS Agreement tends to err towards a scientific approach.

Regionalisation: is the principle by which regions of a country that are free from disease or pests (when other parts of the country may not be) should be free to export without restrictions to trading partners. This prevents situations, for example, in which exports from the whole of the EU are blocked because one region of one member state has a problem with foot and mouth or any other disease.

Transparency: provisions feature in SPS articles in PTAs as in other parts of agreements.

Animal welfare: provisions have begun to appear in PTAs, but as the discussion below will show only in EU PTAs and not in any other PTAs or the WTO SPS Agreement.

Technical Assistance and/or Special and Differential Treatment provisions may also be included in PTAs.

Institutional provisions include clarification of whether bilateral or multilateral dispute settlement provisions apply, whether a special committee or working group is established to oversee implementation of the SPS provisions, which is the case for all PTAs investigated, and which level of government is covered and responsible for *implementation* of the rules.

4.11.2 European Union

EU PTAs are by some stretch the most comprehensive when it comes to WTO-plus procedural measures aimed at implementing the WTO principles. In the past EU provisions on SPS in PTAs fell into three broad categories. There are those in agreements with near neighbours and potential accession states, which take over the entire *acquis communautaire* and thus in effect assume the same rules as the EU. For countries such as Turkey or potential accession states in the Balkans the agreements with the EU assume the progressive adoption of EU rules and standards for all issues including SPS. A second group of countries includes the EuroMed partners with which the PTAs tend to simply restate the parties' obligations under the WTO SPS Agreement and set out a general objective of promoting the approximation or harmonisation of SPS standards, but without any specific binding obligations or details of how this should be achieved. For example, the aim of harmonisation of SPS standards is included in Art 46 of the EU – Israel agreement; Art 51f for EU – Lebanon, Art 58 for EU – Algeria and Art 40 EU – Morocco. All the EU bilateral agreements include provisions on cooperation in a wide range of policy areas including SPS policy and standards. PTAs with other developing countries, such as the ACP states have taken a similar form. The only agreement with a Sub-Saharan African country was the Trade Development and Cooperation Agreement (TDCA) with South Africa which simply included general references to the desire to cooperate in the SPS field to promote a harmonisation of SPS standards and rules in conformance with existing WTO obligations. (Art 61 TDCA).

The third category of PTAs is with major emerging markets or developed markets outside of Europe, such as the agreements with Mexico, Chile and the more recent agreements with Korea and Colombia –Peru. These have included more detailed measures starting with the EU – Chile generation of PTAs that established detailed provisions that go beyond what is in the SPS Agreement on how to implement equivalence, verification and regionalization, as well as promoting special and differential treatment.

The most important SPS provisions in the EU – Mexico agreement can be found in Article 20 of the supplement to the EU – Mexico Agreement resulting from a decision of the EU/Mexico Joint Council 2/2000 of March 2000. This reaffirms the SPS Agreement but establishes a WTO-plus Special Committee on SPS matters to progressively develop cooperation in the SPS field. The pace with which more developed procedural measures are introduced in Mexico will therefore be dependent on the work of this Special Committee. It is possible that more advanced provisions for Chile, see below, will provide a precedent for the EU's approach to this work.

In general terms the EU – Chile PTA is seen as a model for future EU PTA agreements. The SPS provisions in the EU- Chile agreement have provided something of a precedent for the PTAs that followed. The *aims* of the EU –Chile SPS Agreement are set out in Article 89 (2) of the agreement. Details are however, included in Annex IV to the agreement. A special Joint Management Committee is established to develop work on SPS measures. There are also twelve appendices detailing specific procedures and definitions with a view to:

- ensuring full transparency of SPS provisions (to enable each party to comply with the detailed SPS rules and procedures);
- establishing the mechanism for recognizing equivalence (Art 6 and 7 of annex IV)(that would enable the importing party to recognize animal and plant products as satisfying the importing parties rules);
- applying the principle of regionalisation (Art 6b of annex IV) (that allows exporting parties to show that specified regions are free of pests and thus facilitate trade);
- promoting the application of the WTO SPS agreement;
- facilitating trade (such as through building confidence on verification and control applying FAO standards) (Art 10 Annex IV) and;
- improving cooperation and consultation.

The EU-Chile agreement does not appear to cover genetically modified crops (due to the sensitivity of this issue). On the other hand there is no specific reference to science-based approaches. One innovation however, in the EU-Chile agreement is inclusion of a specific reference to animal welfare standards in article 1 of the Annex IV. The aim being to develop common approaches to the treatment of animals and compliance with OIE standards falling within the scope of this Agreement'.

The approach in the EU –Chile PTA has shaped the EU –Colombia –Peru PTA which has similar detailed provisions on the application of approval of exporters and verification (of the exporting parties testing procedures) in Appendix 2 of Annex V to the agreement.

With regard to risk assessment the EU-Colombia –Peru agreement provides for emergency measures and in Art 99 stresses precaution. There is a general, unspecific provision favouring the 'promotion of Animal welfare' in Art 102.

Technical assistance is envisaged in the form of promoting capacity of the parties (meaning Colombia and Peru) to comply and show compliance with international standards. Special and differential treatment is also included with the ANDEAN Community parties having the option of requesting

alternative import conditions and up to one-year transition period to comply with any new SPS measure.

On institutional matters the EU-Colombia-Peru agreement sets up a Sub Committee on SPS, which may establish expert working groups as required to discuss cooperation, the implementation of the SPS provisions and to consult on any disputes.

The EU PTA with Korea likewise seeks to more effectively implement existing WTO principles and rules, but it contains less detail than the EU – Colombia-Peru case.

4.11.3 The United States

The NAFTA was finalized one year before the SPS Agreement. Therefore, there was no mention of the WTO SPS Agreement in the NAFTA. In fact, the WTO SPS Agreement is said to be more stringent than Chapter 7 of NAFTA.⁴⁹ However, the SPS provisions in both the WTO and NAFTA are generally similar. PTAs negotiated by the US subsequent to the 1994 SPS Agreement reaffirm the commitments and obligations in that agreement, such as in Art 8.2 of KORUS.

The requirement to use international standards is further weakened by provisions that allow each country to decide its own 'appropriate level of protection' of human, animal, or plant life or health. Such measures - which can be more stringent than other countries' and differ from international benchmarks - are acceptable as long as they are based on scientific principles and risk assessment, applied consistently to all countries, and not used as disguised trade barriers. This provides for considerable national policy autonomy, but is firmly based on scientific risk assessment.

To reconcile these two potentially divergent aspects NAFTA, like the SPS Agreement stresses the benefit of equivalence (Art 714 NAFTA). In other words parties are to recognize the other's products as equivalent to their standards. NAFTA therefore set a precedent for the SPS Agreement in its use of equivalence, but there is not much detail on how this should work in practice. The more recent US agreements are limited to reaffirming SPS Agreement rights and establishing a specialist committee on SPS. As part of the list of activities of the subcommittee in KORUS is listed a requirement to 'emphasise scientific risk analysis' (Art 8.3 (3) (a)), which appears to be an expression of a desire to reaffirm the scientific as opposed to the precautionary principle approach to risk assessment. In general SPS does not appear to be a priority issue included in the US 'gold standard' for PTAs. So there is no reference to detailed SPS plus procedural rules, although these could conceivably be developed in the specialist sub-committees, no reference to animal welfare and no reference to special and differential treatment or technical assistance beyond the limited provisions in the SPS Agreement.

The US model as established in NAFTA supports the principle of regionalization, in other words the differentiation between regions in the exporting country so that any restrictions on exports from the country can be limited to the affected region, thus mitigating the effects of any health controls on trade.

⁴⁹ In all TBT and SPS provisions NAFTA transparency measures require the parties to notify any new or revised regulation 60 days in advance and to provide an opportunity for the parties to commenting on such regulations. (Art 718 and 719 NAFTA) To facilitate trade, countries are encouraged to use relevant international standards and work towards harmonization - that is, the adoption of common SPS measures. To promote harmonization, the agreements cite, as sources of scientific expertise and globally recognized standards, international bodies such as the Codex Alimentarius Commission, which deals with food safety issues; the International Office of Epizootics (IOE), for animal health and diseases; and the International Plant Protection Convention (IPPC), for plant health. However, Article 713(2) states that a measure that 'results in a level of SPS protection different from that which would be achieved by a measure based on a relevant international standard, guideline or recommendation shall not for that reason alone be presumed to be inconsistent with this section.'

4.11.4 EFTA

EFTA has relied on reiterating the rights and obligations of the parties under the WTO SPS Agreement. This is done through a single article (EFTA-Mexico PTA Article 9) (EFTA-Korea FTA Article 2.7). However, each agreement goes nominally beyond the WTO by stipulating that the Parties shall exchange names and addresses of contact points with SPS expertise in order to facilitate technical consultations and the exchange of information and the Korea and Colombia-Peru agreements set up a Standing Committee and a Working Group respectively.

4.11.5 Japan

The SPS measures in Japan – Mexico reflect those typically incorporated within Japanese PTAs (Section 2 – Articles 12-15). These include explicit reference to the reaffirmation of rights and obligations of the WTO SPS Agreement, enquiry points, institutional cooperation via a subcommittee, and non-application of dispute settlement procedures. On this later point the SPS approach is the same as for TBT provisions.

A sub-committee on SPS measures is established with the mandate to ensure, inter alia, information exchange, notification, science-based consultation to identify and address specific issues that may arise from the application of SPS measures with the objective of obtaining mutually acceptable solutions, technical cooperation and cooperation in international fora. The subcommittee may, if necessary, establish ad hoc technical advisory groups to provide technical information and advice on specific issues.

The wording of the Japan – Malaysia PTA (Chapter 6, articles 68-72), Japan- Chile (Art 63) and Japan – Viet Nam (Art 46) is more or less identical.

4.12 Environment

Two factors prompt the inclusion of provisions on the environment (and core labour standards) in PTAs: a concern about market failure – that without corrective action production in one country can have adverse environmental effects in other countries; and a concern about a potential race-to-the bottom in environmental standards as countries seek to gain competitive advantage.

There are nevertheless concerns about the use of trade agreements to seek to enforce policy objectives in other areas, not least because of the risk of protectionist capture and because of conflict with the principle established by Dutch economist Jan Tinbergen that for policy to work there must be as many independent effective instruments as there are feasible targets (Tinbergen 1956).

These conflicting motivations help explain why there is such a marked lack of consistency in the treatment of the environment (and labour standards) amongst the agreements being considered here.

4.12.1 European Union

EU-Korea, in common with earlier EU PTAs, has overarching references to sustainable development, including environmental objectives. This is reflected throughout the agreement: in the broad objective of promoting foreign direct investment without lowering environmental (and labour) standards (Chapter 1 and repeated in Article 13.7); in reference to GATT Article XX, allowing exceptions necessary to protect human, animal or plant life or health (trade in goods, Article 2.15, repeated in SPS chapter, Article 5.1); and in the requirement to protect plant varieties (IPR chapter, Article 10.39).

In addition, EU-Korea contains a separate chapter on trade and sustainable development in which the Parties commit: to effective implementation in their laws and practices of multilateral environment agreements to which they are party (Article 13.5); to reaching the objectives of the UN Framework Convention on Climate Change and its Kyoto Protocol; to facilitate and promote trade and foreign direct investment in environmental goods and services (Article 13.6); and to cooperate on trade-related aspects of social and environmental policies (Article 13.11 and Annex 13), in consultation with Civil Society (Article 13.13) and through a process of consultation via a Panel of Experts (Articles 13.14, 13.15 and 13.16). And as noted earlier and as an example of a more specific commitment, the trade in services provisions of the PTA give EU firms access to the treatment of non-industrial waste.

There are, however, some qualifying limits to the provisions on environmental matters in EU-Korea. The PTA states that it is not the intention to harmonise the environmental (and labour) standards of the Parties (Article 13.1), that environmental standards should not be used for protectionist purposes (Article 13.2) and that the Parties cannot invoke the dispute settlement provisions of the PTA to resolve environmental disagreements (Article 13.16). Unlike KORUS, EU-Korea does not permit the use of trade sanctions when violations of environmental (or labour) provisions have been deemed to occur.

The environment provisions of EU-Colombia-Peru correspond very closely to those of EU-Korea, including the presence of a specific chapter on trade and sustainable development. There are, however, areas of difference. First, the commitments on climate change are weaker - Parties resolve only to "enhance their efforts". Second, there is relatively more emphasis on biodiversity and traditional knowledge. And thirdly - as an element of asymmetry - recognition is made of the "common but differentiated" responsibilities of the Parties, of the sovereign right of each Party to "establish its own policy and priorities on sustainable development" and of the need to take account of "their [respective] capacities, in particular technical and financial capacities" (Article 267).

4.12.2 United States

KORUS commits the parties to enforce a list of 7 multilateral environment agreements (MEAs) and to add to the list when other agreements enter into force. The language of the PTA is somewhat stronger than the corresponding provision in EU-Korea with the Parties agreeing that neither Party shall fail to effectively enforce its laws and measures in order to meet obligations under the MEAs. In other respects too, KORUS uses stronger wording than EU-Korea, providing, for example: that each Party shall provide persons with a recognised interest under its law effective access to sanctions or remedies for violations of its law (Article 20.4); that each Party shall encourage the development of incentives to protect the environment (Article 20.6); and that the Parties shall commit to expanding their cooperation on environmental matters. The PTA is also more specific on what "danger to human, animal or plant life or health" might actually mean (Article 20.11). And, as touched on earlier, under KORUS (Article 20.9), violations of environmental provisions are to be handled in the same manner as commercial provisions, through the dispute settlement mechanism of the PTA. This means that as long as the violations affect trade or investment between the Parties, they are subject to trade sanctions. According to the Congressional Research Service, this is unprecedented for US preferential trade agreements (CRS 2013).

Without detracting from the overall strength of the environment provisions in KORUS, three qualifying features are present. The agreement recognises the right of the Parties to establish their own levels of environment protection and their own environmental development priorities. The PTA makes no reference to the climate change debate and related commitments. And, in the event of an inconsistency between the PTA and a covered MEA, each Party shall simply "seek to balance its

obligations under both agreements”, rather than the MEA prevailing. Moreover, KORUS stipulates that in complying with an MEA the purpose must not be to impose a disguised restriction on trade (Article 20.10).

US-Colombia follows the pattern of US-Korea, with substantially the same wording. It does, however, contain two provisions not found in KORUS and which may reflect factors specific to the US-Colombia relationship. The PTA has a separate section on the promotion of biological diversity (Article 18.11). And there is recognition in the agreement that the North American Agreement on Environmental Cooperation provides the opportunity for persons or organisations to file a submission that the United States is failing to effectively enforce its environmental laws (Article 18.8).

4.12.3 EFTA

EFTA agreements, like those of Japan, make only minimal reference to the environment. The preamble to EFTA-Korea recognises that trade liberalisation should allow for the optimal use of the world’s resources in accordance with the objectives of sustainable development, seeking both to protect and preserve the environment. The agreement, invoking GATT Article XX, acknowledges measures necessary to protect human, animal or plant life or health as justifying an exception to liberalisation commitments for both trade in goods (Article 2.13) and trade in services (Article 3.15). And in the schedules of services commitments, both Korea and the EFTA states generally maintain open markets for the provision of environmental services (Annex VII).

EFTA-Colombia has similar environmental provisions to EFTA-Korea in its preamble and in the schedules on environmental services. It also invokes GATT Article XX in respect of exceptions to liberalisation commitments in government procurement as well as in goods and services. Unlike EFTA-Korea, however, it also has extensive reference in the chapter on intellectual property rights to measures related to biodiversity and access to genetic resources (see above section on IPRs). The PTA refers to rights and obligations under the Convention on Biodiversity and provides for the imposition of sanctions in the event of misleading patent applications in the field of biodiversity. The agreement also requires the Parties to ratify the International Convention for the Protection of New Varieties of Plants. These differences between EFTA-Korea and EFTA-Colombia may reflect particular concerns and interests of Colombia but also a growing awareness of biodiversity issues in the interval between the two agreements.

4.12.4 Japan

The environment provisions of Japan-Chile are particularly weak. There is no dedicated chapter for this topic and only brief mention: in the preamble, noting the mutually reinforcing nature of economic and social development and environment protection; in the investment chapter, providing that Parties will not derogate from environmental measures in order to encourage investment (Article 87) but without the provision, in earlier PTAs of Japan, for consultation between the Parties in the event of a breach; and a requirement in the IPRs chapter that each signatory to the PTA become party to the International Convention for the Protection of New Varieties of Plants, 2009 (Article 162). Finally, Chile has an exception under trade in services providing that waste collection and disposal can only be undertaken by a company incorporated under Chilean law (Annex 7).

Japan-Vietnam provides for cooperation between the Parties on the environment (Article 111) and has a brief reference to new plant varieties but is otherwise silent on the issue. There is no investment chapter (presumably because of the existence of a bilateral investment treaty between the Parties) and the Preamble makes no reference to the environment. The Preamble does, however, recognise the “development gap between the Parties”.

4.13 Labour Standards

Strong provisions on core labour standards are essentially a feature of US PTAs. Other countries have tended to eschew the use of trade sanctions to seek to enforce such standards for reasons similar to those outlined earlier in relation to the inclusion of environmental provisions in PTAs. In this case being WTO-plus does not necessarily mean “better”.

4.13.1 European Union

The first EU preferential agreement to have labour rights provisions was EU-CARIFORUM. The Parties simply reaffirm their commitments to internationally recognised core labour standards and their obligations as members of the ILO. Korea is not a signatory to some of the core ILO conventions related to freedom of association and forced labour, but it is a signatory to some of the newer ILO conventions for worker safety and has made commitments to the decent work agenda. Under EU-Korea, the Parties: reaffirm their commitment to full and productive employment and decent work for all (Preamble); commit to “respecting, promoting and realising” the objectives of the ILO Declaration on Fundamental Principles and Rights at Work (Article 13.4); agree that a Party shall not fail to effectively enforce its labour laws and shall not weaken labour protections to encourage trade or investment (Article 13.7); and agree to cooperate on labour issues via the Committee on Sustainable Development and a Panel of Experts (Article 13.7). A peer review based system will address issues of non-compliance, stopping short of a “social clause” that would include the use of trade sanctions for non-compliance. Other provisions in the agreement serve to qualify the commitments on labour standards. The PTA asserts that it is not the intention to harmonise standards, that each Party has the right to establish its own levels of labour protection and that the comparative advantage of the Parties should in no way be called into question (Articles 13.1, 13.2 and 13.3). The agreement also states that labour standards should not be used for protectionist purposes (Article 13.2).

Finally, there is one aspect of labour rights in EU-Korea that will require close monitoring and that is trade involving products from the Democratic People's Republic of Korea (DPRK) or North Korea and specifically the particular case of the Kaesong Industrial Complex. This is essentially a matter for the rules of origin for qualifying products under the PTA and involves a careful balancing of, on the one hand, the concerns of various groups in the EU about unfair competition from imports produced by workers who are subject to various forms of social control and, on the other hand, the goal of improving the economic status of some part of the population of the DPRK and thus contributing to peace on the peninsula, while also ensuring that concerns about core labour standards do not become captive to protectionist sentiment. The Protocol on Rules of Origin of the PTA provides (Annex IV) for the establishment of a Committee on Outward Processing Zones on the Korean Peninsula that shall meet not less than once a year to review whether conditions prevailing in the zones are appropriate. The PTA thus treats the issue of processing zones in the same way as US-Korea, by deferring the matter (LSE 2012a).

EU-Colombia-Peru again corresponds closely with EU-Korea and with other EU PTAs. It commits the Parties to the promotion and effective implementation of five internationally recognised core labour standards contained in the ILO Declaration (1998), namely: freedom of association; the right to collective bargaining; elimination of all forms of forced and compulsory labour; effective abolition of child labour; and the elimination of discrimination in respect of employment.

In the Preamble to the agreement, while there is reference to labour rights, somewhat greater emphasis, compared with EU-Korea, is placed on the broader question of fundamental human rights – reflecting persisting concerns on this issue. Emphasis is also placed on the goals of reducing poverty

and raising living standards, while noting the differences in the economic and social development of the Parties. A key to the success of this agreement will be the way in which it is implemented – through a process of peer review - and the extent to which it is backed by wider flanking measures to promote development. While this observation is true of all North-South PTAs it is particularly relevant in this case.

4.13.2 United States

In conformity with the 10 May 2007 understanding between the administration and congressional leaders (see Heydon and Woolcock 2009 pp 133 and 138), US-Korea has strong provisions on labour standards. The understanding requires that US PTA partners enforce the five basic international labour standards (identified earlier), that this commitment be enforceable under the PTA and that neither Party is to derogate from its commitment in a manner that affects trade or investment between the Parties. Should such a derogation occur and if the dispute cannot be resolved through consultation, sanctions under the dispute settlement mechanism of the PTA can be applied. Compliance is to be monitored by a Labour Affairs Council drawn from officials of the respective labour and other appropriate ministries. KORUS also establishes a Committee on Outward Processing Zones to review the appropriateness of such zones in furthering economic development on the Korean Peninsula. Factors considered include labour standards but also progress towards denuclearisation on the Peninsula (Annex 22-B).

US-Colombia was signed in 2006 but prompted congressional debate about labour and human rights in Colombia. The PTA was subsequently modified, to include provisions of the May 2007 bipartisan understanding referred to above, and was accompanied by an Action Plan Related to Labour Rights that was substantially implemented in 2011. The PTA thus incorporates strong labour provisions, corresponding to those as described under KORUS, together with additional commitments from the Colombian government to protect union members and improve worker rights. Nevertheless, US labour unions remain highly opposed to the agreement.

In comparing EU and US approaches, while EU PTAs might be seen as stronger in that they are focused on labour rights per se while US agreements require a link to trade and investment effects, the US agreements could be seen as stronger being backed as they are by the availability of sanctions in the event of a breach whereas the EU approach is based on peer review.

4.13.3 EFTA

Traditionally, EFTA preferential trade agreements have not contained substantive requirements on labour standards, other than the allowance – also provided for in the GATT/WTO – of trade barriers in order to protect against the products of prison labour. EFTA-Korea thus has minimal and indirect reference, to labour conditions, simply stating in the preamble that the Parties reaffirm their commitment to the UN Charter and the Universal Declaration of Human Rights. Under the agreement, a guarantee is given of preferential treatment for the products of the Kaesong Industrial Complex. Compared with EFTA-Korea, EFTA-Colombia has a somewhat fuller reference in the preamble to human rights and the Parties' commitment to the rule of law and fundamental freedoms in accordance with their obligations under international law. In addition, unlike EFTA-Korea, the PTA refers directly to labour rights, with the Parties reaffirming their respect for the fundamental rights of workers, including the principles set out in the ILO Conventions to which they are party. This is still, however, essentially hortatory and in the absence of any other references to worker rights falls well short of the provisions on labour rights found in the EU and US agreements with Colombia.

4.13.4 Japan

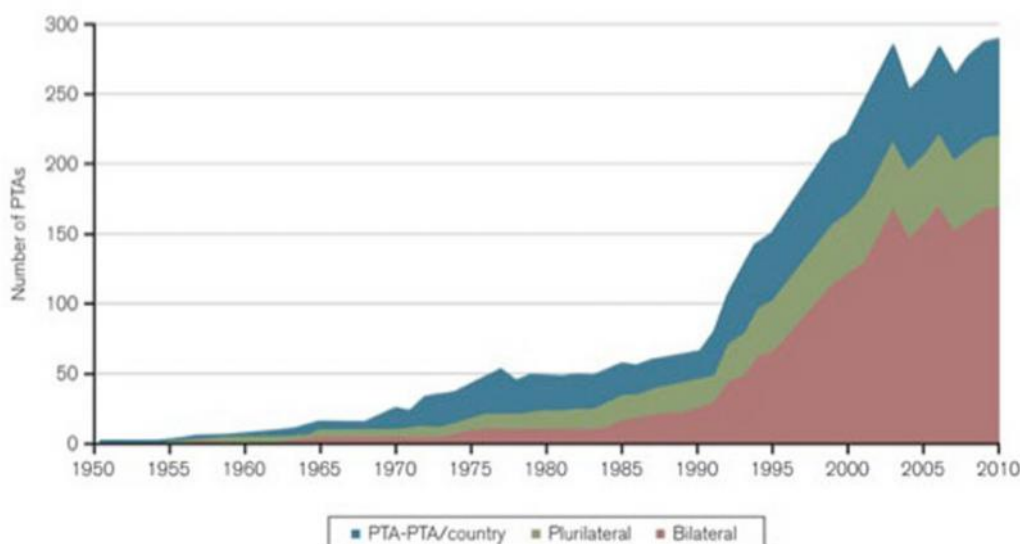
In keeping with earlier Japanese PTAs, neither Japan-Chile nor Japan-Vietnam contains any substantive provisions on labour standards. Rather, they make broad preambular references to sustainable development (Japan-Chile) and the goal of improving human resources (Japan-Vietnam).

5. CONCLUSIONS AND RECOMMENDATIONS

5.1 Future Scenarios of PTA Policy

PTAs are now the main instrument of trade policy and have grown in importance compared to multilateral and unilateral policy. In 1990, a mere 30 or so PTAs were legally in force. By 31 July 2013, the WTO had received 575 notifications of PTAs (covering both trade in goods and trade in services), of which 379 are in force (WTO website). PTAs have attained critical mass; more trade now takes place on a preferential basis than under multilateral, MFN, conditions. And within this broad trend, bilateral arrangements have assumed growing importance. Almost 90% of PTAs are now bilateral, further proliferating the rules and conditions governing international trade (see figure 5.1)

Figure 5. 1 The Rise of Bilateralism



Note: "Bilateral" PTAs consist of two parties only, "plurilateral agreements" of three or more. The category "PTA-PTA/country" denotes PTAs, where an existing PTA has engaged in an agreement with another country, including through accession, or with another existing PTA.

Source: WTO Secretariat.

PTAs are thus set to remain at centre stage. This is evidenced by the EU's engagement in the TTIP and by its pursuit of an agreement with Japan. EU participation in PTAs is likely to be bolstered, and perhaps for some legitimised, by the tendency for EU PTA partners to become more diverse. The United States, for its part, is likely to continue the pursuit of an aggressive "competitive liberalisation" strategy, pursuing all avenues open to it: unilateral, bilateral, plurilateral and multilateral. And in the Asia-Pacific region, we are witnessing a strengthening and consolidation of PTA activity, through the Regional Comprehensive Economic Partnership (RCEP) (ASEAN plus Australia, China, India, Japan, Korea and New Zealand) and across the Pacific, through the Trans-Pacific Partnership (presently, Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, the United States and Vietnam).

All these initiatives are underpinned by powerful motivations: the search for improved market access and the fear of being left out, the goal of strengthened rule making and the desire to foster political and strategic links with selected partner countries and regions. Critically, PTAs are increasingly seen as a way of addressing the “political economy of trade” whereby the gains from trade liberalisation are often highly dispersed and hard to measure while the costs of adjustment are often concentrated and only too easy to measure. PTAs are seen to address this challenge: by facilitating the exclusion of “sensitive” sectors; by focussing selectively on designated partners; by avoiding MFN commitments, and therefore free-riding by third parties; by securing reciprocity from partners; and by addressing concerns about a perceived race-to-the-bottom in labour and environmental standards (Heydon and Woolcock 2009 p 159). Finally, the rush to PTAs has been fuelled by a growing dissatisfaction, particularly on the part of business, with the slow progress of multilateral liberalisation, as embodied in the Doha Development Agenda.

Future scenarios of PTA policy are not therefore a matter of whether preferential agreements will continue to grow in importance or even of how the scope and nature of PTAs will evolve. Preferential agreements will grow in relative importance and will continue the trend towards deep integration via a broad agenda. And taking full account of developments across both the Atlantic and the Pacific, it is likely that PTAs will continue to have important cross-regional, North-South and bilateral dimensions, with partner countries seeking reciprocal commitments and opting for free trade areas rather than customs unions.

The question rather is whether the growth of PTAs will help or hinder the pursuit of multilateral trade liberalisation. The question is important because while PTAs can help promote liberalisation in particular sectors, as this paper has sought to demonstrate, preferential liberalisation will always be second-best to multilateral liberalisation on an MFN basis because of the trade and investment diversion inherent in preferential deals.

At least in the short term, there is clearly a risk that the rise of PTAs will frustrate multilateral efforts. They can do so in three principal ways: first, by creating vested interests on the part of preference holders against, preference-reducing, MFN liberalisation; second, by locking in incompatible regulatory structures; and third, by capturing the ground vacated by the DDA, as with investment, competition and government procurement, and so reducing the attractiveness and feasibility of a grand bargain at the multilateral level.

Whether this scenario is played out or whether a genuine complementarity is established between preferential and multilateral approaches is essentially a matter of policy choice. Here we anticipate the policy implication outlined in the following section. A benign scenario is more likely to unfold if the following (three) steps are taken:

- More effective monitoring by WTO Members of the compatibility of specific PTAs with the conditions set out in Article XXIV of the GATT and Article V of the GATS.
- More active pursuit of the multilateralisation of PTA provisions. One such approach would be to use the cumulation provisions of rules of origin to encourage the development of regional and global value chains.
- More intensive activity to revitalise the DDA. The future of multilateral trade policy is in considerable doubt. The WTO Ministerial Conference in Bali offers perhaps a last opportunity to re-establish some credibility in multilateral negotiations, whether as a single undertaking of linked commitments by all participants or, as seems increasingly likely, as a series of issue-specific agreements. Genuine complementarity between preferential and multilateral approaches – and hence the benign scenario – will only be realised if the multilateral system is

itself strong and resilient in bringing down MFN tariffs and strengthening multilateral rules and so reducing the distorting effects of preferential arrangements.

5.2 Recommendations for the EU

These recommendations are presented with a progressively increasing degree of specificity, looking at: first, the broad objectives and outcomes of EU trade policy in general; second, the overall framework of PTA policy; and third, specific, sectoral, goals of PTA policy.

5.2.1 Targeted Outcomes of EU Trade Policy

The European Parliament should ensure that EU trade and investment policy reflects the balance of four key outcomes.

- Improved EU access to major markets to ensure jobs and growth.
- A strengthened unitary and open multilateral trading system.
- A firmer basis for sustainable development.
- The progressive integration of developing countries into the international economy.

5.2.2 The Overall Framework of PTA Policy

In order to ensure that EU policy with respect to preferential trade agreements is consistent with, and supportive of, the above broad goals, a number of priorities are recommended.

- **Encouraging multilateral liberalisation** in order to foster the complementarity between PTAs and the multilateral trading system. The European Parliament should ensure that the EU holds to its policy of support for multilateralism, which is in the long-term interest of all WTO members, especially the small and developing economies. To this end the EU should not give up on efforts to negotiate multilateral agreements, should redouble efforts to make progress at the 9th WTO Ministerial Conference in Bali and to further the DDA negotiations in a pragmatic and flexible fashion. It should support discussion on 21st century issues within the WTO in a non-negotiating context in order to seek consensus. Only by ensuring the WTO retains relevance for current and future trade issues will it be possible to maintain a credible WTO system.
- **Applying flanking measures** in parallel with PTA implementation in order to cope with the inevitable structural adjustments associated with trade and investment liberalization. The welfare-enhancing trade creation associated with PTAs, though it may bring net gains to growth and employment, will nevertheless cause economic and social disruption as domestic production is displaced. Policies of trade-related structural adjustment - such as active labour market policies - will be needed to accommodate these changes (LSE 2012a). In addition, supplementary technical assistance and development aid may be needed in the case of some developing country partners, for example to help them strengthen their competition laws and institutions.
- **Ensuring that PTAs reflect a policy of differentiation** between agreements with established developed economies, emerging market developing countries, middle income developing countries and small states and less developed economies. This is relevant for all elements of PTAs but especially with regard to commitments in tariffs, establishment, cross-border supply of services and government procurement;
- **Continuing to foster regional integration** through region-to-region PTAs. This would require more patience in negotiating and supporting region-to-region agreements and a willingness to resist calls for bilaterals in response to what the EU's international competitors do. At the least

it would mean ensuring that bilateral PTAs negotiated with countries that are seeking regional integration do not undermine the prospects for that regional integration.

- **Ensuring that PTAs facilitate the ‘multilateralisation’** of liberalization and trade rules, along the lines suggested below.

5.2.3 Specific Measures

Consistent with this broad framework for PTA policy, the INTA Committee should consider the following concrete proposals that the European Parliament should seek to advance:

1. **Avoid making too many sectoral exceptions** from the scope of EU liberalisation commitments, particularly with regard to tariff and services commitments. Exceptions carry a number of dangers. They reduce the potential for welfare gains through trade creation (Corden 1972). And they risk a mutual scaling down of ambition to the point where the PTA has little impact on promoting reform and the game is not worth the candle. On the other hand, the EU should continue to accept asymmetric commitments with developing countries, within a broad interpretation of GATT Art. XXIV and GATS Art. V, that balance the benefits of open markets for development with other development interests, such as the generation of tariff revenue;
2. Continue to **provide regional cumulation for rules of origin** and press ahead with the reform of RoO in order to promote regional integration and facilitate regional supply chains. The EU should also seek convergence between the preferential rules of the major blocs (EU, US, Japan etc). Convergence in preferential rules of origin will also foster intra-industry trade (identified here as a feature of EU PTAs) which generates less structural upheaval as displaced workers can more readily move to a different branch of the same industry;
3. Incorporate **comprehensive investment provisions** into PTAs, made possible by the granting of exclusive competence for investment to the EU in the Lisbon Treaty. This will better reflect the new reality of trade and investment as complements not substitutes, and provide an opportunity for the EU to shape international investment policy and to reduce the number of potentially conflicting PTAs and BITs;
4. Make full use of the various committees and sub-committees available to **ensure that the PTAs are fully and adequately implemented** in areas such as TBT/SPS, competition, as well as sustainable development. In such areas of policy the adoption of a text represents only the beginning of what has to be a continuous process. The European Parliament should play a full and active part in this process;
5. Ensure, in the area of **intellectual property rights**, that PTAs reflect a suitable balance between the protection of owners of intellectual property and the interests of consumers and producers in developing economies. This balance is best defined multilaterally so PTAs should not be used to project regulations that favour one side or the other;
6. Support PTAs that include **government procurement** provisions as they are of potential mutual benefit to parties both developed and developing, but ensure that such provisions are progressive. This means for example, providing for explicit special and differential treatment for developing and least developed economies as in the recent revised GPA. Dealing with government procurement in PTAs is likely to be a more fruitful policy approach for the EU than the introduction of a reciprocity clause;
7. Develop the **transparency provisions for PTAs** within the WTO with a view to developing agreed codes of practice for PTAs to complement Art XXIV GATT and GATS V and ultimately a ‘multilateralisation’ of preferences and rules;
8. Seek specific opportunities to **‘multilateralise’ the provisions of PTAs** by, for example: applying cumulation provisions of rules of origin expansively to wider regions in order to foster

global value chains; encouraging transparency provisions, which by their nature have multilateral application, in the implementation of regulatory reform; avoiding regulatory 'projectionism' whereby PTAs are used to promote an approach that is incompatible with multilateralism (Woolcock, 2007; Horn et al 2010); and seeking opportunities to harmonise PTA work on trade facilitation with parallel efforts at the multilateral level as a possible DDA deliverable.

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