

UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT
Geneva

**INVESTMENT PROVISIONS
IN
ECONOMIC INTEGRATION
AGREEMENTS**

CHAPTER 3



UNITED NATIONS
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III. THE PRESENT UNIVERSE OF EIAs

A. Geographical Distribution

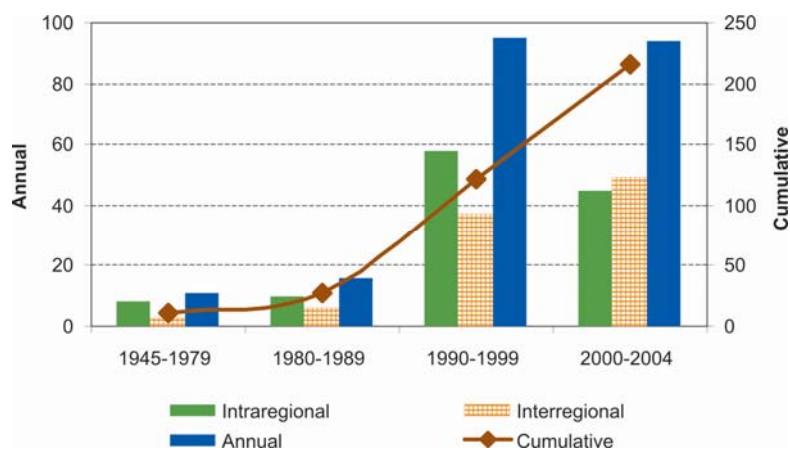
1. Global trends

EIAs identified in this study exceed 218,⁴⁶ about 67% of the total 300 EIAs reviewed⁴⁷ (see annex table I). Approximately 87% of all these EIAs have been concluded since 1990 (41% since 2000), and the other 13% between 1945 and 1989 (figure III.1).

Initially, EIAs between countries in the same geographical region dominated the scene and, until the late 1980s, economic integration through EIAs remained confined mainly to intraregional processes, albeit with important exceptions.⁴⁸ Since the early 1990s, however, countries and groups located in

different regions began to sign EIAs with one another, with the result that interregional EIAs now account for 44% of the total 218 EIAs (87 of which have been concluded since 1990) (figure III.1). This trend is a manifestation of the globalization strategies being pursued by more and more countries in response to the increasing global competition for resources and markets facing national economies. Of course, the choice of partners within and between regions responds to a variety of economic and political motivations depending also on the characteristics of the countries involved.

Figure III.1. Growth of EIAs, 1945 - June 2005
(Number)



Source: UNCTAD.

The dramatic growth in the number of EIAs since the early 1990s parallels the increase in the number of countries that are party to such agreements. Today, more than 99% of all

⁴⁶ The test used for the selection of the agreements included in the study is based on the definition of EIAs and EIAs provided in the introduction to the study. This definition allows for the exclusion of EIAs that are only insignificantly or indirectly related to investment, although where there is a doubt, the balance is tilted towards inclusion. Excluded from the 218 EIAs identified in this study are also EIAs that have been superseded by new EIAs, including those that have been terminated as a result of the relevant countries' accession to the European Union, or EIAs that are no longer in force. In certain cases, major revisions and additional protocols adopted by a pre-established EIA group are counted as separate agreements.

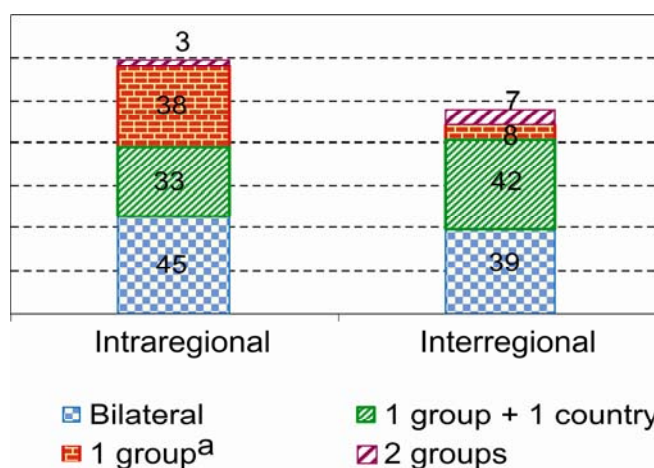
⁴⁷ An exact account of all existing EIAs and EIAs is difficult, if not impossible, in part because there are no consistent data source covering all EIAs, but also in part because of the difficulty of defining precisely what agreements fall within the scope of EIAs. For example, some agreements may deal only very peripherally with investment. It is also difficult to ascertain whether certain old agreements are still in force.

⁴⁸ For example, the agreements signed among Arab and Islamic countries, and earlier EIAs signed by the European Community with third countries, including notably the Lomé Conventions between EC and ACP countries (see chapter II).

countries and economies are members of at least one EIIA,⁴⁹ and the majority of countries are members of several such treaties. At the same time, the increase in membership of certain regional integration schemes has reduced the number of existing EIAs. For example, the recent accession of 15 European countries to the EC has rendered obsolete a number of previous agreements between the EC and these countries.

The geographical expansion of EIAs is proceeding along various paths. Thus, while existing EIIA groups have kept adding new members (e.g. EC, ASEAN), approximately 39% of the total number of agreements concluded since 1945 have been signed between two individual countries (bilateral EIAs) (83 since 1990), of which 53.5% involve countries in the same geographical region and 46.5% are between countries located in geographically dispersed regions. Regarding the other 60% of EIAs, 22 involve the formation of a new group (six since 1990), 24 are major revisions or additional protocols adopted by a pre-established EIIA group (14 since 1990) and only 7.5% involve the adoption of an EIIA between several pre-existing groups of countries (eight since 1990). Finally, over half of this 60% of EIAs are between a group of countries and a third country (40% of which are within the same region, and 60% are interregional). EIAs between an economically integrated group and a third country are sometimes concluded as an intermediate step towards full membership of the third country at a future time (e.g. the association agreements signed by the European Community) (figure III.2).

Figure III.2. Intraregional and interregional EIAs, by type, June 2005



Source: UNCTAD.

^a Including major revisions of and protocols on pre-existing EIAs.

In terms of the distribution of EIAs among geographical regions, the American countries have concluded the largest number of EIAs with 95 agreements, experiencing a sharp increase in the mid-1990s after the conclusion of NAFTA. European countries⁵⁰ were the first to conclude an EIIA after the adoption of the GATT. They have since concluded the second largest number of EIAs, reaching a total of 83 (excluding EIAs that were terminated after the EC accession of additional European countries). They are followed closely by Asian countries with 81 agreements, although these countries had a late start. On the other hand, African countries were the first among developing countries to conclude EIAs but have since concluded fewer agreements than the other developing regions. The African countries are parties to 34 agreements (figure III.3).

⁴⁹ The other 1% of countries/economies that have not concluded an EIIA includes Andorra, the Democratic People's Republic of Korea, Monaco, San Marino, Sao Tome and Principe, and Timor-Leste.

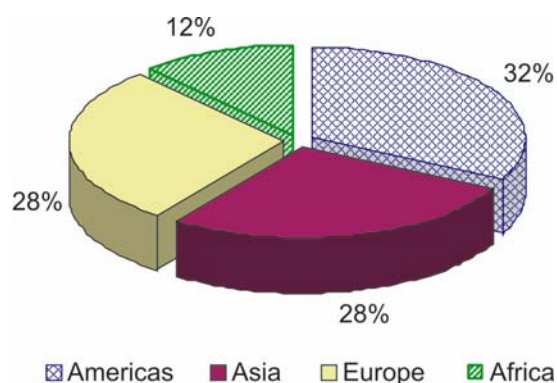
⁵⁰ Including the Commonwealth of Independent States (CIS).

2. Intra-regional trends

When one looks more closely at the agreements signed between countries located in the same geographical region (*intra-regional EIAs*), the following picture emerges (figure III.4):

- Countries in the Americas have signed the largest number of intra-regional EIAs, with 49 treaties (six before 1990). The investment-related economic integration process in America had an early start, notably with the creation of the Andean Pact and CARICOM. However, it was mainly after the conclusion of NAFTA that American EIAs began to proliferate. Apart from the formation, expansion and consolidation of several main sub-regional groups,⁵¹ together with their major amendments and additional protocols, and one EIA signed between two sub-regional groups,⁵² 40% of all American EIAs have been signed between two individual countries, and another 30% between a group and a third country (e.g. the CARICOM-Costa Rica Free Trade Agreement).

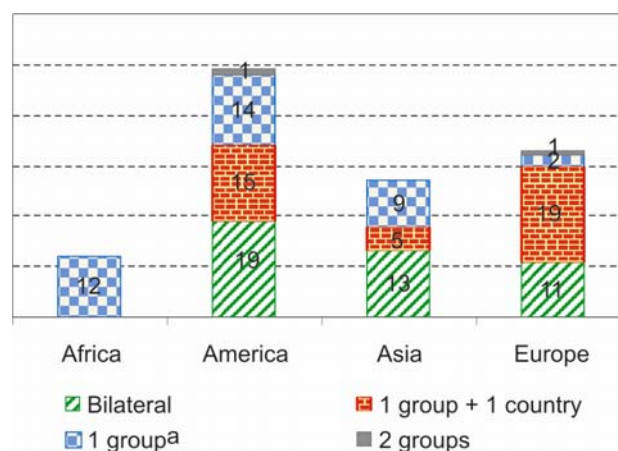
Figure III.3 Total EIAs concluded by region, June 2005



Source: UNCTAD.

- European countries now account for the second largest number of intra-regional EIAs, with 33 such agreements. In addition to the three main European regional economic integration agreements (EC, EFTA and the EEA), 33% of these EIAs have been signed between two European countries, typically between two South-Eastern European countries. The remaining 57% involve the European Community (16) or the EFTA countries (three) with another European country. As noted before, a number of the earlier agreements signed by the European Community with other European countries, as well as between two European countries, have been replaced over the years by new generation of agreements as part of a process of wider and closer European integration.⁵³

Figure III.4. Intra-regional EIAs concluded, by region, June 2005



Source: UNCTAD.

^a Including major revisions of and protocols on pre-existing EIAs.

⁵¹ Notable examples of American subregional groups are MERCOSUR, NAFTA, the Andean Community, CARICOM and the Central American Common Market.

⁵² The Framework Agreement for the Creation of a Free Trade Area between the Central American Common Market and MERCOSUR.

⁵³ Thus, after full accession to the European Community by ten European countries in 2004, the EC association agreements with Slovenia (1996), Estonia (1995), Latvia (1995), Lithuania (1995), the Czech Republic (1993), Slovakia (1993), Hungary (1991), Poland (1991), Cyprus (1972) and Malta (1970) became obsolete.

- Asia ranks third in terms of the number of EIAs signed between countries within the region, with 27 treaties (23 since 1990). These figures confirm the perception that traditionally EIAs between Asian countries were not very popular. Until recently, ASEAN was the main engine for intra-Asian investment-related economic integration. Today, new groups are emerging, especially in Southern Asia and the Pacific, although the process of investment integration within them is moving rather cautiously. Of the total 27 Asian EIAs, five involve the creation of a subregional integration group,⁵⁴ and four are major revisions or protocols amending or expanding pre-existing EIAs, while about 50 % of all EIAs involve two countries, Australia and Singapore being the countries with the highest number of bilateral agreements within the region. The remaining 18.5% of the agreements have been concluded between a group and a third country.⁵⁵ There are no agreements between two Asian groups. As noted, the expansion of EIAs among Asian countries is a recent phenomenon, the region being traditionally more inclined to conclude investment agreements with countries in other regions.
- In contrast, in Africa, intraregional EIAs were most popular among sub-Saharan African countries before 1990.⁵⁶ Of the 12 intraregional EIAs signed (including their major revisions and protocols), 50% were concluded before 1990. Through these EIAs the investment-related economic integration in sub-Saharan Africa has proceeded along subregional groups that expanded, regrouped, re-emerged or merged over the years. Interestingly, there are no bilateral EIAs between individual African countries, nor are there EIAs between North African countries. Some EIAs concluded between Northern and sub-Saharan African countries before the 1990s were in the broader context of Arab and Islamic interregional groups (see below). Since the early 1990s, a new wave of regional and subregional African EIAs has emerged, including the African Economic Community, covering most African countries.

3. Interregional trends

With respect to EIAs concluded by countries located in different geographical regions (*interregional EIAs*), the largest number of agreements have been concluded between European and Asian countries, with approximately 30% of the total, most of which have been concluded between the European Union or EFTA and individual Asian countries and groups (figures III.5 and III.6). These figures are not surprising given the size of the entire Asian region. In second place rank the agreements signed between American and Asian countries, with 25% of all interregional EIAs, the majority of which are between two countries (figures III.5 and III.7). These include 18 bilateral agreements recently signed by the United States. In third place are the agreements between European and American countries and groups, with 14.5% of the total (figures III.5 and III.8). Countries in America have signed 11 agreements with African countries, while European countries have signed eight, including the Cotonou Agreement, which in fact

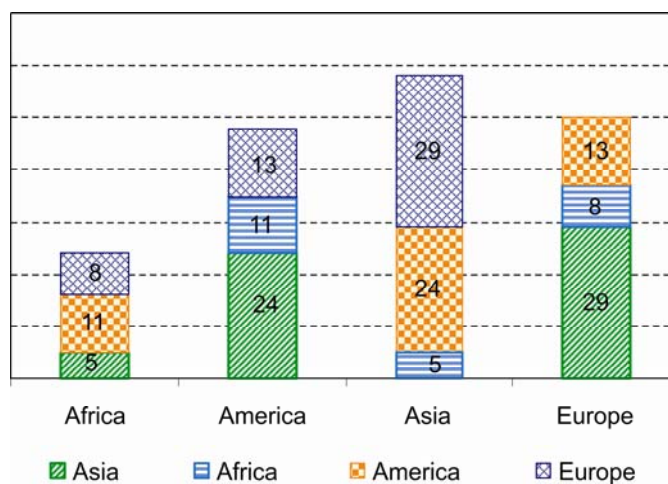
⁵⁴ The Association of Southeast Asian Nations (ASEAN), the Bay of Bengal Initiative for Multi-Sectoral Technical and Economic Cooperation (BIMSTEC), the Gulf Cooperation Council (GCC), the South Asian Association for Regional Cooperation (SAARC) and the South Pacific Regional Trade and Economic Cooperation Agreement (SPARTECA).

⁵⁵ For example, the ASEAN-China Framework Agreement and the Gulf Cooperation Council-Lebanon Agreement Establishing a Free Trade Area

⁵⁶ The Treaty Establishing the Economic Community of West African States (ECOWAS) and the Common Convention on Investments in the States of the Customs and Economic Union of Central Africa (UDEAC or CEMAC) are examples.

involves also the Pacific and Caribbean subregions (figures III.5, III.9 and III.10). Furthermore, the EC has recently embarked on the negotiation of reciprocal economic partnership agreements with the Central African Economic and Monetary Community (CEMAC), the Economic Community of West African States (ECOWAS), the East and South African States (ESA) and the Southern Africa Development Commission (SADC), which are intended to replace the non-reciprocal Cotonou system. EFTA is also negotiating an interregional EIIA with SACU. EIAs between Asia and Africa consist of agreements among Arab and Islamic countries. The Arab and Islamic countries, two groups of countries spread over Asia and Africa but with a clearly defined cultural affinity, signed five agreements among themselves, all of them before 1990.

Figure III.5. Distribution of interregional EIAs, June 2005^a



Source: UNCTAD.

^a The EC-ACP agreement, which covers more than two regions, was counted as an Africa-Europe EIIA.

Some interregional EIAs span over more than two regions. One is the Cotonou Agreement signed by the EC with a group of African, Pacific and Caribbean countries. Other examples include the Mediterranean Initiative launched in 1995 aimed at creating a free trade area by 2010 between the EC and its Southern Mediterranean neighboring countries (covering most North African and Middle Eastern countries) and the Energy Charter Treaty with members from Asia, America and Europe.

4. New trends of selected countries

With regard to recent EIIA activity by individual countries, several new trends are also noteworthy. One is the recent conversion of the United States to bilateral reciprocal preferential EIAs, which, with the exception of earlier FTAs with Canada, Israel and NAFTA, that country had avoided in the past, preferring instead to focus on the MFN-based multilateral approach. Since 2002, the United States has signed bilateral EIAs with countries in various regions, including 14 framework agreements on trade and investment relations⁵⁷ and seven free trade agreements.⁵⁸ Also, negotiations are under way with five additional countries and groups.⁵⁹ The difficulties encountered in the negotiations of the FTAA and the Cancún Ministerial Conference

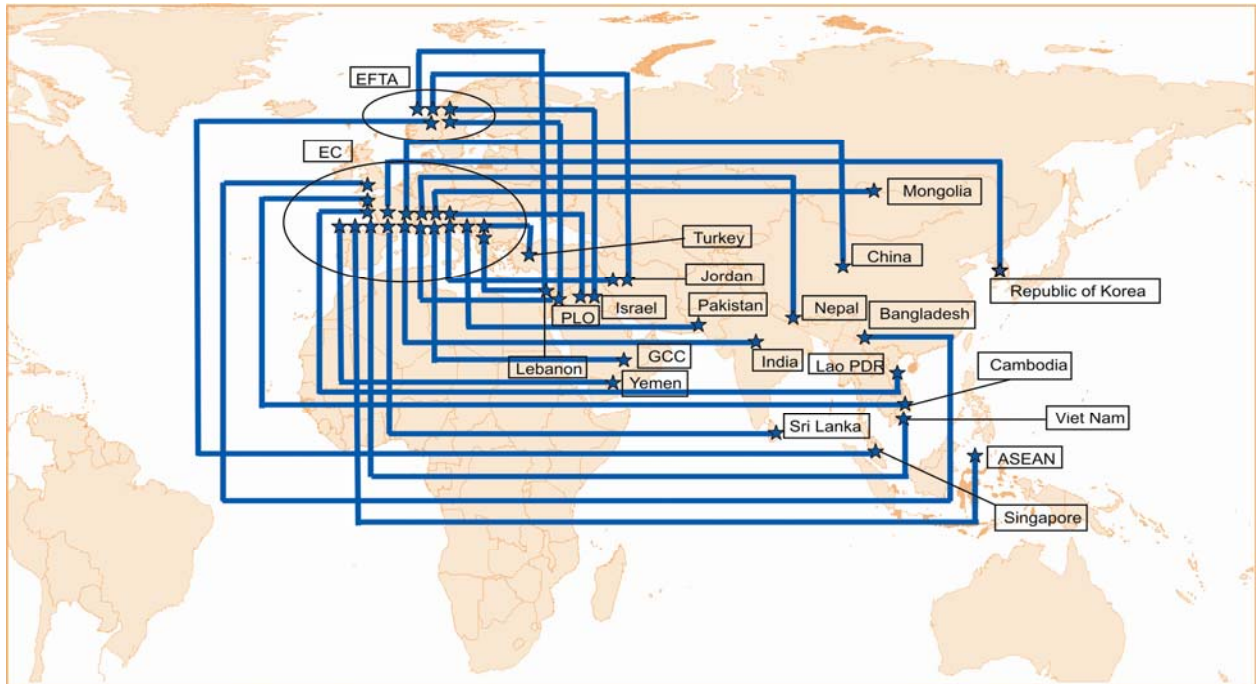
⁵⁷ The latest framework agreements concluded by the United States were with Mozambique and Iraq on 21 June and 11 July 2005, respectively, just a few days after the cut-off date for inclusion in the list of EIAs reviewed in this study.

⁵⁸ Since 2002 the United States has concluded free trade agreements with Australia, Bahrain, Central America and the Dominican Republic, Chile, the Lao People's Democratic Republic, Morocco and Singapore.

⁵⁹ Colombia, Ecuador, Panama, Peru, the Southern African Customs Union (SACU) and Thailand, while other EIAs are under consideration (Bolivia, Egypt, New Zealand, Pakistan, Philippines, Republic of Korea, Sri Lanka, and Taiwan Province of China) (World Bank, 2005, pp. 32-33).

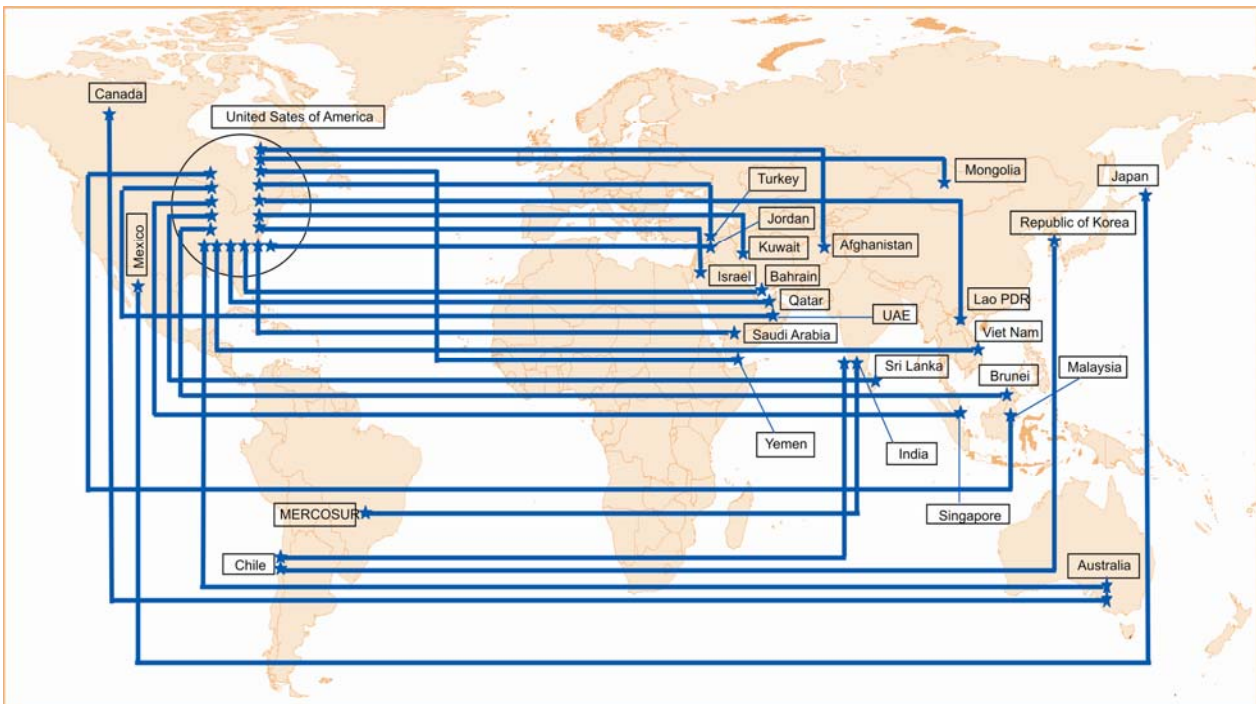
of the WTO may have played a role in this new move by the United States. Efforts are also under way to establish a Middle East Free Trade Area by 2013.⁶⁰

Figure III.6. Interregional EIAs between Asia and Europe, June 2005



Source: UNCTAD.

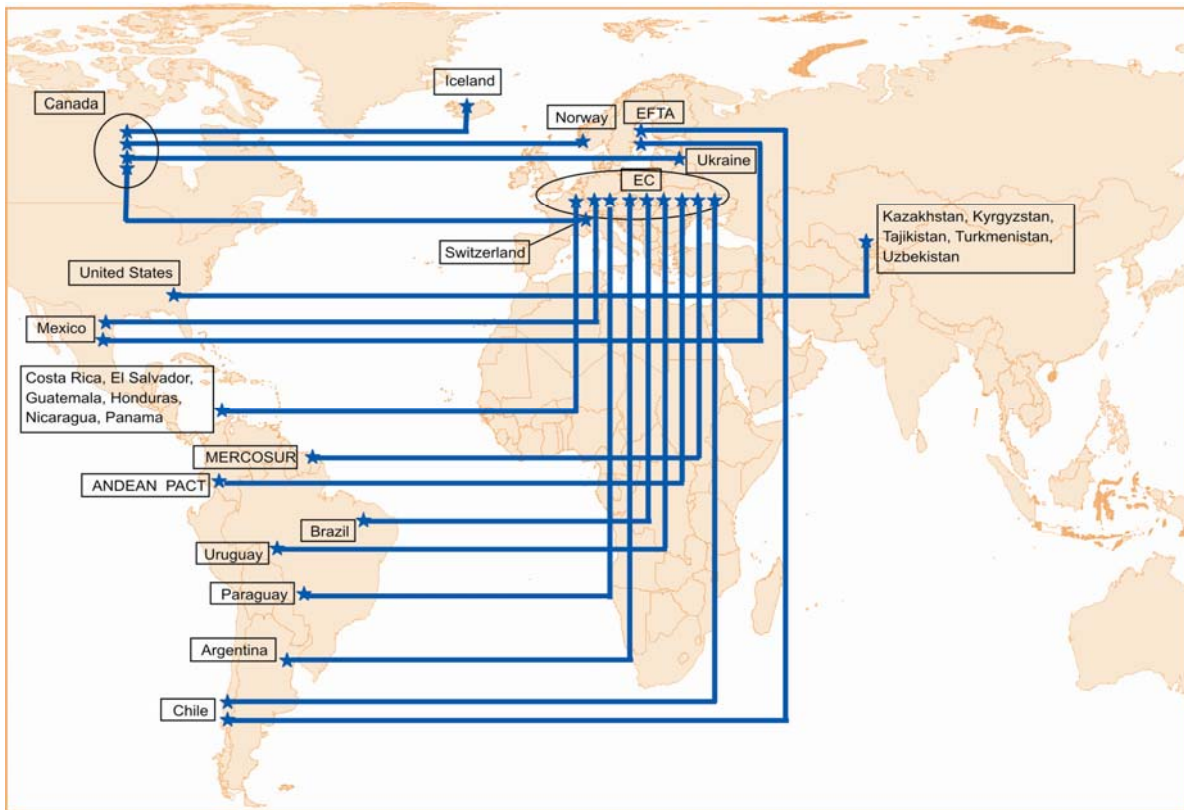
Figure III.7. Interregional EIAs between America and Asia, June 2005



Source: UNCTAD.

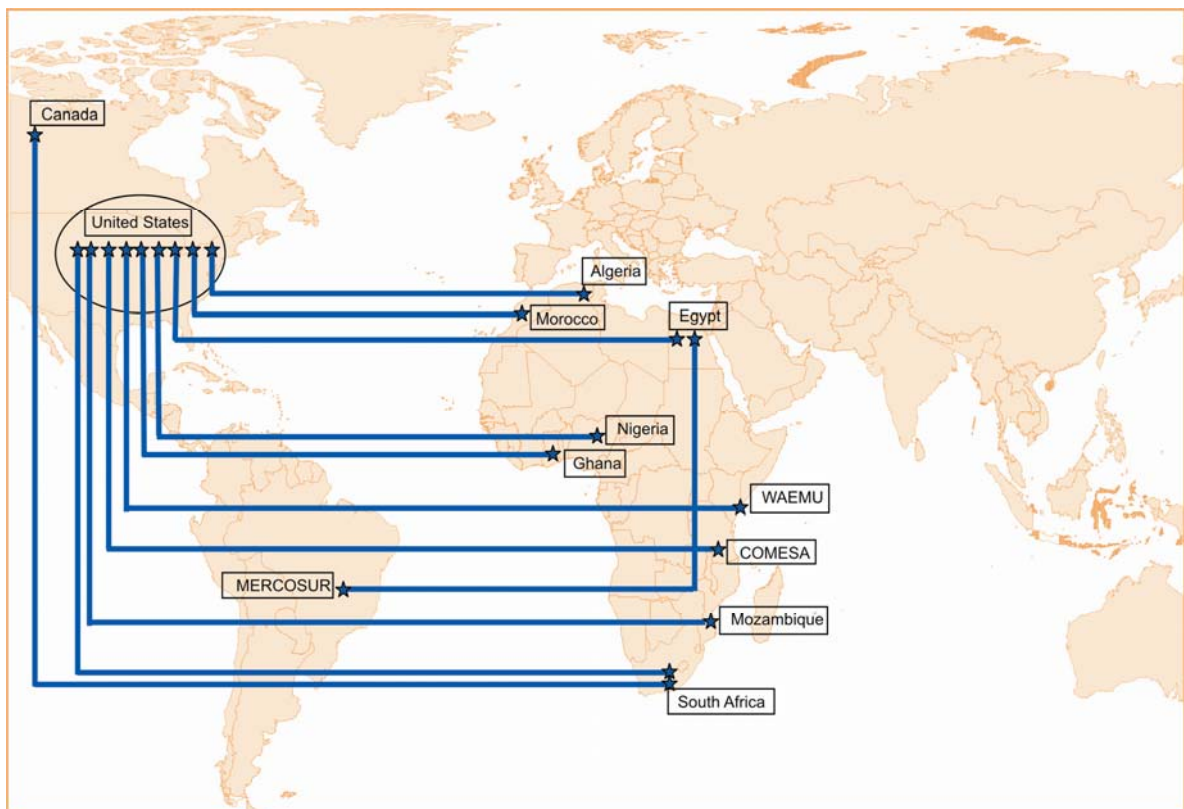
⁶⁰ In addition to the EIAs already concluded with countries in that area, negotiations with the United Arab Emirates and Oman have already started.

Figure III.8. Interregional EIAs between America and Europe, June 2005



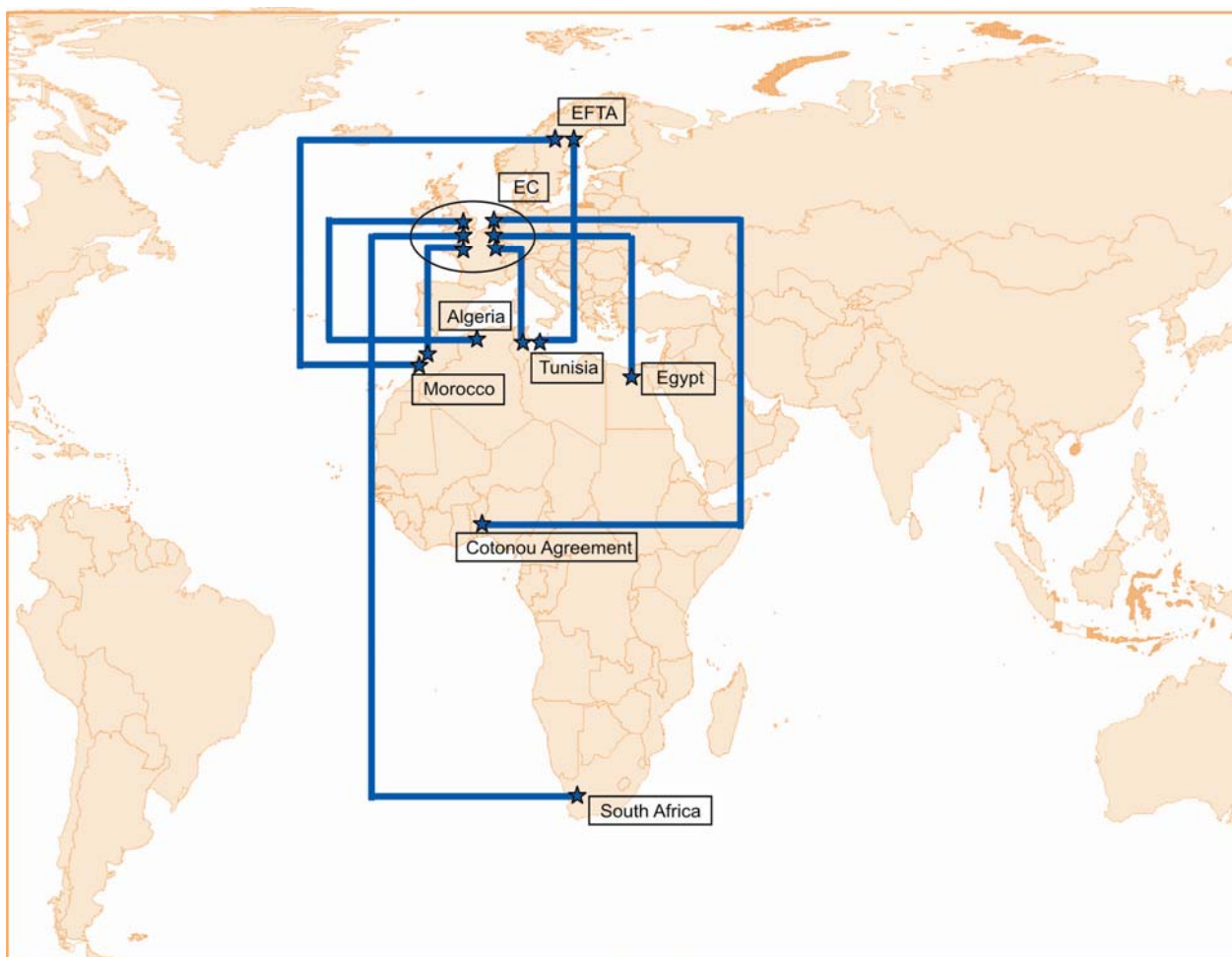
Source: UNCTAD.

Figure III.9. Interregional EIAs between Africa and America, June 2005



Source: UNCTAD.

Figure III.10. Interregional EIAs between Africa and Europe, June 2005



Source: UNCTAD.

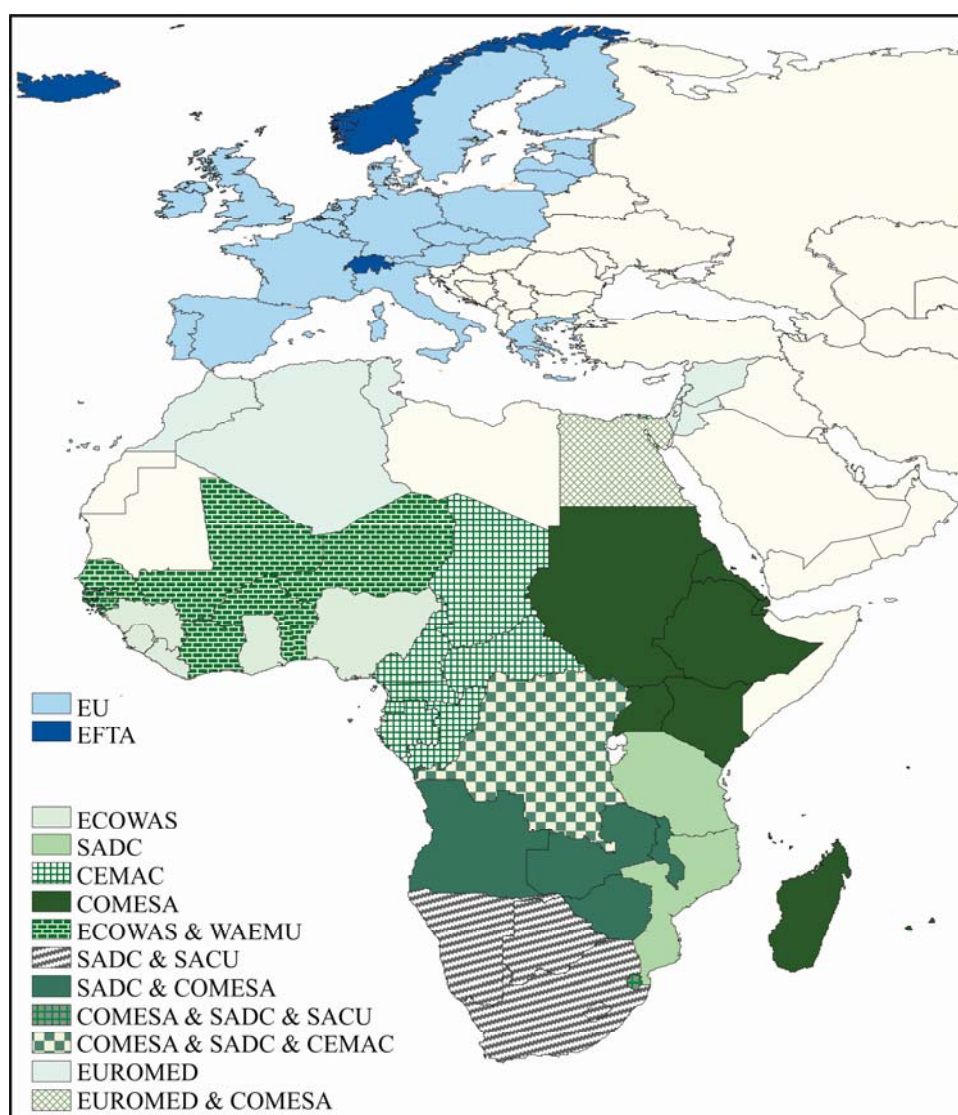
Japan is another major developed country that has recently embraced this strategy and started to negotiate bilateral EIAs both within the Asian region and interregionally. After years of pursuing an open-door trade and investment liberalization under APEC's best-practice approach (based on MFN treatment), Japan signed its first EIA with Singapore in 2002. This agreement was followed a year later by the Trade and Economic Framework Agreement with Australia and the Framework for Comprehensive Economic Partnership with ASEAN, and, in 2004 by the Economic Partnership Agreement with Mexico. Negotiations have also begun with Canada, Chile and the Republic of Korea, while talks are under way with three individual members of ASEAN (Malaysia, the Philippines and Thailand) as well as with the ASEAN group. Some preliminary moves are also taking place on a possible EIA *à trois* between China, Japan and the Republic of Korea. Australia, as well as some advanced developing countries, such as Chile, China, the Republic of Korea, India, Mexico and Singapore, has also become very active in the pursuit of bilateral EIAs with partners in several regions.⁶¹

* * * * *

⁶¹ In addition to its six EIAs already signed, Singapore is currently negotiating EIAs with 10 other developing countries.

The foregoing description of the present EIIA network suggests a universe in constant expansion and change, formed by variable constellations that are linked by overlapping membership and complex interactions. It is still too early, however, to identify a dominant pattern in this constant reconfiguration of the EIIA network, as many forces are in play. Thus, while it appears that there is a tendency towards consolidation and expansion of investment-related economic integration around several geographically close groups through the attraction of new members from neighbouring areas (*circular integration*) (figures III.11, III.12 and III.13), other forces are propelling countries to diversify their EIIA partners through the proliferation of bilateral EIAs that link geographically disperse countries (*linear integration*). Of course, the basic motivations behind these variable tendencies are similar. Not the least among them is the “domino effect” caused by the increase in EIAs, as countries from all parts of the world struggle to both participate and compete in an increasingly global world economy.

Figure III.11. Areas of EIIA integration through subregional groups within and between Africa and Europe^{a b}

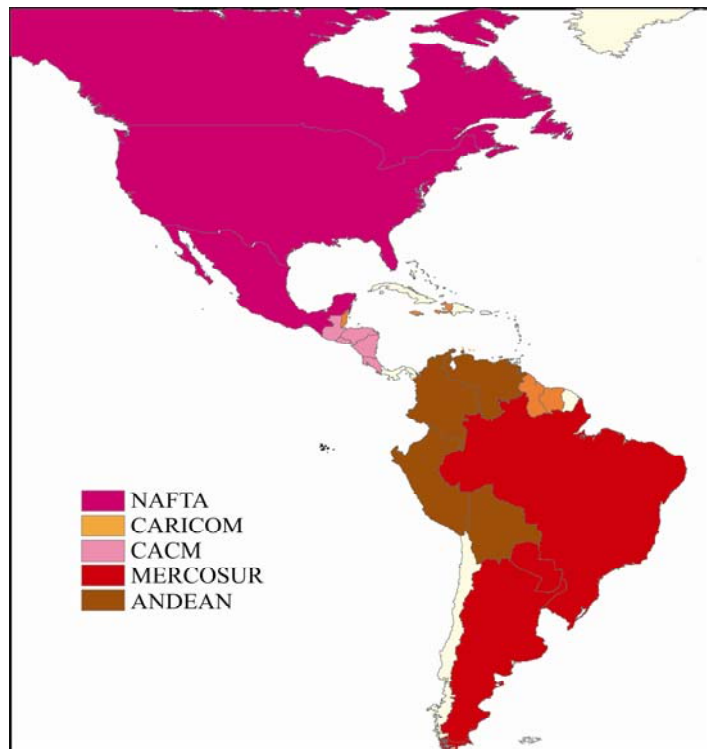


Source: UNCTAD.

^a This figure does not show EIAs between two countries or between one group and a third country.

^b The European Economic Area, the African Economic Union and the ACP-EC agreement are not reflected in this figure.

Figure III.12. Areas of EIIA integration through subregional groups within America^{a b}

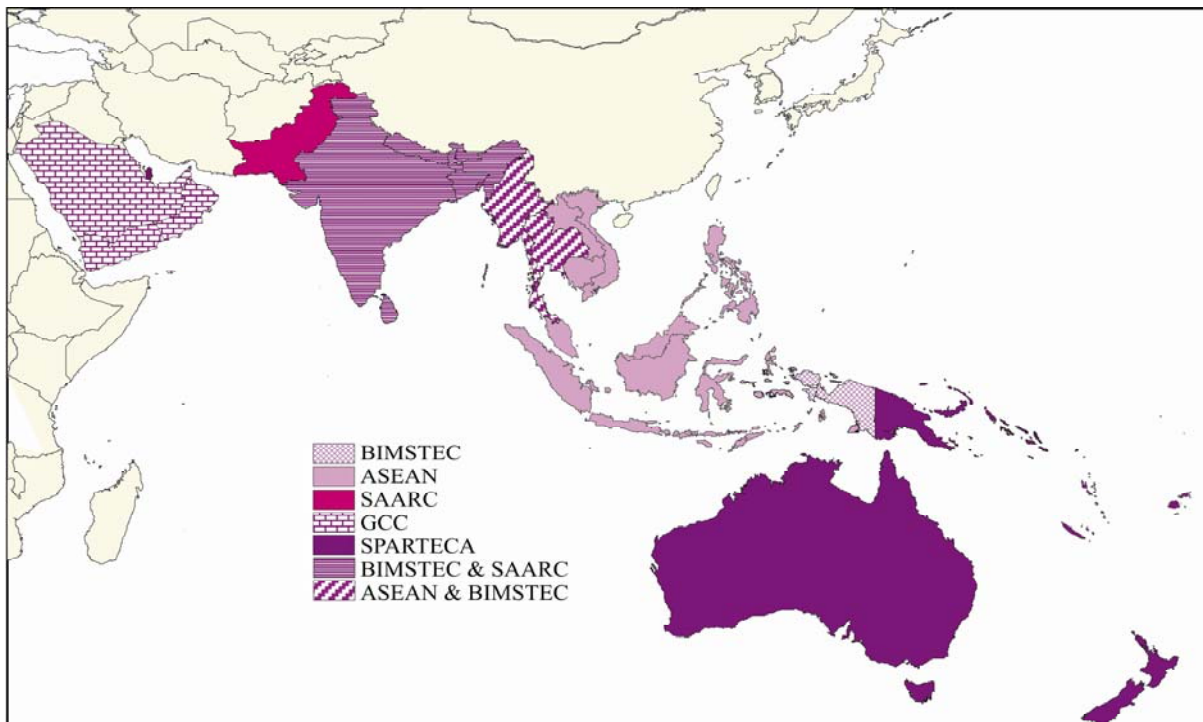


Source: UNCTAD.

^a This figure does not show EIAs between two countries or between one group and a third country.

^b The Latin American Integration Association is not reflected in this figure.

Figure III.13. Areas of EIIA integration through subregional groups within Asia^{a/}



Source: UNCTAD.

^a This figure does not show EIAs between two countries or between one group and a third country.

B. Global Patterns in EIIA Approaches to Investment

As noted in the Introduction, one of the principal objectives behind the adoption of EIAs is to facilitate investment flows as a means of enhancing the process of economic integration between their parties. To achieve this goal, EIAs undertake commitments to liberalize investment, to provide legal protection and guarantees, to promote investment or to regulate investment; or they combine several or all of these elements. Unlike BITs — the other major type of investment agreement — EIAs do not have a uniform structure or a consistent approach to investment.⁶² Rather, their approach to investment varies significantly in terms of the coverage of issues, the depth of the commitments they make on these issues, and the way in which they deal with investment from third parties. As in the case of BITs, however, the structure and the approach to investment in many EIAs have been influenced by previous EIAs and by other investment agreements, notably the BITs themselves, and WTO agreements. Thus, the existing universe of EIAs may be classified according to a number of “models” or patterns that have been followed more or less closely by these agreements through an interactive process that reflects the economic and political conditions of the day, the purposes and priorities of the parties involved, and the preferences of each region.

1. Coverage of Investment Issues

A first approximation to the classification of EIAs in relation to their coverage of investment issues may relate to the purpose of the investment provisions. On this basis, EIAs can be grouped according to four main categories of purposes: cooperation, liberalization, liberalization and protection, and protection and promotion. In practice, however, EIAs are often a combination of several approaches. The range of investment issues addressed under each category may also vary considerably (table III.1). Moreover, as noted earlier, the approach of EIAs in relation to investment does not necessarily parallel their approach to trade or other transactions. Accordingly, the following typology of EIAs relates exclusively to their investment provisions.

a. Investment cooperation EIAs

This group encompasses agreements containing general mandates to engage in various forms of present or future cooperation aimed at promoting, protecting and/or liberalizing investment. It is also common for these agreements to set up a consultative committee or similar institutional arrangement between the parties to give specificity and effect to the cooperation mandates. On the basis of their specific aims, two main types of EIAs may be discerned.

⁶² The two basic approaches to BITs, represented by the traditional European model and the United States model, have remained in use for more than two decades, although these models have become significantly more elaborate in recent years.

Table III.1. Key investment-related issues in EIAs

Agreement	Scope Definition of investment/ investor	Liberalization			Legal protection					Cooperation			
		Admission Rights of establishment	Transfer of funds	Performance requirements	Treatment after entry		FET*	Expropriation	IPR**	Dispute settlement		Promotion negotiation	Framework/ future
					NT*	MFN*				State-State	Investor-State		
North-North													
EFTA (2001)	•	•	•		•				•	•			
Australia-United States (2003)	•	•	•	•	•	•	•	•	•	•			
Australia-Japan (2003)											•	•	
North-South													
NAFTA (1994)	•	•	•	•	•	•	•	•	•	•			
EC- Sri Lanka (1994)									•		•	•	
Canada-Chile (1996)	•	•	•	•	•	•	•	•	•	•			
EFTA-Morocco (1997)			•						•	•	•	•	
Canada-South Africa (1998)											•	•	
EC-Egypt (1999)			•						•	•	•	•	
EC- South Africa (1999)			•						•		•	•	
United States-Ghana (1999)												•	
EC-ACP (2000)									•	•	•	•	
United States-Viet Nam (2000)	•	•	•		•	•	•	•	•	•	•	•	
Canada-Costa Rica (2001) ¹											•	•	
Japan-Singapore (2002)	•	•	•	•	•		•	•	•	•	•		
EFTA-Singapore (2002)	•	•	•		•	•	•	•	•	•	•		
Australia-China (2003)											•	•	
EFTA-Chile (2003)	•	•	•						•		•		
United States-Chile (2003)	•	•	•	•	•	•	•	•	•	•			
CAFTA (2004)	•	•	•	•	•	•	•	•	•	•	•		
Australia-Thailand (2004)	•	•	•		•	•	•	•	•	•	•		
EFTA-Lebanon (2004)			•						•	•	•	•	
United States-Qatar (2004)												•	
United States-Morocco (2004)	•	•	•	•	•	•	•	•	•	•	•		
South-South													
Investment and Free Movement of Arab Capital Among Arab Countries (1970)			•		•	•		•				•	
COMESA (1993)	•	•	•				•	•		•			
MERCOSUR Colonia Protocol (1994)	•	•	•	•	•	•	•	•	•	•			
Group of 3 (1994) ²	•		•	•	•	•	•	•	•	•	•		
ASEAN Investment Area (1998)	•	•			•	•				•		•	
CARICOM (1973/2001)	•	•	•		•	•			•	•	•	•	
India-Thailand (2003)										•	•	•	
Chile-Republic of Korea (2003)	•	•	•	•	•	•	•	•	•	•	•		
ASEAN-China (2003)											•	•	
BIMSTEC Free Trade Area (2004)										•	•	•	
Uruguay-Mexico (2004)	•	•	•	•	•	•	•	•	•	•	•		
Taiwan Province of China -Panama (2004)	•	•	•	•	•	•	•	•	•	•	•		
CARICOM-Costa Rica (2004)	•	•	•	•	•	•	•	•	•	•	•		
North- Economies in Transition													
EC-Bulgaria (1993)	•	•	•		•	•			•	•	•	•	
EC-Russia (1994)	•	•	•		•	•			•	•	•	•	
EFTA-Croatia (2001)			•						•	•		•	
United States-Kazakhstan, Kyrgyzstan, Tajikistan, Turkmenistan and Uzbekistan (2004)											•	•	

Source: UNCTAD.

* NT = National treatment, MFN = Most favoured nation treatment, FET = Fair and equitable treatment, IPR = Intellectual property rights.

¹ The Parties note the existence of a BIT between Canada and Costa Rica.

² Group of 3: Colombia-Venezuela-Mexico.

The first type of cooperation EIIA consists of agreements that address *investment promotion through cooperation*. The framework cooperation and partnership agreements signed by the EC with a number of Asian and Latin American countries and groups of countries,⁶³ as well as the Partnership Agreement between the EC and APC countries, are examples of this approach, as are also the framework agreements concerning trade and investment relations signed by the United States with a number of African and Middle East countries, and, lately, with the former Soviet Republics of Central Asia, the arrangements on trade and economic cooperation signed by Canada with countries in various regions, and, among the most recent EIAs, the Trade and Economic Framework Agreement between Australia and China. These agreements often spell out specific promotional measures that should be taken by the parties (or by some of them), including in particular exchange of information. In some cases, the cooperation mandate includes identification, analysis and gradual elimination of obstacles to investment flows. In other cases, the parties (through the consultative committee) agree to hold consultations on specific investment (and trade) matters and to identify agreements appropriate for negotiation. In still other cases, the parties are specifically encouraged to conclude bilateral protection and promotion agreements. The investment promotion provisions in some cooperation EIAs are part of a broader framework for economic cooperation addressing a variety of sectors and areas of economic activity. Countries tend to negotiate these types of investment cooperation provisions when the field is not yet ready to start negotiations for a full economic integration agreement. Consequently, they tend to involve countries which are geographically dispersed and foresee a relatively low level of economic integration between them in the short term. Often these agreements involve countries whose level of economic and social development differ substantially. In these cases, they tend to be tailored to the characteristics of the developing country partner and involve technical assistance.

The second type of cooperation EIIA consists of agreements that set up a *framework for future negotiations aimed at liberalizing and/or protecting investment flows*. This approach is found in, for example, the Euro-Mediterranean agreements signed by the EC with countries in North Africa and the Middle East. These agreements contain a mandate to widen the scope of the agreement to cover right of establishment for firms and the liberalization of services at a future date (article 31(1)). A follow-up clause provides for assessment of the achievement of these objectives after five years (article 31 (2 and 3)). Another example of this approach is the Partnership Agreement between the EC and the ACP countries, which provides for the negotiation of reciprocal economic partnership agreements between the EC and regional ACP groups in the near future. The Cotonou Agreement mandate goes on to specify what the main characteristics and purposes of these economic partnership agreements should be: they should aim at gradually liberalizing trade in services and should spell out investment protection standards. The recently adopted Framework Agreement between ASEAN and China is another example of this approach. It commits the parties to enter into negotiations in order to progressively liberalize their investment regimes and improve the transparency of investment rules. A similar approach is found in the South Asian Free Trade Agreement, and in the BIMSTEC FTA. In the latter arrangement the parties agree to negotiate expeditiously in order to establish a BIMST-EC FTA through *inter alia* progressive liberalization of trade in services with

⁶³ Examples include the Cooperation Agreement between the Economic Community and its Member States and the Member Countries of ASEAN, the Political Dialogue and Cooperation Agreement between the European Community and the Republics of Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua and Panama, and the Cooperation Agreement between the European Community and its Member States and the States of the Gulf Cooperation Council.

substantial sectoral coverage, and the establishment of an open and competitive investment regime that facilitates and promotes investments within the BIMST-EC FTA. The mandates in most FTAs concluded by the EFTA countries, as well as the bilateral FTAs signed by Southern European and CIS countries between themselves, are less concrete: the parties recognize the importance of investment and services and agree “to cooperate” with the aim of achieving progressive liberalization and mutual opening of their markets for investment.

b. Investment liberalization EIAs

Although the majority of EIAs contain specific obligations regarding the liberalization of investment between the parties as a means to complement trade liberalization and achieve deeper levels of market integration, certain types of EIAs focus mainly, or almost entirely, on liberalization. The scope and range of the liberalization issues covered may vary significantly among EIAs. Several patterns can be discerned in this respect.

At one end of the spectrum, some EIAs contain specific liberalization obligations covering a wide range of investment issues, including typically issues of investment entry, establishment and operation (e.g. post-establishment national treatment), transfer of funds and, in some cases, entry of managerial personnel, as well as trade in services and competition policy. Some liberalization EIAs deal with intellectual property protection as a complement to their liberalization provisions. Liberalization commitments are typically subject to exceptions and are often given effect through a more or less protracted process of gradual elimination of existing restrictive measures (see chapter IV.B.2). EIAs signed between developed countries often fall into this category of EIA.⁶⁴ With respect to EIAs between developing countries, the CARICOM Revised Treaty and the Framework Agreement on the ASEAN Investment Area are also close to this model. The latter provides for a list of temporary exclusions from entry, establishment and national treatment to be phased out by a particular date. Also falling under this model are the Europe agreements of association signed by the EC with Central and South- East European countries. They provide for progressive liberalization of investment and trade in services to be completed in several stages on the basis of detailed provisions, including on rights of establishment, non-discrimination, post-establishment national and MFN treatment, admission of personnel, transfer of funds and competition. (As noted earlier, EC association agreements are often signed as steps towards full EC integration.) The partnership and cooperation agreements between the EC and Eastern European countries cover similar liberalization issues, but the rights granted on these issues are more limited (see chapter IV.B).

The range of specific liberalization issues covered in other types of investment liberalization EIAs is narrower. For example, the Euro-Mediterranean agreements signed by the EC with countries in North Africa and the Middle East contain a prohibition on future restrictions on movements of capital and current payments, with some exceptions. (As noted earlier, these agreements do not grant rights of entry and establishment but commit the parties to provide such rights at a future date.) In addition, these two types of EC liberalization agreements, like their association counterparts, provide for intellectual property protection and protection against anticompetitive practices.

Another yet more limited EIA investment liberalization model, but with potentially far-reaching effects, consists of agreements that contain only general liberalization commitments in

⁶⁴ For example, the EC, EFTA and the European Free Trade Area, and the OECD Codes of Liberalization.

principle but provide for the development of these commitments in the future. This model is followed in some recent African EIAs, for example the Agreement Establishing the African Economic Community. It includes among its objectives the removal of obstacles to the free movement of persons, goods, services and capital and to the right of residence and establishment, to be provided in stages. The agreement envisages the full establishment of these freedoms in the sixth stage of its implementation. In the meanwhile, free movement of capital is to be implemented in accordance with a timetable, and measures to achieve the right of establishment are to be developed in a protocol. The Revised ECOWAS Treaty follows a similar approach. Even less concrete in terms of the specification of its liberalization commitments is the Unified Agreement between the Countries of the Gulf Cooperation Council.

Yet another type of liberalization EIA focuses solely or mainly on the liberalization of services. Examples are the ASEAN Framework Agreement on Services, the Protocol of Montevideo on Trade in Services in MERCOSUR and the Andean Community General Framework of Principles and Rules for Liberalizing Trade in Services (Commission Decision 439).

Stand-alone services liberalization agreements are usually a part of a broader integration framework encompassing trade in goods and, often, investment. A different model is that followed by the recent EIAs signed by the EC with Mexico and Chile and by EFTA with Chile, Mexico and Singapore. These agreements combine specific liberalization commitments in a number of services sectors with general commitments to liberalize investment at a future date (see chapter IV for further details).

c. Investment liberalization and protection EIAs

Another set of EIAs addresses both liberalization and protection of investment. A leading example of this model is the Investment Chapter (Chapter XI) of the North American Free Trade Agreement (NAFTA). Many EIAs signed between American countries follow the NAFTA quite closely in substance. With respect to liberalizing measures, these agreements typically guarantee national and MFN treatment on entry, subject to a list of exceptions, grant free transfer of payments related to an investment, prohibit certain performance requirements and place limits on restrictions on the investors' choice of managerial personnel of their choice. With respect to protection measures, they guarantee national and MFN treatment after establishment, subject to specified exceptions, guarantee minimum standards of treatment, including fair and equitable treatment, full protection and security, and also protection against unlawful expropriation. These commitments are complemented with provisions for investor-to-State arbitration of investment disputes. Other chapters address liberalization of trade in services and competition policy and protect intellectual property rights. The Latin American agreements sometimes depart from the NAFTA model in several respects, notably in the inclusion of a prohibition on the extraterritorial application of laws and, in some cases, in the absence of a right of establishment or an asset-based definition of investment (see chapter IV).

Recent EIAs following the NAFTA model sometimes go further than NAFTA in terms of the coverage of investment and investment-related issues. Included in this group are a number of bilateral (both regional and interregional) EIAs concluded by countries in the Americas and Asia that are, for the most part, more comprehensive and detailed than prior NAFTA-type EIAs. They seek to deal in very extensive ways with trade in services as well as investment. Separate

chapters may appear on topics such as competition policy, government procurement, intellectual property rights, labour, the environment, trade in special service sectors such as telecommunications and financial services, temporary entry for business persons, and transparency. Among the countries concluding these agreements are Australia, Chile, Japan, the Republic of Korea, Mexico, Morocco, Singapore and the United States (box III.1).

Yet other EIAs that deal with liberalization and protection of investment do not go as far as NAFTA in their coverage of issues. An example is the MERCOSUR Protocol of Colonia on Reciprocal Promotion and Protection of Investments within MERCOSUR. The Colonia Protocol is closer to the United States BIT model than to NAFTA.

Belonging to this group are also earlier agreements signed between African countries and by Arab and Islamic countries that provide for a combination of limited protection and liberalization standards. They authorize the host State to grant preferences to investors of member countries meeting certain conditions. These preferences sometimes include a limited right of establishment and freedom of movement of persons. They also typically contain a few provisions on investment protection, most commonly a guarantee of compensation for expropriation, but in some cases a right of free transfers or even a right to investor-State dispute resolution.

**Box III. 1. The investment-related provisions in the Agreement
Between Japan and Singapore for a New-Age Economic Partnership**

The Economic Partnership Agreement between Japan and Singapore contains an investment chapter that follows the NAFTA model but is more comprehensive and detailed than earlier NAFTA-type EIAs. The investment chapter includes,

- A broad, asset-based definition of investment;
- A general guarantee of national treatment, both pre-establishment and post-establishment, subject to exceptions set forth in an annex;
- A guarantee of national treatment with respect to access to courts and administrative tribunals both in pursuit and defense of investors rights;
- A prohibition on certain performance requirements subject to exceptions set forth in an annex;
- A guarantee of fair and equitable treatment and full protection and security;
- A guarantee of compensation for expropriation;
- A guarantee with respect to repurchase of leases by the host government;
- A guarantee of national treatment with respect to the payment of compensation for war or civil disturbance;
- A guarantee of free transfer of payments relating to investments;
- A temporary safeguard with respect to cross border capital transactions;
- Investor-to-state dispute resolution;
- A general exceptions clause;
- A prudential measures clause;
- A limitation on national treatment with respect to intellectual property rights in accordance with the WTO TRIPS Agreement;
- A limitation on taxation measures as a form of expropriation;
- Establishment of a “Joint Committee on Investment” to monitor the implementation of the agreement;
- An extension of the observance of agreement to local governments and non-governmental bodies;
- A guarantee of MFN treatment.

/...

**Box III. 1. The investment-related provisions in the Agreement
Between Japan and Singapore for a New-Age Economic Partnership (concluded)**

The agreement includes as well a chapter on trade in services with GATS-like provisions on,

- Market access commitments and national treatment in sectors where commitments have been made;
- A requirement that domestic regulation of trade in services be reasonable, objective and impartial;
- Judicial review of decisions affecting trade in services; and
- Restrictions on anticompetitive practices.

Further the agreement includes a chapter on movement of natural persons which

- Allows parties to make specific commitments for entry of investors; and
- Establishes a committee on mutual recognition of professional qualifications.

Also included in the agreement are separate chapters that deal respectively with

- Intellectual property rights;
- Restrictive business practices;
- Financial services;
- Science and technology;
- Promotion of trade and investment;
- State-to-state dispute resolution.

Source: UNCTAD.

d. Investment protection and promotion EIAs

Some EIAs follow the traditional European BIT pattern which provides for standards of treatment and protection of investment only after entry. An example is the ASEAN Agreement on the Reciprocal Promotion and Protection of Investments. These agreements typically provide for national treatment, MFN and fair and equitable treatment after entry (the ASEAN Agreement provides only MFN treatment), a guarantee of compensation upon expropriation and the right to free transfer of funds, and include provisions on the settlement of investment disputes between investors and host countries. However, the parties reserve the right to admit investments from the other members in accordance with their national laws. It needs to be noted in this example that the ASEAN promotion and protection agreement is part of a broader integration framework among the members of the ASEAN, encompassing other agreements that cover issues of liberalization of investment and services. The Energy Charter Treaty as it stands at present, and the Agreement on Promotion, Protection and Guarantee of Investments among Member States of the Organization of the Islamic Conference, are other examples of this model.

Another type of agreement belonging to this category are a number of EIAs that follow the NAFTA model in other respects, and provide for both national treatment and MFN but only after establishment. Accordingly, these agreements do not pursue the liberalization of investment flows but provide for investment protection, including guarantees of non-discrimination after entry. Examples are the free trade agreements between Mexico and Costa Rica, between Mexico and Nicaragua, between Colombia, Venezuela and Mexico and between Central America and the Dominican Republic.

The provisions on promotion in this type of investment protection EIIA, like its BIT counterparts, tend to be rather general and vague, as promotion is expected to come about through the protection standards granted in the agreement intended to minimize political risk. However, some agreements falling into this group contain detailed provisions on promotion. An example is the Mexico-Costa Rica FTA, which *inter alia* specifies various information items to be exchanged with the intention of promoting investments between the parties. Still other agreements combine framework provisions on promotion and some general investment protection standards (e.g. COMESA).

In yet another approach, certain recent agreements call for the conclusion of BITs between the parties as part of their mandate to promote investment (see III.B.1.a).⁶⁵ On the other hand, other recent EIAs do not cover investment protection issues for the stated reason that a BIT already exists between the signatories. This is the case with, for example, the Free Trade Agreement between Jordan and the United States and the Free Trade Agreement between Canada and Costa Rica.

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EIAs sometimes pursue more than one purpose and thus combine several of the approaches identified above, in particular by providing for both specific liberalization obligations and cooperation commitments to promote investment flows. This is often the case of agreements between countries at different stages of development, where economic integration cannot be expected to proceed on the basis of liberalization alone, but necessitates additional specific promotional efforts by the Governments involved, including notably exchange of information and technical assistance (typically to be provided by the more developed country or countries). The partnership and cooperation agreements signed by the EC with Central and Eastern European countries, the Cotonou Agreement between the EC and APC countries and the Euro-Mediterranean agreements signed by the EC are examples of EIAs with this hybrid purpose and approach (see above in this section).

Finally, sometimes agreements concluded under a group's integration mandate do not follow a clear pattern or model. This is the case of, for example, the series of economic complementation agreements signed between Latin American countries under the aegis of ALADI. Each individual complementation agreement establishes its own purpose and coverage of investment issues, based on specific needs, which are not necessarily similar to those in other ECAs. As a result, the range and the type of investment issues addressed vary greatly from one agreement to another.

2. *Depth of Commitments on Investment*

A second criterion that may be used for distinguishing between different models or patterns of EIAs in relation to investment relates to the *depth* of the investment commitments made in these agreements. The depth of an EIA in relation to investment is determined by the substantive scope of the agreement (e.g. types of investments and investors covered), and by the extent and nature of the commitments made by the parties under specific investment provisions.

⁶⁵ References to the future conclusion of BITs appear in, for example, association agreements and partnership and cooperation agreements signed by the EC with third countries, in the EC-MERCOSUR and EC-Chile agreements, and in Decision No. 2/2001 of the European Union and the Mexico Joint Council of 27 February 2001.

The “depth dimension” of an EIIA, together with the extent of coverage of investment issues (discussed in the preceding section), provides the substantive parameters that best help determine the degree of investment integration afforded by an EIIA. Some indications of different degrees of depth in EIAs were already given in the preceding section in relation to the coverage of investment issues. Thus, as noted before, while many of the so-called liberalization agreements do little more than promise liberalization in the future, other EIAs go much further in the number of topics covered and the level of detail. Other disciplines on investment also tend to be more rigorous in some EIAs than in others. The actual picture, however, is more complex than these rough classifications may suggest, as it impinges upon the formulation of specific investment provisions as well as the interrelations between provisions. These aspects are examined in detail in the next two chapters.

In addition, the depth dimension of an EIIA with respect to investment is further determined by the manner and extent to which the commitments contained in its investment provisions are implemented. Agreements that contain similar types of liberalization, protection or promotion commitments under their investment provisions may differ greatly when it comes to the level of liberalization or protection or promotion they actually achieve. This study does not discuss implementation issues, nor does it assess the implementation status of EIAs. Nevertheless, it is important to bear this aspect in mind.

3. *Treatment of Third Parties*

A third way of differentiating between EIAs in relation to their approach to investment relates to the manner in which different EIAs treat investment from non-parties. This criterion allows one to discern the degree of EIIA integration *vis-à-vis* third countries. As noted earlier, a key characteristic of non-multilateral EIAs is that they provide preferential treatment to investments within the EIIA group, thus introducing a level of asymmetry (i.e. usually less favourable treatment) with respect to investment from countries outside the group. Such preferential treatment granted to EIIA members is typically reinforced by the use of REIO clauses or exceptions to MFN treatment in other agreements signed by any of the members of an EIIA with third countries. Under a REIO clause, a country is not obliged to extend MFN treatment to the other signatories of an investment agreement on the benefits or preferences resulting from its participation in an EIIA. The REIO exception has been broadly used in all types of investment agreements.⁶⁶

At the same time, while EIAs deal principally with investment relations between the parties, a number of these agreements contain provisions explicitly addressing the treatment of third parties. Third-party provisions of EIAs reflect various models or levels of investment integration between members and non-members of EIAs. An example of EIIA provisions reflecting a fairly liberal approach towards third parties in an investment-related area is article 56 (1) and (2) of the European Community Treaty (consolidated text). This article prohibits all restrictions on the movement of capital and payments between member States and third countries. Articles 57 through 60 allow for certain exceptions and safeguards. The combined effect of these provisions and the provisions granting national treatment within the European Community would seem to suggest that not only would most investments from third countries, once established in one European country in accordance with the relevant entry and establishment rules, be allowed

⁶⁶ For an in-depth discussion of the REIO clause and its economic and legal implications, see Karl (1996) and UNCTAD (2005a).

to freely transfer capital and related payments in and out of the Community, but that also third-party firms would be treated in the same manner as EC companies with respect to European Community rules. It should be noted, however, that while the EC has specific provisions establishing an open-door policy towards investment from third countries, it does not go as far as creating a complete Community-wide foreign investment regime. Instead, investment relations with third countries are, for the most part, within the purview of the individual EC members' national law. Hence, asymmetries between third-party investment regimes within the EC may, and often do, exist.

Another type of EIIA that has explicitly adopted a liberal approach towards investment from third parties is the Framework Agreement on the ASEAN Investment Area. This agreement commits the parties to extend full right of establishment and national treatment to investments from third countries by a particular date (2020), that is 10 years after the same rights must be granted to the members of ASEAN.

In yet another approach, the MERCOSUR Protocol on the Promotion and Protection of Investments from Countries not Members of MERCOSUR is entirely dedicated to third-party investment. The Protocol is reminiscent of the traditional European BIT model. It grants ample protection standards for investments from countries outside MERCOSUR after these investments have been in accordance with the national laws of the MERCOSUR member countries, including investor-State settlement of disputes. The Protocol represents a fairly comprehensive common regime of MERCOSUR for third-party investment, thus leaving little room for asymmetrical treatment of non-party investments by individual MERCOSUR countries. However, the Protocol does not go so far as to grant entry and establishment rights to investments from third countries, which are enjoyed by investments from MERCOSUR countries.

Some earlier African EIAs, such as the Community Investment Code of the Economic Community of the Great Lakes countries, grant specific rights to investors of third parties. In particular, they grant the same legal protection as that granted to enterprises with intra-Community capital, including with respect to intellectual property rights, and are not to be subject to discrimination under the law. A right of free transfer of funds is also granted, subject to existing legislation. However, third party investors have to meet certain requirements in order to benefit from the Agreement's preferential regime.

Other earlier agreements, such as the Andean Pact Commission Decision 24 (superseded by Decision 291), make explicit reference to investments from outside the region, with the purpose of restricting and controlling them, and conditioning their participation in the benefits and preferences of the Agreement.

EIIAs that follow the NAFTA model do not address explicitly the treatment of investment originating from non-parties, except for certain disciplines (e.g. on performance requirements) that apply also to third countries. However, investment from third countries might be affected in certain respects by the rules of origin established by these agreements, as these determine the level of local content a product must have in order to qualify for the preferences granted by the agreement.

4. Distinction between Developed and Developing Country EIAs

Relatively few of the EIAs considered in this study are solely among developed countries. The principal exceptions are the agreements among the European countries. As has been noted, these agreements strongly emphasize investment liberalization, rather than investment protection or promotion.

The majority of the EIAs considered in this study are between developed countries on the one hand and developing countries or transition economies on the other. For the most part, regional differences predominate among these agreements, with the most important factor usually being the region in which the developed country is located. For example, as described above, European Community agreements with transition economies and developing countries focus on liberalization, limiting anticompetitive behaviour, creating a right of free transfers, protecting intellectual property and/or promoting investment through economic cooperation. The nature of the obligations varies, depending upon the region of the non-European country. A number of agreements between the United States and developing countries, by contrast, include liberalization commitments, but also have strong investment protection provisions.

Nevertheless, a significant and growing number of EIAs among only developing countries also exist. Again regional patterns predominate. For example, many of the agreements among developing countries in the Americas have been very much influenced by NAFTA. Agreements among developing countries in Africa or among the Arab States are also unique. Within Asia, the ASEAN agreements are among the most important EIAs among developing countries, which also are distinct from the agreements among developing countries in the other regions.

Some generalizations can be offered concerning the nature of EIAs among developing countries. First, agreements solely among developing countries are less likely to include specific liberalization commitments than agreements involving developed countries. For example, as noted earlier, some of the EIAs among developing countries in the Americas strongly resemble NAFTA, but omit the right of establishment contained in NAFTA (e.g. FTAs between Colombia, Mexico and Venezuela, between Costa Rica and Mexico, and between Mexico and Nicaragua), although many others have it. Similarly, earlier agreements among African or Arab States often limit their liberalization commitments. This tendency should not be overstated, however. Among the earlier developing country EIAs within the Americas, the CARICOM agreement also has liberalization provisions, as does the MERCOSUR Protocol of Colonia. In Asia the ASEAN Framework Agreement on the Investment Area includes liberalization commitments as well. A number of new developing country regional EIAs in Africa and Asia contain the promise of future liberalization, but it is still too early to assess the extent to which these groups will deliver on that promise. Examples are the African Economic Community and the Revised ECOWAS treaty in Africa and the BIMST-EC treaty in Asia. On the other hand, several recent interregional EIAs between developing countries have specific and far-reaching liberalization commitments, such as the free trade agreement between Chile and the Republic of Korea.

Second, agreements solely among developing countries are more likely to have provisions establishing regional preferences. Regional preferences are typically found in older agreements among African and Arab States as well as Asian and Latin American States. Recent developing country EIAs, however, do not seem to dwell much on preferences (except of course for the fact that the establishment of a non-multilateral EIA is, by its very nature, a preferential regime for

the parties involved) but on market-oriented approaches to promotion, protection and liberalization of investment.

Third, agreements solely among developing countries tend to have less extensive provisions on the protection of intellectual property rights. Although intellectual property would be protected against host country action in the same way as other forms of investment, agreements solely among developing countries generally do not provide for special protection of intellectual property against private infringement.

Fourth, agreements solely among developing countries are more likely to have provisions for special and differential treatment, based on the level of development of the parties involved. Such provisions appear, for example, in the CARICOM agreement, the Framework Agreement on the ASEAN Investment Area, and Decision 439 of the Commission of the Andean Community Establishing a General Framework of Principles and Rules for Liberalizing Trade in Services in the Andean Community.

Such provisions are not exclusive to agreements solely among developing countries. The Cotonou Agreement also includes such provisions. Their absence from most agreements involving developed countries may be explained by the fact that most of the EIAs involving developed countries have only one developing country as a party, in which case special provisions to take account of different levels of development are unnecessary since the special circumstances of the one developing party can be taken into account directly in fashioning the various substantive provisions.

The distinction between developed and developing countries is a crude one that may mask some noteworthy trends. For example, as noted earlier, a few relatively developed, but still developing, countries are starting to participate in the negotiation of highly elaborate and complex EIAs with lengthy provisions on both investment and trade in services, including among themselves. Pre-eminent on this list of countries are Chile and Singapore. Half a dozen agreements to which these countries are parties (including also with the European countries, the United States, Australia or Japan) have set detailed and comprehensive standards for both investment liberalization and investment protection. They represent a more market-oriented development policy that is sometimes seen in earlier EIAs among developing countries.

Furthermore, while one might expect that EIAs among developed countries would provide the highest standards of investment protection, this is not always the case. For example, the FTA between the United States and Australia does not include an investor-State dispute resolution mechanism, while a number of EIAs among developing countries do.

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In conclusion, while regional differences remain, and the traditional broad distinction between types of EIAs — that is, agreements that emphasize investment liberalization, agreements that focus on both investment protection and liberalization, agreements that deal with protection only, and agreements that address investment promotion through cooperation — is still valid, a new generation of regional and interregional EIAs is emerging that is moving gradually towards greater coverage and depth of investment issues. In some cases, this is the result of the process of integration set out in the agreements advancing and maturing over time. Also, earlier North-South agreements that granted non-reciprocal preferential treatment to the developing

countries parties are moving towards full reciprocity. Such is the case of the post-Cotonou agreements currently being negotiated between the ACP and European Community countries. South-South EIAs meanwhile are also moving gradually closer to their North-South counterpart models, although significant individual differences are often observed. At the same time, cooperation agreements containing only very few and general commitments on investment have proliferated in recent years, especially within Europe and Asia, as well as between countries in different regions, reflecting a certain reluctance to embark upon full-fledged investment commitments at the earlier stages in certain cases. Hence, as new EIAs appear on the radar screen on an almost daily basis, it might still be too early to reach more definite conclusions in terms of EIA approaches to investment.

A more definitive observation that can be made at this stage is that, as the cross-membership of EIAs continues to expand, and EIAs from all regions increasingly overlap, it becomes more and more difficult to determine in practice what specific investment rules apply to foreign investors in a particular country at a particular time. This suggests that efforts towards rationalization and simplification of the current universe of rules on investment might be in the interest of both countries and investors.
