Asia-Pacific
Economic Cooperation

2019/SOM1/CTI/051
Agenda Item: XIV

Prominent 'Next Generation' Trade and Investment Issues: A Stocktake of Trade Policy Responses in the APEC Region, Other Regions and the WTO

Purpose: Information
Submitted by: Australia

APEC
CHILE 2019

First Committee on Trade and Investment Meeting
Santiago, Chile
3-4 March 2019

Prominent 'next generation' trade and investment issues: a stocktake of trade policy responses in the APEC region, other regions and the WTO

A report for the Australian Department of Foreign Affairs and Trade
prepared by Trading Nation Consulting

APRIL 2018

Disclaimer: The views expressed in this discussion paper are those of the authors and do not necessarily represent those of the APEC Member Economies

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Executive Summary

In November 2016, APEC Leaders instructed officials to undertake a stocktake of next generation trade and investment issues (NGeTIs) in existing regional trade agreements/free trade agreements in the APEC region, other regions and in the World Trade Organization (WTO), as the next step in advancing the Beijing Roadmap. This contribution by Australia is the first draft of the stocktake for consideration by the Committee on Trade and Investment.

The APEC region is one of the world's great centres for RTA innovation.

RTAs are a response to the evolving requirements of modern supply chain trade and the increasingly complex and quickly changing environment of international commerce. The failure of the WTO Doha Round to update the multilateral rules for trade and to bring new trade issues into the multilateral rules-based system has fundamentally increased the appeal of RTAs. APEC economies were involved in the bulk of RTAs negotiated globally in the period since 2001, especially from 2011 to 2015.

RTAs have increased dramatically in scope and ambition across the Asia-Pacific and globally. Almost all recent agreements add in some way to existing WTO rules and commitments (i.e. they are WTO+) on issues ranging from customs procedures to standards and government procurement to services. Over the last 10 years or so, RTAs involving at least one APEC member have, on average, WTO+ coverage in around 80 per cent of policy areas – a proportion in line with the world as whole – and higher still in the case of intra-APEC RTAs. Recent agreements also increasingly include commitments in areas like foreign investment, competition, labour and e-commerce where there are no, or limited, WTO rules currently (i.e. they are WTO-X). APEC economies compare favourably with the world as a whole in WTO-X coverage of RTAs.

There are strong similarities across WTO+ provisions in Asia-Pacific RTAs on coverage and other depth indicators regardless of per capita income levels.

There is generally moderate-to-high coverage, legal enforcement and dispute settlement arrangements for WTO+ measures in modern RTAs and the trend is upwards. This holds for both APEC and non-APEC economies, but is more prominent for APEC economies. In the case of individual WTO+ measures like customs processes, IP protection and services, levels of legal enforcement of commitments vary but are significantly ahead of the world as a whole.

The depth of commitments on WTO-X measures in Asia-Pacific RTAs is more variable and generally weaker than for WTO+ measures.

In contrast to WTO+ measures, legal enforcement and dispute settlement arrangements for WTO-X measures apply at a substantially lower average level across all economy groups in this stocktake. At no time in the last two decades has this (unweighted) average exceeded 10 per cent either for intra- APEC RTAs or APEC RTAs with third economies: the average for the RTAs of the world as a whole was roughly in line. Across 38 WTO-X measures, enforcement rates in excess of 75 per cent apply only in the case of intra-APEC RTAs covering foreign investment and competition policy: these agreements are significantly ahead of regional and global enforcement standards.

There are inevitable differences between economies in negotiating priorities and approaches on specific WTO+ and WTO-X provisions.

The strong shift from 'shallow' to 'deep' agreements over the last 10-15 years and convergence around the core content of RTAs disguises differences in negotiating priorities and approaches among APEC and other economies, as well as differences in the depth of commitments among 'families' of RTAs.

Different negotiating priorities in RTAs emerged early because they reflect differences across economies in enabling environments for trade and investment whether measured by physical infrastructure, relevant skills, the regulatory environment, or demand pressures from business. At a generic level, an example is the emphasis placed by different APEC and other economies on legal enforcement and dispute settlement. Different negotiating approaches also tend to persist over time on specific measures. For example, there are two main approaches on services in RTAs – based on the General Agreement on Trade in Services (GATS) and on the North American Free Trade Agreement (NAFTA) – and multiple approaches on trade and labour.

The growing complexity of modern RTAs contributes to growing divergence in some WTO+ and WTO-X areas.

RTAs have emerged as laboratories for trade policy, particularly to lower trade costs and tackle inventive forms of protectionism. Many provisions have taken on more complexity or precision than their WTO equivalents, and many others have emerged quickly outside the purview of the WTO. This rapid pace of change helps to explain why recent RTAs address a much wider range of issues than agreements a decade ago. And it goes some way to explain variations in the scope and depth of commitments within different agreements signed by the same party. But it also produces divergence at the level of detail that sits on top of more structural differences in the ways different economies assign negotiating priorities and develop approaches on specific WTO+ and WTO-X provisions.

Convergence and divergence in bilateral and small multi-party RTAs increases the importance of mega agreements that can address overlapping or inconsistent approaches that could impede trade and investment.

Over recent years there has been a strong trend towards negotiating mega RTAs. Examples in the Asia-Pacific region include the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) and Trans-Pacific Partnership Agreement (TPP), the Pacific Alliance and ongoing negotiations for the Regional Comprehensive Economic Partnership (RCEP) agreement. As a general principle, mega agreements reduce the scope for regulatory variance compared to bilateral and small-multiparty agreements by consolidating and improving trade and investment rules and lifting commitments. This is especially the case if big agreements supersede older bilateral agreements or create political momentum to negotiate more ambitious region-wide outcomes.

APEC can play a valuable role in supporting the next phase of RTA development.

Powerful forces are shaping RTAs around common goals, principles and shared ambitions and, equally, there are countervailing forces delivering greater heterogeneity. These twin realities present opportunities for APEC to place its stamp on next generation trade and investment issues through developing a broad range of new model chapters that take as their starting point the significant innovations that have occurred in RTAs regionally and globally over the past decade. This work could be reinforced by analysis of issues like why non-tariff measures are proliferating, why many of them become barriers to trade and what can be done to roll them back. This work also could be reinforced by APEC developing a portal that contains links to RTAs negotiated by APEC economies – some are hard to find - and associated literature.

Contents

Background to the Stocktake

In November 2016, APEC Leaders instructed officials to undertake a stocktake of next generation trade and investment issues in existing RTAs/FTAs in the APEC region, other regions and in the World Trade Organization (WTO), as one of the next steps in advancing the Beijing Roadmap. Leaders instructed officials to use the stocktake to develop dedicated initiatives, including through capacity building, to close the gaps between different treatment of next generation trade and investment issues by economies as revealed by the stocktake. Initiatives should be developed within relevant APEC forums and included in each forum's work plan on an annual basis from 2018 onwards (APEC 2016).

In 2017, Australia volunteered to prepare a first draft of the stocktake for discussion by the Committee on Trade and Investment (APEC 2017).

1. Introduction

Over recent decades tariffs have declined substantially globally and in the Asia-Pacific region, and technological change and competitive pressures have led to the unbundling of functions in manufacturing and services. This has boosted two-way trade in most economies, with value added often sourced from many different economies in delivering final products and services to consumers. Global and regional value chains now account for 75-80 per cent of world trade.[1]

Supply chains require smooth movements of goods, services, capital and skills. To work effectively, chains require the elimination or reduction of border barriers like tariffs and quotas (the traditional staples of trade policy). Tariff peaks are a continuing challenge in the Asia-Pacific region and beyond in sectors like agriculture and textiles, clothing and footwear. But a much bigger challenge for the effectiveness of supply chains, given the dramatic decline in average tariffs, is to narrow divergences in domestic regulation and policies across economies – and therefore to reduce associated costs to traders and investors - in areas as varied as technical and professional standards, regulatory transparency, services provided by commercial presence, movement of specialists and executives, digital trade, IP rights, government procurement, and competition policy. The ad valorem tariff equivalent of these non-tariff measures and barriers to services is now several times higher than the average applied tariff in the APEC region (CTI 2016, Appendix 6, p. 67).

The new trade agenda, as defined in this stocktake, is characterised by the high priority accorded to next generation, at-and-behind-the-border, trade issues (NGeTIs) of the kind identified by APEC Leaders and economies in recent years. These issues were identified as a non-exhaustive list of potential NGeTIs in the Committee on Trade and Investment's 2016 report to APEC Leaders: *Collective Strategic Study on Issues Related to the Realization of the FTAAP*.[2]

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[1] This proportion has been rising over recent years, see OECD 2013, OECD 2015 and APEC Policy Support Unit 2014. Over the past 20 years, world trade has been transformed by changing technologies, particularly those clustered around the internet. It also has been transformed by business models that take advantage of easier, cheaper and faster communications and by government policies that have liberalised trade and investment, largely through bilateral and regional agreements. Modern value chains are now central to global commerce. Chains traverse regions and the globe in complex ways, fusing together 'capital, labour, goods, and services through logistics, finance, technology, management structures and government policy in a continuum that produces output for consumers' (Park, Nayyar and Low 2013, p. 12).

[2] Chapter 3 of the *Collective Strategic Study* identifies a range of possible NGeTIs, including services and investment (linked to supply chains), development and economic cooperation, gender issues, digital trade,

The NGeTI agenda has evolved to tackle regulatory divergence, increase trade and investment flows, and lift the efficiency of supply chains. It also has evolved in response to the complex challenges facing developing economies and small and medium enterprises (SMEs) in joining these chains and competing effectively in them. The agenda has been taken up multilaterally, for example through the Trade Facilitation Agreement, and plurilaterally, for example through ongoing Trade in Services Agreement (TiSA) negotiations. But the dominant response has been through the proliferation and deepening of bilateral and multi-party regional trade agreements (RTAs)

This stocktake briefly examines multilateral and plurilateral contributions to the new trade agenda before providing an overview of how RTAs have evolved in the Asia-Pacific and beyond. The overview examines in some depth the proliferation of RTAs and the shift from agreements supporting shallow integration of economies – basically agreements providing non-discriminatory national treatment to foreign goods and services but not intervening in domestic economic policies beyond this requirement - to deep integration aimed at reducing regulatory divergences. The overview also covers the shift to deeper integration in the RTAs of both developed and developing economies in the region, broad similarities and differences among the 'families' of RTAs in the region and the shift to mega-RTAs.

This is followed by a stocktake of how RTAs in the region are dealing with:

- 'new' issues covered to some degree by multilateral disciplines in areas like services, investment, IP and transparency, and
- issues like competition policy, digital trade, SMEs, and labour and the environment that are not yet covered, or are only lightly covered, by multilateral disciplines.

To the extent practical, the stocktake builds on developments over the past couple of decades across more than 250 RTAs, using the World Bank database on preferential trade agreements – referred to here as regional trade agreements - as the main primary source. This database, and the approach used in analysing it, are described in detail in Annex A. The stocktake highlights developments in a few recent agreements that are significant in the evolution of new ideas and approaches to international trade and investment and, in some cases, that may have a significant bearing on further steps towards regional integration. The review of each NGeTI takes in scope and depth of coverage. This is elaborated further in detailed annexes to this stocktake that should be regarded as an integral part of the stocktake. Annex B briefly reviews traditional trade issues like tariffs and rules of origin that continue to play a major role in the efficient functioning of supply chains. Annexes C to M analyse individual NGeTIs based on reviews of the literature, a broad sample of RTAs from the APEC region, and an in-depth investigation of the World Bank RTA database.

Some broad conclusions are presented on the divergence/convergence of specific NGeTIs in RTAs in the APEC region and beyond. This also includes a brief discussion of possible further APEC-related work on NGeTIs, including in areas where there are marked increases in coverage and detail in recently negotiated RTAs.

trade and the environment, trade and labour, trade facilitation, IP, competition, ant-corruption, government procurement, small and medium sized enterprises, and transparency. This taxonomy has been followed here with three exceptions: analysis of competition and state trading/state owned enterprises has been combined; gender issues are discussed as part of separate analyses of development cooperation, trade facilitation, SMEs and labour; and transparency and anti-corruption have been combined.

2. The new trade agenda: multilateral and plurilateral initiatives

APEC economies, like others, rely heavily on a strong, open, global trading system that is capable of resisting inward looking sentiment and the threat of protectionism, and of delivering further trade liberalisation through the WTO. Progress on both fronts is needed if the benefits of trade are to be shared widely across all economies and business.

Over recent years there has been some progress multilaterally, notably:

- Implementing the WTO Trade Facilitation Agreement in 2017. Simplifying and modernising export and import processes increases trade flows by reducing trade costs. SMEs should be a major beneficiary.
- Eliminating agricultural export subsidies
- Applying new disciplines on domestic support for cotton that should benefit least developed economies
- Expanding coverage of the WTO's Information Technology Agreement (ITA). Two decades on from the original 1996 agreement, this is the first major tariff-cutting deal at the WTO, covering about 10 per cent of world trade and eliminating tariffs on trade valued at around USD 1.3 trillion
- Potentially eliminating tariffs on a number of important environment-related products (the Environmental Goods Agreement) in ongoing WTO negotiations. Negotiating parties account for the majority of global trade in environmental goods.

The recent WTO Ministerial Conference in Buenos Aires (MC-11) delivered some potentially important outcomes, including on multilateral disciplines on domestic services regulations; investment facilitation; trade related aspects of e-commerce; and micro firm and SME participation in international trade (MC-11 2017). But even the WTO Director General acknowledged that outcomes were generally disappointing because WTO members' positions were far apart on many of the key issues. This in itself is hardly surprising: ministerial meetings produce different outcomes depending on the prevailing sentiment to strike deals or not. Far more important is that multilateral progress on trade and investment issues has been underwhelming for the best part of two decades: the WTO has been incapable of developing practical and effective multilateral trade rules to liberalise behind the border non-tariff measures and barriers to services and investment that are at the heart of modern supply chain trade.

Developed economies for the most part have pushed strongly over time in the GATT and WTO to widen and strengthen trade and investment issues subject to WTO rules and disciplines. Regulatory issues like competition, government procurement, investment, and trade facilitation (the 'Singapore Issues'), as well as issues like trade and the environment, labour standards and movement of capital have been a particular focus. This push has been countered by some developing and emerging economies in the main arguing that the WTO should apply itself to resolving traditional market access issues of importance to them – a priority set for the Doha Development Round - before moving on to new regulatory issues. The new agenda is often portrayed as benefiting mostly developed economies while eroding the regulatory flexibility of developing economies.

However portrayed, negotiating parties remain mostly locked in stalemate at the multilateral level. This under performance has underpinned responses at two levels:

- advancing specific issues plurilaterally among parties with common interests. TiSA is the best example and, if successful, may provide a basis to develop sectoral or broader regulatory frameworks, and
- advancing on a wide front with intense activity on bilateral and regional (multi-party) RTAs.

If these responses are to support the multilateral trading system, WTO-consistency must be a priority objective. Under WTO rules, RTAs must eliminate tariffs and other restrictions on 'substantially all the trade' in goods between its member economies, and eliminate substantially all discrimination against service suppliers from member economies with substantial sectoral coverage. The best RTAs, including those in the Asia Pacific, do this.

3. The new trade agenda: RTAs

RTAs dominate the new trade agenda as economies across the region and around the world respond to core changes in the international trading system by pursuing deep integration. These agreements have increased dramatically in number, scope and ambition across the Asia-Pacific and globally. Almost all recent agreements add in some way to existing WTO rules and commitments on issues ranging from customs procedures to standards and rules of origin to services. They are referred to here as WTO+ commitments. Recent agreements also increasingly include commitments in areas like movement of capital, competition, labour and e-commerce where there are no, or limited, WTO rules currently: they are referred to here as WTO-X commitments (Table 1).

Table 1
Categories of WTO+ and WTO-X Provisions

WTO+		WTO-X
Tariffs Industrial goods	Anti□corruption	Financial assistance
Tariffs agricultural goods	Competition policy	Health
Customs administration	Environmental laws	Human Rights
Export taxes	IPR	Illegal immigration
SPS measures	Investment measures	Illicit drugs
State trading enterprises	Labour market regulation	Industrial cooperation
TBT measures	Movement of capital	E-commerce/Digital Trade
Countervailing measures	Consumer protection	Mining
Anti□dumping	Data protection	Money laundering
State aid	Agriculture	Nuclear safety
Public procurement	Approximation of legislation	Political dialogue
TRIMS measures	Audiovisual	Public administration
GATS	Civil protection	Regional cooperation
TRIPS	Innovation policies	Research and technology
	Cultural cooperation	SMEs
	Economic policy dialogue	Social Matters
	Education and training	Statistics
	Energy	Taxation
		Terrorism
		Visa and asylum

Source: Hofmann, Osnago and Ruta 2017, p. 6.

The upsurge

The first global upsurge in RTAs was in the first half of the 1990s and was associated, among other things, with the regional activities of what is now the European Union, entry into force of the North American Free Trade Agreement (NAFTA) and the re- emergence of Central and Eastern Europe as a significant element of global trade. Of these, the most important was implementing the EU's Single Market Program from 1992, enlarging membership and numerous EU agreements with third economies: these activities accounted for around two-thirds of all agreements notified to the GATT/WTO in the 1990s (World Bank 2000, p. 3).

The second wave started early in the 2000s and has never stopped as economies around the world, but especially in Europe, East Asia and Latin America, have used RTAs to increase access to markets, counter trade diversion, avoid being left out of emerging economic

architecture and, mostly, pursue deep integration across economies as multilateral options narrowed with the stalling of the Doha Round. RTAs responded to the growing importance of services trade and offered opportunities to attract more direct investment - a major factor encouraging deeper integration, particularly in the case of the Pacific Alliance and ASEAN (Box 1).

Box 1
Factors behind Burgeoning RTAs

The single-most important policy driver behind proliferating RTAs is the underwhelming performance of multilateral processes in dealing with behind-the-border barriers to goods, services and investment in supply chain trading. By default, RTAs have become the primary instrument for dealing with regulatory divergence between economies across supply chains.

Beyond this, technological change is a factor in its own right in driving the RTA upsurge and shaping its agenda. This is most obvious in areas like digital trade, where there is growing interest in barring requirements to hand over source codes to regulatory authorities as a condition of market access, promoting cyber security and protecting consumers of digital technology. But it is fundamental also to areas like technical barriers to trade, sanitary and phytosanitary measures, financial services, and movement of capital.

Often more visible are values-based drivers. The increasing focus of RTAs on micro-small-medium enterprises is linked to growth and job opportunities arising from effective access to supply chains, but it can be linked also to female participation in small business, empowerment and gender equity. Similarly, the focus on environmental elements of RTAs reflects strong values-based pressure from some business sectors and the general public. Much the same can be said for issues like trade and labour and development cooperation: national parliaments, business, labour movements, the media, and other elements of civil society are often prominent in advancing these agendas and use RTAs, among other things, to achieve this. Governments also, where they have sufficient economic and political weight, can achieve outcomes more directly on issues like labour and the environment by making them non-negotiable elements of RTAs.

Many APEC economies were slow to start negotiating RTAs but are now active practitioners, negotiating agreements with counterparts within and outside the APEC region. Over the period 2001-2015, 113 RTAs entered into force involving at least one APEC member economy and, of these, 44 were intra-APEC agreements (Table 2).[3]

[3] According to Kuriyama and Sangaraju (2017, p. 4), 156 RTAs had entered into force involving at least one APEC member economy as of 2016 and, of these, 62 were intra-APEC agreements. The difference with estimates recorded in Table 2 can be attributed to different time periods and perhaps to definitions of what constitute RTAs.

Table 2
Regional Trade Agreements: 2001-2015
Developed, Developing and Transition Economies
Number of Agreements Entering into Force

	World	APEC		
		Non-APEC	All APEC	Intra-APEC
2001-2015				
Total agreements	188	75	113	44
Between:				
Developed economies	33	5	28	16
Developed-Developing & transition	103	44	59	25
Developing & transition	52	26	26	3
2001-2005				
Total agreements	53	25	28	11
Between:				
Developed economies	10	2	8	6
Developed-Developing & transition	26	13	13	5
Developing & transition	17	10	7	0
2006-2010				
Total agreements	79	35	44	19
Between:				
Developed economies	9	2	7	2
Developed-Developing & transition	45	19	26	14
Developing & transition	25	14	11	3
2011-2015				
Total agreements	56	15	41	14
Between:				
Developed economies	14	1	13	8
Developed-Developing & transition	32	12	20	6
Developing & transition	10	2	8	0

Source: World Bank database documented in Annex A. Agreements are classified according to the year in which they entered into force. Note: In this and subsequent tables, 'All APEC' aggregates intra-APEC agreements and agreements between at least one APEC economy and non-APEC economies.

Four points stand out about the upsurge in RTAs from an APEC perspective. First, APEC economies were involved in the bulk of RTAs negotiated globally in the period since 2001, and especially from 2011 to 2015 when they accounted for nearly three-quarters of the agreements entering into force. This preponderance was a primary factor in making the APEC region one of the world's great centres of RTA innovation.

Second, some APEC economies have been more proactive than others in pursuing the new trade agenda through RTAs. Initially the pace was set by a small group of developed economies, in particular the United States. More recently the number of active participants in RTAs in the region has increased dramatically with new big players like China, Japan, Korea, and some Latin American economies (Kuriyama and Sangaraju 2017, pp. 8-9). In Asia,

Singapore has the largest number of RTAs in force. In Latin America, Chile has the largest number ahead of Mexico and Peru.

Third, from the early 2000s several APEC economies developed quite elaborate 'roadmaps' to negotiate RTAs. Korea, Singapore and Chile are examples.[4] Many other economies, including Australia, developed less formal roadmaps but they all ultimately seem to be have been targeted at economies like the United States, Japan and China and at groupings such as ASEAN and the European Union, even if the route to these economies/groups often led initially through agreements negotiated with smaller economies. The European Union, for example, is a major partner in APEC RTAs. In the last 10 years, it has negotiated agreements with Korea, Singapore, Vietnam, Canada, and Japan. Australia and the United States are also negotiating with European Union: EU-Australia FTA negotiations have started but the Trans-Atlantic Trade and Investment Partnership (TTIP) negotiations have stalled.

Like for the world as a whole, most of APEC's RTAs are between developed and developing/transition economies. This raises an important issue: why have developing economies become active participants in the new trade and investment agenda, when so many of them have resisted it multilaterally? There is no simple answer. It may be that they have more control in shaping negotiating agendas in RTAs – how broad, how deep, how much domestic policy change – than in set piece multilateral rounds. It may be that RTA negotiations, on the whole, deliver more access in a shorter time for goods and services and more opportunities to attract direct investment than multilateral options. It also may be that in a world dominated by supply chain trade, developing economies, just like developed ones, have a big stake in accessing regional and global value chains and extracting more value from them over time: RTAs are tuned into this more than multilateral negotiations, complex rules of origin notwithstanding. But whatever the combination of reasons, RTAs between developed and developing/transitional economies and between developing and transitional economies account for around three-quarters of APEC RTAs since 2001.

And fourth, the total merchandise trade between RTA partners 'significantly overstates the amount of world trade that is conducted on a preferential basis' (WTO 2011, p. 64). A large proportion of world merchandise trade already takes place at low or zero MFN rates, reflecting the marked decline in average tariff levels over recent decades. This means that the proportion of global merchandise trade that enters markets through an RTA at preferential rates is inevitably modest. According to the WTO (2011, p. 73), only 16 per cent of world trade is potentially preferential (30 per cent if trade within the European Union is included). Further, less than two per cent of world trade (four per cent including trade within the European Union) is eligible for preference margins above 10 percentage points.[5]

In the case of APEC members, and notwithstanding their active involvement in existing RTAs and in negotiating new ones, there is a great deal of variability in outcomes. For example, over 80 per cent of exports of Brunei Darussalam, Chile, Mexico and Peru enter destination markets

[4] For a discussion of the elaborate preparations made by the Korean Government, see Yoo Duk Kang 2017, 'Korea-EU FTA: Breaking New Ground' in A Elijah et.al., *Australia, the European Union and the New Trade Agenda*, ANU Press, Canberra.

[5] Like in the rest of the world, RTAs among APEC members struggle to reduce tariff peaks in agriculture. Tariff outcomes at the end of what is often a long phase-in vary widely with Korea at under 60 per cent of agricultural tariff lines duty free and Australia and New Zealand at 100 per cent. 'Countries with sensitivities in agriculture tend to extend the same protection when negotiating with their RTA partners' (Crawford 2016, p. 45). This sensitivity applies equally to some areas of manufacturing like to textiles, clothing and footwear and sometimes to automobile production and steel.

either at zero (or low) MFN rates or at preferential rates. This applies to over 70 per cent in the case of Australia, Canada, Korea and Singapore, but to less than 40 per cent for China, Chinese Taipei, Japan, Russia and Papua New Guinea. In the case of some of the latter (e.g. Russia), the proportion is around 10 per cent (Kuriyama and Sangaraju 2017, p.7).

The shift to more ambitious RTAs

Along with the almost exponential growth of RTAs both globally and within the region, agreements have improved substantially in quality and coverage with the shift from shallow to deeper RTAs, especially over the past 10-15 years. This has occurred in various ways. Fundamentally, as previously suggested, it is a response to the evolving requirements of modern supply chain trade, specifically the implications of economies seeking to advance their commercial interests through substantive agreements that tackle non-tariff barriers (NTBs) through regulatory convergence, active trade facilitation, protection of intellectual property, competition policy and so forth. Put in another way, deep agreements tend to boost trade and investment flows more than shallow agreements because of the internationalisation of production (Hofman, Osnago and Rutta 2017, pp.11, 17-23).

The shift to deeper agreements also reflects the changing dynamics of trade policy and RTAs as 'living agreements' with periodic reviews. Initial agreements might set up committees that meet reasonably regularly to reduce regulatory barriers or at least to discuss how this might be achieved. Where this gets traction and trade and investment relations strengthen between the parties, pressures build from business and perhaps from within government for further action. This might involve widening consultation processes and getting business more actively involved to consider practical ways and means to reduce NTBs. These networks then, with enough political will, create an institutional environment to advance the new trade agenda. In the case of RTAs between developed and developing economies, this might build momentum to negotiate agreements that include technology transfers and cooperation and how to involve SMEs in supply chains.

Most recent RTAs are long and complex documents and some – CPTPP and the EU-Canada Comprehensive Economic and Trade Agreement (CETA) are outstanding examples – are setting new standards in coverage and capacity to address regulatory divergence.

Coverage of WTO+ measures compared to WTO-X measures

Table 3 shows unweighted average percentages of policy areas covered in RTAs – by an article, provision or chapter - and traces the shift from shallow to deep agreements over time. Several things stand out from an APEC perspective.

The most obvious standout is that, over the last 10 years or so, RTAs involving at least one APEC member have, on average, WTO+ coverage of around 80 per cent of policy areas – a proportion in line with the world as whole – and higher in the case of intra-APEC RTAs. Also apparent is that APEC economies compare favourably with the world as a whole in the WTO-X coverage of RTAs: intra-APEC RTAs typically have WTO-X commitments that are equal to, or exceed, the average of RTAs globally or RTAs negotiated with partners outside the APEC region. [6]

[6] The World Bank database, on which Table 1 is based, covers 279 agreements among 189 countries that entered into force and were notified to the WTO from 1958 to 2015. It identifies provisions covering 52 policy areas and their legal enforceability. Of the 52 policy areas, 14 are 'WTO plus' (WTO+) and 38 are 'WTO extra' (WTO-X). Annex A describes the database.

Table 3
Regional Trade Agreements: 1958-2015
World and APEC
Coverage of Policy Areas

Coverage	World	APEC		
		Non-APEC	All APEC	Intra-APEC
WTO+				
pre-1996	51%	66%	39%	67%
1996-2000	53%	61%	66%	79%
2001-2005	72%	67%	76%	85%
2006-2010	80%	78%	82%	84%
2011-2015	82%	83%	82%	84%
2001-2015	78%	75%	80%	84%
WTO-X				
pre-1996	15%	23%	7%	13%
1996-2000	19%	18%	17%	26%
2001-2005	20%	24%	17%	19%
2006-2010	19%	18%	20%	25%
2011-2015	31%	38%	28%	31%
2001-2015	23%	24%	22%	25%

Source: World Bank database documented in Annex A. Agreements are classified according to the year in which they entered into force. Note: data for the world in this and following tables relate to total RTAs that entered into force in a given period for the world as a whole. It does not refer to the world minus APEC economies.

Coverage, legal enforcement and dispute settlement arrangements: WTO+ and WTO-X measures

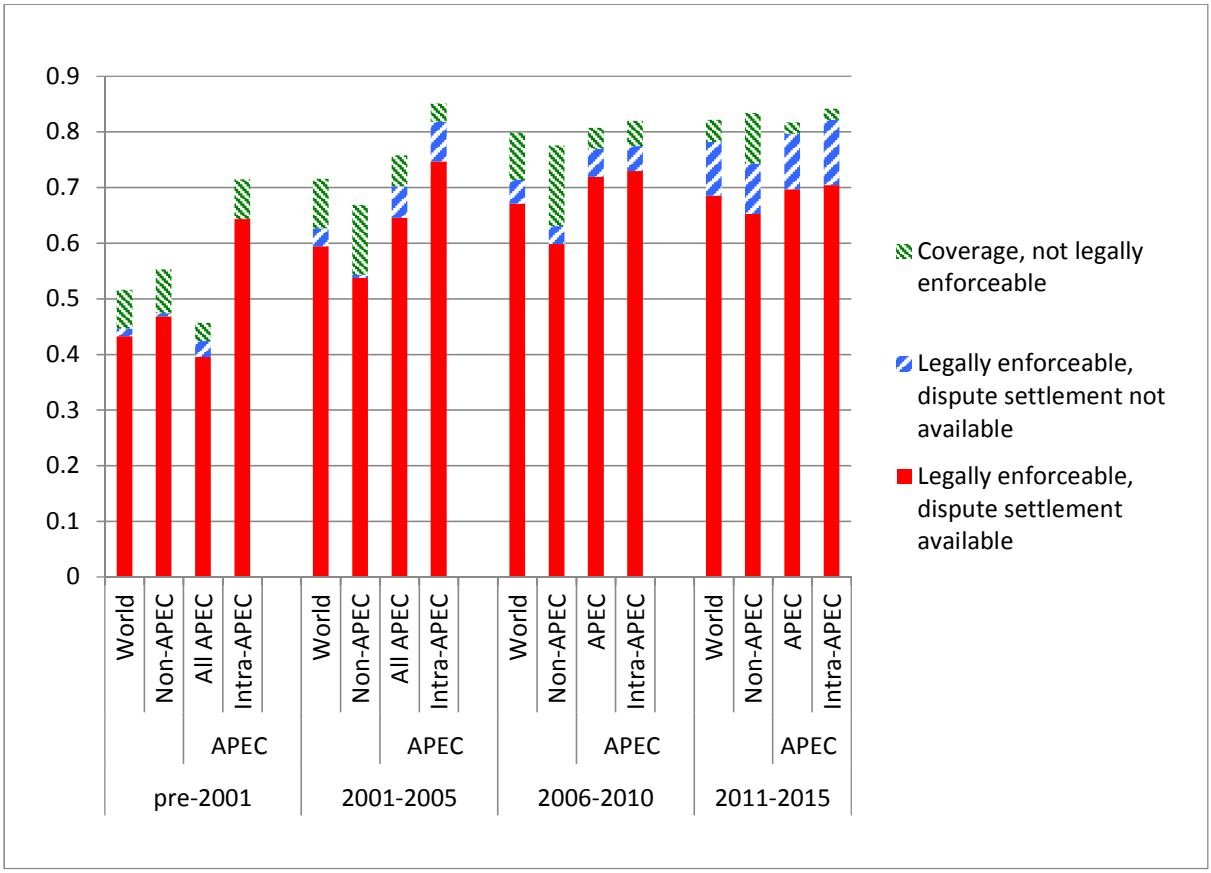
Charts 1-5 take the analysis a stage further by introducing legal enforceability and dispute settlement arrangements for WTO+ and WTO-X measures in RTAs for APEC economies, the rest of the world and the world as a whole, and then breaking this down to the level of specific trade and investment policy and regulatory issues. Legal enforcement and dispute settlement are reasonable indicators of the changing depth of RTAs. Coverage of issues may increase but to have depth that is on par with WTO+ commitments, parties' commitments need to be legally enforceable through processes specified in an RTA (Hofmann, Osnago and Ruta 2017).[7]

Chart 1 shows changes in the percentage of coverage, legal enforceability and dispute settlement provisions for WTO+ measures in RTAs that entered into force between the middle of the last century and 2015. The key observation is the high and rising level of

[7] The logic is that specific, clear legal language to express a commitment combined with access to dispute settlement increases the prospect of a provision being enforced. To that extent, enforcement/dispute settlement can provide an objective measure of a provision's substance or depth. Of course, depth can be gauged in other ways, for example through the stringency of monitoring and transparency and review mechanisms, including involvement by civil society.

coverage, legal enforcement and dispute settlement provisions. This holds for both APEC and non-APEC economies, but is especially prominent for APEC economies, and is most prominent in RTAs between APEC members. Since 2006, coverage combined with legal enforcement and dispute settlement provisions applied on average to over 70 per cent of WTO+ policy areas in APEC RTAs: this compares with an average of 60-65 per cent of RTAs negotiated for the world as a whole.

Chart 1
Regional Trade Agreements: 1958-2015
WTO+: Percentage Coverage and Legal Enforceability



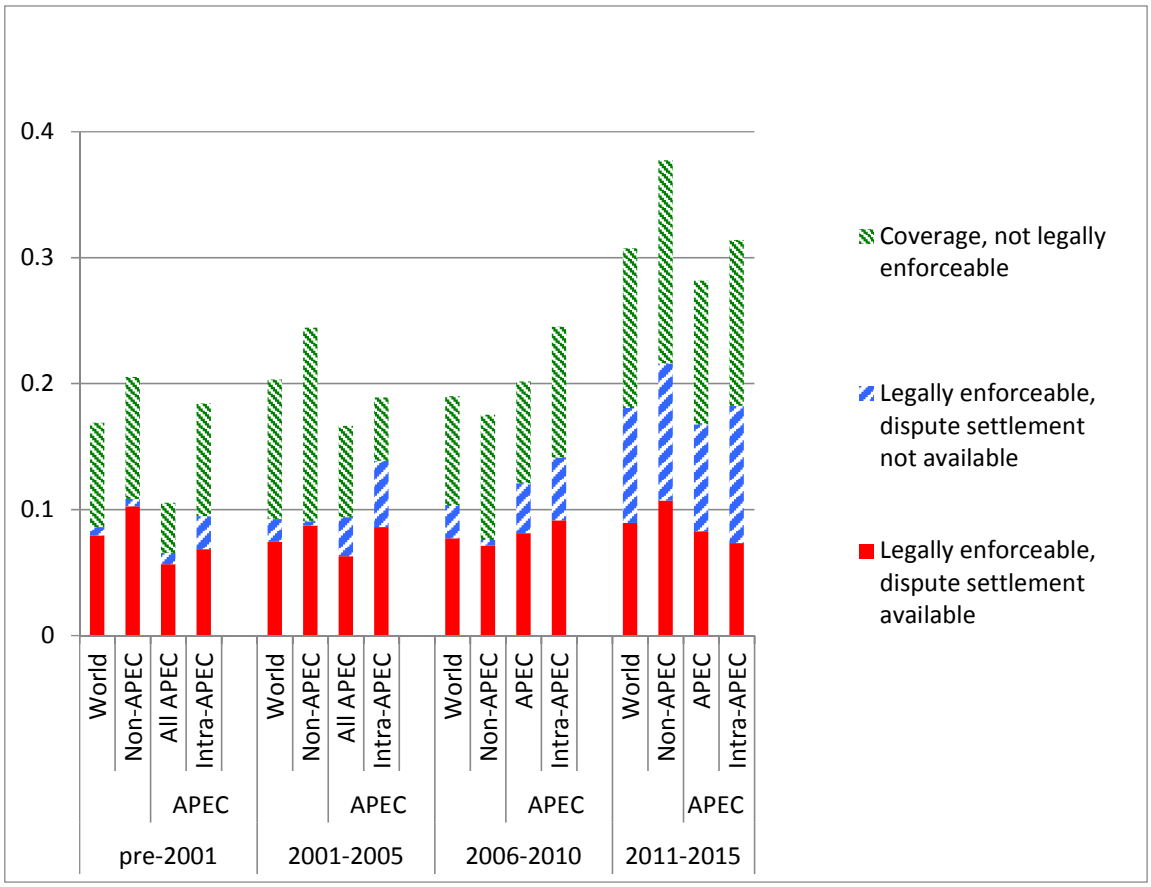
Source: World Bank database documented in Annex A. Agreements are classified according to the year in which they entered into force. Note: data for the world in this and following charts relate to total RTAs that entered into force in a given period for the world as a whole. It does not refer to the world minus APEC economies.

Chart 2 covers the same set of issues for WTO-X measures. The most obvious difference from the previous chart is the substantially lower average level of legal enforcement and dispute settlement arrangements for WTO-X measures across the four economy groupings. At no time in the last two decades has this average exceeded 10 per cent either for intra- APEC RTAs or APEC RTAs with third economies: the average for the RTAs of the world as a whole was roughly in line.

Chart 2

Regional Trade Agreements: 1958-2015

WTO-X: Percentage Coverage and Legal Enforceability

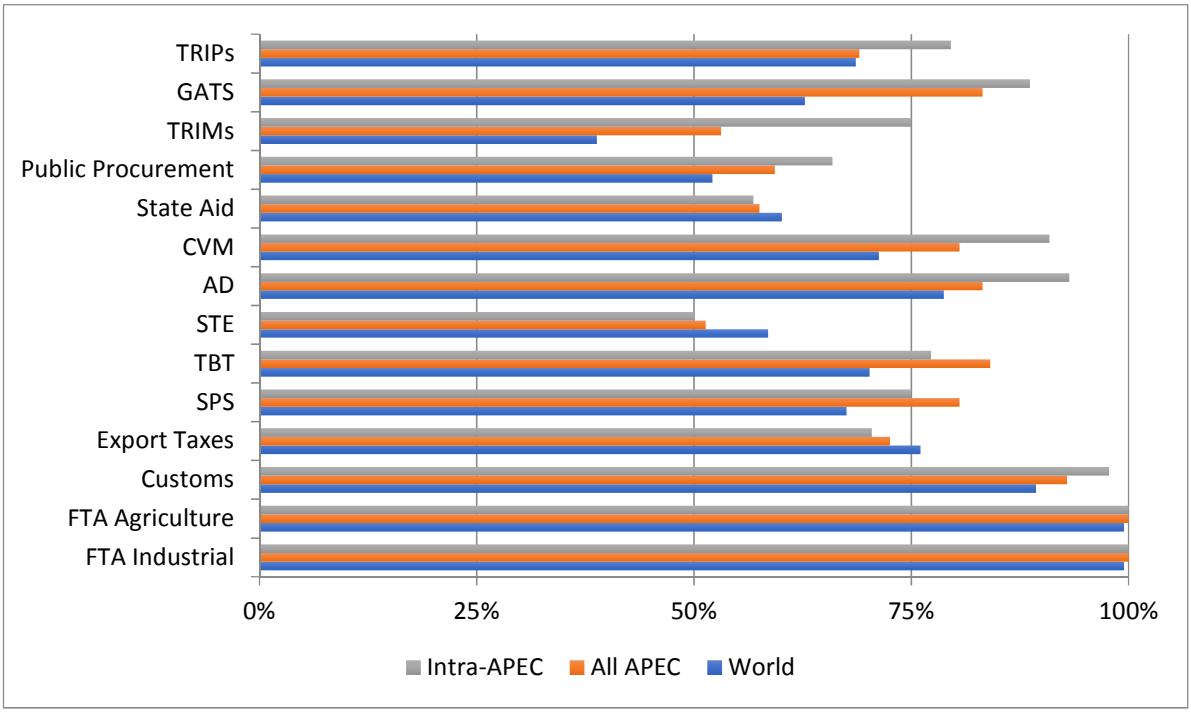


Source: World Bank database documented in Annex A. Agreements are classified according to the year in which they entered into force.

These low averages are, to a considerable extent, artificial because they are the product of weighting all WTO-X measures equally, which is not the case in the real world. The averages, nonetheless, are important because they reflect marked unevenness in enforceability and dispute settlement arrangements across specific WTO-X measures. Measures that are commercially significant in RTAs because they are linked to market access or the smooth functioning of supply chains – such as competition policy, investment, movement of capital, and intellectual property rights – have relatively high levels of legal enforceability and dispute settlement arrangements and, in some cases, these levels are similar to those found in WTO+ measures. Conversely, some measures appearing in recent RTAs - like money laundering, illegal immigration, terrorism and nuclear safety – have virtually no enforceability. This is partly because their inclusion in RTAs is highly controversial: there is a strong body of opinion that they do not belong in trade agreements. But it probably has at least as much to do with the transformation of modern RTAs into vehicles promoting broader international economic relations. Identifying wider objectives and issues of common interest serve a purpose in themselves that probably does not need to be backed up with hard law.

Differences in the depth of specific WTO+ and WTO-X measures in RTAs are demonstrated in Charts 3-5. Chart 3 examines 14 WTO+ measures between 2001 and 2015 and shows clearly that legal enforcement of commitments is generally in the 75-100 per cent range. It also shows that on specific measures, like intellectual property, services, investment measures, government procurement, and customs processes, intra-APEC RTAs have significantly higher levels of enforcement than either all APEC RTAs or RTAs globally.

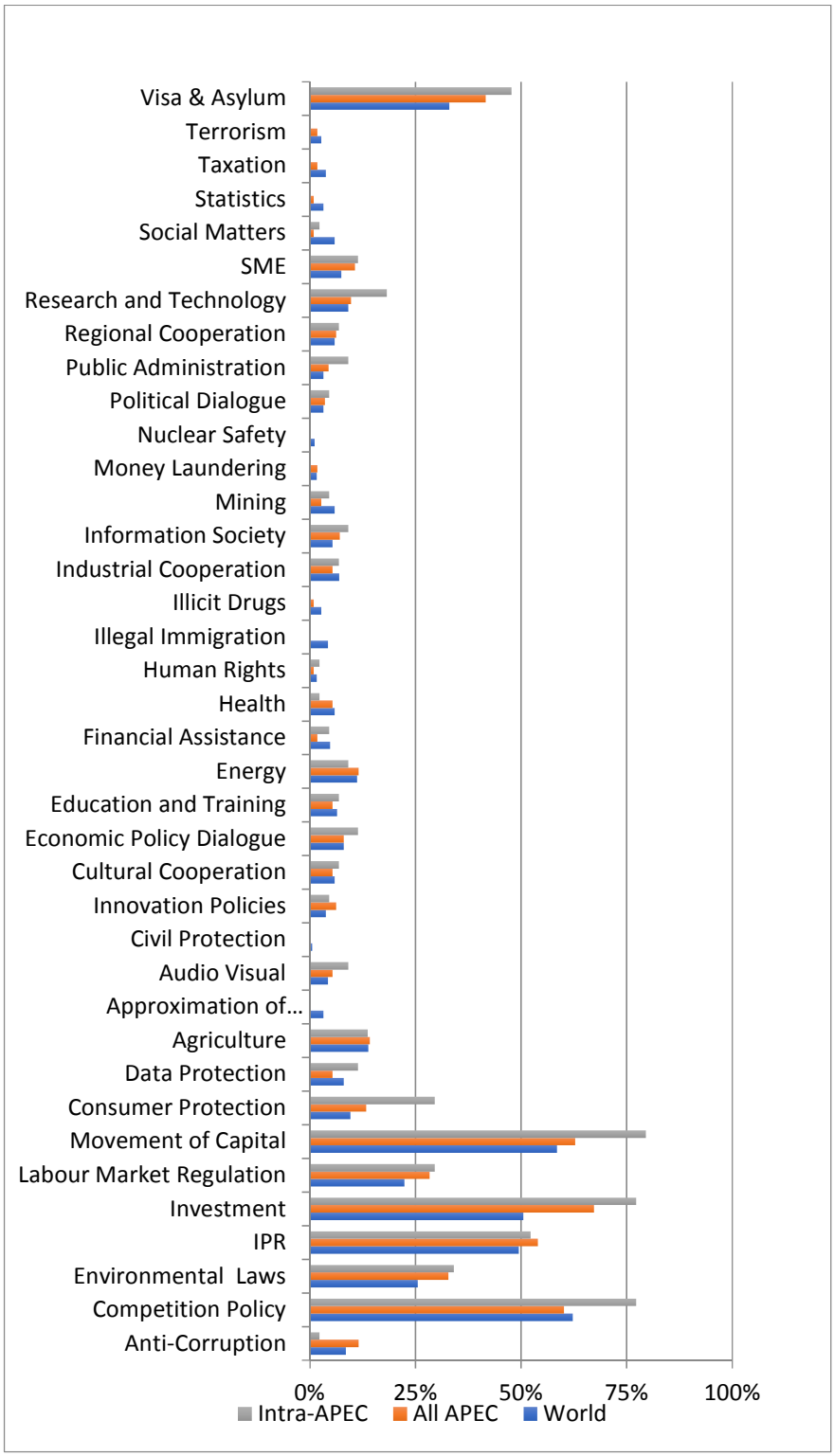
Chart 3
Regional Trade Agreements: 2001-2015
WTO+: Legally Enforceable



Source: World Bank database documented in Annex A. Agreements are classified according to the year in which they entered into force.

Chart 4 presents a more varied picture. Across 38 WTO-X measures, enforcement rates in excess of 75 per cent apply only in the case of intra-APEC RTAs covering investment, movement of capital and competition policy: these agreements are significantly ahead of regional and global enforcement standards. Below that, enforcement coverage in intra-APEC agreements is around 50 per cent for visa and asylum policy and intellectual property rights. It then falls steeply, clustering at around 25 per cent for consumer protection, labour market regulations, environmental laws, and anti-corruption measures, before falling to very low levels for all remaining WTO-X measures. This pattern for intra-APEC RTAs is, more or less, replicated across all-APEC RTAs and RTAs for the world as a whole.

Chart 4
Regional Trade Agreements: 2001-2015
WTO-X: Legally Enforceable

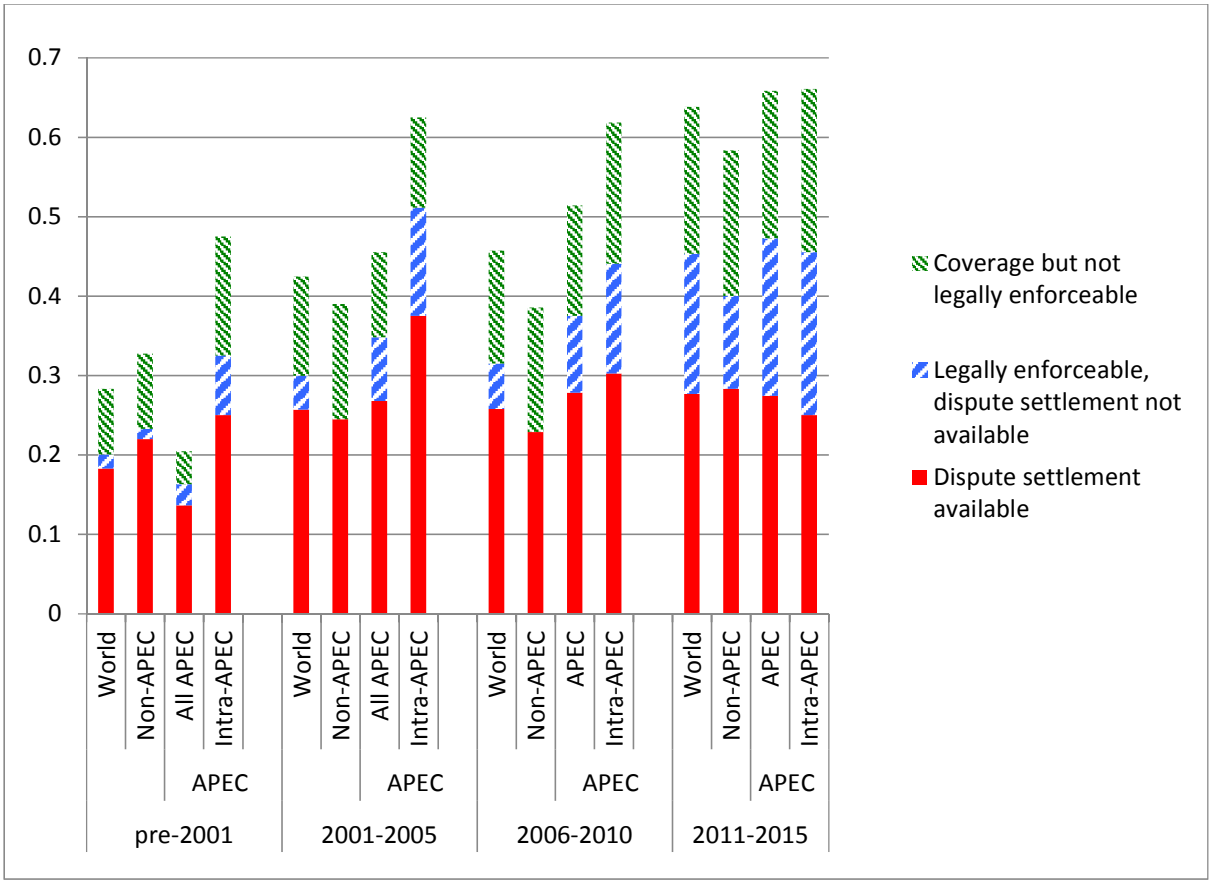


Source: World Bank database documented in Annex A. Agreements are classified according to the year in which they entered into force.

Finally, Chart 5 provides an insight into the depth of the seven most prominent WTO-X NGeTIs over time. Interestingly, the proportion of APEC RTAs entering into force with

both legal enforcement and dispute settlement arrangements has remained around 25-30 per cent for most the period between 2001 and 2015, even as the proportion of RTAs with legal enforcement but without dispute settlement arrangements has continued to rise. This is similar to the world as a whole. It is a useful reminder that many economies in the Asia Pacific region and more generally remain deeply reluctant to take on binding commitments on WTO-X measures.

Chart 5
Regional Trade Agreements: 1958-2015
WTO-X: Selected NGeTIs:
Percentage Coverage and Enforceability



Source: World Bank database documented in Annex A. Agreements are classified according to the year in which they entered into force. Note: the selected NGeTIs are competition policy, environment laws, investment, movement of capital, labour market regulations, intellectual property rights, and information society (digital trade).

Transmission of deep provisions across economies

A particularly striking fact is the high level of similarity in WTO+ provisions in RTAs – in terms of coverage and other depth indicators - and some degree of similarity in WTO-X measures across economies regardless of per capita income levels. In large part, deeper commitments have been transferred from developed economies to a wide range of emerging and developing economies. Developed economy partners have sought to increase security for their capital and intellectual property, while developing partners have used negotiations to increase access particularly to large developed economy markets and attract more direct flows of investment (World Bank 2011, p.132). Emerging economies like Chile and Korea have played a part too by adapting and refining their negotiating templates and transmitting them to regional and other partners, including less developed economies.

This transmission effect is shown in Table 4. It demonstrates that developed and developing economies in APEC match or exceed world averages in coverage and in the proportion of their agreements with legal enforceability and dispute settlement provisions for WTO+ measures. For WTO-X measures, these metrics reflect similar or broader coverage in RTAs between developed and developing economies, but many commitments are not legally enforceable. In the case of agreements between developing economies, legal enforceability, even at a low level, chiefly reflects the priority in economies like Chile, Korea and Singapore to export their regulatory systems and smooth flows along supply chains (World Bank 2011, pp. 132-33).[8]

[8] The term developing economy is applied loosely to these economies. Despite its advanced stage of economic development, Singapore is still classified as a developing country. Korea joined the OECD in 1996 and would normally be classified as a developed country. Chile joined the Organisation in 2010 and would typically be seen as an emerging economy, along with countries such as Mexico.

Table 4

Regional Trade Agreements: 2001-2015
Developed, Developing and Transition Economies
Coverage and Enforceability

	World	Non-APEC	APEC All APEC	APEC Intra-APEC
WTO+				
Coverage in agreements between:				
Developed economies	86%	80%	87%	89%
Developed - Developing & transition	82%	83%	82%	81%
Developing & transition economies	65%	62%	69%	83%
Legally enforceable in agreements between:				
Developed economies	82%	74%	83%	85%
Developed - Developing & transition	74%	68%	78%	79%
Developing & transition economies	58%	50%	66%	74%
Dispute settlement in agreements between:				
Developed economies	73%	74%	73%	75%
Developed - Developing & transition	68%	63%	72%	73%
Developing & transition economies	55%	49%	61%	67%
WTO-X				
Coverage in agreements between:				
Developed economies	24%	39%	22%	27%
Developed - Developing & transition	26%	29%	24%	23%
Developing & transition economies	15%	13%	18%	38%
Legally enforceable in agreements between:				
Developed economies	18%	38%	15%	17%
Developed - Developing & transition	13%	12%	15%	14%
Developing & transition economies	7%	5%	9%	17%
Dispute settlement in agreements between:				
Developed economies	12%	36%	8%	9%
Developed - Developing & transition	8%	8%	8%	9%
Developing & transition economies	5%	4%	6%	4%

Source: World Bank database documented in Annex A.
Note: The data include only three intra-APEC agreements between developing/transition economies and should be interpreted with caution.

Consolidation of RTAs: mega agreements

Over recent years there has been a strong trend towards negotiating large multi-party RTAs. Examples in the Asia-Pacific region include the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), the Pacific Alliance and ongoing negotiations for the Regional Comprehensive Economic Partnership (RCEP). This trend also has been strong beyond our region with, among others, EU enlargement and refining the Single Market, Trans-Atlantic Trade and Investment Partnership (TTIP) negotiations, developments in the Eurasian Economic Union (involving Russia and other members of the Commonwealth of Independent States), and negotiations for the Tripartite Agreement to consolidate three existing African RTAs.

Every RTA has its own rules and approaches on issues from rules of origin and standards to services and investment. As a general principle, multi-party agreements reduce the scope for regulatory variance compared to bilateral agreements (Crawford 2016).

New mega agreements can take this further by consolidating and improving trade and investment rules and lifting commitments, especially if they replace older bilateral agreements or create political momentum to negotiate more ambitious region-wide outcomes. The Pacific Alliance, for example, consolidates bilateral trade relations between Chile, Colombia, Mexico and Peru; provides a common trade policy platform because all four Alliance members have RTAs with each other and with the United States that are based on the North American Free Trade Agreement (NAFTA); and this common platform then forms the basis for RTAs between Alliance members and others, including Asia-Pacific economies. CPTPP will strengthen trade rules and commitments across 11 Asia-Pacific economies: a massive enlargement of the original P4 Agreement between Brunei Darussalam, Chile, New Zealand and Singapore. And, similarly, RCEP aims to bring together the members of the Association of Southeast Asian Nations (ASEAN), Australia, China, India, Japan, the Republic of Korea and New Zealand in a new agreement that consolidates ASEAN's existing +1 RTAs with Australia, China, Japan, Korea, India, and New Zealand, strengthens trade and investment disciplines and builds new regional economic linkages.

As a broad generalisation, big trade agreements address big structural issues and provide a baseline for subsequent agreements, whether multi-party or bilateral. Mega agreements involving major economies provide governments with additional opportunities to re-think their role in world trade. They may provide space for reformers to push unilateral reform to support the movement of exports, imports, investment flows and skills along supply chains. And, in turn, they may generate commercial and wider economic spill-overs beyond a given region or parties to a particular agreement.

The reason for these wider impacts is that many NGeTI measures are applied essentially on an MFN basis. Improved commitments on services and investment mostly involve locking in current levels of openness resulting from unilateral reforms or perhaps binding higher levels of openness as part of a large trade package. Similarly, improved commitments on e- commerce, intellectual property rights, competition, the environment and anti-corruption are applied, for the most part, on an MFN basis. The benefits from increasing regulatory transparency across RTA partners also naturally flow to all trade partners, as do good quality regulatory reforms more broadly. A key and under-appreciated aspect of RTAs is their contribution to institution building and reform at various levels, with the caveat that an economy's institutional capacity is inevitably a factor in expanding or limiting the uptake of WTO+ and especially enforceable WTO-X commitments even in the context of mega agreements.

While new mega agreements can play a key role in opening markets and consolidating and improving trade and investment rules, there is no inevitability that outcomes, especially on rules, will be seamless. Ultimately it depends on the interests and priorities of parties to specific agreements. But as another broad generalisation and assuming that political and strategic factors do not work to create fault lines between agreements, there is often a creative tension between agreements - especially big ones - that can lift outcomes. For example, outcomes in CPTPP will, at a minimum, inform negotiations for RCEP and may lift expectations. Similarly, if RCEP makes significant progress, emphasis will shift to how the AANZFTA Review[9] may add extra value. And, in turn, this may flow through to bilateral agreements - just as the original AANZFTA agreement provided a baseline to secure improve outcomes in, for example, the Malaysia-Australia FTA – and to plurilateral negotiations like TiSA.

[9] Currently, officials have conducted a retrospective examination of outcomes and lessons learnt from eight years of implementing AANZFTA (2008). The retrospective will be followed by a forward evaluation with recommendations to ministers in August 2018.

4. 'New' issues covered to some degree by multilateral disciplines

For the purposes of this stocktake, six 'new' trade and investment issues are considered here that build on existing multilateral rules and disciplines: transparency of rules and obligations, trade facilitation, government procurement, intellectual property rights, services, and investment. There are several common strands running through them. Examples are increasing policy coverage inside and outside the current mandate of the WTO; increasing depth to deal with behind the border barriers to trade and investment; and increasing involvement of developed, developing and transition economies in crafting WTO+ and WTO-X rules of international trade.

Along with convergence, particularly around WTO+ provisions, different standards and approaches are emerging across RTAs on some elements of these six issues. In part this is attributable to the different templates developed by different negotiating parties. But it also reflects the very purpose of ambitious RTAs as laboratories for developing and testing new ideas and approaches on trade policy.

Transparency

Transparency provisions are fundamental to the effectiveness of modern RTAs and to the participation of business in global and regional value chains. A knowledge of rules and regulations governing trade and investment is of key importance to traders operating across a number of different economies. Provisions which make this possible and provide other protections are now included in many RTAs, often in dedicated transparency chapters, but also in other areas such as those covering goods, services, competition policy, technical barriers to trade, government procurement and Investor-State Dispute Settlement. Research published by the OECD finds that transparency strongly promotes trade between the parties to RTAs, with just one additional transparency commitment associated with a more than one per cent increase in bilateral trade flows. Typically, there are many such commitments in a modern RTA (Lejárraga and Shepherd 2013).

The transparency provisions of RTAs build on WTO provisions such as Article X of the GATT and Article III of the GATS but go beyond them in many ways. 'WTO+' commitments include stronger and more detailed provisions relating to the publication of regulations and other material, provision for stakeholders from other parties to participate in consultations and strengthened rights of appeal. CPTPP, the EU-Canada CETA and the Pacific Agreement on Closer Economic Relations (PACER) Plus are examples of agreements which incorporate such provisions. For example, the transparency provisions of PACER Plus require Parties to 'publish promptly laws, regulations, procedures and administrative rulings', to the extent possible electronically or online, and to 'publish in advance, to the extent possible, measures of general application to the Agreement that Parties propose to adopt' (DFAT 2017).

Provisions on bribery and corruption have also been increasingly included under the heading of transparency – this too is of critical importance in determining how effectively an economy can participate in global value chains. These provisions have no counterpart in the WTO agreements. CPTPP includes detailed anti-corruption disciplines in its transparency chapter, continuing a pattern of more frequent provisions in this area over the past 15 years. It requires, among other things, that Parties adopt measures to make bribery of officials and corruption criminal offences where they affect trade and investment, and to enforce national laws on

corruption (though this aspect of the agreement is not subject to its dispute settlement mechanism). According to data derived from the World Bank, some 30 per cent of intra-APEC agreements which came into force over 2001-2015 included provisions on anti-corruption (well above the figure for the world as a whole). But only one of these was enforceable, suggesting that APEC has some way to go in this area. (See Annex C.)

Trade Facilitation

Trade facilitation is an increasingly prominent element of trade negotiations and is one part of domestic, regional and global efforts to tackle non-tariff barriers (NTBs). The turning point was launching WTO negotiations on the Trade Facilitation Agreement (TFA) in 2004. Before that time, the great bulk of bilateral and regional trade agreements contained few, if any, provisions on trade facilitation beyond standard provisions or chapters on customs processes. After that time, virtually all RTAs referred in some way to trade facilitation (Neufeld 2016, pp. 113-14).

There is no shared definition of trade facilitation either among international organisations or across RTAs. Treating the term broadly seems appropriate for RTAs. It reflects the wide scope of recent agreements and highlights their relevance to reducing trade cost and increasing access to value chains. It fits in with APEC's international leadership on trade facilitation issues since its inception nearly 30 years ago. It also links into issues like how regulatory systems and economic capacity are being advanced in RTAs (and through aid for trade investments) to increase the efficiency of international production networks.

The facilitation agenda has been taken up to varying extents by almost all economies around the world. Since 2001 there has been a close alignment between rapid growth in the number of RTAs, both globally and those involving at least one APEC member, and growth in the number of RTAs with WTO+ customs provisions.

There is a good deal of common ground on trade facilitation across RTAs that can, in part, be attributed to cross fertilisation between negotiations on trade facilitation in the WTO and in RTAs: both sets of negotiations intensified over much the same period. Core WTO TFA issues are prominent in RTAs. Examples are provisions on exchanging customs-related information and customs cooperation, and rules on simplifying import- and export-connected procedures and formalities.

There are similar patterns across RTAs in legal enforceability. The depth of WTO+ provisions on core customs-related commitments in terms of coverage, legal enforceability and dispute settlement arrangements is as high as for WTO+ tariff commitments on manufactures and agriculture (Ruta 2017, p. 175). Beyond core customs provisions, however, trade facilitation measures in RTAs are mostly specified in 'best endeavour' terms (Duval, Neufeld and Utoktham 2016, p. 10).

There also are strong similarities across RTAs in the way trade facilitation measures have, in many cases, become more complex and precise than their WTO equivalents, and in the way regional cooperation– such as on capacity building and the like - has steadily become a more important element of modern RTAs: the coverage of WTO-X provisions on cooperation has increased significantly since 2001. This is a global phenomenon but the trend seems to be especially strong for intra-APEC RTAs over the period from 2001-05 to 2011-15: over 40 per cent of RTAs entering into force had WTO-X coverage of regional cooperation by the end of the period compared to less than 10 per cent at the start.

At another level, the growing level of detail and scope for experimentation in modern RTAs contributes to greater divergence. This take various forms starting with the way different

economies approach trade facilitation. Many APEC members, along with the European Union and the European Free Trade Association, want broad coverage. Others, such as Russia in agreements with some members of the Commonwealth of Independent States, opt for narrow coverage, typically limited to transit arrangements and customs-related information exchange. Several economies - Chile, Peru, the United States, the European Union, and Russia are examples - also apply their own negotiating templates that may or may not undergo significant change over a succession of negotiations on trade facilitation.

Notable differences exist across the gamut of facilitation issues: customs cooperation can be narrowly focused or broad; obligations to publish policies, laws, regulations, and draft regulations might be binding or not; enquiry points might cover all facilitation issues or a sub-set; provisions on single windows for electronic documentation are comparatively rare in RTAs but can be targeted and action-oriented (like in the case of the ASEAN Free Trade Area and the Pacific Alliance) or simply promote the concept or in some way work towards it (like the Canada-Peru FTA or AANZFTA); and technical support can be targeted (as in PACER Plus) or more typically very general (Neufeld 2016, pp. 131-149).

Significant progress has been made in many of the areas covered by the APEC Model Chapter on Trade Facilitation such as transparency measures, formalities and institutional arrangements: regional average rates of implementation there are between one-half and two-thirds. There has been less progress in other areas like cross border paperless trade and much less on issues such as customised facilitation measures to support micro, small and medium enterprises and gender equality in business. It would seem timely to focus more on how RTAs can support national, and especially international, cross border paperless trade to accelerate the newest phases of trade facilitation. (See Annex D.)

Government Procurement

The government procurement market in most economies is substantial. Across 14 APEC economies, estimates suggest that it is around 7-10 per cent of GDP, while the OECD states that it is around 12 per cent of GDP for its members. Econometric evidence is that procurement is subject to an appreciable 'home bias'. That has significant costs. For the economy where procurement occurs, it retards (like other forms of protection) competitiveness and economic growth, and adversely impacts efficiency in the public sector and on government budgets. In other economies, it may result in exporters missing out on contracts where they are the most efficient supplier.

Although government procurement is a difficult issue, membership of the WTO Government Procurement Agreement (GPA) has been increasing, with 47 economies now members of the revised GPA that entered into force in 2014. Globally, the World Bank database described in Annex A shows that coverage of the issue in RTAs has also been rising, from 27 per cent prior to 1996 to 73 per cent over 2011-15. Where procurement is covered, it is mostly legally enforceable and subject to dispute settlement provisions. Coverage and enforceability of agreements involving an APEC economy are about the same as for the world as a whole.

The OECD (Ueno 2013) has undertaken a detailed analysis of the coverage of government procurement in 47 RTAs involving at least one OECD member. It suggests that, while much has been achieved, there is some way to go in liberalising this sector in RTAs:

- Around 40-50 per cent of parties to the 47 RTAs have made no commitments to cover the regional and local level procurement (which in the OECD account for about two thirds of the total).

- The thresholds in RTAs (that is, the levels at which non-discriminatory treatment apply) are mostly less than, or equal to, the most common thresholds in the GPA. But they are higher for a significant share: for example, in the case of construction, they are around 15 per cent above the most common GPA threshold at sub-central government level).
- Although OECD RTAs have a much higher coverage for services than in the GPA, around 40 per cent of services are unbound across parties in the 47 RTAs.

RTA provisions on government procurement have become more detailed over time. Three recent agreements examined (the Pacific Alliance[10], the EU-Canada CETA and the CPTPP) have many common features. For example, each includes the core provision of national treatment/non-discrimination, prohibits offsets and the use of technical specifications that would create trade barriers, contains detailed provisions on the time available to submit bids for tenders, and encourages the participation of SMEs.

Government procurement is not covered in agreements like AANZFTA and the ASEAN-Japan Comprehensive Economic Partnership Agreement, reflecting its sensitivity for some regional economies. This suggests that there would be benefits from further exchanges of information and discussion within APEC, building on earlier work by APEC (such as the 1999 APEC non-binding principles and the 2006 model RTA chapter) with the aim of achieving greater consensus on how government procurement should be addressed. (See Annex E.)

Intellectual Property

Intellectual property (IP) rights have been discussed internationally since the late nineteenth century, but their inclusion in trade and investment agreements is of much more recent origin. The negotiation of NAFTA (1994) was one early indication of this change, as was the upsurge from the mid-1990s in bilateral investment treaties (BITs) that typically included IP under the definition of investment. IP is now quite commonly included in RTAs.

Major developed economies have identified IP protection as a core national interest, reflecting its importance to them (for example, the United States Government estimates that 38 per cent of GDP and 18 per cent of employment were attributable to IP-intensive industries in 2014). But econometric evidence suggests that it is important for developing and transition economies as well. IP protection is thus associated with technology transfer, inflows of foreign direct investment and imports of technology-intensive goods such as chemicals, office and telecommunications equipment, electronic equipment, and aerospace, optical and precision equipment – all of which promote innovation and growth.

At the global level, coverage of WTO+ provisions in RTAs – which add to those in the WTO Trade Related Aspects of Intellectual Property Rights (TRIPS) agreement – has risen from 31 per cent over 1996-2000 to about 80 per cent over 2011-15. Almost all of the agreements that covered IP were legally enforceable and subject to dispute settlement. Agreements involving APEC economies have shown a similar rise in IP coverage over time and they had an IP-coverage similar to that of the world over 2001-15. The position is broadly the same for WTO-X provisions (those that address accession to IP treaties not referenced in TRIPS). However, for WTO-X provisions, coverage of IP over 2001-15 in APEC agreements was appreciably higher than for the world.

Work by the WTO on more detailed provisions in RTAs shows a wide gap between those in US agreements and intra-Asian agreements. Thirteen of 14 US agreements addressed copyright, trademarks, geographical indications, patents and new plant varieties. (The

[10] More formally the Additional Protocol to the Framework Agreement on the Pacific Alliance.

exception was a 1985 US agreement with Israel which did not cover any of these issues). Coverage of these issues was well below the US level in intra-Asian agreements. Intra-Asian agreements did score above the US on traditional knowledge and about the same on industrial designs.

IP continues to be treated differently in modern RTAs. CPTPP provides the most comprehensive treatment, with the chapter text running to about 75 pages. Some provisions – for example, the requirement that copyright apply for the life of the author plus 70 years – will not be applied because of US withdrawal from the agreement. But the CPTP text still covers the whole range of IP issues, including cooperation, trademarks, geographical indications, patents, industrial designs, copyright, enforcement and internet service providers. Among other things, the agreement sets out the key principle of national treatment covering all of the IP issues covered by the chapter. It also records the commitment of each party to ratify or accede to international agreements such as the 1989 *Protocol Relating to the Madrid Agreement Concerning the International Registration of Marks*.

The EU-Canada CETA also provides a lengthy treatment of IP, but focuses on some key issues of interest to the European Union and Canada rather than traversing the full range of issues in quite as much detail as CPTPP. One specific outcome is protection for 171 EU geographical indications. Another is patent restoration for pharmaceuticals, designed to compensate for a portion of the time lag between filing a patent for a product and receiving approval to market it. Like CPTPP, the EU-Canada CETA includes a detailed section on enforcement intended to toughen up procedures in this area.

APEC has carried out good work on IP, particularly through the Intellectual Property Rights Experts Group (IPEG). The group has been able to achieve much by consensus. But there are still significant differences within APEC on IP. This suggests that there would be merit in further discussion on the issue in APEC. A useful focus might be to prepare a baseline assessment of IP protection in domestic laws of each economy, drawing together much of the good work in this area already done by the IPEG as well as any economy policy plans or specific proposals for future reform of IP. This baseline assessment could feed into further consideration of what an RTA chapter on IP in the APEC region might usefully address. It might also be useful to assess the available evidence on the impact of various levels of IP protection on broader economic development benefits, including market-based technology transfer, innovation, foreign investment flows and trade in technology-intensive goods and services. (See Annex F.)

Services

Services trade was a sensitive issue during the Uruguay Round negotiations and commitments under the GATS were often modest, leaving considerable scope for RTAs to carry the process of liberalisation further. While barriers to services in some major sectors (such as tourism) are low, there are very high barriers in many sectors, both in terms of restrictions to market entry and regulatory behind-the-border barriers. For legal services, for example, ad valorem barriers are estimated at 31 percent in OECD and other EU economies and at 46 per cent in developing and transition economies.[11] The fact that commitments in the GATS are often significantly less liberal than those applied in practice also creates uncertainty for exporters.

The proportion of RTAs that cover services has increased over time, from 36 per cent of those entering into force over 1996-2000 to 84 per cent by 2011-2015. A very high proportion of

[11] The ad valorem equivalents cited here estimate, in percentage terms, the impact of discriminatory barriers on the prices of the foreign services supplied. See Annex G for other estimates.

agreements that cover services are now both legally enforceable and subject to dispute settlement. APEC economies moved faster to cover services in their agreements than non-APEC economies, although by 2011-15 services coverage for new agreements for APEC and global agreements was about the same. Globally, coverage of services is highest for agreements that involve only developed economies and lowest for agreements between or among developing and transition economies.

Services in RTAs can be handled in different ways. Latrille (2016) identifies two main classes. GATS-style agreements are based on the architecture of the GATS and have a services chapter that covers the four GATS modes of supply.[12] They use a positive list for services covered by the agreement (that is, commitments only apply to services specifically listed). NAFTA-style (or CPTPP-style agreements as they are referred to here as the most modern example of this type of agreement) adopt a negative list approach (that is services are covered by liberalising commitments unless specifically listed). They cover services provided cross-border, as well as through a separate chapter on investment services delivered through commercial presence.

The two types of agreements tend to be distinguished by many other characteristics. For example, CPTPP--style agreements usually have a ratchet mechanism that binds any unilateral liberalisation. GATS-style agreements do not contain a provision of this kind. The national treatment test used in CPTPP-style agreements is based on a 'like circumstances' test (that is treatment no less favourable than for domestic suppliers in like circumstances). The test for national treatment in GATS-style agreements is based on like services and service suppliers. CPTPP-style agreements also usually include additional disciplines on issues such as performance requirements, nationality of senior management and boards of directors and local presence requirements for cross-border services. GATS-style agreements tend to be limited to the market access and national treatment disciplines of GATS. Not all features of GATS-style or CPTPP-style agreements are present in any given agreement. Moreover, there are some agreements that do not fit neatly into either category.

Regardless of the architecture of the RTA, services commitments in RTAs are generally WTO+ in two main ways. First, they go beyond GATS by broadening the services sectors in which parties make commitments on core disciplines like Market Access, Most Favoured Nation and National Treatment. Given that services commitments in the GATS are often significantly less liberal than those applied in practice, locking in existing regulatory openness under RTAs is also a WTO+ outcome that enhances certainty for services suppliers. CPTPP-style agreements, with their negative list approach to scheduling and inclusion of a ratchet mechanism, generally go further in expanding on the degree of commitment in GATS.

In addition to deeper commitments on existing disciplines, RTAs also include new or expanded services rules, for example on transparency, domestic regulation or in specific sectors such as financial services, e-commerce, telecommunications, professional services. Provisions on domestic regulation are particularly important for services trade, seeking to maintain the ability of economies to regulate in the public interest, while ensuring such regulation is impartial and reasonable, and does not constitute a barrier disguised restriction to trade. GATS-style RTAs tend to apply those disciplines only to scheduled commitments, whereas CPTPP-style RTAs often apply them horizontally.

[12] These are cross-border supply or Mode 1 (such as services provided over the internet), consumption abroad or Mode 2 (where the recipient of the service travels abroad to receive it), commercial presence or Mode 3 (where the service-provider establishes a commercial presence in the recipient economy by investment in it), and movement of natural persons or Mode 4 (where the service provider travels to the recipient to provide the service).

The use of GATS-style and CPTPP-style agreements tends to draw a line between APEC economies from the Americas and those from East Asia. APEC members from the Americas have used the NAFTA-style extensively and GATS-style agreements seldom. But economies in South-East and North-East Asia use GATS-style agreements more frequently than not. There are exceptions to this. For example, all of Chinese Taipei's agreements up to the end of 2014 were CPTPP-style arrangements. The Republic of Korea and New Zealand had a fairly even split between the two types of agreements.

The CPTPP has a chapter on cross-border services that covers Modes 1, 2 and 4, while commercial presence (Mode 3) is covered as part of a broader investment chapter. The services, investment and a separate financial services chapter are all based on a negative list approach with ratchet clauses. There are also separate chapters on telecommunications and the temporary entry of business personnel. Two other recent and ambitious agreements – the EU-Canada CETA and the Additional Protocol to the Framework Agreement of the Pacific Alliance also use a negative list approach. For the European Union, CETA was the first time it had used this approach for services liberalisation.

The significance of services to APEC, and especially services delivered through commercial presence, means that it is particularly important that regional agreements reflect best international practice. A useful approach might be for APEC to prepare a model RTA chapter on services. Although the last attempt to do so in 2008 failed because of a lack of consensus, an exercise of this kind could encourage cross-fertilisation of ideas that would be useful for APEC member economies negotiating new RTAs. (See Annex G.)

Investment and Cross-border Movement of Capital

Progressive integration of world markets and the attendant closer links between trade and foreign direct investment (FDI) have resulted in foreign investment becoming more prominent in RTAs. Investment provisions in international agreements have evolved since the early bilateral investment treaties. The focus in those early agreements was on investor protections. RTAs since the 1990s have put more emphasis on the market access aspects of investment, such as the establishment of a commercial presence or the removal of foreign ownership caps. More recently, greater emphasis has been placed in RTAs on balancing investor protections and market access with the government right to regulate in the public interest.

Early and important examples of more comprehensive investment provisions in trade agreements are the 1993 Treaty on European Union (the Maastricht Treaty), which advanced investment liberalization and NAFTA, which was the first agreement to bring together investment and services disciplines under the umbrella of an RTA. The Uruguay Round (1994) outcomes are perhaps the only truly multilateral treaty level agreement to cover services and investment in relation to global trade, and, while the TRIMs coverage is limited given the increased complexity of international investment since then, it remains an important first step.

Around 80 per cent of agreements negotiated since 2001 include investment-related provisions – 85 per cent if services liberalization through commercial presence are added - compared with less than half of agreements in earlier years. Reflecting the close links between services and investment, 90 per cent of RTAs notified to the WTO, and classified as covering both goods and services, have an investment chapter.

Three features stand out in agreements with investment-related provisions. First, coverage of foreign investment in trade agreements among developed economies is higher than in agreements involving developing and transition economies. Second, coverage in agreements

involving APEC economies is higher than the global average, irrespective of the type of economy, and especially in intra-APEC agreements. And third, legal enforceability and dispute settlement arrangements are prominent across all investment policy areas. This is particularly the case in agreements among developed economies and between developed and developing/ transitional economies and is stronger still in agreements involving APEC economies.

The CPTPP style model is the most widely used for framing provisions on foreign investment and is used by many APEC economies. CPTPP-based investment chapters usually include national and MFN treatment applied to pre- and post-establishment investment positions; minimum standard of treatment at customary international law, including on expropriation; and Investor-State Dispute Settlement (ISDS). Other key disciplines relate to performance requirements, transfers of funds, and senior management/boards of directors. In the CPTPP-based model, all investment is covered in the investment chapter including investment in services through commercial presence. In GATS-style agreements, on the other hand, delivery of services through commercial presence is covered in the services chapter. In all types of agreements, provisions of general application that may affect investments are often included, such as provisions on IP, competition policy, the labour market and environmental laws and regulation.

Investment provisions cover both WTO+ and WTO-X policy areas. WTO+ provisions build on the TRIMs agreement and GATS commitments. TRIMs-based provisions in RTAs typically ban or restrict local content and export performance requirements, and range from specific 'TRIMs plus' provisions explicitly prohibiting performance requirements, to simply reaffirming WTO commitments while providing for dispute settlement.[13] TRIMs-based provisions are a standard feature in CPTPP style agreements. GATS-based provisions for establishing delivery of services via commercial presence usually include transparency and MFN obligations, market access and national treatment commitments for commercial presence, and domestic regulatory issues.

WTO-X provisions include behind-the-border measures for protecting, promoting and liberalizing investment - often very broadly defined - and cross-border movement of capital.. The availability of dispute resolution mechanisms, including through ISDS mechanisms, has increased markedly since 2000. ISDS provisions have evolved into more detailed mechanisms with more comprehensive procedural rules, although the depth of detail and nature of provisions varies widely across agreements. There is also an increasing emphasis on transparency.

ISDS mechanisms are continuing to evolve in response to demands to achieve protection for foreign investors while also enabling states to pursue legitimate regulatory and public policy goals. The EU-Canada CETA and EU-Vietnam agreements, for example, move away from the prevailing *ad hoc* arrangements for dispute resolution to a permanent and independent investment tribunal and appellate mechanism. In the negotiation of future agreements, the European Union is likely to advocate for similar provisions. Ongoing discussion on UNCITRAL also has the potential to introduce significant reforms to the ISDS regime.

[13] Note that, while the WTO TRIMs agreement applies only to goods, many RTAs apply performance requirements to mode 3 services as well. They are routinely included in NAFTA-style agreements.

5. New issues not yet covered, or only lightly covered, by multilateral disciplines

Five new trade and investment issues are reviewed here that fall outside, or largely fall outside, WTO rules and disciplines: competition policy (including state trading and state owned enterprises), e-commerce and digital trade, small and medium enterprises, labour and the environment.

Competition Policy and State Trading/State Owned Enterprises

As far back as negotiations on the Havana Charter in the late 1940s, it has been understood that weaknesses in competition policy can limit the gains from trade liberalisation. But it has proved to be extraordinarily difficult to make progress on this issue multilaterally: competition policy was one of the 'Singapore issues' dropped from the Doha Agenda in 2004 owing to lack of consensus. At the regional level, it is now quite common for a competition chapter to be included in RTAs – according to one study 70 per cent of the RTAs signed since 2001 have such a chapter (Lejárraga 2014, pp.15-16). But some important or recent agreements involving APEC economies do not, among them the ASEAN Free Trade Area (AFTA), the Pacific Alliance and PACER Plus.

The World Bank database used through this study provides comprehensive information on the coverage and enforceability of competition policy provisions. It indicates that nearly three quarters of all agreements that entered into force over 2001-2015 covered competition policy. A high proportion of these were legally enforceable (though the proportion subject to dispute settlement was much smaller). Over 60 per cent of the agreements over 2001-2015 covered state trading enterprises (STEs).

Where chapters on competition policy have been included, their quality and depth vary. In the case of AANZFTA, the focus is on exchanging information, capacity building and training, reflecting the limited (and in some cases, very recent) development of competition regimes in some of its members. The EU-Canada CETA similarly has a very short chapter, whose main provision is to endorse an (admittedly very detailed) 1999 agreement on this issue between the parties. By contrast CPTPP has extensive provisions on competition policy, including a commitment to adopt and maintain national competition laws, to maintain a national competition authority (or authorities), to adopt provisions to ensure procedural fairness and transparency, and to exchange information (including for enforcement). These provisions are not subject to dispute settlement, however.

STEs and state owned enterprises (SOEs) can similarly thwart the objectives of trade liberalisation, but there are limited parts of WTO agreements and decisions which address them (GATT Article XVII on State Trading Enterprises is the most prominent example). STEs are defined in an Understanding on the Interpretation of Article XVII as enterprises with 'exclusive or special rights and privileges' that 'influence through their purchases or sales the level or direction of imports or exports'. In practice they are mainly marketing boards. In contrast, in RTAs, SOEs are usually defined in terms of ownership and control by the state as distinct from other state-entities that are established to pursue non-commercial objectives (e.g. museums, health care, research and education). Box 1 in Annex I examines the definitions of both types of enterprise in greater detail.

Several WTO rules are useful in disciplining some government policies that may be directed at SOEs but there are also important deficiencies. First, GATT Article III (National Treatment) bans discrimination favouring domestic producers, including SOEs. Second, all WTO

obligations (e.g., most-favoured-nation treatment, national treatment, and bans on import and export restrictions) can in principle be applied to SOEs acting under governmental instructions. Third, GATT Article XVII (State Trading Enterprises) disciplines some practices in which certain types of enterprises can be used by governments to influence international trade. However, the ambiguous definition of a 'state trading enterprise' means that GATT Article XVII is of limited use in curbing the anti-competitive actions of SOEs.

The WTO Agreement on Subsidies and Countervailing Measures (ASCM) disciplines various forms of subsidies irrespective of whether they are granted to state or private firms. Conversely, a subsidy under the ASCM must be provided by a government or public body (emphasis added). WTO jurisprudence has established that majority government ownership by itself does not qualify an SOE as a "public body". Rather, the SOE must possess both "government authority" and perform a "government function". By way of contrast, the CPTPP SOE Chapter specifies that non-commercial assistance can be provided by a commercial SOE.

The GATS does not refer to SOEs but has two related concepts. First, GATS Article I:3(b) carves out from the scope of the Agreement "services provided in the exercise of governmental authority". Second, GATS Article VIII ensures that monopolies (including SOEs) act in a manner consistent with Members' specific commitments, as well as with the most-favoured-nation obligation.

The GATS is the only multilateral agreement with rules affecting foreign investment (i.e., commercial presence or 'Mode 3'). The GATS disciplines discrimination favouring domestic producers and specifies conditions for market access (including for SOEs). However, an important gap is the absence of rules on subsidies and on state trading enterprises.

Finally, certain WTO accession protocols include additional rules on SOEs (e.g., China and Vietnam).

The EU-Canada CETA text on this issue applies to state enterprises, monopolies and enterprises granted special rights or privileges. The text sets out two key commitments – (i) non-discriminatory treatment to investors and investments of Canada and the EU, and to goods and services providers of Canada and the EU, in buying and selling goods and services; and (ii) action in accordance with commercial considerations in its purchase or sale of a good or service. The CPTPP text, which applies to SOEs and designated monopolies, is far more detailed, although there are a number of exceptions to the main provisions. It includes non-discriminatory treatment (much more elaborately defined than in CETA) and commercial considerations provisions. It also prohibits non-commercial assistance that exclusively or predominantly goes to SOEs and has adverse effects on other Parties, includes additional transparency provisions and would establish a Committee on State-Owned Enterprises and Designated Monopolies.[14] These provisions are subject to the dispute settlement provisions of the agreement. (See Annex I.)

E-commerce/Digital Trade

E-commerce/Digital trade has been discussed by the World Trade Organization (WTO) for more than two decades but efforts to update e-commerce/digital trade rules have stalled until recently and regional trade agreements have 'emerged as the primary laboratories for new rules and disciplines' in this area (Wu 2017, p. 2).

[14] For a careful study of the provisions of the TPP-12 on SOEs, see Haywood (2016). The summary above gives only the broadest flavour of the Chapter, which runs to 34 pages.

The overwhelming impression of RTA provisions on e-commerce/digital trade is that APEC economies are generally leading the way. The number of RTAs with e-commerce/digital trade provisions has increased steeply since 2011, with agreements involving APEC economies especially prominent: intra-APEC agreements and agreements involving APEC and other economies account for the great bulk of agreements negotiated globally with e-commerce/digital trade chapters.

Coverage has extended from requirements not to impose customs duties on electronic transmissions – still the most common provision – and provisions supporting domestic legal and regulatory framework for e-commerce to provisions addressing issues like paperless trade, cooperation on digital trade and free flow of data.[15] The Korea-US FTA (KORUS) was the first RTA with a specific provision to promote free flow of information across borders. Many RTAs have soft commitments on dispute settlement or harder commitments that are limited in scope. As a general principle, legally enforceable commitments are rare except for some recent RTAs in the Asia-Pacific region.[16]

Sizeable differences in the content and approach to digital trade in RTAs within the APEC region and beyond have been noted by various researchers (e.g. Kuriyama & Sangaraju 2017). Differences are predictable. They reflect:

- Major differences across APEC economies in the enabling environment for e-commerce/digital trade whether measured by physical infrastructure, digitally relevant skills, the regulatory environment, or demand pressures from business to strengthen hard and soft infrastructure (Pasadilla et. al. 2017, pp 33-40)
- Different sensitivities and priorities for e-commerce/digital trade across economies on digital security, law enforcement, privacy, and cultural/moral issues
- The impact of time in a fast moving technologically-driven space in which new industries spring up alongside new and more inventive forms of digital protectionism. This goes a long way to explain why the most recent crop of RTAs, especially those involving economies like Australia, Japan, Korea, Singapore, and the United States, address a much wider range of digital trade issues than agreements a decade or so ago. It also helps to explain variations in the extent and depth of commitments within different agreements signed by the same party.

On specific issues, convergence can be encouraged by initiatives like the United Nations Framework Agreement on Facilitation of Cross-border Paperless trade in Asia and the Pacific (FA-PT), and by the UNCITRAL Model Law on Electronic Commerce. By the end of 2017, over 70 economies around the world had based their domestic laws and regulations for electronic transactions on the model law or had been influenced by it.

On a broader scale, multi-party RTAs like CPTPPand the Regional Comprehensive Economic Partnership (RCEP) negotiations offer a major opportunity to achieve convergence of e-commerce/digital trade provisions across a broad range of Asia-Pacific economies.

And on a broader scale still, APEC may have a role in promoting convergence not only in the context of a future FTAAP but, in the more immediate term, by updating the model chapter on e-commerce. It also could promote convergence by considering how the next phases of the e-commerce/digital trade revolution might be addressed in RTAs or in plurilateral arrangements. And there would seem to be a big job ahead for APEC in skills training and capacity building

[15] Note: many RTAs clarify that this also applies to the content being transmitted electronically

[16] Note: even if there are no e-commerce specific dispute settlement provisions, this does not necessarily mean that commitments are not legally enforceable.

linked to negotiating new generation agreements that increase regulatory coherence, and increase opportunities for developing economies, small and medium enterprises and women to participate more actively in supply chain trade. (See Annex J.) In this regard, it would be useful to finalize the Work Plan on Digital Trade and E-Commerce for the Realization of the FTAAP and its progress.

Small and Medium Enterprises (SMEs)

SMEs play a major role in most economies, including in APEC. They typically make up the vast majority of commercial enterprises, a majority of total employment and a sizeable (though smaller) share of GDP. At present SMEs are under-represented in international trade and investment, although it is not uncommon for them to supply larger firms which do export. They are seen, both in the OECD and APEC, as a key to promoting employment, raising productivity and delivering a more inclusive form of globalisation, including promoting the role of women in international commerce.

The core WTO agenda that has seen tariffs cut substantially and bound has been enormously helpful to SMEs, as have WTO agreements addressing technical barriers to trade, sanitary and phytosanitary measures, trade-related aspects of IP and trade facilitation. RTAs have similarly benefited SMEs in areas like these, even if SMEs are not mentioned directly. Simplifying rules of origin and promoting transparency are other areas on the evolving RTA agenda that are particularly helpful to SMEs.

Detailed analysis by the WTO shows that around half of the approximately 270 agreements in force and notified up to May 2016 included at least one provision referring to SMEs. Around a third of the 270 had provisions on cooperation and a quarter allowed for SME flexibilities or exemptions. The percentage of agreements including provisions on SMEs has been trending upward over time. Using a more restricted definition of SMEs than the WTO, World Bank data show coverage increasing over time, from nine per cent prior to 1996 to 25 per cent over 2011-2015, but with few provisions both legally enforceable and subject to dispute settlement.

The World Bank database shows that, for agreements involving one or more APEC members, the share with SME coverage increased from eight per cent prior to 1996 to 24 per cent over 2011-15, mirroring the trend globally. Over the same period, the share of APEC agreements that included legally enforceable provisions on SMEs rose from four to 12 per cent. But there was no clear trend for agreements with provisions that were both legally enforceable and subject to dispute settlement. The shares here were, in any event, very small.

Apart from provisions on general cooperation, RTAs can mention SMEs in such areas as services and investment, government procurement, trade facilitation, IP and transparency. Derogations from agreements often exempt from disciplines programmes intended to support small and medium enterprises. Provisions in different agreements vary. The Japan-Thailand Economic Partnership Agreement has the most provisions on SMEs of those notified to the WTO up to May 2016 and in force. It includes a dedicated chapter on SMEs. CPTPP also includes a detailed chapter on SMEs (though not subject to dispute settlement provisions) as well as other references in areas like government procurement, IP and labour. In the EU-Canada CETA, some of the most novel references to SMEs concern the Investor-State Dispute Settlement mechanism.

The fact that there are significant differences among RTAs on SME provisions suggests that it would be useful for APEC to develop model provisions for an SME chapter, as well as model SME provisions for other key areas that affect them. This work could assist in developing the text of new RTAs. It would also help to give effect to the 2011 decision by APEC Economic

Leaders that 'further efforts could be made to foster the participation of SMEs in global production chains through addressing the issue in next generation trade agreements'. (See Annex K.)

Trade and the Environment

The explosion in environment-related provisions in RTAs was slow to start but NAFTA, or more specifically the side agreement – the North American Agreement on Environmental Cooperation - lit the fuse. It was still slow burning at first. In the five or six years that followed its entry into force, just two intra-APEC RTAs included provisions on the environment: the Canada-Chile FTA (entered into force July 1997) and the Chile-Mexico FTA (1999). More RTAs followed in the early 2000s, but it was only after 2005-08 that the pace quickened decidedly with a surge of basic agreements negotiated among developing economies and a surge in developed-developing economy agreements that incorporated environment-related provisions going beyond the WTO in areas like services, investment, IP rights, cooperation, and governance (Monteiro 2016, p.8). APEC economies were involved in negotiating the great bulk of RTAs with WTO-X provisions on the environment in 2001-10 and especially 2011-15. To a significant extent, this reflected the ambitions of the United States, Canada and New Zealand and, later, of economies like Chile and Korea.

Alongside this surge in the number of RTAs with environmental provisions, there was a similar surge in the breadth of coverage of environment-related issues. It did not happen uniformly across economies either in the APEC region or globally, but in broad terms coverage of WTO-X provisions in RTAs rose steadily through the 2000s, both in agreements struck among developed economies and between developed and developing/transition economies. It then accelerated after 2008-10 for both groups. Before that time, RTAs typically had non-specific environmental provisions as part of preambles, exceptions provisions and regulations relating to product standards, human, plant and animal health, and perhaps government procurement. After that time, RTAs also typically had provisions on environmental cooperation as well as provisions on issues that could include specific commitments on domestic environmental law, multilateral environment agreements, biodiversity, environmental goods and services, trade in natural resource products, environmental governance, and cooperation (Monteiro 2016, p. 12).

Four things standout about the coverage of WTO-X provisions on the environment:

- The majority of economies in the Asia-Pacific region and globally are now negotiating RTAs that incorporate more provisions on the environment. This applies equally to developed and developing/transition economies.
- APEC economies are in the vanguard of these developments: the coverage of WTO-X provisions in agreements between developed economies is similar for APEC economies and globally, but coverage in agreements between developed and developing economies has been consistently higher for at least a decade in the APEC region compared with the world as a whole.
- There is considerable convergence around defining environmental objectives, basic principles, cooperative frameworks and institutional arrangements (Kuriyama 2015; Policy Center for Environment and Economy 2017).
- But there are also some significant differences between economies in the scope and depth of agreements. Among APEC economies; the United States, Canada and New Zealand have tended to incorporate more varied types of substantive environment-related provisions in their agreements, particularly with developing economies, than economies like Japan and Australia. Similarly, economies like Chile, China, Korea and Mexico have incorporated a

wider range of environment provisions than many developing and transition economies. And economies like Russia have, on the whole, incorporated a limited number of environment-related provisions in their RTAs (Monteiro 2016, p. 17; George 2014, pp. 6-12).

Powerful forces are shaping environmental provisions in RTAs around common goals, principles and shared ambitions and, equally, there are countervailing forces delivering greater heterogeneity. The former is seem most dramatically in CPTPP where economies with vastly different approaches and histories on trade and environmental issues agreed to take on substantive, wide-ranging and, in many cases, legally enforceable commitments. The latter is evident in deep-seated differences on issues like monitoring, enforcement and dispute settlement, but also in the very nature of RTAs as vehicles that promote experimentation and innovation in addressing new issues and challenges and that are likely to continue to do so.

These twin realities present important opportunities for the WTO and APEC. For APEC, there is an opportunity to place its stamp on the next generation of environment-related provisions in RTAs through a new model chapter and possible involvement in negotiations. And for the WTO, it is more than time that the laboratory created by RTAs plays a more prominent role in informing multilateral processes like negotiations for the Environmental Goods Agreement and liberalising trade in environmental services. (See Annex L.)

Trade and Labour

Regional Trade Agreements containing substantive references to trade and labour were by far the exception in the early 2000s. A decade later, the number of agreements globally entering into force with labour provisions had increased almost four-fold and APEC economies were well represented. By 2011-15, well over half of agreements entering into force globally and those involving one or more APEC economies contained substantive provisions on labour.

The trend was not uniform across economies. There were still marked differences in coverage. By 2011-15, over three quarters of all APEC RTAs involving developed economies contained substantive labour provisions; the proportion was just over one-half for agreements between developed and developing APEC economies.

So what produced the upsurge of RTAs with trade-related labour provisions and why was it uneven across economies? The most important factor in the upsurge is stasis in the WTO. Other key factors were:

- Fears in some parts of the labour movement in developed economies of a ‘race to the bottom’ in wages and the regulation of labour markets given that capital is mobile and global and regional value chains can easily shift to draw in new suppliers.
- The emergence of a big international labour force joined together through value chains that is poorly paid compared to the work forces in more developed economies and that often lacks basic labour rights like free association, collective bargaining and basic health and safety protections.
- The increasing visibility of global capital and commerce. Rapidly changing technology has opened up multinational companies to greater scrutiny. Accountability is linked to brand identity – labour rights problems can quickly damage brands – and to issues of corporate social responsibility, which are emerging in recent RTAs.
- Governments’ keenness to develop economic and legal rules for regional and global business.

RTAs with labour provisions typically cover: reaffirming International Labour Organisation (ILO) obligations; enforcing and implementing laws, regulations and practices related to the ILO fundamental principles and rights at work; not waiving or derogating from laws, regulations and labour standards to attract foreign trade or investment; promoting public awareness of labour laws; promoting transparency; developing implementation mechanisms – monitoring, technical cooperation, capacity building and, for some agreements, dispute settlement arrangements; ensuring access to tribunals to uphold labour laws and standards; and providing procedural guarantees to ensure the effective application of labour laws, regulations and practices.

Convergence around labour standards, values and programs often disguises differences in negotiating approaches and priorities, differences in the depth of commitments, and differences arising out of the increasing complexity of agreements. Growing complexity is to be expected: it is part and parcel of the natural evolution of RTAs. But it sits on top of quite different approaches by APEC and other economies to incorporating trade-related labour provisions in RTAs. These differences emerged early and have persisted in broad terms over time.

The US model has evolved with the North American Agreement on Labour Co-operation (1993). Its most recent agreements focus on adopting and maintaining the fundamental principles and rights at work as stated in the 1998 *ILO Declaration on Fundamental Principles and Rights at Work* which enforces domestic labour legislation and regulations, and make provision for trade sanctions for non-compliance. The Canadian model is similar, but applies a system of financial compensation for non-compliance. The EU model includes strict regulatory commitments, adherence to a broad range of international labour commitments and principles, and strong civil society participation in monitoring labour standards and settling disputes. And the Chilean and New Zealand models are based on substantive commitments and cooperation and exclude trade sanctions for non-compliance.

In line with earlier discussions in the GATT and WTO, Australia and Japan rejected the labour linkage on principle, but came to accept references to labour standards in some RTAs. Also in line with earlier multilateral discussions, RTAs among developing/transitional economies tended to contain few labour provisions beyond standard references to ILO core labour standards and cooperation.

The enduring nature of these different approaches is suggested by indicators such as legal enforceability across different economy groupings. It also is revealed more broadly in some of the most recent RTAs such as the European Union-Canada CETA (2017) and CPTPP (2018). Both agreements are exemplars of the considerable development of labour provisions in ambitious RTAs. But both also are exemplars of the 'conditional' approach to the labour linkage that fundamentally reflects US and Canadian thinking in CPTPP – that is, labour provisions are subject to dispute settlement and sustained or recurring non-enforcement can result in suspension of benefits - and the European Union's 'promotional' approach based around sustainable development and broad-based dialogue with partners to promote labour standards. (See Annex M.)

6. Conclusions

This stocktake and the accompanying annexes build on work carried out for the *Collective Strategic Study on Issues Related to the Realization of the FTAAP* and Japan's contribution in particular. Seven broad conclusions emerge from the current study.

The APEC region is one of the world's great centres for RTA innovation.

RTAs are a response to the evolving requirements of modern supply chain trade and the increasingly complex and quickly changing environment of international commerce. The failure of the WTO Doha Round to update the multilateral rules for trade and to bring new trade issues into the multilateral rules-based system has fundamentally increased the appeal of RTAs as governments worldwide seek to increase market access and investment opportunities for their businesses through substantive agreements that tackle non-tariff barriers (NTBs). APEC economies were involved in the bulk of RTAs negotiated globally in the period since 2001, and especially from 2011 to 2015 when they accounted for nearly three-quarters of the agreements entering into force. As for the world as a whole, most of APEC's RTAs are between developed and developing/transition economies.

RTAs have increased dramatically in scope and ambition across the Asia-Pacific and globally. Almost all recent agreements add in some way to existing WTO rules and commitments (i.e. they are WTO+) on issues ranging from customs procedures to standards and government procurement to services. Over the last 10 years or so, RTAs involving at least one APEC member have, on average, WTO+ coverage in around 80 per cent of policy areas – a proportion in line with the world as whole – and higher still in the case of intra-APEC RTAs. The process of regulatory convergence is strongest for WTO+ measures, but is also considerable across services, investment and transparency measures.

Recent agreements also increasingly include commitments in areas like movement of capital, competition, labour and e-commerce where there are no, or limited, WTO rules currently (i.e. they are WTO-X). APEC economies compare favourably with the world as a whole in WTO-X coverage of RTAs: intra-APEC RTAs typically have WTO-X commitments that are equal to, or exceed, the average of RTAs globally or RTAs negotiated with partners outside the APEC region.

There are strong similarities across WTO+ provisions in Asia-Pacific RTAs on coverage and other depth indicators regardless of per capita income levels.

The extent of coverage, legal enforceability and dispute settlement arrangements are indicators of the changing depth of RTAs. Coverage of issues may increase but real depth can depend on parties' commitments being legally enforceable through processes specified in an agreement.

There is generally moderate-to-high coverage, legal enforcement and dispute settlement arrangements for WTO+ measures in modern RTAs and the trend is upwards. This holds for both APEC and non-APEC economies, but is more prominent for APEC economies. Since 2006, coverage combined with legal enforcement and dispute settlement provisions applied, on average, to over 70 per cent of WTO+ policy areas in APEC RTAs. This compares to an average of 60-65 per cent in RTAs entering into force for the world as a whole.

For individual WTO+ measures, levels of legal enforcement of commitments vary across APEC economies but are significantly ahead of the world as a whole. Between 2001 and 2015, almost 100 per cent of commitments in intra-APEC RTAs on core customs processes, agriculture and industrial tariffs were legally enforceable. Seventy-five per cent or more of commitments on intellectual property (TRIPS), services (GATS), countervailing measures, anti-dumping, technical barriers to trade, and sanitary and phytosanitary measures were legally

enforceable. And over one-half of commitments on state aid to business, state trading enterprises and export taxes were legally enforceable too. In each of these three broad groupings of WTO+ measures, legal enforceability in intra-APEC agreements exceeded - often by a large margin - enforcement levels in agreements involving at least one APEC member and agreements for the world as a whole.

The depth of commitments on WTO-X measures in Asia-Pacific RTAs is more variable and generally weaker than for WTO+ measures.

In contrast to WTO+ measures, legal enforcement and dispute settlement arrangements for WTO-X measures apply at a substantially lower average level across all economy groups in this report. At no time in the last two decades has this (unweighted) average exceeded 10 per cent either for intra- APEC RTAs or APEC RTAs with third economies: the average for the RTAs of the world as a whole was roughly in line.

Across 38 WTO-X measures, enforcement rates in excess of 75 per cent apply only in the case of intra-APEC RTAs covering investment, movement of capital and competition policy: these agreements are significantly ahead of regional and global enforcement standards. Below that, enforcement coverage is around 50 per cent for visa and asylum policy and intellectual property rights. It then falls steeply, clustering at around 25 per cent for consumer protection, labour market regulations, environmental laws, and anti-corruption measures, before falling to very low levels for all remaining WTO-X measures. This pattern for intra-APEC RTAs is, more or less, replicated across all-APEC RTAs and RTAs for the world as a whole.

In large part, deeper commitments have been transferred from developed economies to a wide range of developing and transition economies. Developed economy partners have sought to increase security for their capital and IP, while developing partners have used negotiations to increase access particularly to large developed economy markets and attract more direct flows of investment. Many commitments, however, are not legally enforceable. In the case of agreements between developing/transition economies, legal enforceability of WTO-X measures, even at a low level, chiefly reflects the priority in economies like Chile, Korea and Singapore to export their regulatory systems and smooth flows along supply chains.

There are inevitable differences between economies in negotiating priories and approaches on specific WTO+ and WTO-X provisions.

The strong shift from ‘shallow’ to ‘deep’ agreements over the last 10-15 years and convergence around the core content of RTAs disguises differences in negotiating priorities and approaches among APEC and other economies, as well as differences in the depth of commitments among ‘families’ of RTAs.

Different negotiating priorities in RTAs emerged early and have tended to persist over time because they reflect differences across economies in enabling environments for trade and investment whether measured by physical infrastructure, relevant skills, the regulatory environment, or demand pressures from business. At a generic level, an example is the emphasis placed by different APEC and other economies on legal enforcement and dispute settlement. In general, economies like the United States and Canada favour penalty disciplines for sustained or recurring non-enforcement of provisions combined with dispute settlement provisions as set out in an agreement. And economies like the European Union and some others, especially many developing and transition economies, favour – beyond an enforceable set of core provisions - a ‘promotional’ approach based around broad dialogue with trading partners. Different negotiating approaches tend to persist over time on specific measures. For example:

- There are two main approaches on services in RTAs. The first – GATS-style agreements – is based on the architecture of the GATS (including a positive list approach and the four GATS modes of supply). The second – CPTPP-style agreements - use a negative list approach and have separate chapters covering cross-border services (essentially GATS Modes 1, 2 and 4) and investment (covering Mode 3 services among other things). As the name suggests, CPTPP-style agreements normally involve at least one party from the Americas, whereas GATS-style agreements are often found in East Asia (Latrille 2016).
- There are multiple approaches on trade and labour. The US model was shaped by the North American Agreement on Labour Co-operation (1993) and focuses on core international labour standards, observing existing domestic labour legislation and regulations, and applying trade sanctions for non-compliance. The Canadian model is similar, but applies a system of financial compensation for non-compliance. The EU model – which is highly relevant to the Asia-Pacific region because of the increasing number of EU RTAs with APEC members - includes strict regulatory commitments, adherence to a broad range of international labour commitments and principles, and strong civil society participation in monitoring labour standards and settling disputes. And the Chilean and New Zealand models are based on substantive commitments and cooperation and exclude trade sanctions for non-compliance.

  In line with earlier discussions in the GATT and WTO, Australia and Japan rejected the labour linkage on principle, but came to accept references to labour standards in some RTAs. Also in line with earlier multilateral discussions, RTAs among developing/transitional economies tend to contain few labour provisions beyond standard references to ILO core labour standards and cooperation.

The growing complexity of modern RTAs contributes to growing divergence in some WTO+ and WTO-X areas.

RTAs have emerged as laboratories for trade policy particularly to lower trade costs, tackle inventive forms of protectionism and deal with evolving business models based on technological advancements. Many provisions have taken on more complexity or precision than their WTO equivalents, and many others have emerged quickly outside the purview of the WTO. This rapid pace of change helps to explain why recent RTAs address a much wider range of issues than agreements a decade ago. It also goes some of the way to explain variations in the scope and depth of commitments within different agreements signed by the same party.

While rapid evolution is a distinguishing characteristic of almost all RTAs, it produces divergence at the level of detail that sits on top of more structural differences in the ways different economies assign negotiating priorities and develop approaches on specific WTO+ and WTO-X provisions. For example:

- Notable differences exist across the gamut of facilitation issues: customs cooperation can be narrowly focused or broad; obligations to publish policies, laws, regulations, and draft regulations might be binding or not; enquiry points might cover all facilitation issues or a sub-set; provisions on single windows for electronic documentation are comparatively rare in RTAs but can be targeted and action-oriented (like in the case of the ASEAN Free Trade Area and the Pacific Alliance) or simply promote the concept or in some way work towards it (like the Canada-Peru FTA or AANZFTA); and technical support can be targeted (as in PACER Plus) or more typically very general (Neufeld 2016, pp. 131-149).
- And on government procurement, the devil again often lies in the detail where differences between agreements exist in the entities covered – central, regional, local, public

companies; the thresholds above which non-discriminatory treatment cuts in; the extent to which commitments cover all goods and services; and derogations from commitments.

Convergence and divergence in bilateral and small multi-party RTAs increases the importance of mega agreements that can address overlapping or inconsistent approaches that could impede trade and investment.

Over recent years there has been a strong trend towards negotiating mega RTAs. Examples in the Asia-Pacific region include CPTPP, the Pacific Alliance and ongoing negotiations for RCEP.

As a general principle, mega agreements reduce the scope for regulatory variance compared to bilateral and small-multiparty agreements by consolidating and improving trade and investment rules and lifting commitments. This is especially the case if big agreements replace older bilateral agreements or create political momentum to negotiate more ambitious region-wide outcomes.

CPTPP- in particular suggests that diverse economies can agree on approaches that would normally be outside their comfort zones if the overall trade and economic package is large enough and if transitional arrangements are available.

APEC can play a valuable role in supporting the next phase of RTA development.

Powerful forces are shaping RTAs around common goals, principles and shared ambitions and, equally, there are countervailing forces delivering greater heterogeneity These twin realities present opportunities for APEC to place its stamp on next generation trade and investment issues through developing a broad range of new model chapters that take as their starting point the significant innovations that have occurred in RTAs regionally and globally over the past decade.[17] A particular focus could be on how best practice RTAs could boost opportunities for developing economies, small and medium enterprises and women to participate more actively in supply chain trade.

This work could be reinforced by analytical work on issues like:

- The impact of various levels of intellectual property protection on broader economic development benefits, including technology transfer, innovation, foreign investment flows, and trade in technology-intensive goods and services, and
- Why non-tariff measures are proliferating, why many of them become barriers to trade and what can be done to roll them back. International evidence suggests that NTMs probably double the level of trade restrictiveness imposed by tariffs and that their overall contribution to trade restrictiveness is increasing as tariff levels on average continue to decline (Adams, Brown and Wickes 2017).

Finally, it would it be useful for APEC to develop a portal that contains links to RTAs negotiated by APEC economies - some of these agreements are difficult to find at present – and to chapter summaries of agreements. Such an initiative might increase awareness of trends in the region in the content of RTAs. Analysis by the APEC Policy Support Unit could also be incorporated.

[17] An example is Singapore's recent (2018) proposal to review and update the 2007 model chapter on rules of origin (APEC 2018).

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Glossary

AANZFTA	ASEAN–Australia–New Zealand Free Trade Agreement
AD	anti-dumping
AFTA	ASEAN Free Trade Area
ANZCERTA/CER	Australia–New Zealand Closer Economic Relations Trade Agreement
APEC	Asia-Pacific Economic Cooperation
ASEAN	Association of Southeast Asian Nations
ASEAN+1	ASEAN members plus bilateral RTA partners (Australia, China, India, Japan, Korea, and New Zealand)
AUSFTA	Australia–United States Free Trade Agreement
BITs	bilateral investment treaties
CETA	EU-Canada Comprehensive Economic and Trade Agreement
CIS	Commonwealth of Independent States
CTC	change in tariff classification
CTI	APEC Committee on Trade and Investment
CUSFTA	Canada–US Free Trade Agreement
CVM	countervailing measures
DFAT	Department of Foreign Affairs and Trade
Doha/Doha Round/DDA	Doha Development Agenda
DR-CAFTA	Dominican Republic-Central America FTA
EAEU	Eurasian Economic Union
EEC	European Economic Community
EFTA	European Free Trade Association
EPA	economic partnership agreement
ERIA	Economic Research Institute for ASEAN and East Asia
ESCAP	United Nations Economic and Social Commission for Asia and the Pacific
EU	European Union
EU3	Germany, France and the United Kingdom
FA-PT	United Nations Framework Agreement on Facilitation of Cross-border Paperless Trade in Asia and the Pacific
FDI	foreign direct investment
FTA	free trade agreement
FTAAP	Free Trade Area of the Asia-Pacific
GATS	General Agreement on Trade in Services

GATT	General Agreement on Tariffs and Trade
GCC	Gulf Cooperation Council
GDP	gross domestic product
GFC	Global Financial Crisis
GIs	geographical indications
GPA	WTO Government Procurement Agreement
GVCs	global value chains
HOR	Hofmann, Osnago and Ruta
ICSID	International Centre for Settlement of Investment Disputes
IDB	Inter-American Development Bank
ILO	International Labour Organisation
IPEG	APEC's Intellectual Property Rights Experts Group
IPIC	Treaty on Intellectual Property in Respect of Integrated Circuits
IP	Intellectual Property
ISDS	Investor-State Dispute Settlement
ITA	WTO Information Technology Agreement
KORUS	Korea–United States Free Trade Agreement
LDCs	least developed countries
LPI	World Bank's Logistics Performance Index
MAFTA	Malaysia–Australia Free Trade Agreement
MEAs	multilateral environment agreements
MFN	most-favoured-nation
Modes 1-4	modes of supplying services: mode 1 (cross-border supply), mode 2 (consumption abroad), mode 3 (commercial presence), and mode 4 (movement of natural persons)
MSMEs	micro, small and medium sized enterprises
NAFTA	North American Free Trade Agreement
NGeTIs	Next generation trade and investment issues
NTBs	non-tariff barriers
NTMs	non-tariff measures
OECD	Organisation for Economic Co-operation and Development
PACER Plus	Pacific Agreement on Closer Economic Relations
PTA	preferential trade agreement
PRO	preferential rules of origin
PSU	APEC Policy Support Unit
RCEP	Regional Comprehensive Economic Partnership negotiations

ROO	rules of origin
RTA	regional trade agreement
SAFTA	Singapore–Australia Free Trade Agreement
SME	small and medium sized enterprises
SOEs	state-owned enterprises
SOM	senior officials' meeting
SPS	sanitary and phytosanitary measures
STEs	state trading enterprises
STRI	services trade restrictiveness index
TBT	technical barriers to trade
TFA	WTO Trade Facilitation Agreement
TiSA	ongoing negotiations for the Trade in Services Agreement
TiVA	trade in value added
TPP	Trans-Pacific Partnership Agreement: trade agreement between Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, Vietnam, and United States signed on 4 February 2016. It was not ratified by at least six signatories comprising 85% of total GDP and did not enter into force
CPTPP	Comprehensive and Progressive Agreement for Trans-Pacific Partnership: trade agreement between the 11 remaining TPP parties following US withdrawal. Agreement signed on 8 March 2018.
TRIMs	WTO Agreement on Trade-Related Investment Measures
TRIPS	WTO Agreement on Trade-Related Aspects of Intellectual Property Rights
TTIP	Trans-Atlantic Trade and Investment Partnership negotiations
UNCITRAL	United Nations Commission on International Trade and Law
UNCTAD	United Nations Conference on Trade and Development
USTR	Office of the United States Trade Representative
WIPO	World Intellectual Property Organization
WTO	World Trade Organization
WTO+	WTO+ provisions in RTAs refer to provisions going further and deeper into issues covered by the WTO (e.g. technical barriers to trade, services, intellectual property and trade-related investment measures).
WTO-X	WTO-X provisions in RTAs refer to provisions going beyond issues covered by the WTO (e.g. competition policy, investment and the movement of capital, environmental laws, labour market regulations and measures on visa and asylum)

Annexes

A. World Bank Database on the Content of Preferential Trade Agreements[18]

Since the 1990s, the focus of trade agreements has extended well beyond lowering tariffs into a wide range of policy areas related to trade and investment, including many 'behind-the-border' issues. Effective analysis of trade agreements, therefore, needs to take into account many more factors.

The World Bank database aims to enable such analysis by providing, in a systematic way, quantitative information about areas covered by trade agreements, enforceability of their provisions and availability of processes to settle disputes.

This annex describes the World Bank database on the content of preferential trade agreements (PTAs) used in this paper and other annexes. The database is described in detail in Hofmann, Osnago and Ruta 2017 (HOR) and is available on the World Bank website at https://data.worldbank.org/data-catalog/deep-trade-agreements.[19]

The version of the database used for this study was updated on 20 February 2018.

Methodology

The World Bank database employs and builds on the methodology developed by Horn, Mavroidis and Sapir (2010) to analyse US and EU trade agreements. Other examples of subsequent uses of the methodology are analyses of: the anatomy of PTAs by the WTO in its World Trade Report 2011 (WTO 2011, pp 128-133); ASEAN preferential trade agreements by Kleimann 2013; the varying effects of trade agreements on international trade by Kohl, Brakman & Garretson 2013; and the impact of PTAs on the integration of global value chains (Ruta 2017).

Description of database

The database covers 279 agreements among 189 economies that entered into force and were notified to the WTO from 1958 to 2015.[20] It identifies provisions covering 52 policy areas and their legal enforceability. Of the 52 policy areas, 14 are within the current mandate of the WTO ('WTO plus' or WTO+) and 38 are outside it ('WTO extra' or WTO-X).[21]

- In addition to tariff reduction measures, WTO+ measures include areas such as customs facilitation, sanitary and phytosanitary (SPS) measures, technical barriers to trade, public procurement, trade-related investment measures (TRIM), trade-related aspects of intellectual property rights (TRIPS), and liberalization of trade in services

[18] The World Bank refers to its database as a 'dataset'. In this annex and elsewhere, we refer to it as a 'database'.

[19] In this annex, the term preferential trade agreements/PTAs is used rather than regional trade agreements/RTAs because this is how the World Bank describes trade agreements in their database. In all other annexes and in the stocktake overview paper itself, we use the term RTA. The distinction is not of any substance. The World Bank prefers to refer to PTAs rather than RTAs 'since some of these agreements are not necessarily between countries within the same region or in regional proximity' (Hofmann, Osnago and Ruta 2017, p.2, footnote 2). The WTO defines RTAs as 'reciprocal trade agreements between two or more partners' (https://www.wto.org/english/tratop_e/region_e/rta_pta_e.htm)

[20] The database includes 16 partial scope agreements (PSAs) involving developing countries.

[21] WTO+ provisions include those that reconfirm existing obligations as well as those that add new obligations.

- The 38 WTO-X areas are very wide ranging. In addition to 'core' economic policy areas including competition policy, foreign investment and IP protection, the database lists coverage and enforceability of areas as diverse as anti-corruption, environmental laws, labour market regulation, regional cooperation, assistance and finance facilitation for small and medium enterprises (SMEs), money laundering, and visas and asylum.

A full list and description of the policy areas are at Attachment A to this annex.

The database consists of 4 spreadsheets for each of the 279 agreements - two each for WTO+ and WTO-X policy areas. The two spreadsheets in each area are for coverage and legal enforceability.

- For coverage, a binary (1,0) coding is used to identify whether or not a policy area is covered
- For legal enforceability, a '0' code indicates provisions that are not considered to be legally enforceable; '1' provisions that are enforceable but dispute settlement is not available; and '2' provisions that are enforceable and dispute settlement is available

  Provisions are considered legally enforceable if the legal language is 'sufficiently precise and committing and it has not been excluded from dispute settlement procedures under the PTA' and compliance does not have to rely on co-operation (HOR p. 7-8)

  Where PTAs specify '… exhaustion of other means of redress or internal legal remedies within a reasonable period of time before dispute settlement becomes available under the PTA' (HOR p.7), a code of '1' is assigned, in particular if weaker mechanisms with lengthy timeframes and processes are involved. This comes with a caveat: 'if dispute consideration is not made available under the PTA or if reference is made to national or international legislation to solve trade quarrels, a provision or policy area is not necessarily less likely to be implemented in practice' (HOR p.8). For example, Investor State Dispute Settlement (ISDS) is not provided for under the Australia-United States agreement (AUSFTA), but dispute settlement for foreign investors is considered to be available in the database because of ready access to remedies through domestic legislation and courts.[22]

Agreements are listed by dates of entry into force so it is possible to track their evolution by coverage and enforceability in each policy area, regional characteristics and level of development of the parties.

[22] Access to domestic legal remedies was cited officially as justification for not having an ISDS in AUSFTA (DFAT 2004, p.12). In addition, Article 11.16 in AUSFTA provides for consultations to set up a mechanism for parties to submit to arbitration in the event of a dispute.

Approach in this report

Assessment and assignment of codes in each policy area of interest followed two discrete steps: (1) searching for provisions in areas of interest and (2), if missing, searching for provisions implicitly addressing them. In short, the analysis went beyond the traditional search for keywords. The analysis also involved dividing provisions on some policies into different groups, for instance provisions on investment and IP were split between WTO+ and WTO-X areas.

Significant limitations of the database should be borne in mind:

- The data are un-weighted. This needs to be taken into account when using composite measures, involving multiple agreements or policy areas.
    - Each agreement has the same impact on aggregate measures for each policy area. NAFTA and the European Union have the same weight as an agreement between two small developing economies.
    - All policy areas have equal significance when policy areas are considered together. Nuclear safety, cultural cooperation and illicit drugs, which are not commonly associated with trade agreements, have the same impact on composite measures as core trade policy areas such as investment and competition policy
- All policy areas have equal significance when policy areas are considered together. It is important to take this into account when using composite measures using more than one policy area
- The distinction between WTO+ and WTO-X imposes limitations, especially in analyzing services provisions. Services are considered as a single WTO+ policy area, although arguably they might be better divided into different sectors, spread between WTO+ and WTO-X areas. And the database cannot highlight effectively the interactions between services sectors, e-commerce and the digital economy more broadly
- The database documentation we have accessed makes no reference to reviews of trade agreements – that is to amendments and extension of liberalization and other provisions after agreements have entered into force. It is possible that the database does not take reviews fully into account, at least on a consistent basis. For example, the 1983 Australia-New Zealand agreement (ANZCERTA) was expanded in 1989 to include services (the Trade in Services Protocol) and in 2013 to include investment (the Protocol on Investment). The database shows ANZCERTA as covering services, but not TRIMs, foreign investment or movement of capital. To the extent the database does not take reviews of agreements into account, it may underestimate their coverage, enforceability and liberalizing intent.

The analyses in the stocktake paper and accompanying annexes present tables showing data for coverage and enforceability (including availability of dispute settlement) for all agreements ('World'), agreements involving at least one APEC economy and those between APEC economies ('intra-APEC').

Economies are split into two groups: 'Developed economies' and 'Developing and transition economies.'

- Developed economies include all OECD economies and 'high income' economies as classified by the World Bank. In APEC, therefore, the developed economies are Australia, Canada, Japan, New Zealand, and the United States (APEC's 'industrialised' economies); the Republic of Korea, Mexico and Chile (OECD members); and Chinese Taipei; Hong Kong, China; and Singapore.
- The development status of economies changes over time. Thus Chile is classified as a developing and transition economy until it joined the OECD in 2010.
- Where parties to an agreement are not in the same development group, agreements are categorised as between developed and developing/transition economies.

Selected Features

The database includes 91 pre-2001 agreements, beginning with the European Communities (EC) treaty in 1958. Just three agreements entered into force before 1970, 11 in the 1970s, 8 in the 1980s, 33 from 1990 to 1995, and 53 from 1996 to 2000. The earlier agreements had generally less 'depth' in terms of coverage and legal enforceability. Notable exceptions were the EC enlargements and the North American Free Trade Agreement (NAFTA). Table 1 shows the number of agreements - including APEC and intra-APEC agreements - entering into force before 1996 and in each five-year period from 1996.

APEC economies were party to over half the agreements entering into force from 2001 to 2015 (113 of 188) compared with less than half in the period to 2000. The shares of APEC in all agreements increased significantly from 2001, rising from 53 per cent in 2001-05 to 56 per cent in 2006-10 and to 73 per cent in 2011-15. Of these, around 40 per cent were intra-APEC agreements.

Table 1
Preferential Trade Agreements: 1958-2015
World and APEC

			APEC	
	World	**Non-APEC**	**All APEC**	**Intra-APEC**
pre-1996	55	29	26	3
1996-2000	36	29	7	2
2001-2005	53	25	28	11
2006-2010	79	35	44	19
2011-2015	56	15	41	14
TOTAL	279	133	146	49
2001-2015	188	75	113	44

Source: World Bank database documented in this annex

Along with growing involvement in negotiating trade agreements, APEC economies were party to agreements with increasing policy coverage that was, on average, at least as large, or greater than, agreements globally. This was especially marked for intra-APEC agreements. It also applies, though to varying degrees in different policy areas, to legal enforceability of provisions and availability of dispute settlement.

The richness of the database supports analysis of differences in agreements between different economies over different time periods. For example, Table 2 shows the average (unweighted) percentages of the identified policy areas covered in WTO+ and WTO-X areas in all agreements. It also shows the percentages of provisions that are considered to be 'legally enforceable' and, of those, for which dispute settlement is available. Again, overall legal enforceability and availability of dispute settlement are greater for APEC economies and greater still for intra-APEC economies than for non-APEC economies, especially for WTO+ measures.

Table 2
Preferential Trade Agreements: 1958-2015
World and APEC
Coverage, Enforceability and Availability of Dispute Settlement: Summary

			APEC	
	World	**Non-APEC**	**All APEC**	**Intra-APEC**
Coverage				
WTO+	70%	66%	72%	82%
WTO-X	21%	22%	20%	25%
Legally enforceable				
WTO+	62%	56%	69%	79%
WTO-X	11%	11%	11%	15%
Dispute settlement				
WTO+	58%	56%	63%	72%
WTO-X	8%	9%	7%	8%

Source: World Bank database documented in this annex

Table 3 captures clearly the trend towards deeper agreements over time, especially in coverage, legal enforceability and availability of dispute settlement by time period, with one caveat. The trend towards a greater proportion of agreements with dispute settlement provisions is not as evident for WTO-X provisions as for WTO+ provisions.

Table 3

Preferential Trade Agreements: 1958-2015
World and APEC
Coverage, Enforceability and Availability of Dispute Settlement

	World	Non-APEC	APEC	
			All APEC	Intra-APEC
WTO+				
Coverage				
pre-1996	51%	61%	39%	67%
1996-2000	53%	50%	66%	79%
2001-2005	72%	55%	76%	85%
2006-2010	80%	67%	82%	84%
2011-2015	82%	78%	82%	84%
Legally enforceable				
pre-1996	46%	56%	34%	55%
1996-2000	43%	39%	60%	79%
2001-2005	63%	47%	70%	82%
2006-2010	71%	54%	78%	79%
2011-2015	78%	63%	80%	82%
Dispute settlement				
pre-1996	45%	55%	34%	55%
1996-2000	40%	38%	47%	79%
2001-2005	59%	47%	65%	75%
2006-2010	67%	54%	73%	74%
2011-2015	68%	60%	70%	70%
WTO-X				
Coverage				
pre-1996	15%	23%	7%	13%
1996-2000	19%	18%	17%	26%
2001-2005	20%	21%	17%	19%
2006-2010	19%	24%	20%	25%
2011-2015	31%	18%	28%	31%
Legally enforceable				
pre-1996	10%	16%	3%	7%
1996-2000	6%	6%	10%	13%
2001-2005	9%	11%	9%	14%
2006-2010	10%	9%	13%	14%
2011-2015	18%	8%	17%	18%
Dispute settlement				
pre-1996	9%	15%	3%	6%
1996-2000	6%	5%	7%	8%
2001-2005	7%	10%	6%	9%
2006-2010	8%	9%	8%	9%
2011-2015	9%	7%	8%	7%

Source: World Bank database documented in this annex.

Table 4 shows the number of agreements struck among developed economies, between developed and developing/transition economies, and among developing and transition economies before 2001, and from 2001 to 2015. It illustrates the sharp increase in agreements negotiated after 2000, especially between developed and developing economies. APEC economies were parties to over half of them. It also illustrates that developed APEC member economies were especially active in negotiating agreements among themselves and with other developed economies, accounting for over 80 per cent of such agreements worldwide from 2001 to 2015.[23]

Table 4
Preferential Trade Agreements: 1958-2015
Developed, Developing and Transition Economies

			APEC	
	World	Non-APEC	All APEC	Intra-APEC
Pre 2001: Agreements between:				
Developed economies	25	19	6	2
Developed - Developing & transition	15	10	5	3
Developing & transition economies	51	29	22	0
	91	58	33	5
2001 -2015: Agreements between:				
Developed economies	33	5	28	16
Developed - Developing & transition	103	44	59	25
Developing & transition economies	52	26	26	3
	188	75	113	44
Total agreements between:				
Developed economies	58	24	34	18
Developed - Developing & transition	118	54	64	28
Developing & transition economies	103	55	48	3
	279	133	146	49

Source: World Bank database documented in this annex

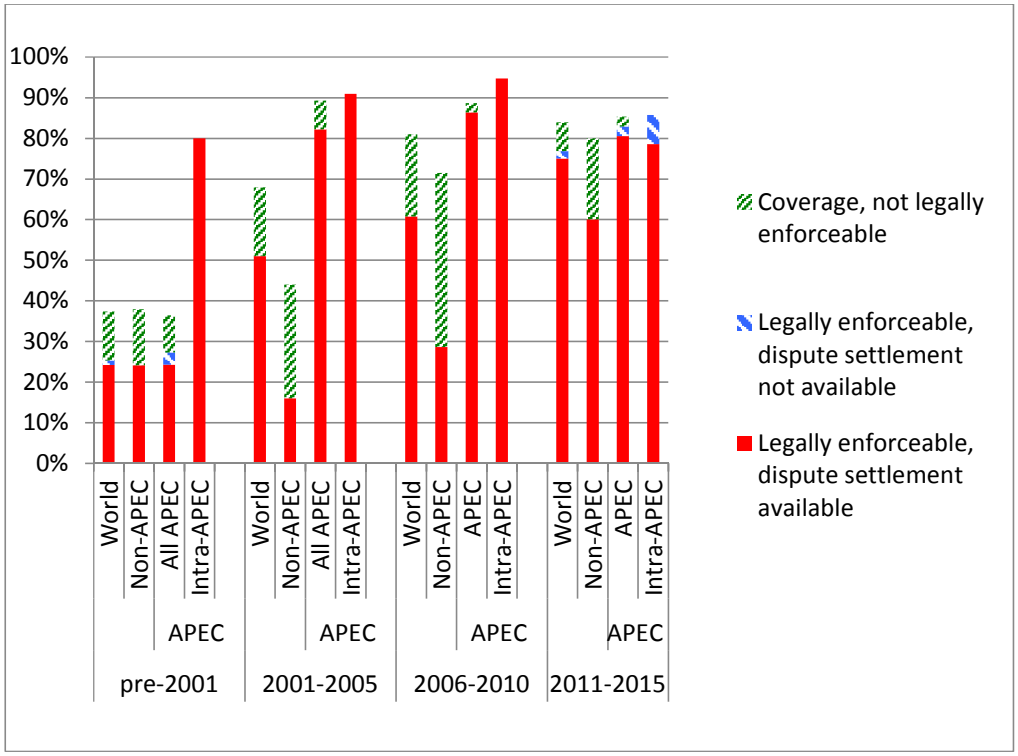
The main stocktake paper and other annexes consider coverage and enforceability in agreements by type of economy. By selectively drilling down into the detail, the analyses reveal differences between coverage and enforceability in different policy areas among agreements between different groups of economies. They also lead to a key conclusion: APEC-related agreements in general have coverage matching or exceeding world averages, especially since 2001.

Charts 1 and 2 and Tables 5 and 6 provide some examples of this for selected WTO+ and WTO-X policy areas. The charts show coverage and enforceability for GATS (liberalization of services) (WTO+) and competition policy provisions (WTO-X) for the years before 2001 and for five-yearly intervals up to 2015. The tables show data for GATS and Customs-related measures (WTO+) and for competition policy and foreign investment (behind-the-border) provisions (WTO-X) for the period 2001 to 2015 for agreements classified according to whether parties are developed economies or developing and transition economies.

[23] Note, however, that Table A4 shows that the number of intra-APEC agreements between developing and transition economies is small. Data concerning such agreements needs to be interpreted cautiously.

Chart 1

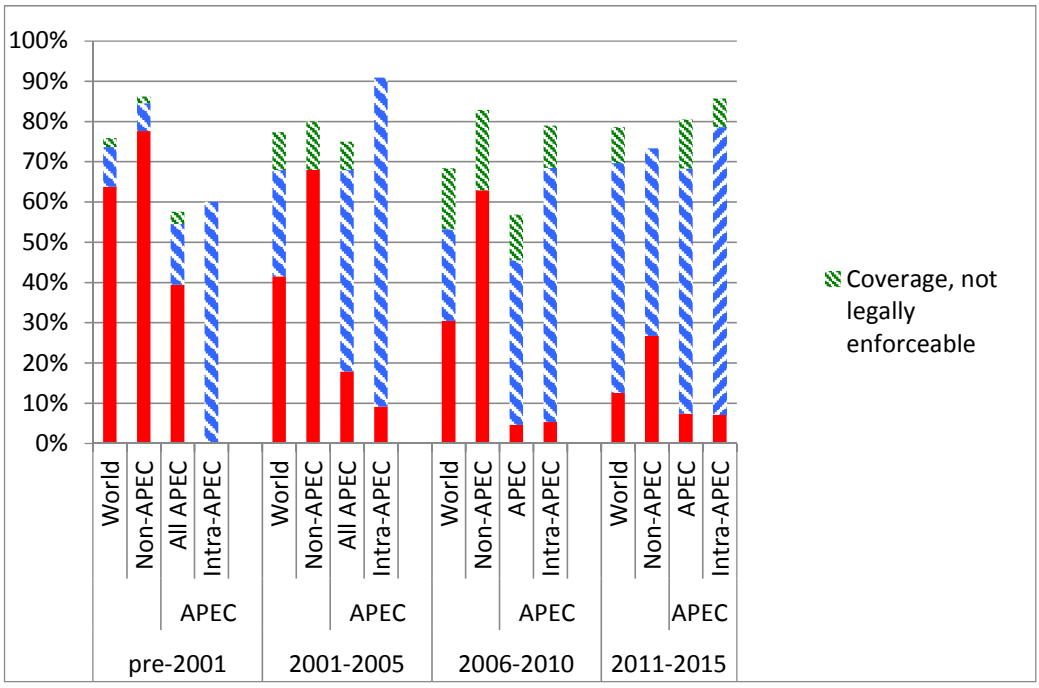
Preferential Trade Agreements: 1958-2015
WTO+: Coverage and Legal Enforceability
GATS (Liberalisation of Services)



Source: World Bank database documented in this annex

Chart 2

Preferential Trade Agreements: 1958-2015
WTO-X: Coverage and Legal Enforceabilty
Competition Policy



Source: World Bank database documented in this annex

Table 5

Preferential Trade Agreements: 2001-2015
Developed, Developing and Transition Economies
WTO+: Customs and GATS: Coverage and Enforceability

	World	Non-APEC	APEC All APEC	APEC Intra-APEC
Customs				
Coverage in agreements between:				
Developed economies	97%	100%	96%	100%
Developed - Developing & transition	97%	98%	97%	96%
Developing & transition economies	85%	81%	88%	100%
Legally enforceable in agreements between:				
Developed economies	97%	100%	96%	100%
Developed - Developing & transition	94%	95%	93%	96%
Developing & transition economies	75%	62%	88%	100%
Dispute settlement in agreements between:				
Developed economies	97%	100%	96%	100%
Developed - Developing & transition	94%	95%	93%	96%
Developing & transition economies	73%	58%	88%	100%
GATS				
Coverage in agreements between:				
Developed economies	94%	80%	96%	100%
Developed - Developing & transition	84%	75%	92%	88%
Developing & transition economies	56%	42%	69%	67%
Legally enforceable in agreements between:				
Developed economies	88%	80%	89%	100%
Developed - Developing & transition	61%	23%	90%	88%
Developing & transition economies	50%	35%	65%	67%
Dispute settlement in agreements between:				
Developed economies	85%	80%	86%	94%
Developed - Developing & transition	61%	23%	90%	88%
Developing & transition economies	50%	35%	65%	67%

Source: World Bank database documented in this annex.

Table 6

Preferential Trade Agreements: 2001-2015
Developed, Developing and Transition Economies
WTO-X: Competition Policy and Investment: Coverage and Enforceability

	World	Non-APEC	APEC	
			All APEC	Intra-APEC
Competition Policy				
Coverage in agreements between:				
Developed economies	82%	80%	82%	94%
Developed - Developing & transition	82%	91%	75%	80%
Developing & transition economies	54%	62%	46%	67%
Legally enforceable in agreements between:				
Developed economies	76%	60%	79%	88%
Developed - Developing & transition	75%	86%	66%	76%
Developing & transition economies	29%	35%	23%	33%
Dispute settlement in agreements between:				
Developed economies	15%	60%	7%	6%
Developed - Developing & transition	35%	70%	8%	8%
Developing & transition economies	23%	35%	12%	0%
Investment				
Coverage in agreements between:				
Developed economies	73%	40%	79%	88%
Developed - Developing & transition	76%	68%	81%	84%
Developing & transition economies	52%	38%	65%	67%
Legally enforceable in agreements between:				
Developed economies	64%	20%	71%	81%
Developed - Developing & transition	50%	20%	71%	76%
Developing & transition economies	44%	31%	58%	67%
Dispute settlement in agreements between:				
Developed economies	64%	20%	71%	81%
Developed - Developing & transition	50%	20%	71%	76%
Developing & transition economies	42%	31%	54%	33%

Source: World Bank database documented in this annex

In brief, the charts and data show:

- For the WTO+ content of agreements (Chart 1 and Table 5), coverage and enforceability of customs provisions in APEC are broadly similar to world levels, though greater in the case of intra-APEC agreements. For GATS/services liberalisation, the measures are also greater for APEC, especially intra-APEC agreements between advanced economies: all these agreements cover services and provide for legal enforceability and 94 per cent provide for dispute settlement.
- The data for WTO-X measures reflect the substantially greater engagement of developed economies in these measures, including in their agreements with developing and transition economies – a fact highlighted in the stocktake paper. The measures for

coverage, legal enforceability and availability of dispute provisions are all substantially greater, especially for competition policy. The measures for these policy areas are somewhat greater than for most other WTO-X areas. The chart reflects the comparatively high level of engagement in competition policy measures. It also reflects lower levels of enforceability in competition policy provisions since 2001, especially in agreements between APEC economies

These and other features that can be highlighted using the World Bank database are addressed in more detail in the stocktake paper and annexes.

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Description of policy areas[24]

WTO+ (WTO plus) areas

FTA Industrial: Tariff liberalization with regard to industrial goods; elimination of non-tariff measures.

FTA Agriculture: Tariff liberalization with regard to agriculture goods; elimination of non-tariff measures.

Customs: Provision of information; publication on the internet of new laws and regulations; training. Incl. provisions on trade facilitation.

Export Taxes: Elimination of export taxes. Examples: Elimination of customs duties on exports, elimination of duties, taxes or other charges on exports.

Sanitary and Phytosanitary: Affirmation of rights and obligations under the WTO Agreement on SPS; harmonization of SPS measures.

Technical Barriers to Trade: Affirmation of rights and obligations under WTO Agreement on TBT; provision of information; harmonization of regulations; mutual recognition agreements.

State Trading Enterprises: GATT Article XVII. Establishment or maintenance of a state trading enterprise (STE) in accordance with and affirming provisions of GATT. Non-discrimination regarding production and marketing condition; provision of information.[25]

Anti Dumping: Retention of antidumping rights and obligations under the WTO Agreement (GATT Article VI).

Countervailing Measures: Retention of countervailing measures rights and obligations under the WTO Agreement (GATT Article VI).

State Aid: Assessment of anticompetitive behavior; annual reporting on the value and distribution of state aid given; provision of information.

Public Procurement: Progressive liberalization; national treatment and/or non-discrimination principle; publication of laws and regulations on the internet; specification on public procurement regime.

Trade Related Investment Measures: Provisions concerning requirements for local content and export performance on FDI. Applies only to measures that affect trade in goods.

General Agreement on Trade in Services: Liberalization of trade in services.

Trade Related Aspects of intellectual Property Rights: Harmonization of standards; enforcement; national treatment, most- favored nation treatment. International treaties

[24] Policy areas are described and presented in Hofmann, Osnago and Ruta (2017) and in the order in which they appear in the data base.

[25] This stocktake considers provisions affecting the wider commercial activities of state owned enterprises. This is broader than the coverage of GATT Article XVII (State Trading Enterprises), which is concerned with influence over the levels and directions of imports and exports of goods. Nonetheless, RTAs with WTO+ provisions on STEs, especially more recent agreements, build on GATT provisions. (See Annex I.)

referenced in TRIPS: Paris Convention, Berne Convention, Rome Convention, IPIC Treaty.

WTO-X (WTO□extra) areas

Anti-Corruption: Regulations concerning criminal offence measures in matters affecting international trade and investment.

Competition Policy: Chapter/provision on competition policy in general, could include prescriptions as regards anticompetitive business conduct; harmonization of competition laws; establishment or maintenance of an independent competition authority, among others.

Environmental Laws: Development of environmental standards; enforcement of national environmental laws; establishment of sanctions for violation of environmental laws; publications of laws and regulation.

Intellectual Property Rights: Accession to international treaties not referenced in the TRIPs Agreement.

Investment: Information exchange; Development of legal frameworks; Harmonization and simplification of procedures; National treatment; Establishment of mechanism for the settlement of disputes.

Labour Market Regulation: Regulation of the national labour market; affirmation of International Labour Organization (ILO) commitments; enforcement.

Movement of Capital: Liberalization of capital movement; prohibition of new restrictions.

Consumer Protection: Harmonization of consumer protection laws; exchange of information and experts; training.

Data Protection: Exchange of information and experts; joint projects.

Agriculture: Technical assistance to conduct modernization projects; exchange of information.

Approximation of Legislation: Application of international legislation in national legislation. Any form of legislation that provides for approximation of laws. [Appears mainly in customs unions.]

Audio Visual: Promotion of the industry; encouragement of co-production.

Civil Protection: Implementation of harmonized rules.

Innovation Policies: Participation in framework programmes; promotion of technology transfers.

Cultural Cooperation: Promotion of joint initiatives and local culture.

Economic Policy Dialogue: Exchange of ideas and opinions; joint studies.

Education and Training: Measures to improve the general level of education.

Energy: Exchange of information; technology transfer; joint studies.

Financial Assistance: Set of rules guiding the granting and administration of financial assistance.

Health: Monitoring of diseases; development of health information systems; exchange of

information.

Human Rights: Respect for human rights.

Illegal Immigration: Conclusion of re-admission agreements; prevention and control of illegal immigration.

Illicit Drugs: Treatment and rehabilitation of drug addicts; joint projects on prevention of consumption; reduction of drug supply; information exchange.

Industrial Cooperation: Assistance in conducting modernization projects; facilitation and access to credit to finance.

Information Society: Exchange of information; dissemination of new technologies; training. Cooperation and exchange of information (often in the context of other policies).

Mining: Exchange of information and experience; development of joint initiatives.

Money Laundering: Harmonization of standards; technical and administrative assistance.

Nuclear Safety: Development of laws and regulations; supervision of the transportation of radioactive materials.

Political Dialogue: Convergence of the parties' positions on international issues.

Public Administration: Technical assistance; exchange of information; joint projects; training.

Regional Cooperation: Promotion of regional cooperation; technical assistance programmes.

Research and Technology: Joint research projects; exchange of researchers; development of public- private partnership.

Small and Medium Sized Enterprises: Technical assistance; facilitation of access to finance.

Social Matters: Coordination of social security systems; non-discrimination regarding working conditions.

Statistics: Harmonization and/or development of statistical methods; training.

Taxation: Assistance in conducting fiscal system reforms.

Terrorism: Exchange of information and experience; joint research and studies.

Visa and Asylum: Exchange of information; drafting legislation; training. Incl. international movement of persons.

B. Traditional issues developed in new ways

For supply chains to work effectively, traditional issues like reducing and eliminating tariffs and modernizing rules of origin, customs processes, and product standards must remain a bedrock issue for trade policy even as the new trade agenda increasingly takes centre stage. Even nuisance level tariffs can add significantly to exporters' costs in an environment where components cross and re-cross national borders until finished articles are delivered to final markets. Rules of Origin (ROO) are a key component of any regional trade agreement on goods because they determine which goods are eligible for preferential tariff treatment. This puts a premium on developing more flexible criteria for establishing origin because, all things being equal, this increases opportunities for more domestic value adding between parties to a trade agreement. Similarly, initiatives to reduce trade costs through faster and more efficient customs clearance of goods increase opportunities particularly for small and medium enterprises to participate in supply chains. And initiatives that build trust and increase compatibility between anonymous buyers and sellers, for example through agreements that encourage the use of international standards and quality assurance systems, boost opportunities for businesses to specialize and attract direct investment and internationally mobile skills.

This annex looks briefly at three traditional issues – tariffs, ROO and sanitary and phytosanitary (SPS) measures– to underline their importance in reducing trade costs and increasing the predictability of trade and their key role in modern RTAs.

Tariffs

RTAs in the APEC region compare well against the world as a whole in terms of tariff reduction and elimination. Comparing the percentage of tariff lines at the HS 6 digit level across APEC economies, it is clear from Table 1 that:

- the share of duty free lines is typically substantially higher on entry into force of RTAs compared with APEC economies' MFN commitments
- the share of duty free lines is typically well over 90 per cent by the end of the phase-in. For the world as a whole, it is 90.6 per cent, and
- some developing economy members of APEC – for example Indonesia, the Philippines, Thailand, and Vietnam - start with a low share of duty free lines on an MFN basis but finish with over 90 per cent of duty free lines by the end of the phase-in.

Modern RTAs in the APEC region, and ambitious RTAs more generally, aim to liberalise at least 90 per cent of all trade and some agreements make 95 per cent the key threshold. This precision is a recent development linked to the pragmatism of RTAs in addressing supply chain issues. The GATT and the WTO failed to define the meaning of 'substantially all trade' in GATT Article XXIV on RTAs because of differences over quantitative and qualitative interpretations of the article, and further differences over the meaning of 'substantially all trade' and 'trade in substantially all products' (WTO 1997).

Like in the rest of the world, RTAs among APEC members struggle to reduce tariff peaks in agriculture. Tariff outcomes at the end of what is often a long phase-in vary widely with Korea at under 60 per cent of agricultural tariff lines duty free and Australia and New Zealand at 100

per cent. 'Countries with sensitivities in agriculture tend to extend the same protection when negotiating with their RTA partners' (Crawford 2016, p. 45). This sensitivity applies equally to some areas of manufacturing.

Table 1
Liberalisation in RTAs across all Goods: selected APEC Members

Economy	Percentage share of duty free lines HS 6 digit level		
	MFN	Entry into Force	End of liberalisation
Australia	46.3	93.9	100.0
Brunei Darussalam	78.0	80.7	99.7
Canada	54.3	96.8	97.8
Chile	0.2	75.9	92.0
China	5.8	39.7	85.5
Hong Kong, China	100.0	100.0	100.0
Indonesia	13.2	65.3	93.2
Korea	13.6	77.8	93.5
Japan	50.4	88.0	93.0
Malaysia	59.2	72.0	92.9
Mexico	15.5	47.9	93.2
New Zealand	57.3	81.0	99.9
Peru	46.7	73.1	98.1
The Philippines	1.8	60.2	96.3
Singapore	100.0	100.0	100.0
Chinese Taipei	28.7	72.9	97.6
Thailand	13.0	59.2	99.0
United States	37.8	91.5	99.7
Vietnam	33.8	34.1	95.0

Source: J-A Crawford 2016, 'Market access provisions on trade in goods in regional trade agreements', in R Acharya, *Regional Trade Agreements and the Multilateral Trading System*, Cambridge University Press, Kindle Edition.
Note: the analysis is based on RTAs notified to the WTO by December 2014 for which data are publicly available.

Rules of Origin

Restrictive rules of origin are often seen in the literature as hidden forms of protection and powerful contributors to the 'spaghetti' bowl effect (e.g. WTO 2002). This conclusion is grounded in the observable fact that the positive benefits from reducing and eliminating tariffs can be offset by stringent rules for determining origin.

Over recent years, the stringency of these rules has been relaxed. It is now easier (and less costly) to determine the circumstances under which goods imported from a party to an agreement can be given preferences where they contain inputs from non-parties – a common occurrence in supply chain trading:

> A general review of the PROs [preferential rules of origin] [in a major study of 252 RTAs]… shows that, in the vast majority of cases a combination of methods for determining origin is used – namely a change in tariff classification (CTC, with the change in tariff heading or CTH being the most used), value-added and processing requirements (Abreu 2016, p. 61).

In line with international best practice, APEC economies have incorporated this flexibility in recent RTAs (Kuriyama 2016, pp. 2, 12-13). Indeed, in some cases, starting with the ASEAN-Australia-New Zealand Free Trade Agreement (2010), they have improved on it by allowing

exporters to claim a preference by satisfying the least costly of three co-equal rules on CTC, regional value content and processing.

Developing modern, simple and consistent ROO, however, has a long way to go. There are different families of ROO; different approaches to cumulation; different treatment of least developed economies; different approaches to declaration and certification of origin and so on. Given its importance, there is a strong need to get back to basics: just what has to be done to make ROO easy for traders to understand and comply with, and what can be done to make ROO more consistent across economies' RTAs.

Sanitary and phytosanitary (SPS) measures

The world relies on standards and quality assurance systems on animal and plant health and food safety. Global demand for these standards and assurance systems is driven by the value attached to food safety and the need to continue to streamline approvals processes, reduce costs and improve the predictability of trade in animal and plant products.

The majority of RTAs with SPS provisions do not go beyond parties' rights and obligations as set out in the WTO's 1995 Agreement on the Application of Sanitary and Phytosanitary Measures. Nonetheless, the level of SPS detail in RTAs has increased over time - they now typically include dedicated SPS chapters. Detail tends to be greatest in agreements between parties that are geographically disparate, where different animal and pest health conditions may apply and where different management systems may have evolved to deal with different risks (Jackson and Vitikala 2016).

As part of streamlining systems and reducing trade costs, modern RTAs have built on the WTO SPS Agreement in some areas, including by:

- Identifying contact points for coordinating implementation of agreements and exchanging information (e.g. ASEAN– China Trade in Goods Agreement; Chile– Japan Economic Partnership Agreement)
- Acknowledging pest- and disease-free areas across regions prone to particular risks in order to support unnecessary interruptions to trade (e.g. Peru– Republic of Korea FTA) and developing principles, criteria and processes on adapting to regional conditions (e.g. China– New Zealand FTA)
- Referring to equivalent standards and procedures developed by international organisations (e.g. ASEAN Free Trade Area; Peru-Singapore FTA)
- Further developing and applying concepts of equivalence and mutual recognition of different SPS measures (e.g. EU-Canada CETA). Different measures, if recognized as providing equivalent levels of protection, can reduce costs of trading across international borders by reducing onerous but legitimate SPS processes.

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C. Transparency and Anti-Corruption[26]

The transparency provisions of regional trade agreements (RTAs) have attracted increased attention over the past two decades, with some agreements breaking new ground in their treatment of it. A large number of agreements include transparency in the preamble as an important objective. Many have a separate chapter on transparency, as well as separate transparency provisions in other chapters (or sections of them) dealing with such issues as goods, services, competition policy, technical barriers to trade, government procurement and Investor-State Dispute Settlement (ISDS) (Lejárraga 2013, pp.6, 26).

The shift towards greater emphasis on transparency is bound up with the growing emphasis on 'behind the border' barriers to goods and impediments to services trade and investment as tariff barriers have come down. The number of RTAs tackling issues like services, investment and competition policy, as well as goods, has expanded extremely rapidly since the mid-1990s according to research published by the World Economic Forum and the International Centre for Trade and Sustainable Development. Indeed, such 'deep integration agreements' by 2012 constituted somewhere in the region of 40 per cent of all RTAs in force (Suominen 2016, p.10).

As the coverage of agreements has broadened and deepened, the requirements for information about them has increased. Moreover, as Lejárraga (2014, p.25) points out many provisions in areas as diverse as technical barriers to trade, sanitary and phytosanitary measures, export restrictions, government procurement, services and investment 'are not aimed at the removal of regulations per se, but rather at enhancing their *ex ante* and *ex post* transparency and facilitating procedures to render them less restrictive and uncertain'. This too has contributed to a trend towards more comprehensive coverage of transparency, both globally and in APEC economies.

Research by Lejárraga and Shepherd (2013), based on a large database of bilateral RTAs, suggests that several factors help to determine the differing scope and depth of transparency provisions across different RTAs. Not surprisingly, the authors find that transparency commitments are more likely to be comprehensive where the participants have democratic institutions and high levels of governance. Other factors which make comprehensive commitments more likely are a substantial difference in per capita incomes (so that RTAs between higher and lower income economies are more likely to contain strong provisions); significant cultural (especially language) differences; large populations; and at least one party acceding to the WTO after 1995.[27]

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[26] Transparency is defined broadly here to include, not only the publication of information about trade and investment regulations and agreements, but also opportunities for participate in consultation arrangements on them and to comment on them, rights to appeal against decisions on trade regulations and tackling corruption.

[27] In looking at the transparency provisions applying to technical barriers to trade in regional trade agreements (RTAs), the WTO identified differences between the comprehensiveness of transparency provisions on a geographical basis. It found that agreements in the Americas and Asia were much more likely to contain strong provisions than those involving Africa or Europe. These differences were not small: in the Americas and Asia, over 60 per cent of RTAs had transparency provisions in sections of the agreement dealing with technical barriers to trade, whereas in Europe and Africa the figure was around 20 per cent. In Europe's case, the low proportion partly reflects the emphasis on harmonization of standards, as opposed to mutual recognition in agreements in the Americas (WTO 2011, pp.141-142).

According to one study released by the OECD, deep provisions on transparency strongly promote bilateral trade, with just one additional transparency commitment associated with a more than one per cent increase to bilateral trade flows (Lejárraga and Shepherd 2013, p.18). Transparency is particularly important in encouraging the involvement of SMEs in global supply chains, given that they face substantial fixed costs when seeking information on, and accessing, prospective markets. Corruption and bribery are also contrary to the interests of the public and business, both small and large, and this is reflected in two codes which APEC economies have released applying to the conduct of public officials and to business integrity (APEC 2007a; 2007b).

The transparency provisions in RTAs typically build on commitments that are contained in multilateral trade agreements. Article X of the GATT (1947, 1994) and Article III of the GATS are particularly important. Many RTAs deepen these provisions with 'WTO+' commitments seeking to ensure, as examples, publication of regulations and other material on the Internet, publication in English, the ability of stakeholders from the other party or parties to participate in consultations on domestic regulations, and strengthened rights to appeal. 'WTO-beyond' – or WTO-X - commitments (where the commitments have no parallel in the WTO) mainly address bribery and corruption at this stage (Lejárraga 2013, 7, 36-37).

Table 1
Transparency Provisions in Selected Free Trade Agreements

	Preamble Objective	Separate Chapter	WTO+	WTO-X	Dispute Settlement
AFTA	No	No	Yes	No	Yes
AANZFTA	No	No	Yes	No	Partial
EU-Canada	Yes	Yes	Yes	No	Partial
PACER Plus	No	Yes	Yes	No	Yes
Pacific Alliance	Yes	Yes	Yes	Yes	Yes
CPTPP	Yes	Yes	Yes	Yes	Partial

Source: Agreement texts. Dispute settlement refers to whether transparency and anti-corruption articles are subject to the dispute settlement provisions of the agreement. WTO+ commitments are those which deepen WTO provisions (for example, by requiring a notice period and opportunities to comment on laws and regulations). WTO-X commitments have no parallel in the WTO agreements. In this table, they are limited to provisions on corruption and bribery. The comparisons should be used with caution as they do not capture important differences in commitments under the headings given. For example, the Pacific Alliance provisions on anti-corruption are far more limited than those in the CPTPP.

In looking at the transparency provisions of RTAs, there are a number of questions which should be addressed, among them: (1) whether transparency is accorded high priority as an objective with inclusion in the preamble to the agreement; (2) whether there is a separate chapter on transparency in the agreement; (3) whether there are WTO+ commitments, which deepen commitments in multilateral agreements, as opposed ones which simply reiterate those in GATT Article X, GATS Article III and other relevant WTO provisions; (4) whether there are capacity-building and other cooperation provisions regarding transparency;(5) whether there are WTO-X commitments, notably on bribery and corruption; and (6) whether

commitments are enforceable or are simply best endeavours.[28] Table 1 compares several agreements with respect to some of these criteria.

Among agreements involving APEC economies, the text of the CPTPP is one of those that stands out. On the key issue of the presence of WTO+ commitments, it scores well in setting minimum standards (though many of the WTO+ commitments are akin to a best-endeavours basis).[29] Thus:

- In line with GATT Article X, it provides for prompt publication of laws, regulations and the like that affect matters covered by the agreement, but goes further to state that to the extent possible, parties should publish these in advance and allow for a reasonable opportunity for interested persons to comment (Parties are to endeavour to allow at least 60 days for this, or another period which provides time for comment). Publication is also preferably to be online.
- Parties are to endeavour to provide a reasonable time between publication of laws and regulations and their entry into force.
- Parties shall ensure that whenever possible, those subject to administrative proceedings are given reasonable notice of them, as well as a reasonable opportunity to present relevant facts and arguments 'when time, the nature of the proceeding and the public interest permit'.
- There is provision for prompt and independent review of decisions (GATT Article X already provides for this in relation to customs issues)

The EU-Canada CETA is another example of a modern agreement with many important WTO plus provisions applying to transparency. In the case of technical barriers to trade, for example, the agreement requires that Parties ensure that interested persons from the Parties can participate at an early stage in the development of regulations and conformity assessment procedures, except where urgent issues such as safety or national security arise. Where the consultation process is open to the public, a national treatment provision applies so persons from the other Party 'participate on terms no less favourable than those accorded to … persons [from the first Party]'. Parties must also ensure that technical regulations and conformity assessment procedures are available to the public on official websites and that importers are informed of the reason when goods are prevented from entering because a technical regulation is infringed.

For sanitary and phytosanitary laws and regulations, PACER Plus provides an example of provisions that deepen WTO commitments.[30] The Australian Department of Foreign Affairs and Trade (DFAT) notes that in this regard PACER Plus 'requires prompt publication of … laws and regulations, and for Parties to allow a reasonable period – not less than six months – between publication and implementation to allow businesses in exporting countries time to

[28] A number of these issues are discussed by Lejárraga (2013).

[29] The language in the commitments described below ('shall', 'shall ensure whenever possible' and the like) provides an indication as to how far they are mandatory. It is also relevant to note whether the commitments are subject to the dispute settlement provisions of the RTA: for example, this is not the case for one of the anti-corruption provisions in the TPP discussed below.

[30] There are many other WTO+ provisions in PACER Plus. These are documented on the DFAT website.

adapt their products and production processes to the requirements of importing countries' The Agreement also establishes contact points for dealing with SPS matters (DFAT 2017).

A number of agreements involving regional economies have WTO-X provisions covering bribery and corruption. As Lejárraga (2014, p.26) notes:

> 'The evolution of anti-corruption illustrates how WTO-beyond measures are adopted and enhanced over time. The measure was first introduced in the RTAs of the United States and adopted by other economies. The first RTAs made minimal provisions (Australia and Chile), and were largely best-endeavor (Singapore). In a second iteration, the RTAs starting with Morocco and DR-CAFTA started to display significantly stronger commitments: for instance, each of these incorporated whistle-blower protection, first cast in hortatory language and later in the subsequent RTA with Korea, such obligation was rendered mandatory. In a similar vein, more recent RTAs introduced new measures providing for non-criminal sanctions for enterprises that cannot be punished criminally. These measures have emerged in the RTAs of Canada and other economies, being present in 40% of a sample of 120 RTAs signed since 2001.'

More comprehensive data on the coverage and enforceability of anti-corruption provisions in RTAs are available from the World Bank database documented in Annex A. At the global level, these data show the share of agreements with anti-corruption provisions rising from zero prior to 2001, to eight per cent of those entering into force over 2001-2005 and then to 32 per cent over 2011-2015. But even by 2011-2015, only around 13 per cent of agreements entering into force had anti-corruption provisions that were both legally enforceable and subject to dispute settlement. Coverage of anti-corruption over 2001-2015 was somewhat higher for agreements involving at least one APEC economy and higher still for intra-APEC agreements. But of the intra-APEC agreements that entered into force over 2001-15, only one had legally enforceable provisions.

Table 2

Anti-Corruption Provisions in Regional Trade Agreements: 1958-2015

Percentage of Agreements Entering into Force

			APEC	
	World	**Non-APEC**	**All APEC**	**Intra-APEC**
Coverage				
1958-2015	12%	6%	18%	27%
2001-2015	18%	11%	23%	30%
pre-1996	0%	0%	0%	0%
1996-2000	0%	0%	0%	0%
2001-2005	8%	8%	7%	18%
2006-2010	15%	3%	25%	26%
2011-2015	32%	33%	32%	43%

Source: World Bank database documented in Annex A.

Inclusion of anti-corruption provisions in RTAs has been driven mainly by developed economies, especially the United States. It is therefore not surprising that coverage of anti-corruption in agreements over 2001-2015 involving only developed economies (30 per cent) was appreciably higher than in agreements between developed and developing and transition economies (19 per cent) and in agreements involving only developing and transition economies (eight per cent).

Among the modern agreements examined in this report, the CPTPP includes bribery and corruption in the transparency provisions, but the EU-Canada CETA does not.[31] The text of the CPTPP states that:

- Each Party shall adopt measures to make bribery of officials and corruption criminal offences where they affect international trade and investment.
- Parties are to endeavour to promote integrity, honesty and responsibility of public officials (for example, by measures to require that senior and other relevant officials declare gifts or benefits that may give rise to a conflict of interest).
- Parties are to enforce their laws on corruption (though this aspect of the agreement is not subject to its dispute settlement provisions).
- Parties are to promote active participation of persons outside the public sector in programmes to address corruption and bribery. For example, they may undertake public information activities for this purpose.

A model RTA chapter on transparency developed by APEC was released at the Vladivostok Ministerial Meeting in 2012 (APEC 2012). This model chapter includes a solid set of WTO-plus provisions on transparency, but does not address corruption and bribery. Given that provisions in RTAs on transparency are evolving, there might be scope to look again at this issue in considering measures which would help to promote the realization of FTAAP. Any such review might also include the transparency provisions of other parts of RTAs like technical barriers to trade and ISDS. A possible initial work programme might include:

- Forming a small ad hoc group under the CTI's oversight to examine the issue
- APEC members submitting details of the transparency arrangements in key agreements to which they are a party or to which they intend to become a party
- The ad hoc group reviewing this information to ascertain whether the model chapter and other relevant transparency provisions need to be updated and reporting to the CTI.

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[31] The EU-Canada CETA does, however, specify in Article 8.19 that an investor may not make a claim in a dispute with a member state where the investment has been made through a process that involved corruption.

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D. Trade Facilitation and Regional Cooperation

Falling average tariff levels over recent decades have exposed non-tariff barriers (NTBs) at and behind the border as the chief impediments to value chain trade, now accounting for around 80 per cent of global trade. Trade facilitation is an increasingly prominent element of trade negotiations and is one part of national, regional and global efforts to tackle NTBs. The turning point was launching World Trade Organization (WTO) negotiations on the Trade Facilitation Agreement (TFA) in 2004. Before that time, the great bulk of bilateral and regional trade agreements contained few, if any, provisions on trade facilitation beyond standard provisions or chapters on customs processes. After that time, virtually all RTAs referred in some way to trade facilitation (Neufeld 2016, pp. 113-14).

There is no shared definition of trade facilitation either among international organisations or across RTAs. The scope depends on the interests and priorities of the parties concerned. In the TFA, the WTO focuses on reducing trade costs through simplifying international trade rules and procedures on freedom of transit (GATT Articles V), fees and formalities connected with import and export (Article VIII) and general exceptions (Article X), as well as on cooperation. At its broadest, trade facilitation encompasses any procedure, process or policy that reduces transaction costs and facilitates international trade (Wille and Redden 2007). This could include customs processes, paperless trading, logistics services, insurance and payment systems, as well as physical infrastructure like transport systems.

The concept of treating trade facilitation broadly seems appropriate for RTAs. It reflects their wider scope on trade facilitation, particularly in recent agreements, and highlights their relevance to reducing trade cost and increasing access to value chains. It fits in with APEC's work on reducing trade costs through the Supply Chain Connectivity Framework Action Plan (APEC 2016a; APEC 2016b),[32] and more generally with APEC's international leadership on trade facilitation issues since its inception nearly 30 years ago. It also links into issues like how regulatory systems and economic capacity are being advanced in RTAs (and through aid for trade investments) to increase the efficiency of international production networks.

This annex is structured as follows. Trade costs across the Asia-Pacific region are discussed first. This is followed by a discussion on how trade facilitation measures have been developed in RTAs involving APEC members and others. Finally, possible implications are considered briefly for future APEC-related work on facilitation.

Trade costs

Costs relating to merchandise trade can be seen as part of a broad continuum that stretches from costs incurred in getting goods to the border, costs at the border and costs beyond the border. It is impossible to give a precise average weighting for these costs, but international evidence suggests that costs linked to transport, border procedures and meeting non-tariff measures (including standards) are significant. Costs linked to trade finance and accessing network infrastructure (information technology, power, telecommunications) also are important. Tariff costs are much less important than in the past (ESCAP 2012, pp. 26-29).

[32] In APEC 2016b, eight chokepoints were identified in establishing efficient supply chain connectivity. Some like regulatory transparency and burdensome customs processes are addressed typically in RTAs. Others like variations in cross-border standards and regulations, lack of regional cross-border customs transit arrangements and lack of capacity in regional logistics services are less common.

Significant costs also are incurred in services trade. This applies especially to delivery of services via establishing commercial presence in overseas markets – by far the most important way for trading in services. (See Annexes G and H.) Costs include fees and charges in relation to legal formalities (for example establishing joint ventures); business set-up requirements (for example in relation to business licensing requirements and variations in scope of business); meeting foreign ownership limits and local content requirements; and restrictions on repatriating profits.

Table 1 provides an indication of how trade costs vary across the Asia-Pacific region in comparison with three EU economies – Germany, France and the United Kingdom. Average intra-regional trade costs are lowest in the EU-3; are somewhat higher between Australia and New Zealand and in East-Asia; are almost double in ASEAN; and are around three times higher in North and Central Asia and Pacific Island Countries – a level that could potentially distort economies' comparative advantages and certainly limit opportunities for trade. A similar set of circumstances – high trade costs linked to weaknesses in information flows, regulations, transport and trade facilitation – also discourages intra-regional trade in Latin America, limits involvement of small and medium companies in international trade and reduces options for joining regional and global value chains (IDB 2015, pp. 1-7.)

Table 1

Intra- and extra-regional comprehensive trade costs in tariff equivalents in the Asia-Pacific region: 2010-2015

(excluding tariff costs)

Region	ASEAN-4	East Asia - 3	North & Central Asia - 4	Pacific Islands-2	ANZ	EU-3
ASEAN - 4	76					
East Asia - 3	76	51				
North & Central Asia - 4	343	167	116			
Pacific Island Econs				130		
ANZ	101	87	341	82	51	
EU-3	105	84	150	204	108	42
USA	86	63	174	161	100	67

Source: ESCAP 2017, pp. 2-3

Note: Trade costs may be interpreted as tariff equivalents. They are defined by ESCAP as the difference between all costs involved in trading goods bilaterally and those involved in trading goods domestically. They include international shipping and logistic costs, policy barriers (tariff and non-tariff costs), legal and regulatory costs, and costs associated with the use of different languages and currencies.

ASEAN-4: Indonesia, Malaysia, Philippines, Thailand; East Asia-3: China, Japan, Republic of Korea; North and Central Asia-4: Georgia, Kazakhstan, Kyrgyzstan, Russian Federation; Pacific islands-2: Fiji, Papua New Guinea; ANZ: Australia, New-Zealand; EU-3: Germany, France, United Kingdom; USA: the United States of America.

There is a strong correlation across the Asia Pacific region and more broadly between economies' international trade costs and the level of implementing trade facilitation measures (ESCAP 2017, p. 21). For example, full implementation of binding and non-binding measures

in the TFA could reduce average trade costs in the Asia-Pacific region by 15 per cent annually, and full implementation of both these and other measures promoting digital trade facilitation could reduce costs by more than 26 per cent annually. In the case of least developed economies, the savings could be in the order of 40 per cent (Duval and Kravchenko 2017, pp. iv, 41).

There also is a correlation between large reductions in trade costs and stronger trade growth (World Bank 2015, pp. 60-82), particularly through the greater engagement of micro, small and medium enterprises (MSMEs) in international trade and by providing increased opportunities for developing economies – especially the least developed – to engage in trade. Trade costs can be reduced in several ways. The key is improving an economy's business and investment environment, which mostly comes down to unilateral reform like reducing overall costs of doing business, creating a more secure environment for foreign direct investment, liberalising logistics and information services, digitalising customs and border agencies, and perhaps rolling out blockchain technology (Green 2017). Costs also are reduced by improving regional connectivity: developing key gateway facilities and diffusing best practice regulations within and across regions are examples. The possible role of PACER Plus (2017)[33] in reducing trade costs is illustrated in Box 1.

Box 1
Reducing Trade Costs in Pacific Island Countries: PACER Plus's Contribution to Strengthening and Modernising Customs Procedures and Processes

PACER Plus commits Australia and New Zealand to continue to streamline and modernise customs procedures and processes in Pacific Island Countries (PICs) as part of a multi-part strategy to facilitate trade and people movement aimed at promoting greater regional economic integration and the growth and jobs that should follow.

PIC intra-regional and inter-regional trade costs as a proportion of total trade values are among the highest in the world. In part, this reflects circumstances that cannot be changed such as geographical isolation and small market size. But it also reflects circumstances that can be changed such as the availability and quality of 'hard' and 'soft' infrastructure and the efficiency of transport systems and border arrangements.

Substantially reducing trade costs is essential if the PICs are to become more integrated in global exports and imports. PACER Plus, along with aid-for-trade investments, will intensify Australian and New Zealand involvement in improving regional customs services, for example by providing increased training and assistance in areas from goods classification, valuation and risk management to introducing or upgrading automated customs systems to drafting new customs legislation and drafting confidentiality laws and regulations.

Achieving successes on border processing could help to build momentum for tackling more intractable supply side problems like the PICs' 'hard' infrastructure deficit.

This approach appears to be in line with recent research that suggests that, if PICs are to succeed in reducing cross-border trade costs, RTAs need to focus on strengthening trade facilitation-related provisions, raising PIC capacity to implement trade facilitation-related obligations, and making trade facilitation reforms a central element of national trade and development policy (Azapmo 2017).

[33] The Pacific Agreement on Closer Economic Relations (PACER) Plus is a regional development-centred trade agreement concluded in April 2017 between Australia, New Zealand and eight Pacific Island countries: Cook Islands, Kiribati, Nauru, Niue, Samoa, Solomon Islands, Tonga, and Tuvalu.

Table 2 provides an insight into the challenge posed by high trade costs for APEC economies, focusing on logistics performance. The key insight is that two-thirds of APEC members are in the top quarter of the World Bank's Logistics Performance Index (LPI). But the index also reveals the uneven performance of economies across each element of the LPI, with some elements like infrastructure and international shipping connectivity especially difficult to address.

Table 2
Logistics Performance Index (LPI): APEC Economies, 2016

	LPI Rank (out of 160 econs)	LPI Score	Customs	Infrastructure	International Shipping	Logistics competence	Tracking/ tracing	Timelines
Singapore	5	4.14	4.18	4.20	3.96	4.09	4.05	4.40
Hong Kong, China	9	4.07	3.94	4.10	4.05	4.00	4.03	4.29
United States	10	3.99	3.75	4.15	3.65	4.01	4.20	4.75
Japan	12	3.97	3.85	4.10	3.69	3.99	4.03	4.21
Canada	14	3.93	3.95	4.14	3.56	3.90	4.10	4.01
Australia	19	3.79	3.54	3.82	3.63	3.87	3.87	4.04
Korea	24	3.72	3.45	3.79	3.58	3.69	3.78	4.03
Taiwan, China	25	3.70	3.23	3.57	3.57	3.95	3.59	4.25
China	27	3.66	3.32	3.75	3.70	3.62	3.68	3.90
Malaysia	32	3.43	3.17	3.45	3.48	3.34	3.46	3.65
New Zealand	37	3.39	3.18	3.55	2.77	3.22	3.58	4.12
Thailand	45	3.26	3.11	3.12	3.37	3.14	3.20	3.56
Chile	46	3.25	3.19	2.77	3.30	2.97	3.50	3.71
Mexico	54	3.11	2.88	2.89	3.00	3.14	3.40	3.38
Indonesia	63	2.98	2.69	2.65	2.90	3.00	3.19	3.46
Vietnam	64	2.98	2.75	2.70	3.12	2.88	2.84	3.50
Peru	69	2.89	2.76	2.62	2.91	2.87	2.94	3.23
Brunei	70	2.87	2.78	2.75	3.00	2.57	2.91	3.19
Philippines	71	2.86	2.61	2.55	3.01	2.70	2.86	3.35
Russia	99	2.57	2.01	2.43	2.45	2.76	2.62	3.15
PNG	105	2.51	2.55	2.32	2.46	2.35	2.58	2.78

Source: World Bank 2017, Logistics Performance Index
Note: Index top score: 5

RTAs have obvious limitations in dealing with some of these challenges but they are a mechanism that can contribute to, and lock in, unilateral reform. New research suggests a positive association between value chain trading and the depth of trade agreements as measured by the number of policy areas covered. Unbundling production creates a demand for deeper agreements to allow chains to work more efficiently by improving cross-border regulatory efficiency and lessening trade costs. In turn, deeper trade agreements can lead to finer cross-border production networks by encouraging unilateral reform – reforms by some trading partners show up lack of reform in others, potentially threatening their involvement in trading chains – and by establishing deeper common disciplines between bilateral and multi-party trading partners (Ruta 2017, pp 175-182).

RTAs and trade facilitation

From an RTA perspective, the rapid increase in the number and range of economies negotiating and implementing trade facilitation provisions in RTAs is arguably the most important development in trade facilitation over the last decade or so. The facilitation agenda has been taken up to varying extents by almost all economies around the world. Table 3 shows the close alignment since 2001 between rapid growth in the number of RTAs, both globally and those involving at least one APEC member, and growth in the number of RTAs with WTO+ customs provisions. The correlation between the two series is almost perfect irrespective of development levels or whether agreements were struck between trading partners within a given region or between partners in distant regions.

Table 3

Regional Trade Agreements: 2001-2015
WTO+: Customs Coverage

Number of Agreements Entering into Force

			APEC	
	World	Non-APEC	All APEC	Intra-APEC
Total agreements	188	75	113	44
Total agreements covering customs	176	69	107	43
Agreements covering customs between:				
Developed economies	32	5	27	16
Developed – Developing & transition	100	43	57	24
Developing & transition economies	44	21	23	3
2001-2005				
Total agreements	53	25	28	11
Total agreements covering customs	47	24	23	10
Agreements covering customs between:				
Developed economies	9	2	7	6
Developed-Developing & transition	23	12	11	4
Developing & transition economies	15	10	5	0
2006-2010				
Total agreements	79	35	44	19
Total agreements covering customs	76	32	44	19
Agreements covering customs between:				
Developed economies	9	2	7	2
Developed-Developing & transition	45	19	26	14
Developing & transition economies	22	11	11	3
2011-2015				
Total agreements	56	15	41	14
Total agreements covering customs	53	13	40	14
Agreements covering customs between:				
Developed economies	14	1	13	8
Developed-Developing & transition	32	12	20	6
Developing & transition economies	7	0	7	0

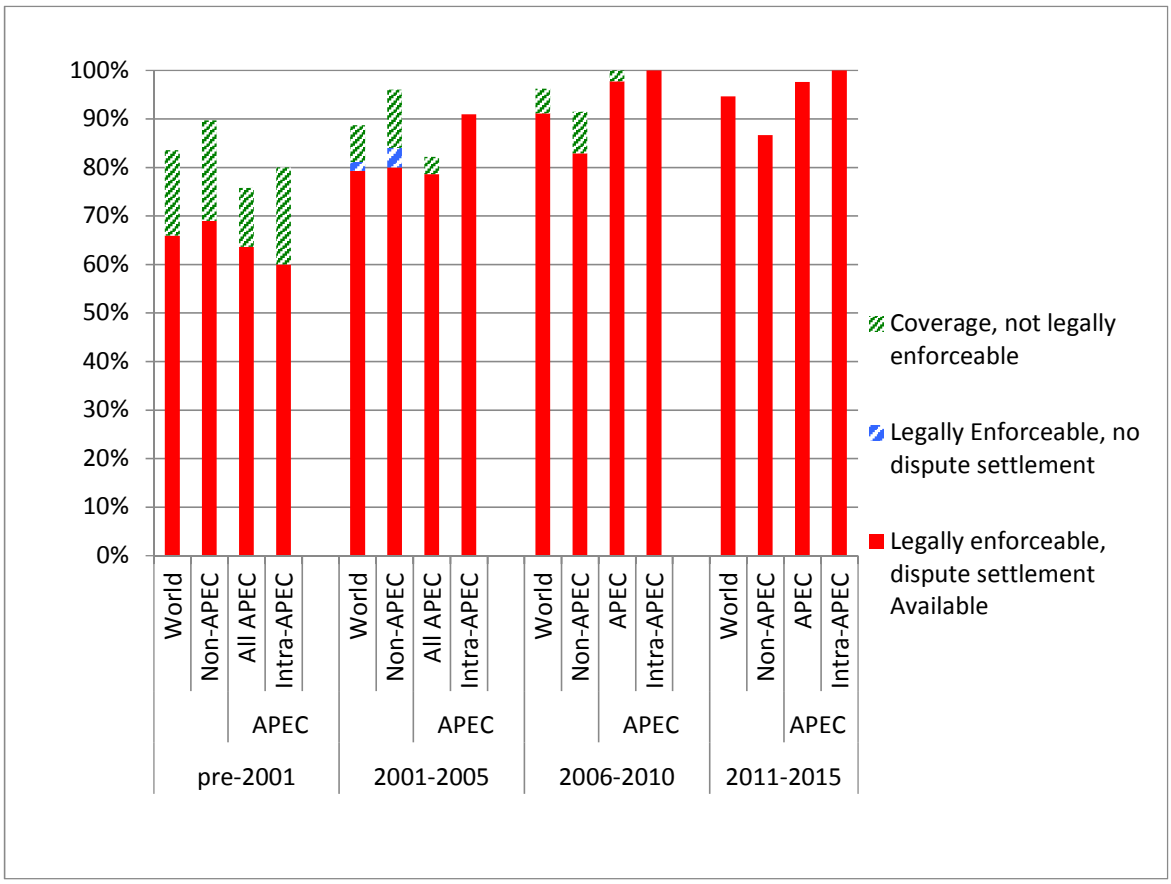
Source: World Bank database documented in Annex A

There is a good deal of common ground on trade facilitation across RTAs. In part, this can be attributed to cross fertilisation between negotiations on trade facilitation in the WTO and in RTAs: both sets of negotiations intensified over much the same period. Core WTO TFA issues are prominent in RTAs. Examples are provisions on exchanging customs-related information and customs cooperation followed by rules on simplifying import- and export-connected procedures and formalities. Disciplines on publication/transparency, appeals and risk assessment also are prominent among RTA issues, together with measures on advance rulings, publication of draft regulations prior to implementation, use of international standards, and import- and export-related fees and charges (Neufeld 2016, p. 120).[34]

There are similar patterns across RTAs in legal enforceability. The depth of WTO+ provisions on core customs-related commitments is as high as for WTO+ tariff commitments on manufactures and agriculture (Ruta 2017, p. 175). Chart 1 shows the near 100 per cent level of legal enforceability and dispute settlement arrangements for customs provisions globally and for APEC members. Beyond core customs provisions, however, trade facilitation measures in RTAs are mostly specified in 'best endeavour' terms (Duval, Neufeld and Utoktham 2016, p. 10). This may reflect the cooperative nature of much of this agenda. It also may reflect their mostly non-discriminatory nature. For example, publishing rules and regulations on the internet, implementing automatic clearance systems for goods and establishing a single window for electronic documentation benefits third parties equally with parties to an agreement

[34] There are similarities between RTAs in another respect. Just as there are a core of TFA measures that are regularly included in RTAs, there are others that are not. TFA provisions on single windows (to support import, export and transit formalities), pre-shipment inspections and post-clearance audits are rare in RTAs. Provisions on customs brokers , business consultations, penalty disciplines, authorized operators, release times, expedited shipments, and pre-arrival processing are relatively rare (Neufeld 2016, p. 120)

Chart 1
Regional Trade Agreements: 1958-2015
WTO+: Coverage and Legal Enforceability
Customs



Source: World Bank database documented in Annex A

There also are strong similarities across RTAs in the way trade facilitation measures are evolving rapidly – a not unsurprising fact given the role played by RTAs as laboratories for trade policy. This has several dimensions, but two are particularly relevant here. The first is that many RTA provisions have come to have more complexity and precision than their WTO equivalents, for example in relation to releasing goods (as far as possible) from customs control within 48 hours or faster, the scope of cross-border customs cooperation, the specificity of appeal and review rights, and the machinery of paperless trading.[35] In the case of the latter:

> … more than half of the trade agreements which have entered into force since 2005 globally include paperless trade measures or provisions, with a large majority of RTAs now featuring one or more measures aiming to exchange trade-related data and information electronically. In many cases, recent RTAs are found to go further than the WTO TFA in promoting digital trade facilitation and the application of modern information and communications technologies to trade procedures (Duval and Kravchenko 2017, pp. iv-v).

A second feature is how regional cooperation has steadily become a more important element of modern RTAs. RTA coverage of regional cooperation is somewhat less than for competition policy, investment, movement of capital, IP rights and the environment, but it ranks alongside

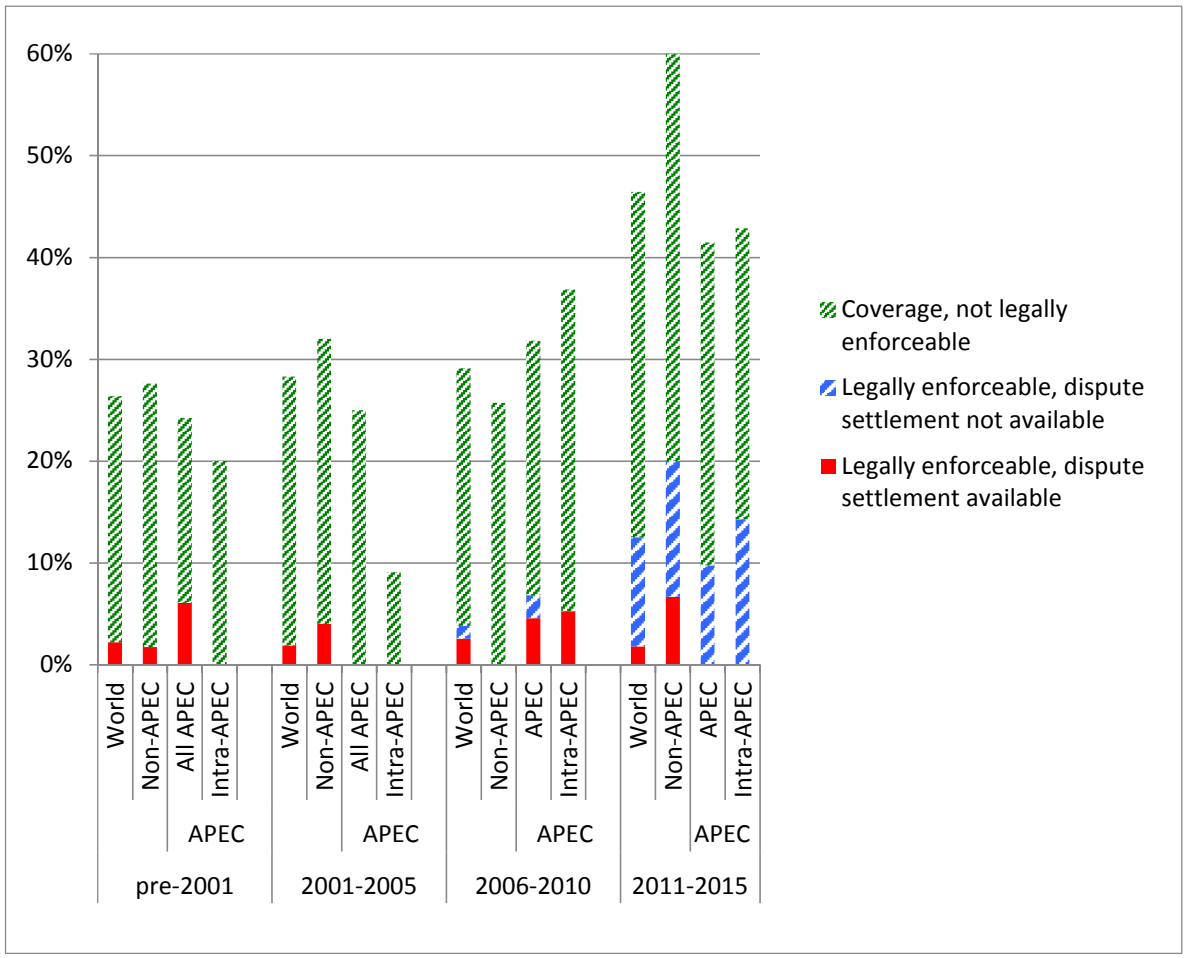
[35] See Annex J on digital trade for a fuller discussion.

issues like digital trade and visa and asylum policy. Its importance is underlined by a basic fact: in global value chains, unilateral reform is critical to lowering trade and general business costs, but deep agreements need the active cooperation of partner economies if they are to add value across production networks (Ruta 2017, pp. 177, 183).

Cooperation has been an element of RTAs in the Asia-Pacific region over recent decades: the North American Free Trade Agreement and the ASEAN Free Trade Area are obvious examples, while APEC itself is the exemplar of developing a regional vision and transforming ideas on regional relationships and integration into workable policies and productive networks. But the notion of regionalism, and of regional cooperation in building linkages, has intensified over recent years. The various ASEAN+1 trade agreements, the Pacific Alliance,[36] CPTPP, and ongoing Regional Comprehensive Partnership negotiations are some of the most visible examples of this trend. Less visible, but no less important, is the increasing coverage of WTO-X provisions on regional cooperation in RTAs since 2001 (Chart 2). This is a global phenomenon but the trend seems to be especially strong for intra-APEC RTAs over the period from 2001-05 to 2011-15: over 40 per cent of RTAs had WTO-X coverage of regional cooperation by the end of the period compared to less than 10 at the start. This upward trend also has been backed up in a minor way by legal enforceability, though this is still by far the exception in the great majority of RTAs regionally and for the world as a whole.

[36] Formally, the Additional Protocol to the Framework Agreement of the Pacific Alliance.

Chart 2
Regional Trade Agreements: 1958-2015
WTO-X: Coverage and Legal Enforceability
Regional Cooperation



Source: World Bank database documented in Annex A.

While recent RTAs converge in their increasing coverage of trade facilitation, inventiveness, level of detail, and regional underpinnings, at another level the growing level of detail and scope for experimentation contributes to greater divergence. Differences take various forms, starting with the way different economies approach trade facilitation. Many APEC members, along with the European Union and the European Free Trade Association, want broad coverage. Others, such as Russia in agreements with some members of the Commonwealth of Independent States, opt for narrow coverage, typically limited to transit arrangements and customs-related information exchange. Several economies - Chile, Peru, the United States, the European Union, and Russia are examples - also apply their own negotiating templates that may or may not undergo significant change over a succession of negotiations on trade facilitation.

US RTAs after 2004, for example, contain provisions "on publication (including internet and prior publication), enquiry points, advance rulings, appeal procedures, separation of release, risk management, release times, expedited shipments and simplification of formalities – many of which are similar in wording and often even in article number. These agreements are often also similar in what they do not cover. None of those treaties have provisions on post-clearance audit, authorized operators, harmonization, single window, [pre-shipment inspection], customs

brokers or transit. Offensive interests pursued by Washington in the WTO negotiations are often reflected in its RTAs: most agreements have provisions on internet publication, penalty disciplines and expedited shipments" (Neufeld 2016, p.123).

In the case of EU RTAs with APEC and other economies, "Customs-related cooperation and information exchange, as well as the simplification of formalities, are the most frequently addressed issues. They are followed by harmonization provisions, which are included in almost two-thirds of all EU– partnered agreements, while transit questions are covered in more than half…With respect to ambition levels, even the most comprehensive agreements are not always binding in a strict sense. Provisions are often phrased in non-coercive terms, calling for 'cooperation' on a given area or the enactment of certain measures without prescribing mode and methods. The language can also be relatively unspecific, setting out broad objectives while leaving it up to each partner to decide how to implement them" (Neufeld 2016, pp. 121-122).

Beyond the approaches taken by different economies to trade facilitation, divergence appears to increase as the detail on facilitation increases to the point where it is 'difficult to generalize about their [RTA] design, structure and substantive trade facilitation content' (Neufeld 2016, p. 154). Notable differences exist across the gamut of facilitation issues: customs cooperation can be narrowly focused or broad; obligations to publish policies, laws, regulations, and draft regulations might be binding or not; enquiry points might cover all facilitation issues or a sub-set; provisions on single windows for electronic documentation are comparatively rare in RTAs but can be targeted and action-oriented (like in the case of the ASEAN Free Trade Area and the Pacific Alliance) or simply promote the concept or in some way work towards it (like the Canada-Peru FTA or AANZFTA); and technical support can be targeted (as in PACER Plus) or more typically very general (Neufeld 2016, pp. 131-149).

Three examples – on paperless trading, customs cooperation and advanced rulings by customs authorities on goods for import or export –illustrate how the growing complexity of facilitation provisions adds to divergence across RTAs.

Paperless trading

There are large variations between RTAs on paperless trade content. Around half refer to using international standards for electronic exchange of data and documents; promoting electronic certification and signatures; developing legal frameworks to enable electronic transactions; encouraging electronic submission of trade-related data and documents, electronic record keeping and acceptance of electronic copies; and encouraging specific measures like exchanging information on technical barriers to trade across borders.

Around one-quarter to a third of RTAs mention electronic or automated customs systems, electronic transmission of financial information across borders and measures to facilitate inter-agency communication and collaboration.

Rarely mentioned are single window facilities, electronic payment systems or electronic systems for sanitary and phytosanitary certification or to obtain relevant import/ export permit or licenses (Duval and Kravchenko 2017, p. 51).

Customs cooperation

Divergence across RTAs is especially marked in customs cooperation. Some RTAs:

- Specify cooperation in particular areas such as risk management (as in the Canada-Honduras FTA) or simplifying documents and exchanging information or assistance in investigating cases of infringements of customs laws (as in the Korea-Australia FTA) or even ways to strengthen cooperation in multilateral fora on trade facilitation (as in the China-Switzerland FTA).

- Define the level of ambition in a given area using less or more binding legal language. Commitments on customs and trade facilitation in the Pacific Alliance agreement are often expressed in binding language: e.g. 'The Parties shall implement and promote its Single Window for Foreign Trade…', or 'Each Party shall publish, including on the Internet, its customs laws…' . This contrasts with less binding language in the European Union-Canada CETA: e.g. 'Each Party shall endeavor to make public, including on the internet, proposed regulations and administrative policies relating to customs matters….' or 'The Parties shall endeavor to cooperate in the development of interoperable electronic systems…in order to facilitate trade between the Parties'.
- Have very general objectives such as exploring and undertaking economic cooperation activities.
- Reduce cooperation to a shell for work on future arrangements. For example, the Singapore-Taipei China FTA leaves open the possibility to explore cooperation projects to further simplify customs procedures and share advanced technical skills.
- Set out areas for cooperation without providing guidance on how this might be done or over what period (Neufeld 2016, pp. 130-131; Kuriyama, 2015).

Advanced rulings

The release and clearance of goods is facilitated by advanced customs rulings on the classification of goods and their origin and value. This saves time and reduces costs for traders. But there is no common set of procedures across RTAs.

In some agreements, advanced rulings may be limited in scope and apply to a single issue, often rules of origin. Examples include the Canada-Honduras FTA and the Vietnam-Eurasian Economic Union FTA.

Other agreements are broader and include tariff classification, customs valuation and applicable rates of customs duties or certain taxes. For example, the Korea-Colombia FTA, the Pacific Alliance and CPTPP provide for advanced rulings on tariff classifications, origin of goods, application of customs valuation criteria, and other things that the parties may agree upon.

Beyond this, there are differences in the detail of advance rulings and legal enforceability. Most RTAs use legally binding language but this is often weakened by qualifying phrases like "to the extent permitted by domestic law" or "where possible".

Many RTAs include provisions on the validity of ruling and their applicability. Some set out time frames for issuing rulings and conditions for revoking them. For example, the Korea-Colombia FTA, the Singapore-Taipei China FTA and the Vietnam-EAEU FTA require that advanced rulings must be issued no later than 90 days from the date of application for information; the Canada-Honduras FTA stipulates no later than 120 days; and the Pacific Alliance and CPTPP no later than 150 days.

Some RTAs also set out procedural rights and requirements such as the obligation to provide persons requesting a ruling with a written explanation (Neufeld 2016, pp. 134-135; Kuriyama, 2015; Kuriyama and Sangaraju 2017).

Conclusions and further work

Trade facilitation costs have become a major issue for global and regional trade policy makers in the wake of falling average tariff levels and the requirements of efficient production networks involving multiple economies.

The WTO Trade Facilitation Agreement has raised the level of ambition of governments in advancing their unilateral reforms on trade facilitation. This in turn has raised the bar for RTAs if they are to remain the principal vessel for promoting change and innovation on trade facilitation across global and regional value chains.

Reducing costs through trade facilitation reforms follows a basic pattern. First comes institutional reforms to bring together relevant national agencies, set priorities and coordinate implementation plans. This tends to be followed by initiatives to improve the transparency of existing laws, regulations and processes. This is followed, more or less, by designing and implementing more efficient and simpler trade formalities. And, over time, the focus starts to shift to developing national paperless trading systems and then international ones (ESCAP 2017, p.27).

There has been significant progress over time in some areas of the facilitation agenda, particularly in transparency measures, formalities and institutional arrangements: regional average rates of implementation are between one-half and two-thirds. There has been less progress in other areas like cross border paperless trade and much less on issues such as customised facilitation measures to support MSMEs and gender equality in business.

This unevenness raises a potential challenge for APEC. Significant progress has been made in many of the areas covered by the Model Chapter on Trade Facilitation. There is still much to do there, of course, but it would seem timely to focus more on how RTAs can support national, and especially international, cross border paperless trade and on how to share regional knowledge and experience to accelerate the newest phases of trade facilitation.

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E. Government Procurement

Government procurement has been one of the more difficult issues in international trade negotiations. It brings into direct play, on the one hand, the interests of sections of domestic industry and other groups advocating procurement preferences, and on the other, firms seeking to sell into government procurement markets abroad and wider community interests of 'value for money' and economic efficiency. Despite this, the coverage of government procurement in international agreements has been expanding. Membership of the WTO Government Procurement Agreement (GPA) has more than doubled since the GPA 1994 entered into force at the beginning of 1996, with the revised GPA, which entered into force in 2014, now consisting of 19 parties and 47 WTO members.[37] The number of bilateral and regional agreements with provisions on government procurement has also been expanding.

The Economic Significance of Government Procurement

For APEC, the government procurement market is very substantial. Estimates across 14 APEC economies for which data are available, indicate that the unweighted share of government procurement in GDP is in the order of 7-10 per cent, albeit with quite substantial individual economy variations.[38] The WTO gives a higher estimate of 10-15 per cent of GDP, although this is for all economies rather than those for just APEC, while the OECD estimates that government procurement (excluding procurement by state-owned utilities) is around 12 per cent of GDP for its members (OECD 2011, p.148). Other estimates can be even higher. Some estimates exclude defence procurement where supplies are likely to be chosen on security grounds. Data on this for APEC economies are not available, but removing defence procurement from global data has been estimated to lower the share of government procurement in GDP by around two percentage points (Gourdon and Messent 2017, pp.7-10). On the other hand, adding in procurement by state-owned utilities can raise the figures appreciably (OECD 2011, p.148).

A key issue in looking at the economic impact of government procurement is that of 'home bias' – which can be partly estimated by the extent to which government procurement spending lowers imports of all goods and services. Econometric work by Gourdon and Messent (2017, pp.13-15) suggests that, for a sample of economies around the world, a one percentage point increase in government procurement as a share of GDP lowers the share of all imports in GDP by 0.82 percentage points. This is not, of course, always a consequence of discriminatory practices, since procurement spending may have a focus on non-tradeable goods and services. Even so, it points to a sizeable home bias. Moreover, the size of the apparent bias has been increasing over time in both developed and developing economies.

To the extent that home bias does exist, it has costs both for exporting and importing economies. Exporters may miss out on contracts in other economies that they can supply

[37] The EU counts as one party.

[38] These data include the sum of intermediate government consumption, government contributions to gross fixed capital formation and government purchases of goods and services which are transferred in kind to domestic households. They are based on UN System of National Accounts data and on IMF Government Finance Statistics data. For some of the 14 countries, data are only available from one of these sources.

competitively. Economies where the procurement occurs may also lose given that discrimination involves a departure from open trade and investment which can have substantial impacts on the efficiency and growth of an economy, on its competitiveness and on its capacity to link into global value chains. Procurement which does not use the most competitive supplier may have adverse effects on efficiency in the public sector and for government budgets. Non-discriminatory procurement, in contrast, may have a broader impact in reducing levels of corruption and encouraging procedural fairness. As Cernat and Kutlina-Dimitrova (2017, Chapter 18) note:

> 'The combination of a large share of government expenditures in GDP and the "home bias" characteristics makes public procurement one of the few fields in which liberalisation efforts at the international level have substantial untapped potential, and thus an area of growing importance in international negotiations'.

Government Procurement in Regional Trade Agreements

Tables 1 and 2 below present data on coverage of government procurement in RTAs and the extent to which the provisions are legally enforceable and subject to dispute settlement.[39] These data are drawn from the rich World Bank database documented at Annex A. Points that emerge from Table 1 include the following:

- The proportion of RTAs which cover government procurement has been trending upward over time - as with many other sectors examined in this stocktake – rising from 27 per cent prior to 1996 to 73 per cent over 2011-15.
- The proportion of agreements that involve legally enforceable provisions has also increased, as has the share subject to dispute settlement provisions. The latter share rose from only just over a quarter pre-1996 to around two thirds in 2011-15.
- A very high proportion of agreements that are legally enforceable are also subject to dispute settlement. For the period 2001-15, the proportion of agreements classified as legally enforceable was at 52 per cent and the proportion subject to dispute settlement provisions were not much below this at 46 per cent of the total.
- For agreements involving an APEC member, coverage compares well with those at the global level. For 2001-15, the proportion involving an APEC member stood at 65 per cent compared to 67 per cent at the global level. Coverage for intra-APEC members was about the same, at 73 per cent.
- The coverage of global agreements involving an APEC member has been much higher over the past two decades than it was pre-1996.

[39] An agreement is regarded as covered 'if it contains an article, chapter or provision, providing for some form of undertaking'. Government procurement (called public procurement by the World Bank authors) is defined as 'progressive liberalization, national treatment and/or non-discrimination principle; publication of laws and regulations on the internet; specification on public procurement regime'. See Hofmann, Osnago and Ruta (2017, pp. 5-6, 27). Note that the World Bank uses the terminology PTAs (rather than RTAs).

Table 1

Government Procurement in Regional Trade Agreements: 1958-2015

Percentage of Agreements Entering into Force

			APEC	
	World	**Non-APEC**	**All APEC**	**Intra-APEC**
Coverage				
1958-2015	56%	56%	56%	71%
2001-2015	67%	71%	65%	73%
pre-1996	27%	38%	15%	33%
1996-2000	44%	38%	71%	100%
2001-2005	66%	64%	68%	91%
2006-2010	63%	74%	55%	63%
2011-2015	73%	73%	73%	71%
Legally enforceable				
1958-2015	43%	33%	51%	67%
2001-2015	52%	41%	59%	68%
pre-1996	27%	38%	15%	33%
1996-2000	17%	7%	57%	100%
2001-2005	43%	32%	54%	82%
2006-2010	47%	43%	50%	58%
2011-2015	68%	53%	73%	71%
Dispute settlement				
1958-2015	38%	29%	47%	57%
2001-2015	46%	35%	53%	57%
pre-1996	27%	38%	15%	33%
1996-2000	17%	7%	57%	100%
2001-2005	36%	28%	54%	55%
2006-2010	38%	31%	50%	47%
2011-2015	66%	53%	73%	71%

Source: World Bank database documented in Annex A.

Table 2 looks at a breakdown of agreements involving developed and developed and transition economies over 2001-15. It shows that for this period, the coverage of agreements between developed economies (91 per cent) was much higher than those between developed and developing and transition economies (73 per cent) and higher still than those between developed and transition economies only (40 per cent). A similar observation holds for agreements which are legally enforceable and those which are subject to dispute settlement. It also holds true for agreements involving an APEC member.[40] This no doubt reflects a wariness in developing economies and transition economies about limiting their capacity to use government procurement as one arm of plans to promote economic development. The GPA has a membership that consists primarily of advanced economies for much the same reason.

Table 2

Government Procurement in Regional Trade Agreements: 2001-2015

Percentage of Agreements Entering into Force

			APEC	
	World	**Non-APEC**	**All APEC**	**Intra-APEC**
Coverage in agreements between:				
Developed economies	91%	80%	93%	100%
Developed - Developing & transition	73%	84%	64%	64%
Developing & transition economies	40%	46%	35%	0%
Legally enforceable in agreements between:				
Developed economies	82%	60%	86%	94%
Developed - Developing & transition	50%	41%	58%	60%
Developing & transition economies	37%	38%	35%	0%
Dispute settlement in agreements between:				
Developed economies	73%	60%	75%	81%
Developed - Developing & transition	47%	41%	51%	48%
Developing & transition economies	27%	19%	35%	0%

Source: World Bank database documented in Annex A.

For government procurement, more than in many areas of trade, the devil often lies in the detail. It is important to examine other variables in assessing the coverage of government procurement in RTAs. One issue that needs to be considered is the entity coverage of agreements – the extent to which they apply to central government agencies, agencies at the regional/local level and to other entities (which vary according to the economy in question, but which may include public corporations). A second issue is the thresholds above which non-discriminatory treatment cuts in. Thirdly, there is the question of the extent to which commitments cover all goods and services. Fourth, it is important to look at derogations from commitments, which can apply, for example, to preferences for small and medium enterprises. Finally, the provisions of the

[40] For intra-APEC agreements involving developing/transition economies, this point is not particularly meaningful as there were only 3 agreements of this kind for 2001-15.

agreements need to be examined – an issue which is taken up here in the next section. Details on all of these issues for APEC economies have not been analysed in the literature, but some observations can be made on the basis of more general studies, particularly an OECD study (Ueno 2013) that looks at 47 RTAs involving one or more of OECD member economies.

On coverage of entities, Ueno's principal findings are as follows:

- For RTAs involving two GPA partners, the coverage of central government entities is broadly the same as for their GPA commitments.
- For RTAs involving one GPA party, the GPA party usually commits to much the same level of coverage as in its GPA schedule.
- For non-GPA parties, commitments are generally very similar across all of the RTAs in which they are involved.

At the sub-central government level, there is clearly a long way to go in terms of coverage. Table 3, again drawn from Ueno (2013, p.13) shows that around 40-50 per cent of parties provide no commitments on entities at the regional and local levels of government. Although there are some exceptions, coverage tends to be based on reciprocity: if one party excludes sub-central government entities, the other typically does the same. Coverage of 'other' entities varies considerably. Across all levels of government, coverage tends to be based on a positive list approach, although coverage of 'other' entities in the Chile-Central-America RTA is based on negative lists (for example, Chile's coverage excludes the central bank and state-owned enterprises among others).

Table 3
Coverage of Entities at Sub-Central Level in RTAs

	Regional level (n=105)	**Local level (n=115)**
Full coverage commitment	55.2%	35.7%
Partial coverage commitment	5.7%	12.2%
Unbound	39.0%	52.2%

Source: Ueno (2013, p.13). The number of possible sets of commitments (n) is greater than 47x2 because agreements involving parties like EFTA have multiple sets of commitments. At the same time, not all parties have a sub-central level of government.

Table 4 shows a comparison for RTAs in Ueno's sample of thresholds compared to those most commonly adopted in the GPA. As the table suggests, at the central government level, almost all RTAs offer the same or better access than the most common GPA level. The proportion is somewhat lower, but still high for construction services. At the sub-central and 'other' levels, there can be significant room for improvement, with many RTAs having thresholds higher than the most common GPA level. Box 3 and Table 5 look in more detail at US procurement at the federal government level showing a pattern of thresholds that are mostly based on those of either NAFTA or the GPA. However, the NAFTA thresholds for construction are significantly higher than the corresponding US thresholds for the GPA.

Table 4
RTA Thresholds Compared to the Most Common GPA Level

	Central Gov.	Sub-Central Gov.	Other
Goods and Services			
<= 130,000 SDR	99.2%		
<= 200,000 SDR		71.3%	
<= 400,000 SDR			96.9%
Construction			
<= 5,000,000 SDR	83.6%	85.2%	70.7%

Source; Ueno (2013, p.18). The figures in column 1 are the most common GPA thresholds for that level of government or sector.

Box 1
US Thresholds in its RTAs at the Federal Level

The US procurement market is huge – at the Federal level worth around US$600 billion and at state and local level US$1 trillion (Hufbauer and Moran 2017). But US procurement thresholds vary. Historically, NAFTA played an important role in the development of US policies towards RTAs and it remains important today. Of 13 agreements in Table 3, six give thresholds for federal goods and services procurement at the same level as US commitments in NAFTA. Another five agreements have federal procurement thresholds for goods and services equivalent to what is available through the GPA (even though some of the partners are not GPA members). Among other economies, Canada receives highly favourable access but for goods only, a position which goes back to the Canada-US FTA which preceded NAFTA (for services, NAFTA levels apply). Israel and Korea also receive special thresholds, for goods in the case of Israel and for both goods and services for Korea. For construction, there are only two levels – the NAFTA level and the GPA level.

The US thresholds for goods and services at federal level illustrate the broader point made by Ueno that most RTA commitments offer equivalent or better access than the GPA. This is less clearly the case where construction services are concerned. Here the NAFTA level is actually appreciably higher than the US GPA threshold. But there are only three US agreements – one of them NAFTA itself – which use the NAFTA threshold for construction.

As already noted, the commodity and services coverage for procurement is also important. For goods, all except defence-related goods are typically covered. But there are carve-outs in some agreements. For example, purchases of agricultural products for programmes intended to support the sector or for 'human feeding services' are excluded for several economies, notably Canada, Korea, Peru and the United States (Ueno 2013, p.32). For services, the position is complex. Table 6 summarises the position for procurement in the 47 agreements involving at least one OECD member examined by Ueno. As the Table shows, services coverage is appreciably more extensive for the RTAs covered than for the GPA. The difference is not marked for RTAs between GPA parties, but is very large for agreements involving a non-GPA party.

Table 5

US Federal Procurement Thresholds in its RTAs for 2018 and 2019

US dollars

Partner/Agreement	Goods and Services	Construction
Australia	80,317	6,932,000
Bahrain	180,000	10,441,216
Chile	80,317	6,932,000
CAFTA-DR	80,317	6,932,000
Colombia	80,317	6,932,000
Israel*	50,000	
Korea*	100,000	6,932,000
Morocco	180,000	6,932,000
NAFTA	80,317	10,441,216
Canada (goods)*	25,000	
Oman	180,000	10,441,216
Panama	180,000	6,932,000
Peru	180,000	6,932,000
Singapore*	80,317	6,932,000
GPA	180,000	6,932,000

Sources: Office of the US Trade Representative (2017); Grier (2017); Hufbauer and Moran (2017)

* Denotes Revised GPA member.

The US-Israel FTA apples only to goods and services incidental to them, rather than to goods and services. Canada has special access to the United States for procurement for goods which is written into NAFTA. It does not apply to services. With some exceptions (Canada, Israel and Korea), figures are adjusted for inflation by applying formulae/methods set out in the agreements.

Table 6

RTA Government Procurement Services Coverage for 47 OECD Member Agreements

	Full	Partial	Unbound
All RTAs (130 sets of commitments)	53.4%	3.1%	43.5%
Between GPA Members (33)	24.2%	5.8%	70.1%
GPA & Non-GPA (80)	61.1%	2.2%	36.6%
Non-GPA Parties (17)	73.8%	2.2%	24.0%
GPA Commitments	25.3%	5.1%	69.5%

Source: Ueno (2013, p.28).

By way of illustration, the figure of 53.4 per cent in the above table is the average, across the 130 sets, of the shares of each party's commitments: in this case the shares that provide full coverage of individual sub-sectors on the WTO's Services Sectoral Classification List. The GPA commitments take reciprocity into account. (For example, the United States' 'General Notes' state that a 'service is covered with respect to a particular Party only to the extent that such Party has included that service [in its own commitments]'. The number of sets of commitments (130) is greater than 47x2 because agreements involving parties like EFTA have multiple sets.

Derogations from agreements often exempt from disciplines programmes intended to support small and medium enterprises. This is discussed in more detail in Annex K. Other important derogations, such as excluding defence-related procurement for national security and programmes intended to support the agricultural sector or for food supply services have been

mentioned already. The Korea-US FTA, for example, exempts from the agreement's provisions certain types of procurement in each of these categories for both Korea and the United States. Notes to the US Schedule list a number of other exemptions ranging from procurement related to shipbuilding by the National Oceanic and Atmospheric Administration, to purchases involving specialty metals, to procurement by the Federal Aviation Administration. Korea's exclude, for example, purchases by the National Police Agency and the Korea Coast Guard.

The Provisions of Three Recent Agreements

The provisions of modern government procurement chapters have a good deal in common. The paper shows this by looking at the provisions in three recent agreements – the Pacific Alliance (or more accurately the Additional Protocol of the Framework Agreement of the Pacific Alliance), the EU-Canada CETA and the CPTPP.

National treatment and non-discrimination. This is the core principle of a government procurement chapter and each of the RTAs undertakes to provide it. In each case, the principle of non-discriminatory treatment extends to locally established suppliers that are either owned by or affiliated with investors from other parties, or which supply goods and services from other parties.

Prohibition of Offsets. Each agreement prohibits offsets at any stage of the procurement process. Offsets are defined in similar (but not identical) terms in each agreement: in the CPTPP, for example, they are defined as 'any condition or undertaking that requires the use of domestic content, a domestic supplier, the licencing of technology, technology transfer, investment, counter-trade or similar action to encourage local development or to improve a Party's balance of payments accounts'.

Avoiding technical specifications that would create trade barriers. Each of the RTAs has detailed provisions on this and the language in each is broadly similar. For example, the EU-Canada CETA states the 'A procuring entity shall not prepare, adopt or apply any technical specification or prescribe any conformity assessment procedure with the purpose or the effect of creating unnecessary obstacles to international trade'. Parties are encouraged to use international standards or specifications based on 'performance and functional requirements, rather the design or descriptive characteristics'. Each of the three agreements allows a Party to prepare or adopt technical specifications for conservation/environmental protection reasons.

Publication of general procurement procedures. All three agreements provide for this.

Encouraging the use of electronic methods of conducting procurement. Each of the agreements provide for this in some form, though in somewhat different ways. For example, the CPTPP Government Procurement Chapter states that 'The Parties shall seek to provide opportunities for covered procurement to be undertaken through electronic means, including for the publication of procurement information, notices and tender documentation, and for the receipt of tenders'.

Time to Submit Bids. There are some differences on this. The Pacific Alliance states that no fewer than 30 days should be allowed, though it permits exceptions in certain circumstances. The CPTPP states that the final date for submission of tenders shall be no fewer than 40 days from the date of the notice of intended procurement, but it permits significant reductions in this time under certain circumstances (for example, if the notice of intended procurement, tender documentation or acceptance of tenders occurs by electronic means). The EU-Canada CETA

also opts for 40 days, but again with the possibility of reducing this under various circumstances, including where the procuring entity accepts tenders by electronic means.

Opportunity to Appeal. Each agreement provides for this.

Encouraging participation of SMEs. The Pacific Alliance and the TPP-11 contain specific articles on this issue. The Pacific Alliance (which uses the terminology MSMEs) states that parties should also endeavour to reduce measures according preferential treatment of its MSMEs as opposed to those of other parties, but like the TPP-11, sets out ways in which parties can encourage these firms to participate (notably by using an electronic portal to provide information on government procurement and making documentation available free of charge).

Committee on Government Procurement. Each agreement provides for a Committee of this kind to be established to carry out such functions as monitoring the operation of the agreement and discussing cooperation in implementing it.

A Forward Agenda on Government Procurement

APEC has long played a useful role on government procurement. The APEC Government Procurement Experts Group (GPEG) prepared non-binding principles for procurement which were endorsed by APEC Leaders in 1999. A model RTA Chapter on government procurement was endorsed in 2006. However, only eight APEC members are currently members of the revised GPA, with a further eight observers (three of these are in the process of negotiating accession). This suggests that RTAs in the APEC region have an important role to play in extending liberalisation and adding to disciplines on government procurement.

Some APEC economies clearly still consider government procurement to be a bridge too far and for this reason the issue is not covered in some quite recent agreements. For example, the ASEAN-Japan Comprehensive Economic Partnership Agreement that entered into force in December 2008 does not include a chapter on, or indeed any reference to, government procurement, nor does the issue figure in topics for future cooperation listed in Article 53 of the Agreement. Again, AANZFTA, which entered into force in 2010, contains only two references to government procurement, simply stating that it is excluded from coverage by the services and investment chapters of the agreement.

What this suggests is that there might be value in further exchanges of information and discussion of this issue within APEC, perhaps initially within an experts' forum, with the aim of building greater consensus on how government procurement should be addressed in trade agreements. In such a debate, an initial focus might be to carry out a more detailed stocktake of the way in which government procurement is addressed in RTAs involving an APEC member or more broadly, building on the work carried out by the OECD. It would also be useful to look at the economic impact of government procurement measures along the lines of those in the CPTPP or the Additional Protocol of the Pacific Alliance. Economic modelling of this impact could be valuable as part of this work.

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F. Intellectual Property (IP)

Intellectual property (IP) has been discussed internationally for many years. No less than three important agreements date from the last part of the nineteenth century.[41] The World Intellectual Property Organization (WIPO) goes back more than fifty years. But the inclusion of IP in international trade and investment agreements is of more recent origin. The negotiation of NAFTA (which was signed in 1992 and entered into force in 1994) was one early indicator of this change, as was the entry into force of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) in 1995. Another was an upsurge in bilateral investment treaties (BITs) with IP content, also from the mid-1990s (Anderson and Razavi 2010, p.277). The rapid growth in the number of regional trade agreements (RTAs) containing IP provisions, discussed in detail below, was a further step in this direction.

Including IP provisions in trade and investment agreements has been controversial, as has IP more generally. Both domestically and internationally, the development of an IP regime involves striking a balance between the legitimate rights of the creators of IP and those who wish to access it. Internationally, different economies have differed over where this balance should be struck. In the multilateral arena, it has proved difficult to make substantial progress on an agenda for further strengthening IP (Morin 2013, p.2). Indeed, in the case of pharmaceuticals, the Doha Declaration of 2001 marked a significant retreat by key developed economies from positions they had earlier advocated in relation to patents in this area (Sykes 2001, pp.1-2). There have also been significant bilateral tensions between some economies over IP, particularly in relation to their enforcement.

The Economic Impact of IPR Protection.

Although the debate has been characterised above as one between creators of IP and those who wish to access it, there is strong evidence that the protection and enforcement of IP rights has a positive impact on growth in both net technology exporters and importers. This is very clearly so in the former case. The US Government estimates that 38 per cent of US GDP and 18 per cent of employment was directly attributable to IP-intensive industries in 2014. These industries accounted for a little over half of US merchandise exports and around 12 per cent of private services exports. Similar work by European agencies finds that IP-intensive industries account for about 42 per cent of GDP, 28 per cent of employment and 93 per cent of goods exports.[42] Not surprisingly, both the US and the EU have been advocates of strong and effective IP in trade agreements, though their emphasis differs, partly reflecting the differing structure of industries and domestic stakeholder interests and public policy priorities, in the two economies. The European Commission has thus accorded priority to geographical indications,

[41] These are the Paris Convention for the Protection of Intellectual Property, the Berne Convention for the Production of Literary and Artistic Works, and the Madrid Agreement Concerning the International Registration of Marks.

[42] See Economic and Statistics Administration and US Patent and Trademark Office (2016) and European Patent Office and the European Union Intellectual Property Office (2016). Both the US and EU studies note that the contribution of IP-intensive industries to employment is considerably higher if other industries supplying them are taken into account. In the US case, this lifts the total contribution of the industry to about 30 per cent of total employment and, in the EU case, to 38 per cent.

trademarks and patents, while the United States has emphasised copyright, combatting piracy and patent enforcement (Directorate-General for External Policies 2013, pp.20-21).

Econometric evidence suggests that developing economies, which are typically net technology importers, also benefit from strong IP protection and enforcement. One study covering the 1990s by Park and Lippoldt looked at the impact of stronger IP rights and their enforcement on international licensing (a key method of transferring technology to developing economies). It found that patent rights and IP enforcement had a strong association with licensing receipts for US affiliates (Park and Lippoldt 2004).[43] Another study by the same authors covering the period 1990-2005 found, for example, that a one per cent strengthening of patent rights generated a more than two per cent increase in foreign direct investment and that 'Patent protection is strongly significant and positively associated with imports of pharmaceutical goods, chemicals, office and telecom equipment, electronics, aerospace, and optics and precision equipment' (Park and Lippoldt 2008, pp.20, 23, 45, 52). A more recent study by Mrad similarly finds that there is a positive and significant effect of strengthening IP on imports of capital goods, which in turn embody foreign technology and promote growth in total factor productivity (Mrad 2017).

Intellectual Property Rights and Bilateral Investment Treaties

At the bilateral level, IP are shaped not only by regional trade agreements, but by BITs as well. There are a large number of such agreements: the UNCTAD Secretariat estimates that there were almost 2960 at the end of 2016 (UNCTAD 2017, p.111). The United States alone currently has 42 BITs in force and Australia 20.[44] By virtue of defining IP as a covered investment in these arrangements, they provide a range of protections. For example, Australia's BIT with Indonesia provides for each party to grant the other most-favoured-nation treatment for covered investment (excluding benefits granted to other economies as a result of an RTA or double taxation agreement).

In the case of the United States, USTR states that BITs generally afford 'the better of national treatment and most-favoured-nation treatment for the full life-cycle of investment … from establishment or acquisition, through management, operation, and expansion, to disposition'. BITs can also provide for an investor state dispute settlement mechanism: this is typical for US agreements. They may define IP very broadly (Anderson and Razavi 2010, pp.278-281). BITs are not examined further in this annex, but given their importance, it would be useful to have more detailed information on them, particularly for the APEC economies.

[43] In one regression this study found that patent rights had a strong association with licensing receipts, with a one per cent increase in a patent rights index generating a 1.5 per cent increase in licensing fees and royalties per employee in US foreign affiliates. A similar regression showed that IP enforcement also had a statistically significant impact (Park and Lippoldt 2004, p.30). The relatively strong correlation between patent rights and IP enforcement made it difficult to separate out the impact of these two variables.

[44] Australia's BIT with India was terminated by India on 23 March 2017: investments prior to that date will be covered for a period of 15 years from the date of termination, but new investments are not covered.

Intellectual Property Rights and Regional Trade Agreements

Tables 1 to 4 below present data on coverage of IP in RTAs and the extent to which the provisions are legally enforceable and subject to dispute settlement.[45] The first two tables examine IP provisions in agreements over time, from 1958 to 2015. Table 1 covers WTO+ provisions, defined as those that add to the TRIPS Agreement. Table 2 does the same for WTO-X provisions, defined as those that address accession to international treaties not referred to in TRIPS. Tables 3 and 4 look at the percentage of agreements with IP provisions over 2001 to 2015, breaking down the data to show shares for agreements between developed economies, developed and developing and transition economies, and developing and transition economies. All of this information is derived from the same rich World Bank database that has been used throughout this report and that is documented at Annex A.

The data on WTO+ provisions in Table 1 presents a picture which is in some respects similar to that in other annexes of this report. Thus:

- Coverage of IP in RTAs has risen strongly over the past two decades. This can be understood in terms of more comprehensive IP chapters over time both in terms of the range of IP subject-matter encompassed by more recent RTAs, as well as the substantive nature of obligations that go beyond multilateral standards under TRIPS and WIPO.
- The share of agreements with substantive IP provisions has risen from 31 per cent of the global total entering into force prior over 1996-2000 to 79 per cent over 2011-15.Almost all of the agreements which covered IP had provisions that were legally enforceable and subject to dispute settlement.
- Agreements involving APEC economies have shown a similar rise in coverage over time.
- Agreements involving APEC economies had a coverage similar to the world's for 2001-2015, and coverage in intra-APEC agreements was appreciably higher.

For the WTO-X provisions examined in Table 2, the story is only a little different. There has again been a sharp rise in coverage of these provisions in RTAs over the past two decades, this time from 39 per cent over 1996-2000 to 66 per cent over 2011-2015. A high proportion of all of the agreements that covered IP also had legally enforceable provisions subject to dispute settlement. Coverage rose sharply over time for agreements involving an APEC economy and for intra-APEC agreements. Agreements involving an APEC member had an appreciably higher coverage than for the world total for 2001-2015. Intra-APEC agreements had a higher coverage still.

Tables 3 and 4 also show a pattern that is now familiar. Developed economies clearly drive coverage of IP, with the share of agreements involving a developed economy a good deal higher than for agreements solely between developing and transition economies. This is also true for provisions that are legally enforceable and subject to dispute settlement. Much the same pattern holds for agreements which involve at least one APEC economy.

[45] An agreement is regarded as covered 'if it contains an article, chapter or provision, providing for some form of undertaking'. See Hofmann, Osnago and Ruta (2017, pp. 5-6, 27). Note that the World Bank uses the terminology PTAs (rather than RTAs). The World Bank's usage has been followed in discussing its database.

Table 1

Intellectual Property in Regional Trade Agreements: WTO+: 1958-2015

Percentage of Agreements Entering into Force

	World	Non-APEC	APEC All APEC	APEC Intra-APEC
Coverage				
1958-2015	57%	53%	60%	82%
2001-2015	71%	69%	73%	86%
pre-1996	25%	38%	12%	33%
1996-2000	31%	28%	43%	50%
2001-2005	68%	64%	71%	91%
2006-2010	68%	69%	68%	84%
2011-2015	79%	80%	78%	86%
Legally enforceable				
1958-2015	55%	52%	58%	78%
2001-2015	69%	67%	70%	82%
pre-1996	25%	38%	12%	33%
1996-2000	31%	28%	43%	50%
2001-2005	68%	64%	71%	91%
2006-2010	66%	66%	66%	84%
2011-2015	73%	73%	73%	71%
Dispute settlement				
1958-2015	54%	52%	56%	78%
2001-2015	68%	67%	69%	82%
pre-1996	25%	38%	12%	33%
1996-2000	25%	28%	43%	50%
2001-2005	66%	64%	71%	91%
2006-2010	66%	66%	66%	84%
2011-2015	73%	73%	73%	71%

Source: World Bank database documented in Annex A. This table covers WTO + areas, defined as 'Harmonization of standards; enforcement; national treatment, most favoured nation treatment. International treaties referenced in TRIPS: Paris Convention, Berne Convention, Rome Convention, IPIC Treaty' (Hofmann, Osnago and Ruta 2017, p.28).

Table 2

Intellectual Property in Regional Trade Agreements: WTO-X: 1958-2015

Percentage of Agreements Entering into Force

	World	Non-APEC	All APEC	APEC Intra-APEC
Coverage				
1958-2015	47%	53%	54%	69%
2001-2015	57%	59%	65%	73%
pre-1996	20%	52%	8%	33%
1996-2000	39%	38%	43%	50%
2001-2005	58%	44%	68%	91%
2006-2010	49%	60%	64%	68%
2011-2015	66%	80%	66%	64%
Legally enforceable				
1958-2015	39%	47%	45%	51%
2001-2015	49%	51%	54%	52%
pre-1996	16%	48%	8%	33%
1996-2000	22%	38%	43%	50%
2001-2005	45%	44%	46%	55%
2006-2010	44%	49%	55%	53%
2011-2015	61%	67%	59%	50%
Dispute settlement				
1958-2015	37%	47%	40%	45%
2001-2015	46%	51%	49%	45%
pre-1996	16%	48%	8%	33%
1996-2000	17%	38%	14%	50%
2001-2005	42%	44%	39%	45%
2006-2010	39%	49%	45%	42%
2011-2015	61%	67%	59%	50%

Source: As for Table 1. This table covers WTO-X areas, defined as 'Accession to international treaties not referenced in the TRIPS Agreement'.

Table 3

Intellectual Property in Regional Trade Agreements: WTO+: 2001-2015

Developed, Developing and Transition Economies

Percentage of Agreements Entering into Force

			APEC	
	World	Non-APEC	All APEC	Intra-APEC
Coverage in agreements between:				
Developed economies	85%	60%	89%	94%
Developed - Developing & transition	83%	91%	76%	84%
Developing & transition economies	40%	35%	46%	67%
Legally enforceable in agreements between:				
Developed economies	82%	60%	86%	88%
Developed - Developing & transition	80%	86%	75%	80%
Developing & transition economies	38%	35%	42%	67%
Dispute settlement in agreements between:				
Developed economies	79%	60%	82%	88%
Developed - Developing & transition	80%	86%	75%	80%
Developing & transition economies	38%	35%	42%	67%

Source: As for Table 1. Note that there were only three intra-APEC agreements involving 'developing and transition' economies over 2001-2015.

Table 4

Intellectual Property in Regional Trade Agreements: WTO-X: 2001-2015

Developed, Developing and Transition Economies

Percentage of Agreements Entering into Force

			APEC	
	World	Non-APEC	All APEC	Intra-APEC
Coverage in agreements between:				
Developed economies	79%	60%	82%	81%
Developed - Developing & transition	64%	64%	64%	68%
Developing & transition economies	29%	8%	50%	67%
Legally enforceable in agreements between:				
Developed economies	70%	60%	71%	63%
Developed - Developing & transition	55%	61%	51%	48%
Developing & transition economies	25%	8%	42%	33%
Dispute settlement in agreements between:				
Developed economies	61%	60%	61%	50%
Developed - Developing & transition	53%	61%	47%	48%
Developing & transition economies	23%	8%	38%	0%

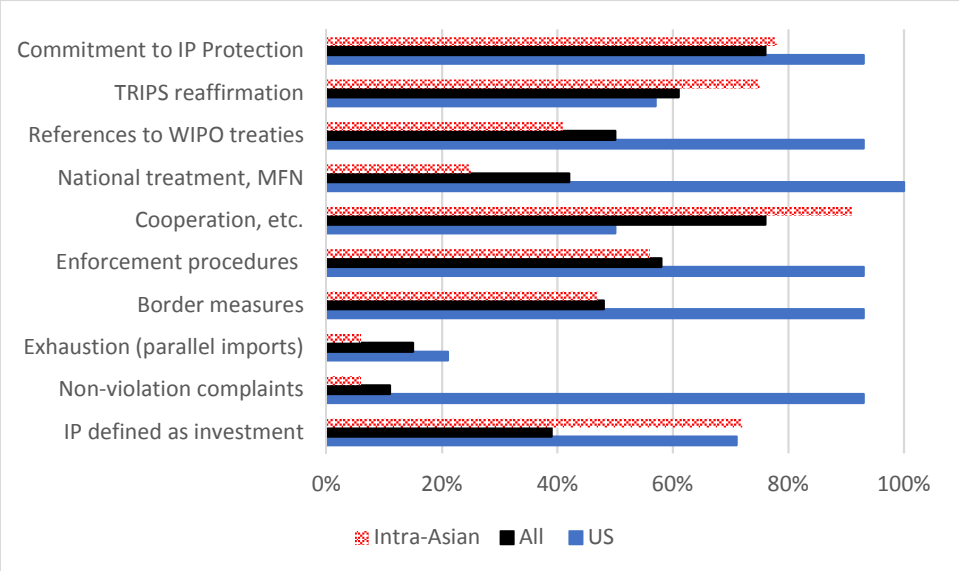
Source: As for Table 1. WTO-X is defined as in Table 2. See also the note to Table 3.

Although the World Bank database gives a good overview of IP in regional trade agreements, it is useful to look in more detail at the provisions in these agreements. Detailed work of this kind has been carried out by the WTO, drawing on its own database (Valdés and McCann 2014). The WTO's work covers 245 'physical' agreements notified to the WTO and in force by February 2014. Of the 245 agreements, 174 (or slightly over 70 per cent) were deemed by the authors to cover IP.. This share is somewhat lower than the share identified by the World Bank database discussed above. However, in broad terms, the two databases show similar trends and patterns.

Chart 1, drawn from the WTO's work shows the coverage of various general provisions for US agreements, intra-Asia agreements and those for any world economy. The chart shows that a high proportion of the 174 agreements at the global level which covered IP included some form of general commitment supporting IP protection, while around 60 per cent reaffirmed TRIPS rights and obligations. A smaller share of the 174 agreements – about 40 per cent – included separate national treatment or most-favoured-nation provisions in addition to the MFN and national treatment obligations already provided under TRIPS. At the global level, provisions concerning cooperation, aid and the like featured quite strongly. Enforcement provisions were also surprisingly strong. Some more technical areas like parallel imports and non-violation complaints figured at relatively low levels.

Chart 1

General IP Provisions: Shares of Those Covering IP



Source: Valdés and McCann (2014, p.12). By way of clarification, the chart shows that almost 80 per cent of intra-Asian agreements classed as having IP coverage included a commitment to IP protection. Cooperation also covers aid and coordination. Border measures in the chart refer to commitments to action at the border (for example, cooperation on IP in customs procedures). Exhaustion covers the way in which control of distribution is treated (for example, where parallel imports not authorised by the IP owner are concerned). Non-violation complaints are those that allow general nullification and impairment action in relation to benefits a party might reasonably be expected to obtain, even where there is no specific violation of an agreement.

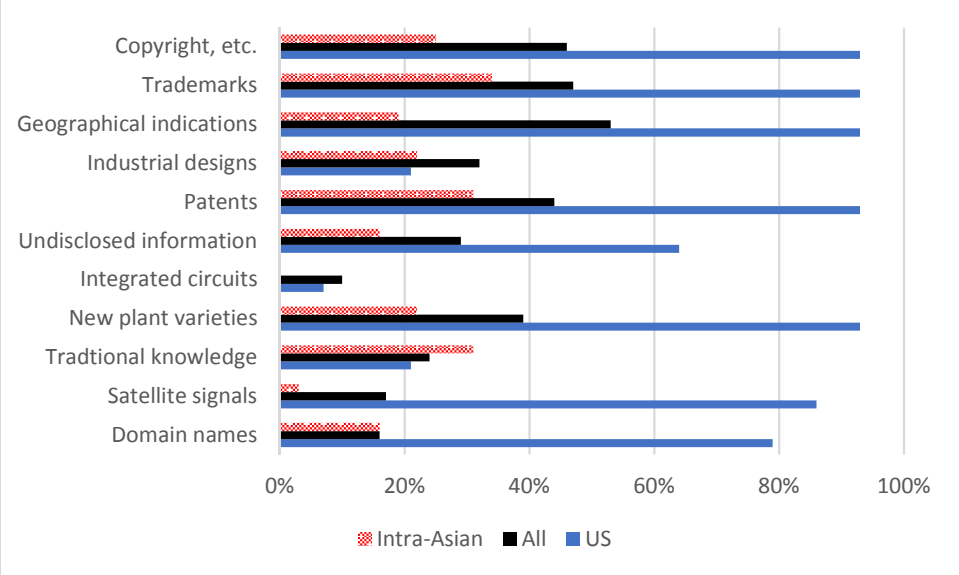
Not surprisingly, the United States scores highly in most categories, with 100 per cent of its 14 agreements that covered IP recorded as having national treatment or MFN provisions, and with

very high proportions for commitment to IP protection, references to WIPO treaties, enforcement provisions, border measures and non-violation complaints. The United States scores below the global level for references to TRIPS and for cooperation, aid and the like. Intra-Asian agreements score quite highly for general commitments to IP protection, TRIPS reaffirmation, cooperation/aid, and defining IP as investment, but have lower scores in some other categories such as national treatment/MFN provisions.

Chart 2, again drawn from the WTO work, shows coverage for some specific provisions. Here the gap between the United States and global scores is very marked. Thirteen of the 14 (or 93 per cent) of the US agreements that covered IP addressed copyright, trademarks, geographical indications, patents and new plant varieties. (The exception was a 1985 agreement with Israel that did not cover any of the specific issues examined in Chart 2). In contrast, intra-Asian agreements scored below the global level in a number of categories. They scored significantly above the United States in only one area in Chart 2, namely traditional knowledge. The US and intra-Asian agreements scored about the same for industrial designs.

Chart 2

Specific IP Provisions: Shares of Those Covering IP



Source: Valdés and McCann (2014, p.24). By way of clarification, the chart shows that almost 40 per cent of the 174 agreements at the global level classed as having IP coverage addressed new plant varieties. Integrated circuits cover layout designs for these circuits. Undisclosed information refers to trade secrets. Traditional knowledge also covers genetic resources in the above chart. Satellite signals refer to action to prevent unauthorised distribution of programme-carrying satellite signals.

The Provisions of Three Recent Agreements

The preceding section has suggested that IP has been addressed in very different ways in RTAs. This continues to be the case in modern agreements. In part, this reflects continued differences between developing economies and some developed economies on IP issues, with consequent differences among agreements depending on which economies are involved. In part, it occurs because TRIPS and other international agreements already provide minimum standards for protecting IP rights. It is therefore possible for agreements to focus on areas (if any) where the parties negotiating the agreement consider strengthened IP rights necessary. This may also be informed by parties' consideration of emerging issues and technologies that have not yet been governed by international IP rules. The WIPO "Internet treaties" (e.g. the WIPO Performances and Phonograms Treaty and the WIPO Copyright Treaty) are examples of IP treaties that, in part, set out to address emerging IP issues, in this case IP in the digital environment.

Box 1

The CPTPP and the TPP: Differences on Intellectual Property

While the CPTPP incorporates the IP chapter of the TPP Agreement, it contains more of the inoperative provisions than any other chapter. Examples are:

- The requirement in TPP that the term of protection for copyright apply for at least the life of the author plus 70 years has been suspended.
- The CPTPP suspends an obligation to adjust a pharmaceutical product's term of patent protection as a result of the marketing approval process.
- A provision requiring protection of test data for at least five years from the date of approval for pharmaceutical products has been suspended under the CPTPP.
- A provision requiring criminal and civil penalties in relation to decoding and unauthorized distribution of encrypted programme-carrying satellite signals has also been suspended.

A more detailed list of provisions that have also been suspended under the CPTPP can be found on the website of the Australian Department of Foreign Affairs and Trade, at http://dfat.gov.au/trade/agreements/tpp/outcomes-documents/Documents/tpp-11-faqs-suspensions-explained.pdf

The TPP provides the most comprehensive treatment of IP rights of the modern agreements, with the text of the relevant chapter running to almost 75 pages. Although some of its provisions were suspended by the 11 remaining TPP Parties following the withdrawal of the United States (Box 1), it still covers the whole range of IP issues, including cooperation, trademarks, geographical indications, patents, industrial designs, copyright, and IP rights enforcement. Among its general provisions, the agreement sets out the key principle of national treatment covering all IP issues covered by the chapter, describes the key objectives of protecting and enforcing IP rights and records the commitment of each party to ratify or accede to international agreements ranging from the 1989 *Protocol Relating to the Madrid Agreement Concerning the International Registration of Marks*[46] to the 1991 *International Convention for the Protection of New Varieties of Plants.*

[46] This is part of the Madrid System that allows an applicant to obtain an international registration that protects a mark in a large number of countries (WIPO 2018a). The TPP gives parties the alternative of joining

Specific aspects of the agreement are too long to summarise adequately, but some examples of provisions include the following:

- *Trademarks*. Initial registration and each renewal of a trademark is to be for no less than 10 years.
- *Exhaustion of IP rights*. Each party can determine the conditions under which exhaustion of IP rights applies (this means that parties can determine for themselves whether to allow parallel imports, subject to other international agreements in which they are involved).
- *Geographical indications*. Parties are to 'provide procedures that allow interested persons to object to the protection or recognition of a geographical indication', and protection may be refused on several grounds, among them that the indication 'is likely to cause confusion with a pre-existing trademark, the rights to which have been acquired in accordance with the Party's law'.
- *Industrial designs*. With respect to industrial designs, parties 'shall give due consideration to ratifying or acceding to the *Geneva Act of the Hague Agreement Concerning the International Registration of Industrial Designs'*.[47]
- *Enforcement*. Each Party is to ensure that enforcement procedures are available 'so as to permit effective action against any act of infringement of IP rights' covered by the chapter. These are to include civil and administrative procedures (covered at length in Article 18.74) and criminal procedures (Article 18.77).

The EU-Canada CETA also provides a lengthy treatment of IP, but one which focuses on some key issues of particular interest to the EU and Canada rather than traversing the full range of issues in quite as much detail as the TPP. Examples of the issues which it addresses are as follows.

- *Enhanced protection for trademarks*. CETA states that the parties will make 'all reasonable efforts' to accede to the 1989 *Protocol Relating to the Madrid Agreement Concerning the International Registration of Marks*. Canada was not a party to the Protocol or the preceding Madrid Agreement when CETA entered into force.
- *Strengthened protection for geographical indications*. CETA provides for protection for 171 EU geographical indications (for instance, Roquefort and Gouda Holland cheeses). With agreement of the parties, there is scope to add to geographical indications that are protected or delete those that have fallen into disuse.
- *Patent restoration for pharmaceuticals*. To compensate for a portion of the time lag between first filing a patent and receiving approval to market the pharmaceutical product concerned, the parties agreed to provide an additional period of protection for a period not to exceed two to five years.
- *Stronger protection for industrial design*. Each party is to make 'all reasonable efforts to accede to' the 1999 *Geneva Act of The Hague Agreement Concerning the International Registration of Industrial Designs*.

the 2006 *Singapore Treaty on the Law of Trademarks*, which seeks to harmonise administrative practices in this area.

[47] The Hague Agreement makes it possible for applicants to register their design with WIPO, and as a consequence protect it in multiple countries or regions (WIPO 2018b).

- *Enforcement and border measures*. Like the CPTPP, the agreement includes a detailed section on enforcement intended to toughen up procedures in this area
- The CETA also includes another detailed section on measures to be applied at the border to tackle counterfeit geographical indication, trademark goods and pirated copyright goods. The parties are to cooperate on border measures.

The Additional Protocol to the Framework Agreement of the Pacific Alliance does not include a separate chapter on IP and there are very few references to it in the text. The most substantive provision includes IP under the definition of investment (though intellectual property itself is not defined). This makes IP subject to the same disciplines as investment, which include national and most-favoured-nation treatment, and presumably allows recourse to the investor-state dispute settlement provisions of the agreement for some purposes. There is also provision for cooperation on IP in the e-commerce chapter.

A Forward Agenda on Intellectual Property Rights

APEC has carried out good work on IP issues, particularly through the Intellectual Property Rights Experts' Group (IPEG) that was established (under a slightly different name) in 1996 and given its present name and status as a working group in 1997. The group has been able to achieve much by consensus. Nevertheless, there are clearly differences within APEC on IP issues. One sign of differences, already noted, is the fact that the CPTPP parties have suspended a number of IP provisions that were in the TPP. Another is that not all APEC members have joined important agreements discussed in the previous section – only about one quarter of APEC members were parties to the 1999 Geneva Act to the Hague Agreement as at mid-January 2018 and around one third were not members of the 1989 Protocol Relating to the Madrid Agreement. A further indication is that RTAs have treated IP issues quite differently.

This suggests that there would be merit in further discussion of these issues and of the broader questions of the impact of IP rights on APEC economies, initially within the IEPG and subsequently in the CTI, the SOM and at Ministerial level. A useful focus for a discussion of this kind could be a baseline assessment of IP protection in domestic laws of each economy, drawing together much of the good work in this area already done in the IPEG, as well as any economy policy plans or specific proposals for future reform of IP. This baseline assessment could feed into further consideration of what an RTA chapter on IP in the APEC region might usefully address. It could also be useful to assess the available economic evidence on the impact of various levels of IP protection on broader economic development benefits, including technology transfer, innovation, foreign investment flows, and trade in technology-intensive goods and services.

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G. Services

Services trade was a sensitive issue during Uruguay Round negotiations and commitments under the General Agreement on Trade in Services (GATS) established by the Round were often modest, with a good deal of 'water' in the commitments when compared with applied regimes. This has left considerable scope for RTAs to carry the process of liberalisation further, as well as building on other disciplines such as those on domestic regulation and sector-specific commitments. To this point in time, RTAs have arguably produced worthwhile results, particularly in binding access at improved levels, and developing additional and more specific rules. They have, however, typically fallen well short of making a serious dent in the very substantial barriers to this trade – barriers estimated in one study to be in the region of 40-70 per cent in developing and transition economies in several sectors when expressed as tariff equivalents (Jafari and Tarr 2017, p.569).

One of the NGeTI issues endorsed by APEC Ministers – facilitating global supply chains – depends critically on the services like distribution centres, freight, retailing, banking, insurance, software and computer services, advertising and marketing that are required to move goods efficiently from the original producer to the consumer. It is not an exaggeration to say that services are a large part of the glue which allows value chains to function. Another of the NGeTIs endorsed - manufacturing services relating to supply chains and value chains - identifies directly the role of services in contributing to the activity of manufacturing, the movement of manufactures across borders, and marketing and after-sales service.

Services negotiations on a Trade in Services Agreement (TiSA) by 23 WTO members (including 11 APEC members)[48] remain on hold at the time of writing, but could prove extremely significant for future services negotiations, whether it remains a plurilateral agreement or becomes the basis of a broader WTO agreement. TiSA seeks to set a new international standard in services liberalisation by building upon commitments made in the GATS and in existing FTAs. TiSA negotiations cover key sectors like e-commerce, professional services, energy and mining-related services, transport services, and financial services. One assessment, prepared by consultants for the European Union, is that an outcome from TiSA based largely on binding services access at existing applied levels would still see a substantial reduction in the costs of exporting services by reducing exporter uncertainty (ECORYS and Centre for Economic Policy Research 2017, Annex A).

The Economic Significance of Services Barriers

In 2015, the latest year for which data are available, services comprised 67 per cent of APEC's GDP. When measured in terms of the services component of the current account, services make up around a fifth of APEC's exports. This understates, however, the contribution of services in two main ways. First, this measure at most captures only services delivered by GATS Modes 1, 2 and 4. It does not measure services delivered via commercial presence, which is the most important way of supplying services. Second, the balance of payments measure does not record the contribution of services to the supply of merchandise trade and their input into other services exports. On a value-added basis, domestic services in 2011 (the latest year for which data are available) made up around 36 per cent of APEC's gross exports and foreign services another 11 per cent.

[48] The European Union is counted as one in the 23. There are thus 50 economies participating.

While some major services sectors (such as tourism) are typically not subject to high barriers, many other services sectors are. Table 1 gives data on ad valorem equivalents to barriers to services trade estimated by Jafari and Tarr (2017) using methods pioneered by the Australian Productivity Commission. Their data are naturally subject to significant uncertainties, but they do point to quite high ad valorem rates in OECD economies (especially for fixed line telecommunications) and higher levels still for developing and transition economies.[49] Other work, using different methods, has arrived at broadly similar conclusions on the magnitude of barriers (see, for example, Fontagné, Guillin and Mitaritonna 2011).

Table 1
Ad Valorem Barriers to Foreign Suppliers of Services

Sector	OECD/ Other EU	Developing and transition	Least Developed
Accounting	29%	35%	33%
Legal services	31%	46%	46%
Air transport	15%	44%	47%
Rail transport	16%	58%	56%
Road transport	18%	38%	31%
Banking	2%	18%	15%
Insurance	14%	27%	31%
Fixed line telecom.	35%	69%	764%
Mobile line telecom.	1%	1%	4%
Retail	1%	3%	3%
Maritime transport	9%	40%	31%

Source: Jafari & Tarr (2017, p. 569)

It is important to note that for services trade, behind the border barriers are a significant part of the puzzle. This means that in addition to barriers like local presence requirements, limitations on foreign ownership and form of establishment, service suppliers also face barriers posed by burdensome and duplicative licensing and qualification requirements, unreasonable registration fees, opaque regulation and other costly forms of red tape. For this reason, RTAs have sought to deliver disciplines on behind the border barriers that are WTO+. Domestic regulation provisions, which seek to maintain the ability of economies to regulate in the public interest, while ensuring such regulation is impartial and reasonable and does not constitute an unnecessary barrier to trade, provide one way of delivering such disciplines.

The fact that there is a significant gap between applied barriers to services trade and those bound in the GATS (Chart 1) has an additional chilling effect on trade because of the uncertainties exporters face. Work to estimate these effects for cross-border services trade has been carried out by ECORYS and the Centre for Economic Policy Research (2017, Annex A). It suggests that the impact is similar to that of imposing additional trade costs on exporters of services. The cost saving to exporters from eliminating binding overhangs is estimated to be typically between two and four per cent, although there are some outliers.[50] This may overstate the cost in the case of some economies where there is little likelihood of services barriers being increased. However, eliminating the gap between GATS and applied services regimes (binding

[49] The ad valorem equivalents cited here estimate, in percentage terms, the impact of discriminatory barriers on the prices of the foreign services supplied.

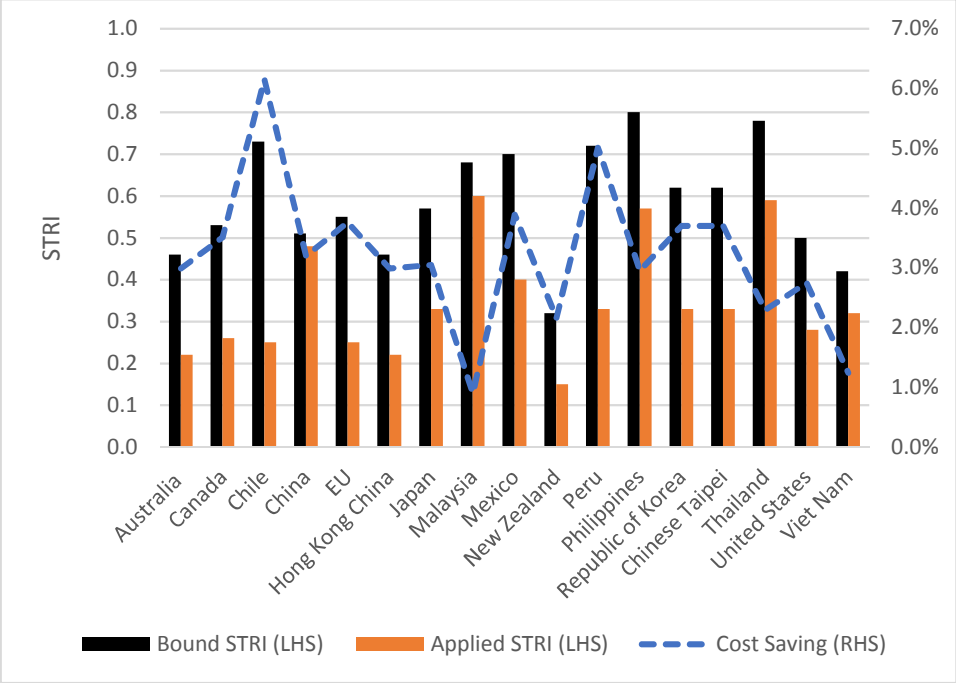
[50] These estimates should be used with considerable caution given the simplifying assumptions used to produce them.

overhangs, or 'water in the GATS') is still likely to have some trade impact even if applied barriers are not wound back.

All of this suggests that trade in services is an area where there are likely to be significant benefits from further liberalisation. Gains will clearly flow to economies exporting services to markets undergoing liberalisation. Benefits from increased competition will flow from an economy's own liberalisation. In the case of RTAs, liberalisation is less likely to involve some static welfare costs from trade diversion than is the case for goods, given that services do not typically involve the loss of tariff revenue (Mattoo and Fink 2004).[51] Moreover, the services equivalent of rules of origin (typically called denial of benefits) is less likely to be strongly discriminatory for the bulk of services trade than is the case for goods. Even so, liberalisation by a broad group of economies is likely to deliver stronger gains than more limited liberalisation by two or a few economies.

Chart 1

Applied and Bound STRI and Cost Savings from Eliminating Binding Overhangs: Selected APEC Markets and the EU



Source: ECORYS and Centre for Economic Policy Research (2017). A similar graph appears in this publication. STRI stands for Services Trade Restrictiveness Index. It has a maximum value of 1 (most restrictive). Cost savings are expressed as a percentage of the cost of exporting services to the market identified.

Services Trade and Regional Trade Agreements

Tables 2 below presents data on the services coverage of RTAs and on the extent to which services commitments are legally enforceable and subject to dispute settlement. These data are drawn from the World Bank database documented in Annex A. Among other points, Table 2 shows:

[51] In the classic model developed by Viner, static welfare gains from trade liberalisation for goods can be offset by the loss of tariff revenue when liberalisation is on a preferential basis. However, Mattoo and Fink do point out that there is a special form of trade diversion that can apply for services trade: namely where improved access on a preferential basis gives a less efficient provider first mover advantages in the market.

- The proportion of agreements that cover services has increased over time. Services coverage thus follows the broad pattern for many other sectors addressed in this paper. Whereas coverage of services was 36 per cent of agreements entering into force over 1996-2000, it increased to 84 per cent by 2011-2015.
- The proportion of agreements that are legally enforceable and subject to dispute settlement has increased. The latter rose from 17 per cent of agreements entering into force over 1996-2000 to 75 per cent over 2011-2015.

Table 2

WTO+ Commitments in Preferential Trade Agreements on Services

(percentage of agreements entering into force)

			APEC	
	World	**Non-APEC**	**All APEC**	**Intra-APEC**
Coverage				
1958-2015	65%	53%	76%	90%
2001-2015	78%	64%	88%	91%
pre-1996	38%	48%	27%	67%
1996-2000	36%	28%	71%	100%
2001-2005	68%	44%	89%	91%
2006-2010	81%	71%	89%	95%
2011-2015	84%	80%	85%	86%
Legally enforceable				
1958-2015	51%	28%	71%	90%
2001-2015	63%	31%	84%	91%
pre-1996	29%	41%	15%	67%
1996-2000	19%	7%	71%	100%
2001-2005	51%	16%	82%	91%
2006-2010	61%	29%	86%	95%
2011-2015	77%	60%	83%	86%
Dispute settlement				
1958-2015	50%	28%	70%	88%
2001-2015	62%	31%	83%	89%
pre-1996	29%	41%	15%	67%
1996-2000	17%	7%	71%	100%
2001-2005	51%	16%	82%	91%
2006-2010	61%	29%	86%	95%
2011-2015	75%	60%	83%	79%

Source: World Bank database documented in Annex A.

- Over time, more of the agreements entering into force that covered services were also legally enforceable and subject to dispute settlement. In 1996-2000, this applied to less than half of the agreements that entered into force. By 2011-15, it applied to about 90 per cent.
- After the WTO was established in 1995, APEC economies moved faster to cover services than non-APEC economies. Over 1996-2000, coverage of services was 71 per cent for agreements entering into force involving an APEC economy – about twice the global share. But by 2011-15, services coverage for APEC and global agreements entering into force was about the same.

The increase in services coverage of RTAs reflects the broader trend towards increasing depth in these agreements that has been discussed on a number of occasions elsewhere in this stocktake. For example, many of the factors that led to investment becoming a more prominent part of RTAs also apply to services (see Annex H). With services, an extremely important factor was the entry into force of the GATS in 1995, which as Latrille has remarked 're-set' the situation 'by creating rules on international trade in services through the GATS and its Article V ("Economic Integration"), which apply specifically to regional services agreements' (2016, Chapter 8). NAFTA's entry into force in 1994 was another important factor – one that, as discussed below, created a different model for including services in regional agreements.

Table 3
WTO+ Commitments in Preferential Trade Agreements, GATS, 2001-2015
(percentage of agreements entering into force)

			APEC	
	World	**Non-APEC**	**All APEC**	**Intra-APEC**
Coverage in agreements between:				
Developed economies	94%	80%	96%	100%
Developed-Developing & transition	84%	75%	92%	88%
Developing & transition economies	56%	42%	69%	67%
Legally enforceable in agreements between:				
Developed economies	88%	80%	89%	100%
Developed-Developing & transition	61%	23%	90%	88%
Developing & transition economies	50%	35%	65%	67%
Dispute settlement in agreements between:				
Developed economies	85%	80%	86%	94%
Developed-Developing & transition	61%	23%	90%	88%
Developing & transition economies	50%	35%	65%	67%

Source: World Bank database documented in Annex A.

Table 3 looks at a different aspect of services coverage and enforceability by breaking down shares according to whether developed economies or developing and transition economies were involved over the period 2001-2015. As the table shows, coverage of services in agreements involving developed economies only was very high over this period. It was somewhat lower, but still high, for agreements that involved developed and developing and transition economies. Coverage was lowest – only 56 per cent – for agreements between or among developing and

transition economies. However, the rule that services coverage decreases with lower levels of development is not as marked for agreements involving APEC economies. This no doubt reflects the relative openness to trade of a number of developing APEC economies - an openness that goes some way to explaining the region's dynamism.

Box 1
GATS-Style Services RTAs

GATS-Style Agreements. Latrille's database, which runs to the end of 2014, looks at 122 services agreements notified to the WTO under Article V of the GATS ('Economic Integration'). He identifies 48 GATS-style agreements. Typically (but not always with all elements), they feature:

- a positive list approach (that is, commitments only apply to services specifically listed)
- an architecture based on the four GATS modes of supplying services
- services delivered via commercial presence (Mode 3) addressed along with other services in the services chapter rather than in a separate investment chapter
- a market access clause based on Article XVI of the GATS. Where market access commitments are undertaken, Article XVI excludes a number of restrictions unless otherwise scheduled. Examples are various types of quantitative restrictions (such as a limit on the number of service providers), economic needs tests and measures that require a specific form or legal entity when services are delivered by commercial presence
- national treatment based on like services and service suppliers (this prohibits measures that have an adverse impact on foreign suppliers vis-à-vis like domestic services or service suppliers)
- no standstill or ratchet provisions (standstill provisions essentially involve no new restrictions, while ratchet mechanisms give to the RTA partner the benefit of any unilateral liberalisation)
- transparency commitments confined to publication of measures
- no 'explicit provisions on performance requirements, on the composition of senior management and the board of directors and on local presence' and
- 'most operative domestic regulation obligations linked to commitments'.

Source: Latrille (2016)

Services in RTAs can be handled in different ways. Latrille (2016) identifies two main classes of agreements. The first are GATS-style agreements that are based on the architecture of the GATS including a positive list of services for liberalisation and the four GATS modes of supply.[52] The second are NAFTA-style agreements that adopt a negative list approach and cover services delivered through commercial presence as part of a broader and separate chapter on investment. These two types of agreements tend be distinguished by many other characteristics (though all characteristics are not always present). Boxes 1 and 2 provide further

[52] These are cross-border supply or Mode 1 (such as services provided over the internet), consumption abroad or Mode 2 (where the recipient of the service travels abroad to receive it), commercial presence or Mode 3 (where the service-provider establishes a commercial presence in the recipient economy by investment in it), and movement of natural persons or Mode 4 (where the service provider travels to the recipient to provide the service).

detail drawn from Latrille's work. There are, of course, agreements that do not fall neatly into either category or that have some features of both.[53]

Box 2
NAFTA-Style Services RTAs

NAFTA-Style Agreements. Latrille identifies 58 agreements of this type. They are usually characterised by:

- a negative list approach (that is, services are covered by liberalising commitments unless specifically listed as not covered)
- an investment chapter that covers Mode 3 services as part of a broader treatment of investment
- national treatment using a 'like circumstances' test (that is, treatment no less favourable than domestic suppliers in like circumstances)
- transparency provisions that require advance notification of measures
- standstill and ratchet provisions
- 'explicit coverage of performance requirements; requirements for the composition of senior management and the board of directors, and local presence requirements'
- mutual recognition of qualifications (for example for engineers) for future negotiation and
- 'domestic regulation disciplines untied from commitments'.

Latrille distinguishes two different types of NAFTA-style agreement, namely NAFTA-I (where eliminating market access provisions of the kind indicated in GATS Article XVI is on a best-endeavours basis) and NAFTA-II (where market access provisions rule out quantitative and similar restrictions unless otherwise is scheduled).

Source: Latrille (2016)

The use of GATS-style and NAFTA-style RTAs tends to draw a line between APEC economies from the Americas and those from East Asia. As Chart 2 shows, APEC members from the Americas use NAFTA-style arrangements extensively and GATS-style agreements seldom. But economies in South-East and North East Asia use GATS-style agreements more frequently than not. There are exceptions to this. For example, all of Chinese-Taipei's agreements up until the end of 2014 were NAFTA style arrangements. The Republic of Korea and New Zealand had a fairly even split between the two types of agreements.[54]

Regardless of the architecture of the RTA, services commitments in RTAs are generally WTO+ in two main ways. First, they go beyond GATS by broadening the services sectors in which parties make commitments on core disciplines such as market access, most-favoured-nation and national treatment. Given that services commitments in the GATS are often significantly less liberal than those applied in practice, locking in existing regulatory openness under RTAs

[53] Latrille identifies 16 agreements that do not fall into either of the two main categories, perhaps because they are hybrids or because they are based on alternative concepts (EU-related agreements that aim at deeper economic and political integration are examples of the latter).

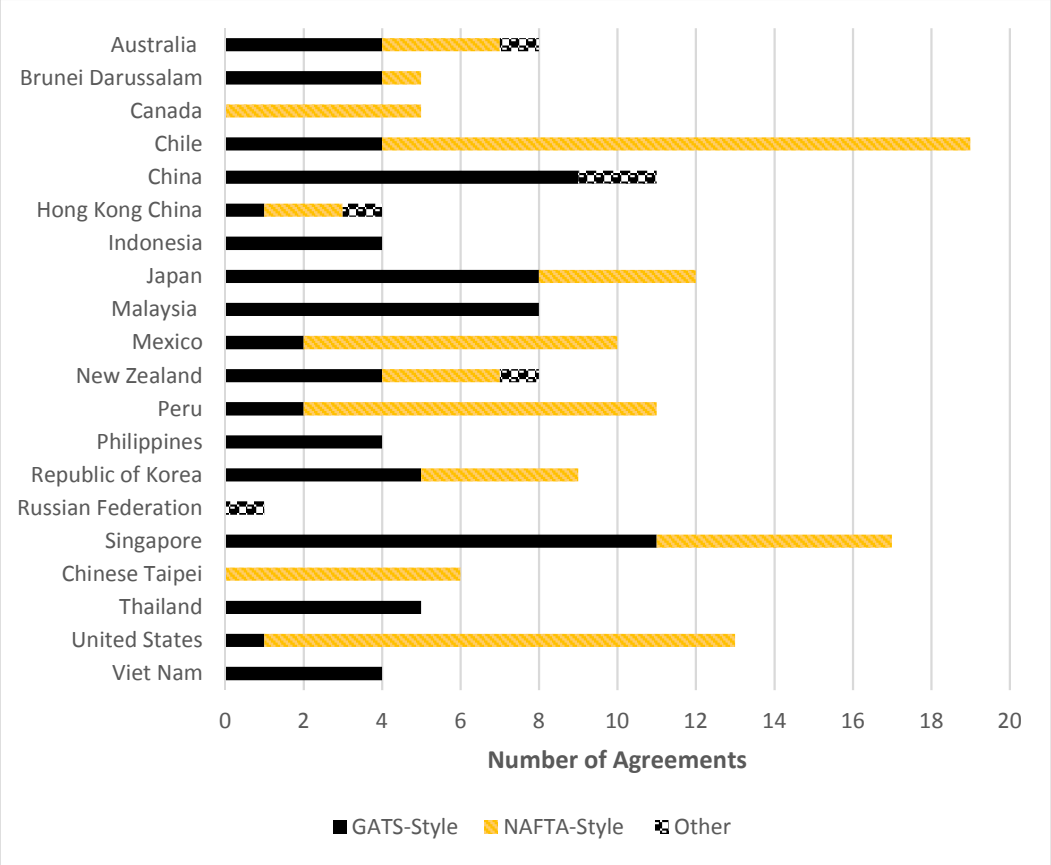
[54] Latrille also observed that GATS-style agreements mainly occur between developed and developing economies and among developing economies. The practice of developed economies varies, with Canada, for example, not using the GATS model at all (Latrille 2016).

is also a WTO+ outcome that enhances certainty for exporters. NAFTA-style agreements, with their negative list approach to scheduling and inclusion of a ratchet mechanism, generally go even further in expanding on the degree of commitment in GATS.

In addition to deeper commitments on existing disciplines, RTAs also include new or expanded services rules, for example on transparency, domestic regulation or in specific sectors such as financial services, e-commerce, telecommunications and professional services. Provisions on domestic regulation are particularly important for services trade, seeking to maintain the ability of economies to regulate in the public interest, while ensuring such regulation is impartial and reasonable, and does not constitute an unnecessary barrier to trade. GATS-style RTAs tend to apply those disciplines only to scheduled commitments, whereas NAFTA-style RTAs often apply them horizontally.

Chart 2

APEC RTAs at the end of 2014: GATS and NAFTA-Styles



Source: From data in Latrille (2016, Annex Table 8.5)

The Treatment of Commercial Presence

As already noted, commercial presence (Mode 3) is the most important way of delivering services abroad. In most economies, services delivered by Mode 3 are greater than total cross-border trade in services. This is especially the case in developed economies (Andrenelli et al. 2018, pp. 5, 19). For this reason, this stocktake looks more closely at the treatment of commercial presence in RTAs.

The different approaches in GATS-style and NAFTA-style agreements summarised in Box 1 and 2 apply to commercial presence as much as to the other modes. In many GATS-style agreements, obligations relating to investment by Mode 3 overlap with obligations associated

with the broader definitions of investment in the investment chapter (see Annex H). The provisions typically affected include national and MFN treatment and scheduling. This is often addressed by applying the chapters in parallel and specifying which chapter's provisions prevail in the case of inconsistencies, or by specifying the conditions under which certain provisions are applicable.[55]

- In some GATS-style agreements, the scope of investment liberalisation is limited to commercial presence and investment to a narrow enterprise-based definition based on commercial presence (and closely resembling FDI). Chornyi, Nerushay & Crawford (2016, pp 10, 18) identified 18 RTAs with investment liberalisation confined to the services chapter. About one third of these agreements were concluded by China.
- Investment protection as specified in the investment chapter, including access to ISDS, usually also applies to commercial presence in the services chapters of GATS-style agreements. It is not affected by the interaction between services and investment provisions.[56]

In NAFTA-style agreements, commercial presence commitments are usually included in the investment chapter and within a framework encapsulating all forms of investment covered by the agreement, generally using an 'assets-based' definition of investment, and pre- and post-establishment national treatment and MFN.[57]. There is therefore a distinct separation between the commitments for commercial presence and the other modes of supply of services, which are addressed in cross-border trade in services chapters.

- There are, however, overlaps with service provisions in many agreements, especially for market access, domestic regulations and transparency. Where conflict arises, priority is almost always given to the services chapter (Latrille 2016).
- In some NAFTA-style agreements without an investment chapter, there are cross-references to a pre-existing bilateral investment treaty (Latrille 2016).
- Obligations for financial services, which account for a substantial proportion of commercial presence, are often handled in a separate chapter for cross-border trade and investment in financial services. However, it is worth noting that separation of investment from services obligations and separate financial services chapters is not exclusive to NAFTA-style agreements. For example, the Japan-Mexico agreement has clear separation of investment and services obligations and a financial services chapter; and the EFTA-Korea, EFTA-Singapore and EU-Chile agreements have financial services chapters. The EU-Chile financial services chapter covers all the four modes of supply (Houde, Kolse-Patil & Miroudot 2007, pp. 8, 20, 24-25).

[55] For instance, in AANZFTA the investment chapter applies to a measure only to the extent that it is not covered in the services chapter, but certain specified provisions in the investment chapter, for example articles relating to expropriation, compensation and ISDS, apply to all investment in services. Some agreements, for instance, Japan-Singapore and China Pakistan, do not address interactions between services and investment chapters and therefore rely on interpretation of the rules of international law (Chornyi, Nerushay & Crawford 2016, pp. 19-20; Houde, Kolse-Patil & Miroudot 2007, pp. 17-22).

[56] 'This is because the broad-asset-based definition of investment which generally delineates the scope of application of these protections encompasses the narrower concept of "commercial presence" upon which the liberalisation obligations of GATS-inspired agreements are based' (Houde, Kolse-Patil & Miroudot 2007, p.26).

[57] Around 90 per cent of substantive investment chapters include national treatment for pre-establishment (entry) of investment, and 70 per cent include MFN. The provisions are typically based on Articles 1102 and 1103 of NAFTA that explicitly refer to "the establishment and acquisition of investment." (Chornyi, Nerushay & Crawford 2016, p.21).

The Provisions of Three Recent Agreements

Three recent agreements that are likely to have a profound impact on the Asia Pacific region are the TPP-11, the EU-Canada Comprehensive Trade Agreement (CETA) and the Additional Protocol to the Framework Agreement of the Pacific Alliance. They are reviewed briefly here and an assessment is offered as to how closely they follow the GATS-style or NAFTA-style approaches outlined in the second part of this stocktake.

The TPP-11 is regarded as something of a 'gold standard' among RTAs and this is also true of its treatment of services. Not only does the agreement contain important disciplines in this area, but it has also given rise to significant steps towards liberalisation through expanded commitments by its member economies. Insofar as its core provisions are concerned, it is essentially a NAFTA-style agreement under Latrille's definition. The chapter on cross-border services thus covers GATS Modes 1, 2 and 4, while commercial presence is covered as part of a broader investment chapter. As is usual for modern agreements covering services, there is a separate and largely self-contained chapter on financial services, as well as one on telecommunications. There is also a separate chapter on temporary entry of business personnel. Other provisions of the agreement relevant to services are included in chapters on state-owned enterprises, e-commerce and transparency.

The services, investment and financial services chapters are all based on a negative list approach, with ratchet clauses.[58] An annex to the services chapter deals with mutual recognition of professional services and establishes a Professional Services Working Group to facilitate this. The core national and MFN treatment clauses apply in 'like circumstances' in all three chapters. Between them, the market access clauses in these chapters rule out measures like quantitative restrictions or economic needs tests of a kind indicated in GATS Article XVI: further, this is mandatory, making the agreement a NAFTA II type in Latrille's terminology. The investment chapter explicitly addresses nationality/residency requirements for boards of directors (it rules out nationality requirements for senior management positions but allows nationality/residency requirements for a majority of the board of directors 'provided that the requirement does not materially impair the ability of the investor to exercise control over its investment'). The transparency provisions of the agreement are rigorous (see Annex C).

Reservations to the agreement are treated in several annexes. Annex I to the agreement covers reservations on existing measures, while Annex II addresses areas that the parties may wish to regulate in a more restrictive way in future. Annex III covers financial services. Not surprisingly, considering the barriers to services in the region and the sensitivity of many of them, the list of reservations is long. Nevertheless, the commitments represent a significant advance on those in the GATS and an incremental but overall positive advance in the specific case of financial services (Hufbauer 2016; Gelpern 2016. See also Box 3).

The telecommunications chapter recognises the value of competitive markets, but it falls short of a clear requirement that parties are to rely on market forces. Its main thrust is to require parties to ensure non-discriminatory treatment and reasonable access to telecommunications services and to telecommunications markets by firms from other parties. For example, each party is to provide 'its telecommunications regulatory body with the authority to require interconnection at reasonable rates'. Again, parties are to 'endeavour to cooperate on promoting transparent and reasonable rates for international mobile roaming services'. Other detailed provisions cover such matters as the resale of public telecommunications services, unbundling of network elements, interconnection with major suppliers, and access to 'poles,

[58] There are special provisions for Viet Nam regarding the ratchet clause for each of the three chapters for a period of three years after the agreement enters into force.

ducts, conduits, and rights of way' to suppliers from other parties. There are additional transparency provisions in the chapter.

Box 3
Commitments Under the CPTPP on Services

Hufbauer (2016, pp.88-89) has examined commitments under the TPP-12 on services for Japan, Malaysia and Viet Nam and compared these with their GATS commitments. His findings, which also apply to the CPTPP, include:

- Japan committed in the GATS to full national treatment for Modes 1 and 3 for 26 sub-sectors in the standard 138 sub-sector WTO classification, but under the negative list approach in the CPTPP there are full national treatment commitments in 85 sub-sectors and more liberal commitments in another 47. Examples of sub-sectors with improvements over GATS include courier services, telecommunications, radio and television services, and distribution services.
- Malaysia has committed to liberalisation of legal services and provided improvements over GATS commitments in areas such as computer and related services, construction services, environmental services and higher education services.
- Viet Nam had made commitments for full national treatment for Mode 1 and Mode 3 in only eight sectors in the GATS, but under the CPTPP has agreed to full national treatment in 64 sub-sectors and more liberal commitments compared with GATS in another 43. Examples where improvements have occurred are engineering services, management consulting services, general construction services and radio and television services.

Source: Hufbauer (2016).

The EU-Canada CETA is another ambitious trade agreement - perhaps the most ambitious trade agreement concluded by the European Union other than its own progress towards an economic community. The agreement breaks new ground in a number of areas. For services and investment, it does not conform wholly to either the GATS-style or NAFTA-style agreements discussed above, although it is much closer to the NAFTA model. The agreement thus separates out services supplied via commercial presence (addressed in the investment chapter) from other types of services. But the latter are themselves split into two chapters, one covering Modes 1 and 2 services and the other Mode 4 services. For the first time in an EU trade agreement, a negative listing approach is adopted for services liberalisation (Webb 2017, p.11). There are separate chapters on financial services, telecommunications and maritime services, as well as chapters that are relevant to services, including those covering mutual recognition of professional qualifications, domestic regulation and regulatory cooperation.

The negative listing approach is theoretically more liberalising than a positive listing, but it should be noted that there are many reservations maintained by the European Union and Canada on services and investment. Taking reservations on services and investment together, they run to over 850 pages (although many reservations are of limited significance). The reservations include those maintained at member state level for the European Union and at province or territory level for Canada.

As with the NAFTA model, there are ratchet clauses that lock in unilateral liberalisation for the benefit of the other party where existing measures are modified. These clauses cover cross-border services, investment and financial services. The national treatment article includes, again in line with the NAFTA model, reference to 'in like situations'. A market access article rules out the use of quotas and the like or economic needs tests in areas where no reservations

have been made, as with the NAFTA II model described by Latrille. CETA places strong emphasis on negotiating mutual recognition of qualifications: indeed, there is a chapter on this issue. This is innovative, allowing approved professional bodies in the European Union and Canada to put forward proposals for mutual recognition and subsequently negotiate arrangements. These can then be presented for review by a special committee of EU and Canadian representatives and, if judged consistent with the agreement, incorporated into CETA.

A key objective of the Pacific Alliance is to achieve deep integration among its member economies (Adams and Brown 2015). Reflecting this, the Additional Protocol includes detailed coverage of services. Its basic structure follows the NAFTA-style model outlined above, perhaps partly because each of the member economies had entered into free trade agreements with the United States before, and sometimes well before, negotiations on the Additional Protocol concluded. The chapter on cross-border services adopts a negative list approach to scheduling commitments and it addresses Modes 1, 2 and 4, with Mode 3 principally covered by the investment chapter.

Some of the more specific articles in the services chapter also reflect the NAFTA approach. The national treatment test that a party shall apply is one 'no less favourable than … it accords, under similar circumstances, to its own service suppliers'. Again, 'to the extent possible' each party is to allow a 'reasonable time between publication of final regulations and their effective date'. The market access provision of the services chapter is based on the NAFTA II model in Latrille's classification. There is provision in the chapter for work to achieve mutual recognition of professional qualifications. The chapter rules out a local presence requirement as a condition for the cross-border supply of a service.

Box 4
Convergence Towards a Negative List?

The fact that all three of the modern agreements examined here use negative lists raises the question of whether this is becoming the dominant approach. But it may be premature to draw this conclusion. Of nine agreements examined by the APEC Policy Support Unit that entered into force in 2015, eight had chapters on services and four used a negative list approach for cross-border services. Three agreements used a positive list, while one (the China-Australia Free Trade Agreement) used a mixed approach, with Australia using a negative list and China a positive list (Kuriyama 2016, p.19).

There are separate chapters on financial services and telecommunications in the Additional Protocol (as was the case in the NAFTA agreement), as well as another chapter on maritime services. The financial services chapter is broad, covering insurance and a wide range of banking services. It too is based on a negative list approach, but covers both cross-border trade in financial services (essentially Modes 1, 2 and 4) and investment in or by financial institutions. The maritime services chapter provides for national treatment for ships from a party in the ports of another party (for example, with respect to access, right of stay and exit, allocation of berths and the like) and for developing cooperation in this sector. The telecommunications chapter is very detailed. It provides, among other things, for non-discriminatory access to telecommunications networks and services and for competitive safeguards, transparency in telecommunications tariffs and independent telecommunications regulatory agencies (Lima and Cracau 2016, pp.38-39).

A Forward Agenda on Services

The significance of services to APEC, and especially services delivered through commercial presence, means that it is particularly important that regional agreements reflect international best practice. As the preceding analysis has suggested, there are appreciable differences in services agreements, with some agreements mainly following the path set by NAFTA and others based on the architecture of the GATS. There is no doubt that proponents of these two types of agreements have much to learn from each other. The analysis suggests that the division is a fluid one with economies adopting approaches of others as they negotiate their own RTAs. Even so, it would be useful to encourage further discussion on how services are treated in order to promote best practice RTAs in the region.

As with a number of other sectors examined in this paper, a useful focal point in discussing these issues would be to prepare a model RTA chapter on services. Aside from one model chapter covering temporary entry of business persons prepared in 2008, this has not yet been completed in APEC, with an attempt to prepare one in 2008 abandoned in the absence of consensus on it (Kuriyama 2016, p.19). While it might be optimistic to expect that differences on services have been bridged or that they will be resolved easily, an exercise of this kind could encourage cross-fertilisation of ideas. At the very least, it should be possible for APEC economies to examine trends in the services component of RTAs, partly drawing on work carried out by the APEC Policy Support Unit and with a view to assisting APEC economies as they move to negotiate new RTAs.

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H. Investment and Cross-border Movement of Capital

As world markets have become more integrated, investment, in particular foreign direct investment (FDI), has become increasingly connected to trade flows as businesses have expanded their markets and supply chains across national borders. The interests of businesses in agriculture, manufacturing and mining and energy, and the markets in which they trade, have become closely identified not just with the integrity and efficiency of the supply chains and attendant services that are their lifeblood, but also with the financial infrastructures that support them. Similarly, services sectors and services trade have become increasingly linked to FDI, including to support the activities of foreign affiliates. Services sectors are predominant in modern economies, including many developing economies, and account for around two thirds of global FDI stock. Removing impediments to FDI across goods and services sectors, and initiatives to protect or reinforce the integrity of financial markets more generally, can significantly advance business interests and the broader public policy interests of governments around sustainable growth and job creation. The growing prominence of investment provisions in trade agreements is one consequence of the latest phase of globalization as governments and business seek to reap the public and private benefits from integrating international markets. [59]

Investment in early trade agreements

Prior to 1990, foreign investment issues were addressed mostly through bilateral investment treaties (BITs). Treaties were typically narrow in scope, focusing on investment protection and associated IP rights, and sometimes on investment promotion: investment liberalization was not a priority (Box 1). Most trade agreements did not have comprehensive investment provisions. The agreement setting up the European Economic Community (1957) was an exception: it is the earliest modern regional trade agreement (RTA) to liberalize investment, aiming to create a borderless internal market with free movement of capital and labour and embodying national and MFN treatment. The Canada-US Free Trade Agreement (1989) was another exception. It included an investment chapter with liberalisation and protection provisions that were expanded and further developed in the North America Free Trade Agreement (1994).

In the 1990s, the growing complementarity of trade and investment, ongoing trade liberalization in APEC economies and other regions and the onset of modern supply chain trading put more focus on incorporating comprehensive investment provisions in trade agreements. Early and important examples are the 1993 Treaty on European Union (the Maastricht Treaty), which advanced investment liberalization; NAFTA, which was the first agreement to bring together investment and services disciplines under the umbrella of an RTA; and Uruguay Round (1994) outcomes, which incorporated services and investment for the first time into the multilateral trade framework through the General Agreement on Trade in Services (GATS); the Agreement on Trade-Related Investment Measures (TRIMs); and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs), which addressed protection of IP linked to foreign investment. Collectively, these developments ushered in a new era in developing trade agreements.

[59] A similar rationale also applies to why services have become prominent in RTAs. See, for instance, UNCTAD 2006, pp. 2-11.

Box 1
Foreign Investment in Early International Agreements

From the late 1950s until the mid-1990s, foreign investment issues were addressed in bilateral investment treaties (BITs), RTAs and other arrangements. Their scope and approach varied widely.

BITs proliferated. The first was signed in 1959 and there were around 900 by the mid-1990s (UNCTAD 2017, p. 111). They influenced many RTAs, their provisions and investment chapters often resembling BITs with an emphasis on protecting investments over liberalizing and facilitating access to new investment opportunities. Many BITSs included investor-state dispute settlement (ISDS) provisions.

The OECD's 1961 Code of Liberalization of Capital Movements provided a model for developed economies on international investment facilitation that was adapted in later trade agreements. It relied on policy reviews and peer pressure to encourage unilateral liberalisation. The 1976 Declaration of International Investment and Multinational Enterprises complemented the code with provisions on national treatment.

Investment issues, including freedom of movement of capital, preferential, national and MFN treatment of investment and, in some cases, conciliation and arbitration of disputes, were also addressed from the late 1950s in agreements between developing economies. These agreements often reflected an intention to stimulate development through cooperation on investment between developing economies, in part a reaction to political-economy concerns about FDI from developed economies. Examples are:

- The Agreement on Arab Economic Unity (1957), later agreements signed by Arab League states and the Gulf Cooperation Council (GCC) agreement (1981)
- The Caribbean Common Market (CARICOM) (1973) and Andean Community (1988)
- Various agreements among African economies such as the Common Market for Eastern and Southern Africa (COMESA) (1994)
- ASEAN's Agreement for the Promotion and Protection of Investment (1987), based on traditional European BITs.

Sources: UNCTAD 2006, pp. 2, 13-29, 55; Bernasconi-Osterwalda and Jha 2011, pp. 5-6.

Table 1

Regional Trade Agreements: 1958-2015
Coverage of Foreign Investment in Agreements Entering into Force

			APEC	
	World	**Non-APEC**	**All APEC**	**Intra-APEC**
WTO+: TRIMs				
1958-2015	32%	16%	47%	76%
pre-2001	16%	16%	18%	60%
2001-2015	40%	16%	56%	77%
2001-2005	32%	16%	46%	73%
2006-2010	48%	17%	70%	89%
2011-2015	36%	13%	44%	64%
WTO-X: Investment				
1958-2015	55%	44%	64%	84%
pre-2001	26%	29%	21%	80%
2001-2015	69%	56%	77%	84%
2001-2005	60%	48%	71%	100%
2006-2010	71%	57%	82%	84%
2011-2015	73%	67%	76%	71%
WTO-X: Movement of Capital				
1958-2015	54%	53%	55%	80%
pre-2001	36%	45%	21%	60%
2001-2015	62%	59%	65%	82%
2001-2005	51%	44%	57%	91%
2006-2010	62%	60%	64%	84%
2011-2015	73%	80%	71%	71%
One or more: TRIMs, Investment & Movement of Capital				
1958-2015	67%	61%	73%	90%
pre-2001	44%	50%	33%	80%
2001-2015	79%	69%	85%	91%
2001-2005	72%	56%	86%	100%
2006-2010	82%	71%	91%	100%
2011-2015	80%	87%	78%	71%

Source: World Bank database documented in Annex A. The policy areas listed are: WTO+ TRIMs: provisions concerning requirements for local content and export performance on FDI. TRIMs measures only apply to investment relating to trade in goods. WTO-X Investment: information exchange; development of legal frameworks; harmonization and simplification of procedures; national treatment; establishment of dispute settlement mechanisms. WTO-X Movement of Capital: liberalization of capital movement; prohibition of new restrictions.

Investment Provisions in RTAs

The World Bank database shows that 67 per cent of all agreements entering into force from 1957 to 2015 (and currently in force) include provisions addressing one or more WTO+ TRIMs-related measures and WTO-X measures on investment and movement of capital. If agreements addressing GATS+ plus liberalization of services are included, the proportion rises to 72 per cent because of provisions on commercial presence.

The proportion of agreements negotiated since 2001 with investment-related provisions is appreciably higher than in earlier years: 79 per cent (84 per cent if services liberalization is added) compared to 44 per cent from 1957 to 2000. Following a familiar pattern in other new generation trade and investment issues (NGeTIs), investment provisions, including on specific measures, have become more prevalent in RTAs since the early 2000s. Also following a familiar pattern, investment coverage in trade agreements involving APEC economies is higher than the global average and, generally speaking, is substantially higher for intra-APEC agreements across WTO+ TRIMs, WTO-X investment and WTO-X movement of capital (Table 1)[60].

Table 2 provides a breakdown of agreements involving developed, developing and transitional economies over 2001-15 for TRIMs (WTO+), and investment and movement of capital provisions (WTO-X). Three things are especially noteworthy. First, in all three policy areas, investment coverage in agreements among developed economies was substantially higher than between predominantly developing economies. Second, investment coverage in intra-APEC agreements – irrespective of the type of economy - was significantly higher than for the world as whole. This was particularly marked in relation to TRIMs but was significant for movement of capital and WTO-X investment. And third, legal enforceability and dispute settlement arrangements were prominent across all investment policy areas, particularly involving agreements among developed economies and between developed and developing/transitional economies. Coverage tended to be markedly less in agreements among developing/transitional economies across the board, but here again agreements struck between APEC members tended to have substantially greater legal enforcement and provision for dispute settlement than agreements between developing/transitional economies globally.

[60] This trend has continued. All but two of the ten agreements involving APEC economies implemented in 2015 and 2016 and not included in the World Bank database include chapters on investment and cross-border trade in services. One, between Chile and Thailand, includes national treatment and market access commitments for commercial presence in the trade in services chapter. The other (between Malaysia and Turkey) includes a provision to broaden the agreement to include investment (Kuriyama 2016, pp.10, 24; Kuriyama and Sangaraju 2017, p. 11).

Table 2

Regional Trade Agreements: 2001-2015
WTO+TRIMs, WTO-X Investment and WTO-X Movement of Capital
Developed, Developing and Transition Economies

Percentage of Agreements Entering into Force

	World	Non-APEC	APEC All APEC	APEC Intra-
WTO+: TRIMs				
Coverage in agreements between:				
Developed economies	55%	60%	54%	81%
Developed - Developing & transition	40%	5%	66%	72%
Developing & transition economies	31%	27%	35%	100%
Legally enforceable in agreements				
Developed economies	55%	60%	54%	81%
Developed - Developing & transition	40%	5%	66%	72%
Developing & transition economies	27%	27%	27%	67%
Dispute settlement in agreements				
Developed economies	55%	60%	54%	81%
Developed - Developing & transition	40%	5%	66%	72%
Developing & transition economies	27%	27%	27%	67%
WTO-X: Investment				
Coverage in agreements between:				
Developed economies	73%	40%	79%	88%
Developed - Developing & transition	76%	68%	81%	84%
Developing & transition economies	52%	38%	65%	67%
Legally enforceable in agreements				
Developed economies	64%	20%	71%	81%
Developed - Developing & transition	50%	20%	71%	76%
Developing & transition economies	44%	31%	58%	67%
Dispute settlement in agreements				
Developed economies	64%	20%	71%	81%
Developed - Developing & transition	50%	20%	71%	76%
Developing & transition economies	42%	31%	54%	33%
WTO-X: Movement of Capital				
Coverage in agreements between:				
Developed economies	76%	80%	75%	88%
Developed - Developing & transition	69%	68%	69%	80%
Developing & transition economies	40%	38%	42%	67%
Legally enforceable in agreements				
Developed economies	76%	80%	75%	88%
Developed - Developing & transition	62%	55%	68%	80%
Developing & transition economies	40%	38%	42%	67%
Dispute settlement in agreements				
Developed economies	76%	80%	75%	88%
Developed - Developing & transition	62%	55%	68%	80%
Developing & transition economies	40%	38%	42%	67%

Source: World Bank database documented in Annex A

Links to BITs in RTAs

Foreign investment provisions in many RTAs continue to have a close resemblance to BITs, as noted previously for the 1990s. BITs are not included in this stocktake, but it is worth bearing in mind that their numbers continue to grow: there were nearly 3000 by 2016, though 1000 were beyond their expiry date and could be terminated unilaterally. However, it is worth noting that many contain 10-15-20 year survival clauses. Many older BITs use broadly based and vague definitions, include few exceptions and safeguards and therefore have scope to generate investor uncertainty (UNCTAD 2017, pp. 111, 127-29). There also is substantial overlap between investment provisions in BITs and RTAs. An UNCTAD sample of 167 trade treaties with investment provisions revealed that "at least 119" overlapped with earlier agreements, predominantly BITs. Investment provisions in many RTAs are applied in parallel with BITs because older BITs have not been terminated or consolidated.[61]

BITs continue to emphasise protection of established investments and investment-related IP[62] rather than increased opportunities for foreign investors (Box 1).[63]

WTO+ and WTO-X provisions in RTAs

RTAs, especially recent ones that address foreign investment, provide platforms that link investment disciplines and liberalisation in other areas, especially services. They also typically address investment directly through WTO+ and WTO-X provisions.

WTO+ provisions apply to FDI linked to international trade in goods and build on the TRIMs agreement and GATS commitments on establishing commercial presence in the territory of partners to an agreement. TRIMs-based provisions in RTAs typically ban or restrict local content and export performance requirements.[64] They range from specific 'TRIMs plus' provisions explicitly prohibiting performance requirements to simply reaffirming WTO commitments while providing for dispute settlement.[65] GATS-based provisions for establishing delivery of services via commercial presence typically cover transparency and MFN obligations, market access and national treatment commitments for commercial presence in specified sectors or sub-sectors, and domestic regulatory issues. Incorporated into RTAs they can add substantially to GATS commitments (Houde, Kolse-Patil and Miroudot 2007, p. 7).[66]

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[61] UNCTAD also outlines reform options to address these overlaps (UNCTAD 2017, pp.126-47).

[62] See, for instance UNCTAD 2007 and Liberti 2010.

[63] BITs with liberalizing provisions include US and Canadian BITs concluded after 2004 (Chornyi, Nerushay and Crawford 2016, p.5).

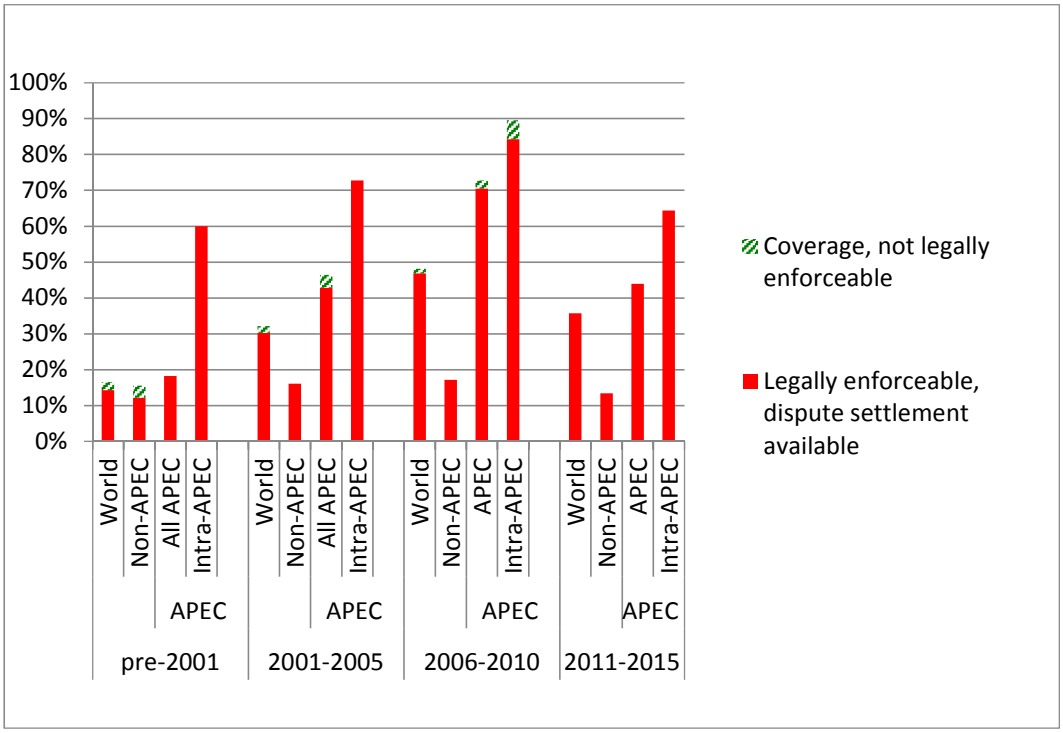
[64] Note that, while the WTO TRIMs agreement applies only to goods, many RTAs apply performance requirements to mode 3 services as well. They are routinely included in NAFTA-style agreements (Chornyi, Nerushay and Crawford 2016, pp. 20-22, 49).

[65] For instance, NAFTA Article 1106 '… contains a mix of TRIMs-type provisions as well as TRIMs-plus provisions prohibiting a party from imposing or enforcing mandatory performance requirements relating to export of a given level or percentage of goods or services; achieve a given level or percentage of domestic content, technology transfer, production process or other proprietary knowledge to a person in its territory' (Bernasconi-Osterwalda and Jha 2011).

[66] GATS commitments on investment relate to commercial presence, or 'Mode 3' for the supply of services under the agreement. Mode 3 is the supply of services by a service supplier of one WTO Member, through commercial presence, in the territory of another Member. The other three modes of supply are: Cross-border (Mode 1), consumption abroad (Mode 2) and presence of natural persons (Mode 4). Commitments under Mode 4, in particular concerning the eligibility of foreigners to reside in the territory of another Member for the purpose of employment in businesses with commercial presence, are also relevant.

The World Bank database indicates that RTAs with WTO+ provisions covering TRIMs are present in less than half of all agreements. But they do have significantly greater coverage in APEC economies, especially since 2000: 56 per cent of RTAs compared with 16 per cent for non-APEC economies (Table 1 and Chart 1). This is because the CPTPP style agreements, which are predominant in the APEC region, routinely include 'TRIMs plus' performance requirements, whereas EU and EFTA agreements do not (Houde, Kolse-Patil and Miroudot 2007, p.55). TRIMs-related provisions with their emphasis on bans and restrictions are almost always legally enforceable and have dispute settlement arrangements (Chart 1).

Chart 1
Regional Trade Agreements: 1958-2015
WTO+: Coverage and Legal Enforceability
TRIMs



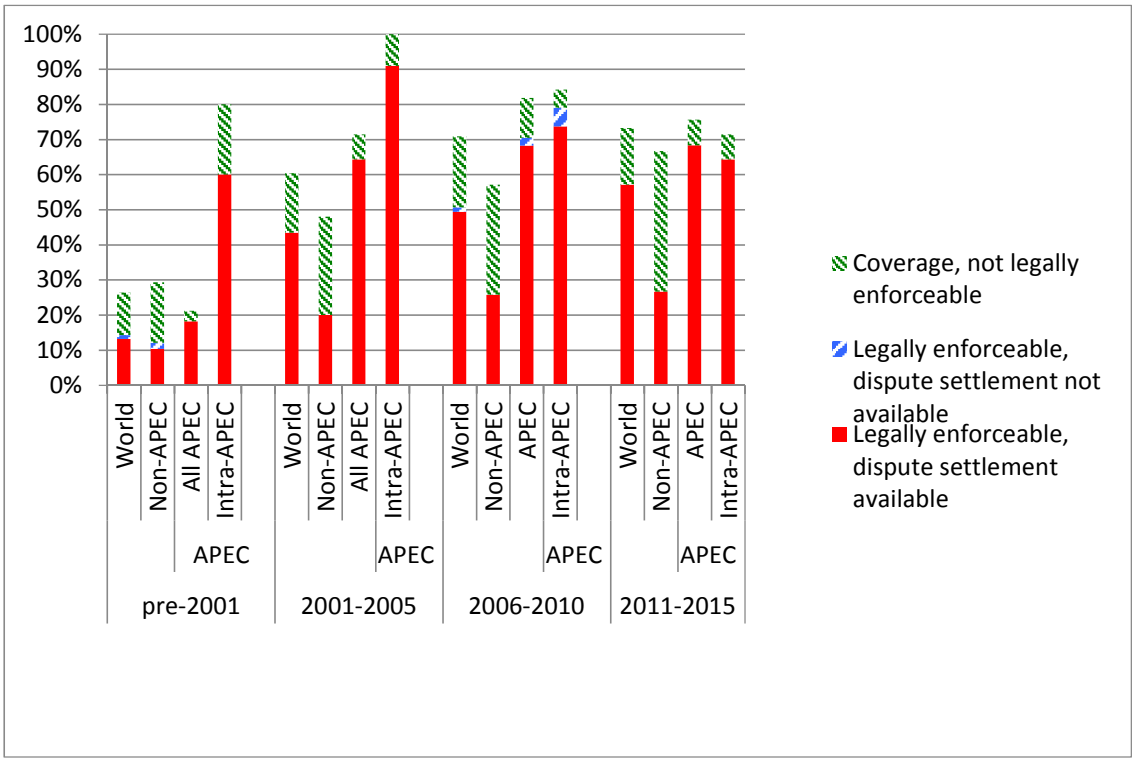
Source: Source: World Bank database documented in Annex A.

WTO-X provisions cover behind-the-border measures for protecting, promoting and liberalizing foreign investment - often very broadly defined - and the availability of investor-state (ISDS) and state-to-state dispute settlement mechanisms. These provisions also cover cross-border movement of capital and prohibit new restrictions on investment flows.[67] The proportions of agreements covering these areas has increased markedly since 2000. Coverage of legal enforcement on cross-border movement of capital is high and rising across APEC and all other economies. Enforcement provisions for investment (behind-the border) measures are much more evident in agreements involving APEC economies than in other agreements. Dispute settlement is available in almost all agreements involving APEC and non-APEC

[67] Coverage and enforceability of WTO-X investment in the World Bank data base is defined to include: information exchange; development of legal frameworks; harmonisation and simplification of procedures, national treatment and establishment of mechanisms for the settlement of disputes. 'Movement of capital' includes: liberalization of capital movement and prohibition of new restrictions. (See Annex A.)

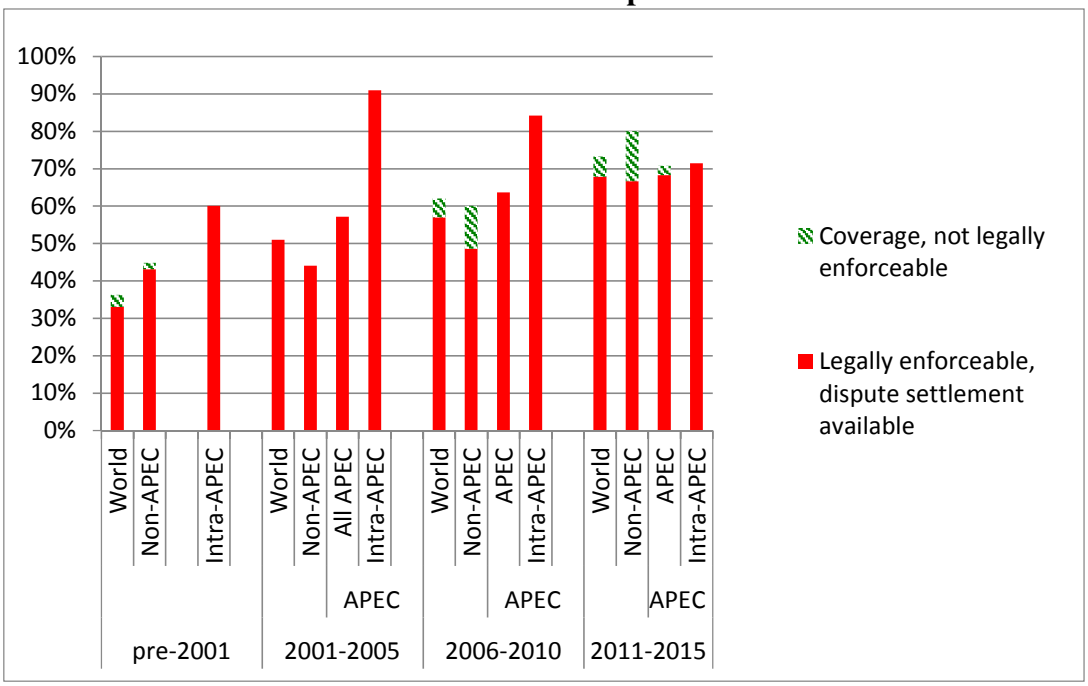
economies that cover (behind the border) investment. It also is available in all agreements with coverage of movement of capital (Charts 2 and 3 and Table 1).

Chart 2
Regional Trade Agreements: 1958-2015
WTO-X: Coverage and Legal Enforceability: Investment



Source: World Bank database documented in Annex A.

Chart 3
Regional Trade Agreements: 1958-2015
WTO-X: Coverage and Legal Enforceability
Movement of Capital



Source: World Bank database documented in Annex A.

Investment chapters in RTAs

Core investment liberalisation and protection are typically addressed in the investment chapters of RTAs. A 2016 survey by the WTO Secretariat of investment provisions in 260 RTAs notified to the WTO by 31 December 2015 found that 133 agreements – over half – have an investment chapter (Chornyi, Nerushay and Crawford 2016, pp. 10-11). Categories of investment chapters identified in the survey included:

- A 'NAFTA' model, used by many APEC economies in their trade agreements: for example, all ASEAN RTAs with third parties, all Canada's goods and services RTAs, most RTAs involving the United States, and some RTAs involving Japan and Korea.[68] Chapters incorporate national and MFN treatment applied to pre- and post-establishment investment positions; treatment disciplines, including on expropriation; and ISDS
- A 'freedom of establishment' model without an ISDS module, used in many EU and EFTA agreements.[69] In such chapters, investment is defined as commercial presence. In many of these agreements, BITs negotiated by the parties include ISDS[70]
- Agreements incorporating a pre-existing BIT (including ISDS provisions) or other existing investment agreement. All these agreements involve APEC economies[71]
- RTAs incorporating provisions with limited scope, including a focus on investment cooperation and promotion.

The NAFTA model is the most prevalent. It is used in over half (55 per cent) of the agreements surveyed. The freedom of establishment model is found in around 20 per cent of agreements; pre-existing BITs or other agreements are incorporated in around seven per cent; and 13 per cent have limited scope.[72]

Over time, the prevalence of ISDS provisions has increased. In particular, the freedom of establishment model without ISDS no longer applies to agreements with the European Union. All EU agreements with other economies since 2009 include ISDS.[73]

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[68] Five intra-APEC agreements use the NAFTA model without an ISDS module: Australia-New Zealand (ANZCERTA,) Japan-Australia, Japan-Philippines, Malaysia-Australia and United States-Australia (Chornyi, Nerushay and Crawford 2016, p.10).

[69] Freedom of establishment is the right of individuals or corporations in one state to establish companies or firms in another state. It is, in effect, freedom for commercial presence and is one of four 'freedoms' in the Treaty of the Functioning of the European Union (The Lisbon Treaty). The other freedoms are for movement of workers, provision of services and movement of capital. The freedom of establishment is addressed in Chapter 2 (Articles 49-55) of the Treaty. (http://www.lisbon-treaty.org/wcm/the-lisbon-treaty.html).

[70] BITs containing ISDS are also available to the parties of several plurilateral regional agreements with minimal investment provisions Chornyi, Nerushay and Crawford 2016, p. 48).

[71] The RTAs that incorporate an existing BIT or other agreement are: Chile-Central America (5 agreements), Japan-Peru, Japan-Vietnam, China-Singapore, and EFTA-Republic of Korea. In the WTO survey, incorporating a BIT into an agreement is taken as equivalent to having a chapter on investment (Chornyi, Nerushay and Crawford 2016, p.11).

[72] Eight agreements were classified as not fitting into the categories identified, including five involving APEC economies: EFTA-Singapore, New Zealand Singapore, Pakistan-China, Peru-China, and Thailand-New Zealand.

[73] See, for example, the EC trade policy webpage, at http://ec.europa.eu/trade/policy/accessing-markets/dispute-settlement/.

Investment in other chapters of RTAs

Investment issues are addressed not just in the investment chapters of RTAs. Services chapters often include provisions on delivering services through commercial presence, as do chapters on IP rights - specifically investment-related provisions to protect intellectual property (TRIPS WTO+) and strengthen IP rights (WTO-X). Investment related provisions also are scattered though agreements in areas like competition policy, the labour market and environmental laws and regulation.

Reflecting the close links between investment and services, 90 per cent of RTAs notified to the WTO and classified as covering both goods and services have an investment chapter, compared with 13 per cent of agreements covering goods (Chornyi, Nerushay and Crawford 2016, pp. 7-8).[74] Similarly, in the World Bank database, 93 per cent of agreements entering into force from 2001 to 2015 with WTO+ provisions for liberalizing services also have WTO-X provisions covering investment (behind-the-border) measures and/or movement of capital (across borders), compared with less than a quarter (24 per cent) for agreements that are shown as not including services liberalising provisions. Comparable percentages apply for APEC and non-APEC agreements, although (as noted in the main stocktake paper) coverage of services and investment is greater in APEC agreements.

There are, however, some differences in overlaps in the agreements among and between developed and developing/transition economies. From 2001 to 2015, all agreements with services liberalization between developed economies and among developing and transition economies outside APEC involved investment and /or capital movement liberalization, as did all intra-APEC agreements involving developing and transition economies. This was offset by lesser (though still substantial) foreign investment liberalisation in such agreements in agreements between developed economies involving APEC economies and non-APEC agreements and between developed and developing/transition economies (Table 3).

Table 3
RTAs: Developed, Developing and Transition Economies
Agreements with Services Liberalization that Cover Investment and/or Capital Movements
Percentage of Overlaps

			APEC	
Overlap in coverage in agreements	**World**	**Non-APEC**	**All APEC**	**Intra-APEC**
All economies	93%	92%	93%	95%
Developed economies	87%	100%	85%	88%
Developed-Developing & transition	93%	88%	96%	100%
Developing & transition economies	97%	100%	94%	100%

Source: World Bank database documented in Annex A.

Investment liberalization in RTAs

Investment liberalization provisions vary between RTAs, particularly in the interaction between investment and services chapters. In the 2016 WTO survey of 167 RTAs, 43 confine all liberalization, including commercial presence in services, to the investment chapter. This

[74] Furthermore the investment provisions in agreements covering goods only are "for the most part limited in scope" (Chornyi, Nerushay and Crawford 2016, p 8).

group includes NAFTA, EU and EFTA agreements with third economies and the Maastricht Treaty. There are 18 RTAs with investment liberalization confined to services chapters: they either do not have substantive investment chapters or have no investment chapter. Agreements concluded by China account for about one-third of these agreements.

Seventy three RTAs in the sample have liberalization provisions in both investment and services chapters. They are divided into two groups. In the first group 40 'hybrid' agreements have services chapters that cover commercial presence (Mode 3) and investment chapters covering other aspects of investment. In these agreements, the services chapters tend to be modelled on GATS with positively listed scheduling[75]. Their investment chapters are often based on NAFTA, with negative-list schedules and standstill and ratchet obligations.[76] Asian economies are parties to most of these agreements, with Japan a party to about one-quarter of them.

In the second group, 33 'post-NAFTA' agreements have investment chapters that apply to all investment regardless of sector. Some services chapters cover only cross-border trade in services and not commercial presence; CPTPP Chapter 10 covers mode 3. Investments in services, however, are subject to market access disciplines set out in the chapters on cross-border trade in services. Negative listing tends to be used for market access for services and investment obligations. The United States, Canada and Latin American economies negotiated most of these agreements (Chornyi, Nerushay and Crawford 2016, pp. 17-25).[77]

The WTO survey also notes that a new trend may be emerging from the RTA between Canada and the European Union (which provisionally entered into force in September 2017). Market access investment obligations are transformed from limitations on particular services sectors to limitations for all sectors (Chornyi, Nerushay and Crawford 2016, p. 25).

Legal Enforceability and Investor State Dispute Settlement

As noted earlier, the World Bank database shows a generally high degree of enforceability of investment provisions in RTAs. Since 2001, the proportion of agreements with legal enforceability and availability of dispute resolution in agreements has increased noticeably, especially in agreements involving APEC economies (Charts 1, 2 and 3).[78]

In the WTO survey, ISDS is incorporated in almost 75 per cent of agreements with substantive investment chapters and has been included increasingly in investment chapters in recent agreements. Five agreements incorporate ISDS mechanisms in BITs negotiated between the parties.[79] Remaining agreements leave resolution of disputes to State-to State mechanisms,

[75] These agreements would generally be classified as GATS-style agreements in their treatment of services (Annex G). Note, however, that their investment chapters were often based on NAFTA.

[76] Standstill obligations or mechanisms automatically bind liberalization reforms and prevent them from being rolled back. Ratchet obligations or mechanisms are liberalization measures adopted by a member country which cannot be replaced by new measures that are more restrictive. (See, for example, SICE Foreign Trade Information System, at http://www.sice.oas.org/dictionary/IN_e.asp)

[77] These agreements are labelled as 'post-NAFTA' in the WTO Working Paper because they follow the structure of NAFTA, with investment addressed comprehensively in the investment chapter and services chapters addressing cross-border trade only and not commercial presence. NAFTA itself is not included because no provisions in its services chapter apply to investment.

[78] This trend has continued. All the eight APEC agreements entering into force in 2015 and 2016, which include investment chapters and were not included in the World Bank data base, provided for ISDS (Kuriyama and Sangaraju 2017, p.12).

[79] Chile-Central America (5 agreements), Japan-Peru and Japan-Vietnam incorporate BITs in their RTAs (Chornyi, Nerushay and Crawford 2016, pp 53-54).

which are generally available for all enforceable measures in agreements, including for investment.[80]

ISDS provisions have evolved into more detailed mechanisms with more comprehensive procedural rules, though depth of detail and the nature of provisions vary widely across agreements. There is also an increasing emphasis on consultative processes to head off litigation and transparency, including provisions on publishing key documents, public access to hearings and public involvement in making submissions. The International Centre for Settlement of Investment Disputes (ICSID) and the United Nations Commission on International Trade and Law (UNCITRAL), which account for much of the institutional mechanisms for conducting hearings, are also updating their rules and processes, including to balance public concerns about transparency and private interests of disputing parties (Chornyi, Nerushay and Crawford 2016, p. 47).[81]

Many agreements have provisions that limit ISDS reviews in areas that intersect with sensitive government policy issues and increasingly provide for exceptions. For instance, 16 RTAs, concluded predominantly by ASEAN economies, exclude claims relating to investment liberalization and a number of agreements exclude MFN from dispute settlement processes to prevent 'treaty shopping' by investors. Other recent innovations include provisions for initiating proceedings for breach of contracts and provisions to avoid frivolous or unmeritorious claims[82]. The recently signed CPTPP includes a narrowing of the original TPP Agreement's provisions on ISDS to tighten the criteria for pursuing ISDS settlements. [83] The original scope of ISDS in TPP was beyond most Parties' treaty practice, with the exception of the US in respect of the inclusion of 'investment authorisations' and 'investment agreements'.

ISDS mechanisms are continuing to evolve in response to demands to achieve protection for foreign investors while also enabling states to pursue legitimate regulatory and public policy goals. The EU-Canada CETA and EU-Vietnam agreements, for example, move away from the prevailing *ad hoc* arrangements for dispute resolution to a permanent and independent investment tribunal and appellate mechanism. In the negotiation of future agreements the European Union is likely to advocate for similar provisions. The European Commission has also advocated the creation of a 'Multilateral Investment Court.[84]

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[80] For a discussion of State-to-State mechanisms provided by RTAs, see Chase et al 2013. Most agreements provide for quasi-judicial arrangements. The US-Australia agreement (AUSFTA) is an example of an agreement that does not provide for ISDS but does provide for quasi-judicial State-to State resolutions of investment disputes.

[81] ICSID administers the majority of international investment cases; UNCITRAL focuses on the legal framework for international commerce. ICSID is currently working to update its rules and UNICITRAL is considering a roadmap for possible ISDS reform (UNCTAD 2017, p. 123-24). See also:
https://icsid.worldbank.org/en/Pages/resources/ICSID%20NewsLetter/2017-Issue2/Update-on-ICSID-Rule-Amendment-Project.aspx
http://www.uncitral.org/uncitral/en/commission/working_groups/3Investor_State.html

[82] See Chornyi, Nerushay and Crawford 2016, pp. 26, 40. Certain agreements concluded since 2008, including by the United States, Canada, Japan, New Zealand, and Peru exclude MFN from dispute settlement processes to stop procedural use of MFN to access ISDS under another agreement.

[83] CPTPP suspends indefinitely provisions in TPP concerning investment screening (the criteria by which a party approves an investment) and with respect to investment agreements between host governments and investors. These changes are likely to redirect the handling of investor disputes towards domestic jurisdictions (Fergusson and Williams 2018).

[84] See for instance European Commission (2018a and 2018b). The EU-Vietnam FTA is yet to be ratified (http://www.europarl.europa.eu/thinktank/en/document.html?reference=EPRS_BRI(2018)614702.

Other provisions

A number of technical areas, some of which are touched on previously, add to the supporting framework for investment provisions. Box 2 summarises findings from the WTO survey on these areas.

Box 2
Investment Provisions for the Supporting Framework in Modern RTAs

The 2016 WTO Working Paper survey on investment agreements included findings across a number of specific areas addressed by agreements with investment chapters. They included:

- **Definitions of investment** are generally broad, covering tangible and intangible assets (including IP rights). 'Characteristics' of investment assets and transactions are used in later agreements to clarify identification of investment. The most widely used are the commitment of capital, assumption of risk and the expectation of profit
- **Definitions of investor** cover both natural persons and legal entities (usually companies). Many agreements have additional requirements, such as requiring investors to have substantive operations in the territory of a party
- **Denial of benefits and full and partial exclusions** delimit coverage of investment. Denial of benefits provisions are usually used to prevent benefits flowing to third party nationals and investors without substantive business operations in the territory of a party to an agreement. Exclusions of scope from the investment chapter, for instance relating to subsidies, government procurement, and taxation are a feature of many investment chapters
- The handling of **national treatment (NT) and most favoured nation (MFN)** varies between agreements. For example, MFN carve-outs are common, around 30 per cent of agreements do not include an MFN obligation for the pre-establishment phase of foreign investment and different NT standards are often applied at sub-national levels
- **Prohibition of performance requirements** often go beyond goods (TRIMs Agreement) and extend to services
- In almost all RTAs, **market access obligations** apply to investment in services only. Application beyond services 'is not (yet) established treaty practice'
- Both **positive and negative listing approaches** are used in listing investment commitments. Negative lists with standstill and ratchet mechanisms are used for most investment chapters. Commitments for commercial presence attached to services chapters tend to use positive listing or a hybrid approach
- **BITs-like investment protection provisions** usually feature in investment chapters. In this respect, provisions addressing fair and equitable treatment and expropriation are more precisely drafted in later agreements in a quest for ' a greater balance between investment protection and sovereignty'
- Provisions covering **transparency** of rules applying to foreign investment; prohibition on restrictions of **transfers of capital** and repatriation of profits; and **movement of business people** support the investment framework
- **Investment promotion** is provided for in about one-third of agreements, including some without substantive liberalizing provisions - which may signal a liberalizing 'intention' by the parties

- **Sustainable and socially responsible investment** provisions are included in about two-thirds of agreements, though they are 'largely aspirational.'

Source: Chornyi, Nerushay and Crawford (2016), pp.21, 23, 49 -51

A Forward Agenda

Foreign investment has become prominent in modern RTAs because it has become more closely linked with international supply chains and the delivery of services across borders and through commercial presence. Around 80 per cent of agreements concluded since 2011 have chapters on investment-related provisions. They include the major agreements recently concluded involving APEC economies – CPTPP and the EU-Canada CETA - and all but three of 19 agreements reviewed by the APEC Policy Support Unit that entered into force in the three years to 2016 (Kuriyama 2015, 2016, and Kuriyama and Sangaraju 2017).[85] Greater access to investment opportunities and balancing the interests of investors and governments through safeguards and enforcement mechanisms have become part and parcel of agreements to achieve more open and secure arrangements for international trade.

Handling foreign investment is complex. There is no 'one size fits all' formula that can work for investment provisions across all agreements. Convergence and flexibility work in tandem: there are clearly desirable and overriding principles and approaches to crafting investment provisions - for instance in relation to MFN and national treatments, transparency and consultative processes – but there are also caveats and exceptions that safeguard national interests. Investors should expect menus that vary appreciably across agreements and between parties to agreements that take into account sensitivities on access to particular sectors and the practical needs of business within widely varying institutional frameworks.

NAFTA-style agreements are likely to continue in which all investment liberalization is addressed in the investment chapter, as are GATS-style agreements in which commercial presence for services is reserved for the services chapter. And ISDS mechanisms are likely to differ to varying extents in response to differences in the institutional and legal frameworks of negotiating parties, albeit with greater emphasis on transparency and consultation processes.

APEC members have much to gain potentially from a deep and comprehensive examination of investment aspects of RTAs across the region and perhaps globally, possibly using provisions in the CPTPP as a benchmark, and focusing on how different agreements aim to meet the practical requirements of business.[86] In this context, there is a case for APEC ministers to commission a thorough examination of investment, including services-related aspects, to provide the basis for high level discussions about the handling of foreign investment in negotiations and exchanges more generally at officials, ministerial and leader levels.

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[85] Of the three agreements without an investment chapter, one (Chile-Thailand) covered Mode 3 investment in the Trade in Services chapter and another (Malaysia-Turkey) flagged an intention to expand the agreement to include investment in the future. Of the agreements reviewed by the APEC PSU with an investment chapter, however, two (China-Iceland and China-Switzerland) were limited to information exchange and investment promotion. The China-Iceland agreement deferred to a 1994 BIT. (Kuriyama 2016, p. 24, Kuriyama 2015, p.10).

[86] There is a precedent. The APEC PSU reviewed investment measures in RTAs involving APEC economies entering into force in 2015 using the TPP as benchmark (Kuriyama 2016, p.24). Note, however, when an initiative for APEC Model Measures on RTAs/FTAs was endorsed in 2008, APEC economies could not agree on measures for an investment chapter (Kuriyama 2015, p.11).

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I. Competition Policy and State Trading/State Owned Enterprises

It has long been understood that weaknesses in competition policy have the potential to prevent the realisation of gains from trade liberalisation – for example, by allowing anti-competitive conduct flowing from cartels, mergers between firms within and across national boundaries, and discrimination in favour of state enterprises. However, it has been difficult to move forward on competition policy as a dedicated area in multilateral trade negotiations.[87] As one of the 'Singapore issues', WTO Ministers agreed in 1996 to set up a working group to explore competition and trade. But along with two of the other three Singapore issues, it was dropped from the Doha Agenda in 2004, reflecting significant differences among WTO members on it.

Modelling by the WTO using a gravity model with 200 economies between 1980 and 2007 finds that competition policy has a substantial impact on trade in the parts and components – a proxy for trade and production sharing within value chains. Of their own accord, RTAs are found to increase trade in parts and components between members by around 35 per cent. Adding just one additional competition policy provision to RTAs is estimated to increase the trade in these products by around three percentage points (WTO 2011, p.162).[88] These results seem high, but are statistically significant at the one per cent level. Increasing competition is, of course, one of the ways in which broader trade liberalisation for goods and services promotes economic growth and, in this sense, it pervades all modern free trade agreements.

Trends in Coverage and Enforceability

Competition provisions are frequently included in RTAs. According to one study published by the OECD, 70 per cent of such agreements signed since 2001 have incorporated a dedicated chapter on competition policy (Lejárraga 2014, pp.15-16). For RTAs involving APEC economies, the proportion in recent years has also been high. Reviews of 19 APEC RTAs which entered into force in between 2014 and 2016 show that 14 had a separate competition policy chapter (Kuriyama 2015, p.10; 2016, pp.10-11; Kuriyama and Sangaraju 2017, p.11.) In addition to provisions in competition policy chapters, RTAs can include competition commitments in a range of other chapters, for example those dealing with investment, services, telecommunications, government procurement and intellectual property (WTO 2011, p.143).

Further information is available from the World Bank database on Regional Trade Agreements, which has been used throughout this document and which has been documented in Annex A.

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[87] Of course, many other aspects of multilateral trade negotiations address aspects of competition, among them tariff liberalisation, anti-dumping, subsidies and services liberalisation.

[88] The model used has country-pair fixed effects and country-time fixed effects. The competition policy variable used is an index that 'is built as the unweighted sum of three different elements. The first element focuses on the general objectives of an agreement. This element takes the value one whenever these objectives promote and advance conditions of fair competition between parties or establish cooperation between them in this field and zero otherwise. The second element represents the count of the total number of competition related provisions that are present both in the competition policy chapter and in other sections of an agreement such as investment and services. The third element counts the number of horizontal principles such as transparency, non-discrimination and procedural fairness that are included in the agreement' (WTO 2011, p.155, footnote 50). The result of three percentage points given above is based on Table D.4, and differ from those given in the text of the World Trade Report (WTO 2011, pp.146, 162).

Table 1 shows trends in coverage and enforceability for competition policy principles focusing on the period since 1996. As the Table shows:

- Coverage of competition policy in RTAs has been quite high over the whole period covered by the database, running at 74 per cent for all agreements for 2001-15.
- The proportion of new RTAs having provisions on competition policy has fluctuated and, unlike many other policy areas examined in this stocktake, there has been no apparent upward trend over the past two decades. For example, coverage over 1996-2000 was 89 per cent at the global level, whereas for 2011-15 it was 79 per cent.
- A high proportion of RTAs that have competition policy provisions also have legally enforceable provisions.
- For reasons that are not clear, the proportion of RTAs where dispute settlement applies for competition policy has fallen sharply, from 72 per cent over 1996-2000 to 13 per cent over 2011-15.
- For APEC agreements (that is agreements involving one or more APEC economies), coverage was only slightly below that of the world over 2001-15. Coverage has again fluctuated, but there is more evidence of an upward trend for APEC agreements. Intra-APEC agreements have had higher coverage, but the series is quite volatile.
- Legally enforceable agreements are a big proportion of agreements with competition policy provisions, both for APEC and intra-APEC agreements.
- The proportion of APEC RTAs with competition policies subject to dispute settlement has fallen sharply. For intra-APEC RTAs, the series is again volatile.

As Table 6 in Annex A shows, there is a big gulf in coverage of competition policy when comparing RTAs between two or more developed economies and those between developing and transition economies. This probably reflects not only a wariness on the part of developing and transition economies regarding these types of provisions, but also the fact that some may have implemented a competition policy framework only recently. This is the case with some ASEAN economies, for example.

Box 1

State Trading Enterprises and State Owned Enterprises in Trade Agreements

State trading enterprises (STEs) are defined in the GATT as enterprises with 'exclusive or special rights or privileges', which 'influence through their purchases or sales the level or direction of imports or exports'. [89]

- STEs include statutory, export and regulatory marketing boards; boards or corporations resulting from nationalised industries; and other enterprises or agencies focused on, for example, public health and safety, with purchases and sales that influence exports and imports[90]
- In practice, STEs are predominantly marketing boards and operate in the agriculture sector (Haywood, 2016, p.3)
- The term 'state trading enterprises' is potentially misleading because it can apply to *any* enterprise. However, there seems to be no instance of a member notifying the WTO of a private enterprise (Haywood, 2016, p.3).
- The definition of STEs is limited in that it includes only enterprises that influence trade through their purchasing and selling activities. Furthermore, since it is part of the GATT, it covers goods trade and not services trade.[91]
- The GATT (Article XVII) requires STEs to be non-discriminating in their exporting and importing activities and to abide by other GATT disciplines.
- These rules are, however, considered to lack specific disciplines addressing specific concerns about enterprises. They go no further than general obligations and weak transparency mechanisms. **In contrast, State owned enterprises (SOEs)** are usually defined in terms of ownership and control by the state as distinct from other state-entities that are established to pursue non-commercial objectives (e.g. museums, health care, research and education).

WTO+ provisions on state enterprises in RTAs usually cover SOEs explicitly and build on the disciplines in GATT Article XVII and GATS Article VIII. SOE rules in many RTAs (e.g., CETA) reference both GATT Art XVII & GATS Art VIII.

RTAs that include provisions on SOEs often refer explicitly to the right to establish and maintain SOEs. They also include non-discrimination obligations, though with varying scope and typically with many exclusions, refer to rules of competition law and address transparency issues. Amongst RTAs, TPP has perhaps the most fully developed provisions on SOEs. For instance, it includes goods and services and sets out non-discrimination obligations which explicitly require both MFN and national treatments, (Willemyns 2016, pp. 667-77)

[89] See the "working definition" of STEs in Understanding on the Interpretation of Article XVII of the General Agreement on Tariffs and Trade 1994, para. 1, https://www.wto.org/english/docs_e/legal_e/08-17_e.htm Note that the definition of STEs does not explicitly tie 'purchases or sales' to imports or exports. This suggests that an enterprise itself need not import or export in order to be covered by Article XVII and, to that extent, may capture their 'behind-the-border' activities. (Mastromatteo 2017, p. 5)

[90] See WTO, 'Technical Information on State Trading Enterprises', https://www.wto.org/english/tratop_e/statra_e/statra_info_e.htm

[91] This less prescriptive definition was preferred because it was recognized, at the time of drafting, that 'State trading activities were varied and not very well understood and, consequently, that it would be best to avoid being overly prescriptive' (Mastromatteo 2017, p. 4).

Table 1

Regional Trade Agreements: 1958-2015
Competition Policy: Coverage and Enforceability in RTAs

			APEC	
	World	**Non-APEC**	**All APEC**	**Intra-APEC**
Coverage				
1958-2015	75%	83%	67%	82%
2001-2015	74%	80%	70%	84%
pre-1996	67%	79%	54%	33%
1996-2000	89%	93%	71%	100%
2001-2005	77%	80%	75%	91%
2006-2010	68%	83%	57%	79%
2011-2015	79%	73%	80%	86%
Legally enforceable				
1958-2015	66%	74%	59%	76%
2001-2015	62%	67%	59%	77%
pre-1996	65%	79%	54%	33%
1996-2000	86%	90%	71%	100%
2001-2005	68%	68%	68%	91%
2006-2010	53%	63%	45%	68%
2011-2015	70%	73%	68%	79%
Dispute settlement				
1958-2015	40%	66%	16%	6%
2001-2015	28%	57%	9%	7%
pre-1996	58%	69%	52%	0%
1996-2000	72%	86%	14%	0%
2001-2005	42%	68%	18%	9%
2006-2010	30%	63%	5%	5%
2011-2015	13%	20%	7%	7%

Source: World Bank database documented in Annex A.

Table 2

State Trading Enterprises in Regional Trade Agreements: 1958-2015

Percentage of Agreements Entering into Force

			APEC	
	World	**Non-APEC**	**All APEC**	**Intra-APEC**
Coverage				
1958-2015	52%	59%	47%	57%
2001-2015	62%	73%	55%	57%
pre-1996	29%	48%	8%	33%
1996-2000	36%	31%	57%	100%
2001-2005	64%	72%	57%	64%
2006-2010	65%	74%	57%	68%
2011-2015	57%	73%	51%	36%
Legally enforceable				
1958-2015	49%	55%	44%	53%
2001-2015	59%	69%	51%	52%
pre-1996	25%	41%	8%	33%
1996-2000	36%	31%	57%	100%
2001-2005	62%	68%	57%	64%
2006-2010	59%	71%	50%	58%
2011-2015	54%	67%	49%	36%
Dispute settlement				
1958-2015	43%	52%	35%	43%
2001-2015	51%	65%	42%	41%
pre-1996	25%	41%	8%	33%
1996-2000	28%	28%	57%	100%
2001-2005	57%	68%	57%	64%
2006-2010	56%	71%	50%	47%
2011-2015	39%	47%	49%	14%

Source: World Bank database documented in Annex A.

Note: This table covers state trading enterprises, as described in Article XVII of the GATT, which do not necessarily equate to state owned enterprises. Nonetheless, RTAs that include provisions relating to state owned enterprises generally build on Article XVII disciplines. (See preceding text and Box 1.)

State trading enterprises (STEs) figured in over 60 per cent of the agreements over 2001-2015 incorporated in the World Bank's database, though in the relatively restricted context of WTO+ provisions for state trading enterprises as defined in GATT Article XVII (see Box 1 for a discussion of the differences between this concept and that of state owned enterprises, or SOEs).[92] Coverage since 2001 has been markedly higher than it was before 2001, but the upward trend did not continue after that date: indeed, coverage was slightly lower over 2011-2015 than it was over 2001-2005. A high proportion of agreements with STE provisions over 2001-15 were also legally enforceable and allowed recourse to dispute settlement. Coverage for APEC and intra-APEC agreements over 2001-2015 was slightly lower than for the world. Globally, coverage for agreements involving developed economies was higher than those involving only developing and transition economies (Tables 2 and 3).

Table 3
State Trading Enterprises in Regional Trade Agreements: 2001-2015
Developed, Developing and Transition Economies
Percentage of Agreements Entering into Force

			APEC	
	World	**Non-APEC**	**All APEC**	**Intra-APEC**
Coverage in agreements between:				
Developed economies	70%	80%	68%	63%
Developed - Developing & transition	69%	86%	56%	48%
Developing & transition economies	44%	50%	38%	100%
Legally enforceable in agreements between:				
Developed economies	64%	60%	64%	56%
Developed - Developing & transition	66%	84%	53%	48%
Developing & transition economies	40%	46%	35%	67%
Dispute settlement in agreements between:				
Developed economies	48%	60%	46%	38%
Developed - Developing & transition	58%	77%	44%	44%
Developing & transition economies	38%	46%	31%	33%

Source: World Bank database documented in Annex A.
Note: As for Table 2.

Provisions in Selected Trade Agreements

Of the six agreements being closely examined in these annexes, three (AFTA, PACER Plus and the Pacific Alliance) do not include separate chapters on competition policy. In the case of AFTA, this partly reflects the limited development of competition regimes in some member states when the agreement was negotiated and updated. Strengthening competition policy is, nevertheless, a key element in ASEAN's strategy for the future development of its Economic

[92] RTAs, especially more recent agreements, generally define state enterprises in terms of their wider commercial activities and government ownership and control. Nonetheless the World Bank data for STEs is relevant because RTAs, including more recent agreements such as the TPP-11, seek to build on the disciplines in Article XVII of the GATT (Gadbaw 2016, p.89).

Community. An ASEAN Competition Action Plan for 2016-2025 identifies five strategic goals for this purpose. The first is to complete the task of developing effective competition regimes in all member states (all but one member had some form of competition law in place when the strategy was drafted, though some were of very recent origin). Other objectives include strengthening the capacity of competition-related agencies, setting in place regional cooperation arrangements, fostering awareness of competition issues and harmonising competition policy and law. Progress in these areas will assist ASEAN members in participating in international initiatives involving the development of high-quality RTAs.

Although the Pacific Alliance (or more accurately the Additional Protocol to the Framework Agreement of the Pacific Alliance) does not have a competition policy chapter, it does include competition-related clauses elsewhere in the agreement. Under the telecommunications chapter, parties to the agreement are specifically required to prevent providers from engaging in anti-competitive conduct, such as anti-competitive cross-subsidisation, or the use for anti-competitive purposes of information from competitors. There are specific provisions which, for example, require parties to ensure that their major telecommunications providers allow interconnection with suppliers from other parties and that the terms and conditions necessary for this be publicly available. Provisions relating specifically to telecommunications supplement the transparency provisions discussed in Annex C.

AANZFTA, the EU-Canada CETA and the TPP-11 text have separate competition policy chapters. The provisions in AANZFTA are quite limited, reflecting differences in capacity in this area between some ASEAN members states and Australia and New Zealand. The chapter can be characterised as a capacity building one. It does not require parties to develop specific competition measures, but indicates that they may cooperate on competition issues, for example, by exchanging officials and experts for training purposes or for more general technical cooperation. The areas of cooperation listed do not include matters related to the enforcement of competition law, although the chapter does not rule this out. The agreement provides for contact points to be established to facilitate technical cooperation and information exchange.

The competition chapter of the EU-Canada CETA is also quite limited, running to only about one and half pages. None of the provisions in it are subject to the dispute settlement provisions of CETA. The main provision in the agreement states that the parties shall cooperate in accordance with the June 1999 *Agreement between the European Communities and the Government of Canada regarding the application of their competition laws*. This last is a very detailed agreement which provides, among other things, for the parties to notify one another in advance when taking actions regarding enforcement 'that may affect important interests of the other Party' and to allow the other party an opportunity to comment. It also provides for consultations at the request of either party, for coordination of enforcement activities 'to the extent compatible with the assisting Party's laws and important interests' and for cooperation when the interests of one party are adversely affected by anti-competitive activities in the territory of the other.

CETA has a separate chapter on state enterprises and monopolies. Its main provisions are that: (i) each party shall ensure that in its territory any covered entity provides non-discriminatory treatment with respect to investors and investments of Canada and the EU, and to goods and services providers of Canada and the EU, in the purchase or sale of goods and services; and (ii) each party shall ensure that in its territory any covered entity act in accordance with commercial considerations when they are buying or selling goods and services, including where these are

provided to or by an investment from the other party.[93] This chapter covers all level of government, and is subject to the state-to-state dispute settlement. Each Party is also required under CETA Article 1.10 to ensure that any such entity acts in accordance with the Agreement wherever the entity has been granted regulatory, administrative or other governmental authority. The term 'state enterprise' is defined in CETA Article 1.1 as "an enterprise owned or controlled by a Party".

Box 2
CPTPP: Provisions in the Competition Policy Chapter

- All parties 'shall adopt or maintain' national competition laws and maintain an authority or authorities for their enforcement (Brunei Darussalam is to be granted more time to meet this requirement).
- Parties 'shall adopt' a number of procedures designed to ensure procedural fairness in enforcing competition policy law, such as the right to counsel and the opportunity to seek review in a court or independent tribunal.
- Parties should adopt laws which allow a private right of action for those affected by a violation of national competition laws.
- The national competition authorities shall cooperate by exchanging information and in enforcing competition law. There is also provision for technical cooperation.
- Parties shall adopt or maintain consumer protection laws, recognising that consumer protection issues 'increasingly transcend national borders'.
- Parties are to make competition policy enforcement as transparent as possible.
- Parties are to consult if a request is made by another party and 'afford full and sympathetic consideration to the concerns of the requesting Party'.

In contrast to the preceding agreements, the CPTPP text provides a solid chapter on competition policy and a very long and detailed chapter on state-owned enterprises and designated monopolies. Key provisions of the competition policy chapter are summarised in Box 2. Nothing in the competition policy chapter is subject to the dispute settlement provisions of the agreement.

The provisions on SOEs and monopolies in the CPTPP text are extremely detailed and they have been described by one author as 'revolutionary' and a major accomplishment (Gadbaw 2016, p.89). (Gadbaw was referring to the TPP Agreement's provisions, but these are identical to those in the CPTPP Agreement for the relevant chapter). All are subject to state-to-state dispute settlement). The provisions of this chapter are summarised in Box 3.

[93] If the standard of commercial considerations is met, then the non-discriminatory treatment provision is assumed to have been satisfied.

Box 3
CPTPP: Provisions on SOEs and Designated Monopolies[94]

- Each party shall ensure that each of its SOEs 'acts in accordance with commercial considerations in its purchase or sale of a good or service'. This obligation only exists when the SOE is engaging in 'commercial activities', which excludes activities undertaken on a cost-recovery basis or not-for-profit basis.
- In addition, they shall ensure that each of their SOEs, in purchasing goods or services, do not discriminate against goods or services supplied by an enterprise from another party or an enterprise of a non-party. Similarly, when an SOE is selling a good or service, a Party is to ensure that the SOE does not discriminate against an enterprise, of any other Party or of any non-Party'. Non-discriminatory treatment also applies to covered investments (e.g. where an SOE is purchasing goods or services, covered investment of other parties must also be accorded 'no less favourable' treatment). These obligations only exist when the SOE is engaging in 'commercial activities'.
- Designated monopolies must also act in accordance with commercial considerations/non-discriminatory provisions.
- 'No Party shall cause adverse effects to the interest of another Party through the use of non-commercial assistance that it provides … to any of its state-owned enterprises' with respect to the production or sale of a good, or the supply of a service (either across borders or via a covered investment). A similar provision applies to non-commercial assistance from SOEs to other SOEs.
- For goods, no party shall cause injury to the domestic industry of another party through non-commercial assistance to its covered investments in another party.
- Parties are to adhere to a number of transparency provisions, such as publicly listing their SOEs on an official website and providing details of SOEs and non-commercial assistance to other parties when requested.
- A Committee on State-Owned Enterprises and Designated Monopolies is to be established, to review, among other things, the operation of the Chapter.
- A number of exceptions and carve-outs are permitted. For example, key provisions do not apply to SOEs or designated monopolies with annual revenue of less than SDR 200 million in any of the three preceding fiscal years (there is provision for adjustment for inflation). For Brunei Darussalam, Malaysia and Viet Nam, for the first five years of the Agreement, some key provisions do not apply below a threshold of SDR 500 million.

Although many RTAs have sought to strengthen competition law, relatively few have gone as far as relying on it and abolishing recourse to anti-dumping for goods originating from parties to the agreement. Rey's analysis of some 253 agreements shows that a total of 228 either do not contain anti-dumping provisions (50 agreements), simply confirm the parties' rights under the WTO Agreement (86 RTAs) or contain procedural/transparency additions that essentially do not change rights and obligations under the WTO (92 RTAs). One agreement (the EFTA-Korea FTA which entered into force in 2006) states that the parties 'shall endeavour to refrain' from implementing anti-dumping action against each other, while at the same time reaffirming WTO rights and obligations. Only 24 RTAs establish anti-dumping regimes that differ

[94] Haywood (2016) contains a detailed discussion of the TPP-12 provisions on SOEs.

markedly from those in the WTO Anti-Dumping Agreement with 18 prohibiting anti-dumping directed against other parties, or around one in 14 of the whole group of 253. Examples of those prohibiting anti-dumping are the Australia-New Zealand Closer Economic Relations Trade Agreement (ANZCERTA) from mid-1990 and the Canada-Chile FTA. Two other RTAs are considered to have similar effect. Four make use of anti-dumping more difficult or less effective for firms seeking to use it against imports from other parties in the RTA, for example, by reducing the time for which anti-dumping duties can apply without review or raising the *de minimis* level.[95] For example, the *de minimis* level in the Singapore-New Zealand FTA rises from the two per cent which applies under the WTO Anti-Dumping Agreement to five per cent and the maximum duration of an anti-dumping measure is reduced from five to three years (Rey 2016).

A Forward Agenda on Competition Policy

The 2005 APEC Economic Leaders meeting, under the Busan Road Map, committed APEC to developing model measures for RTA chapters with a view to promoting high-quality and consistent agreements that would contribute to the realisation of free and open trade and investment. However, a model chapter on competition policy was last prepared in 2008 and there has been no update since that time. It may therefore be appropriate for the APEC Competition Policy and Law Group, in conjunction with the CTI and the Economic Committee to work towards developing an updated text, building on the APEC Principles to Enhance Competition and Regulatory Reform approved by Leaders in Auckland in 1999 and the 2008 model chapter. This would be of value to APEC economies currently negotiating agreements, as well as to further work towards the eventual realisation of FTAAP.

Given the importance of addressing the presence of SOEs in the global trading system, as evidenced by the increase in FTAs with specific chapters on SOEs, APEC could undertake a review of provisions related to SOEs in various RTAs/FTAs. A compilation of these provisions would identify convergence and divergences in the way these agreements address SOEs, and how much these provisions are WTO +. In addition, because of some of the economic structural issues surrounding SOE's participation in trade, collaboration with the Economic Committee could be developed to facilitate a greater understanding of SOEs' impacts on domestic economic arena, but also the global trading system. The result of these discussions could lead to the development of best practices or other practical tools (model FTA chapters) to assist APEC economies as they negotiate future FTAs.

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J. E-Commerce/Digital Trade

Digital trade has grown almost exponentially over the last couple of decades. Rapid changes in information technology and connectivity, business activities moving online either to access consumers directly or participate in supply chains, and governments scrambling to put in place enabling regulatory and legal environments have all contributed to an economic transformation that could be as momentous as steam-driven technological change in the nineteenth century.[96]

Further strong growth across the entire digital market offers the simultaneous prospect of both more jobs and more inclusive growth - for example by lessening the impacts of geography and reducing the costs of accessing information – while at the same time challenging individuals, communities, regions and economies that do not adapt effectively to structural change. Further growth also will challenge trade policy as differences between goods and services become less clear, and as new concerns arise over digital protectionism. Just as in the physical world where falling tariffs have been offset to varying extents by rising non-tariff barriers, concerns mount in the digital world over impediments to the free flow of data – now the world's most valuable commodity (The Economist 2017).

Regional trade agreements: the primary laboratories for digital trade

Digital trade has been discussed by the World Trade Organization for more than two decades. While efforts to update digital trade rules had stalled, 70 Members agreed at the WTO Ministerial Conference in December 2017 to "initiate exploratory work together toward future WTO negotiations on trade-related aspects of electronic commerce". Existing WTO rules, like those on services and IP, are applicable to measures affecting digital trade, but were negotiated before the explosion of digital trade. Their limitations mean, by default, that regional trade agreements have 'emerged as the primary laboratories for new rules and disciplines' in areas from negotiating market access commitments between trade partners and clarifying data localization to developing online consumer protection, online security (such as electronic signatures) and digital trade facilitation beyond the WTO Trade Facilitation Agreement (Wu 2017, p. 2, 6).

As illustrated in Tables 1 and 2, the number of RTAs with digital trade provisions has increased steeply since 2011 both for developed and developing economies, with agreements involving APEC economies especially prominent. These provisions encompass dedicated chapters on digital trade and references to digital trade in areas like technical barriers to trade, customs processing, services, and IP rights.

Intra-APEC agreements and agreements involving APEC and other economies account for the great bulk of agreements negotiated globally that include digital trade chapters. According to the World Bank database on the content of regional trade agreements, all agreements entering into force from 2001 to 2015 between advanced economies and with provisions covering the

[96] This argument is not without its detractors. For example, Robert Gordon (2016) argues that the Internet revolution is over hyped compared with the period from 1865 to the 1920s when the US economy was transformed by electricity and mass production of motor vehicles.

'information society' involved APEC economies.[97] The Singapore-Australia Free Trade Agreement (SAFTA) appears to be the world's first RTA with a standalone chapter on e-commerce (Weber 2015). This precedent was followed up quickly in agreements negotiated by Australia,[98] Singapore and the United States with other APEC members. [99] Over the following 15 years, over 30 economies first agreed to RTAs containing dedicated digital trade chapters in negotiations with one of these three economies (Wu 2017, p.7). More recently, other APEC members like Canada, Japan, Korea, and Mexico have been active in including e-commerce chapters in their RTAs. And economies from Indonesia and the Philippines to China and Peru all first agreed to include digital trade provisions in their RTAs with advanced economies.

[97] The WTO's Regional Trade Agreements Information System (RTA-IS) also reflects the prominence of APEC economies in agreements which address the digital economy. It shows that all but 10 of 58 agreements with electronic commerce provisions entering into force from 2001 to 2015 and all but two of the 16 agreements since then involved APEC economies (https://rtais.wto.org/UI/PublicMaintainRTAHome.aspx).
Note, however, that World Bank and WTO data have different emphases. The World Bank data set covers cooperation and information exchange, whereas the WTO RTA-IS identifies whether agreements cover e-commerce, in particular, customs duty exemption for digital products, internal taxation of digital products and prohibition of dispute settlement.

[98] In Australia the powerful push to explore the trade policy implications of digital trade was closely associated with Deputy Prime Minister and Trade Minister Tim Fischer (1996-99). See DFAT (1997) and DFAT (1999a & b) for a review of early thinking on the potential of e-commerce to transform world trade, and on how Australia might develop domestic and international elements of a trade strategy to promote e-commerce. For a review of current Australian thinking on digital trade, see DFAT 2017.

[99] For example, SAFTA entered into force in July 2003. This was followed by the US–Chile FTA and the US–Singapore FTA (both entered into force on 1 January 2004) and by the Thailand–Australia FTA and the Australia- US FTA (both entered into force on 1 January 2005. All had standalone e-commerce chapters.

Table 1

Regional Trade Agreements: 2001-2015:
WTO-X Information Society: Coverage
Developed, Developing and Transitional Economies
Number of Agreements Entering into Force

			APEC	
	World	**Non-APEC**	**All APEC**	**Intra-APEC**
2001-2015				
Coverage in agreements between:				
Developed economies	10	0	10	6
Developed - Developing & transition	50	14	36	13
Developing & transition economies	18	8	10	1
2001-2010				
Coverage in agreements between:				
Developed economies	1	0	1	1
Developed - Developing & transition	25	8	17	7
Developing & transition economies	14	8	6	1
2011-2015				
Coverage in agreements between:				
Developed economies	9	0	9	5
Developed - Developing & transition	25	6	19	6
Developing & transition economies	4	0	4	0

Source: World Bank database documented in Annex A.

RTAs: increasing coverage and depth

The coverage and depth of RTA provisions on digital trade have increased greatly as global trade has become more dependent on the smooth functioning of supply chains and as the spectre of digital protectionism has become more menacing for more businesses. Provisions in the Comprehensive and Progressive Trans-Pacific Partnership (TPP-11) Agreement and the recently updated RTA between Singapore and Australia demonstrate how coverage is becoming wider and more detailed. TPP-11 provisions, for example, go beyond US RTAs, particularly in relation to enforcement, on issues such: (i) prohibiting customs duties on electronic transmissions and other discriminatory measures; (ii) enabling cross border data and information flows; (iii) protecting innovation, technology choices and copyrights by barring forced technology transfers (e.g. handing over source codes as a condition of market access) and promoting copyright protections; (iv) recognizing the importance of cyber security; and (v) protecting the privacy of consumers by enhancing consumer protection and tackling spam (Elms & Nguyen 2017).

Table 2
Regional Trade Agreements 2001-2015
WTO-X: Information Society Coverage
Developed, Developing and Transition Economies
Percentage of Agreements Entering into Force: Changes Over Time

	World	Non-APEC	APEC All APEC	APEC Intra-APEC
2001-2015				
Coverage in agreements between:				
Developed economies	30%	0%	36%	38%
Developed – Developing & transition	49%	32%	61%	52%
Developing & transition economies	35%	31%	38%	33%
2001-2010				
Coverage in agreements between:				
Developed economies	5%	0%	7%	13%
Developed – Developing & transition	35%	25%	44%	37%
Developing & transition economies	33%	33%	33%	33%
2011-2015				
Coverage in agreements between:				
Developed economies	64%	0%	69%	63%
Developed – Developing & transition	78%	50%	95%	100%
Developing & transition economies	40%	0%	50%	

Source: World Bank database documented in Annex A.

In general, the coverage and depth of digital provisions is greatest in agreements negotiated with advanced economies. Following Wu (2017), standout features include:

- Many RTAs globally with robust digital trade chapters define digital product – something that the WTO could not reach consensus on – and extend the principles of national treatment and most favoured nation treatment to digital trade
- The most common provision in RTAs globally with digital trade provisions is the obligation not to impose customs duties on electronic transmissions
- Many RTAs contain provisions to facilitate digital trade by establishing a domestic legal and regulatory framework for e-commerce. This includes reflecting in some way the 1996 United Nations Commission on International Trade Law (UNCITRAL) Model Law on Electronic Commerce. In about half of RTAs with digital trade provisions, disciplines are included on electronic authentication technologies. Australia, Japan, Korea, and the United States, in particular, have built on these disciplines to include provisions requiring that governments not limit electronic transactions by designating particular authentication technologies and implementation models.
- Approximately half of RTAs globally with standalone e-commerce chapters contain provisions on paperless trading. The most common paperless trading provisions are for governments to make publicly available electronic versions of all trade administration

documents, and to accept trade administration documents submitted electronically as the legal equivalent of paper versions. Beyond this there is a great deal of variation in the breadth and depth of trade facilitation measures. TPP-11 has the most detailed and binding paperless trade measures of any RTA, and recent RTAs, generally speaking, have substantially more detailed digital coverage than the WTO Trade Facilitation Agreement (Box 1).

- Approximately two-thirds of the RTAs globally with digital trade provisions address ways to protect users of e-commerce. This is done in various ways. Most RTAs recognize the importance of measures to protect consumers from fraudulent and deceptive commercial activities, but do not impose binding commitments. Around one-third contain provisions to protect personal information. Binding language to require parties to adopt or maintain data protection laws are commonly found in the RTAs of Australia, Canada, New Zealand, Korea, and Peru. Many recent RTAs have begun to tackle unsolicited electronic messages. Most use non-binding language but some, like the Pacific Alliance and TPP-11, set out binding commitments on parties to establish national legal frameworks to protect users from spam.
- The Korea-US FTA (KORUS) is the first RTA with a specific provision to promote free flow of information across borders. The commitment is expressed in "shall endeavour'' language. TPP-11 and the SAFTA Review contain binding language, as do some RTAs concluded between some developing economies: the Mexico–Panama FTA is an example.[100] Most RTAs seek to promote regulatory cooperation on this issue or commit parties to consider negotiating on cross border information flows at some point in the future as in the case of the Pacific Alliance Additional Protocol.
- The TPP-11, the updated SAFTA and the Japan-Mongolia Economic Partnership Agreement have provisions that limit governments' capacity to require foreign companies to use or locate computing facilities in their territory as a condition for conducting business.
- Provisions on cooperation in digital trade between parties is common in standalone e-commerce chapters. Several RTAs in the Asia-Pacific region affirm the importance of cooperation to facilitate the use of e- commerce by micro, small, and medium-sized enterprises, and to encourage the private sector to adopt codes of conduct, model contracts, guidelines, and enforcement mechanisms. Most RTAs simply mention the importance of regulatory authorities exchanging information and sharing their experience with each other.
- Many RTAs have soft commitments on dispute settlement or harder commitment that are limited in scope. As a general principle, legally enforceable commitments are rare except for some recent RTAs in the Asia-Pacific region: trade agreements of the European Union and members of the European Free Trade Association place greater emphasis on regulatory dialogue. Given the general weakness of legally enforceable commitments, dispute settlement arrangements in RTAs across the board are very limited (Table 3).[101]

[100] The US-Korea FTA entered into force in March 2012. The Mexico-Panama FTA entered into force in July 2015.

[101] Note: dispute settlement may apply even if there are no e-commerce specific dispute settlement provisions. And, even if dispute settlement does not apply, it does not necessarily mean that commitments are not legally enforceable.

Box 1

Paperless trade measures in RTAs

Duval & Mengjing (2017) identify 27 measures in RTAs to 'dematerialise' trade data and documents and enable electronic exchange: in other words measures to promote paperless trading.[102] TPP-11 has the highest number of measures: 21. The Korea-US FTA (KORUS) comes next with 15 measures followed by the Korea-Vietnam FTA with 14. For comparison, the WTO Trade Facilitation Agreement has five measures and provisions on paperless trade.

From the perspective of the average number of paperless trade measures in RTAs signed by particular economies from different world regions, Australia and New-Zealand have the highest average (9.2 measures) in the Asia-Pacific region followed by Korea with the highest average in East Asia (7.1 measures). Singapore is the standout in Southeast Asia with an average of 6.8 measures. ASEAN is active in paperless trade rule-making. There are ten paperless trading measures spread through intra-ASEAN agreements but the number varies widely in ASEAN+ agreements: there are 12 measures in the ASEAN-Australia-New Zealand FTA but only one in the ASEAN-India FTA.

Many RTAs signed by the United States and Canada include eight or more paperless trade measures. RTAs signed by some Latin American economies also have significant numbers of measures, in part because they often involve the United States or other APEC economies. Peru is the standout in Latin America: it has the highest number of RTAs with paperless trade measures and is party to one of the world's most comprehensive RTAs – the US-Peru FTA – in its treatment of paperless trading.

The European Union (EU) has paperless trade systems as part of its Single Market but has not emphasized them in its RTAs: with an average of only four paperless trade measures across its RTAs, it is below the TFA average.

Source: Y Duval & K Mengjing 2017, 'Digital Trade Facilitation: Paperless Trade in Regional Trade Agreements', ADBI Working Paper 747, Asian Development Bank Institute, available at: https://www.adb.org/publications/digital-trade-facilitation-paperless-trade-regional-trade-agreements

Note: Duval & Mengjing's work relates to the original TPP-12 agreement. No provisions on digital trade were suspended in TPP-11, so the text here refers to this agreement.

[102] This includes acceptance of e-copies, e-submissions and processing of trade-related data, e-submissions of sea cargo manifests, e-systems of export/import licenses or permits, e-payment systems, e-customs systems/customs automation, use of single windows, use of electronic certificates and signatures, trade-related electronic data exchange, and use of international standards for paperless trading.

Table 3
Regional Trade Agreements 2001-2015
WTO-X: Information Society: Coverage and Enforceability
Developed, Developing and Transition Economies
Percentage of Agreements Entering into Force

			APEC	
	World	**Non-APEC**	**All APEC**	**Intra-APEC**
Coverage in agreements between:				
Developed economies	30%	0%	36%	38%
Developed – Developing & transition	49%	32%	61%	52%
Developing & transition economies	35%	31%	38%	33%
Legally enforceable in agreements between:				
Developed economies	6%	0%	7%	6%
Developed-Developing & transition	8%	5%	10%	12%
Developing & transition economies	0%	0%	0%	0%
Dispute settlement in agreements between:				
Developed economies	0%	0%	0%	0%
Developed - Developing & transition	2%	0%	3%	8%
Developing & transition economies	0%	0%	0%	0%

Source: World Bank database documented in Annex A.

RTAs: divergence and convergence

The overwhelming impression of RTA provisions on digital trade is that APEC economies are generally leading the way and that provisions are becoming both more detailed and more varied across economies. Sizeable differences between RTAs globally and within the Asia-Pacific region were noted in the preceding section, but it is also clear from recent work by various researchers such as Kuriyama and Sangaraju (2017). In their analysis of four RTAs involving APEC members that entered into force in force in 2016,[103] they noted differences in areas like defining digital products; coverage of digital trade provisions; use of national treatment and MFN treatment for digital products; binding provisions on electronic authentication, digital certificates and consumer protection; and localization of computing facilities and source codes.

Differences in the content and approach to digital trade in RTAs within the APEC region and beyond are predictable at one level because they reflect, to some extent, major differences across APEC economies in the enabling environment for digital trade whether measured by physical infrastructure, digitally relevant skills, the regulatory environment, or demand pressures from business to strengthen hard and soft infrastructure (Pasadilla et. al. pp 33-40). They also must reflect the impact of time in a fast moving technologically-driven space in which new industries spring up alongside new and more inventive forms of digital protectionism. This goes a long way to explain why the most recent crop of RTAs, especially

[103] The analysis covered the Japan-Mongolia Economic Partnership Agreement, the Korea-Colombia Free Trade Agreement, the Pacific Alliance, and the Vietnam-Eurasian Economic Union Free Trade Agreement.

those involving economies like Australia, Japan, Korea, Singapore, and the United States, address a much wider range of digital trade issues than agreements a decade or so ago. And it also helps to explain variations in the extent and depth of commitments within different agreements signed by the same party, though other factors clearly would be at work. Different parties have different sensitivities on digital security, law enforcement, privacy, and cultural/moral issues and have different priorities for digital trade: this inevitably puts limits on how particular negotiating templates can be applied across diverse economies.

On specific issues, convergence can be encouraged by initiatives like the United Nations Framework Agreement on Facilitation of Cross-border Paperless trade in Asia and the Pacific (FA-PT), and by the UNCITRAL Model Law on Electronic Commerce. By the end of 2017, over 70 economies around the world had based their domestic laws and regulations for electronic transactions on the model law or had been influenced by it.

On a broader scale, multi-party RTAs like TPP-11 and the Regional Comprehensive Economic Partnership (RCEP) negotiations offer a major opportunity to achieve convergence of digital trade provisions across a broad range of Asia-Pacific economies. [104] The potential of RCEP in this area is not clear, but TPP-11 demonstrates emphatically how economies as different as Australia, Canada, Peru and Vietnam can establish common ground as part of a bargain in which developing economies take on higher digital standards with the aim of attracting more foreign direct investment, perhaps stimulating domestic economic reform and strengthening supply chain connectivity (Elms & Nguyen 2017).

And on a broader scale still, APEC may have a role in promoting convergence not only in the context of a possible future FTAAP but, in the more immediate term, by updating the model chapter on e-commerce: this could draw on the upsurge of recent high quality agreements and research findings from major national, regional and global agencies. It also could promote convergence by considering how the next phases of the digital trade revolution, including the regulatory challenges arising from the transition of digital trade to mobile devices and perhaps the use of blockchain technologies in supply chain management[105], might be addressed in RTAs or in other plurilateral arrangements. And there would seem to be a big job ahead for APEC in skills training and capacity building linked to negotiating new generation agreements that increase regulatory coherence, and increase opportunities for developing economies, small and medium enterprises and women to participate more actively in supply chain trade. In this regard, it would be useful to finalize the Work Plan on Digital Trade and E-Commerce for the Realization of the FTAAP and its progress.

[104] RCEP negotiations involve the 10 members of ASEAN together with Australia, China, Japan, India, Korea, and New Zealand.

[105] For an overview of blockchain and supply chain management, see Lehmacher & Mcwaters 2017.

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K. Small and Medium Enterprises (SMEs)

SMEs play a major role in most economies, including those in APEC. They typically make up the vast majority of commercial enterprises, a majority of total employment, and a sizeable (though smaller) share of GDP and exports. In the case of ASEAN, for example, SMEs comprise more than 97 per cent of enterprises and 52-97 per cent of all employment (leaving aside Myanmar). For a smaller group of ASEAN economies for which data are available, they contribute 23-58 per cent of GDP and 10-30 per cent of exports (ERIA 2014, p.1).[106] SMEs are seen both in the OECD and in APEC as a key to promoting employment, raising productivity, contributing to growth and delivering a more inclusive form of globalisation. Reflecting these views, APEC Leaders in 2011 stated that 'further efforts could be made to foster the participation of SMEs in global production chains through addressing the issue in next generation trade agreements' (APEC 2011).

Although SMEs are substantial contributors to regional economies, they are under-represented in international trade and investment, as well as in the global value chains that now make up a high proportion of global trade. The high fixed costs associated with exporting are an impediment to direct exports for many small and medium firms. Other impediments include difficulties in obtaining credit, limited technical capabilities, and a lack of experience in and knowledge about exporting (López González 2017, pp.13-14). OECD experience is that SMEs that do export often only deal with one major market, perhaps in a neighbouring economy. Often, they withdraw from exporting after one or two years (OECD 2017, p.11).

The contribution of SMEs is higher when indirect exports are taken into account, with many SMEs exporting indirectly by supplying a larger firm which is itself an exporter. For example, Yuhua and Bayhagi note that in Thailand there are 14 foreign joint ventures that assemble cars for the export market, but that these are supported by a network of around 1800 firms, the majority of them SMEs (2013, p.9). Partly as a consequence, the share of exports in value added terms for SMES is usually higher than that measured conventionally. López González estimates that for Mexico, SMEs accounted for less than 15 per cent of gross exports, but around 30 per cent of exports in value added terms in 2009. For the United States, exports in value added terms by SMEs were between 40 and 50 per cent of total exports, well above the share as conventionally measured (López González 2017, p.12).

SMEs and Trade Agreements

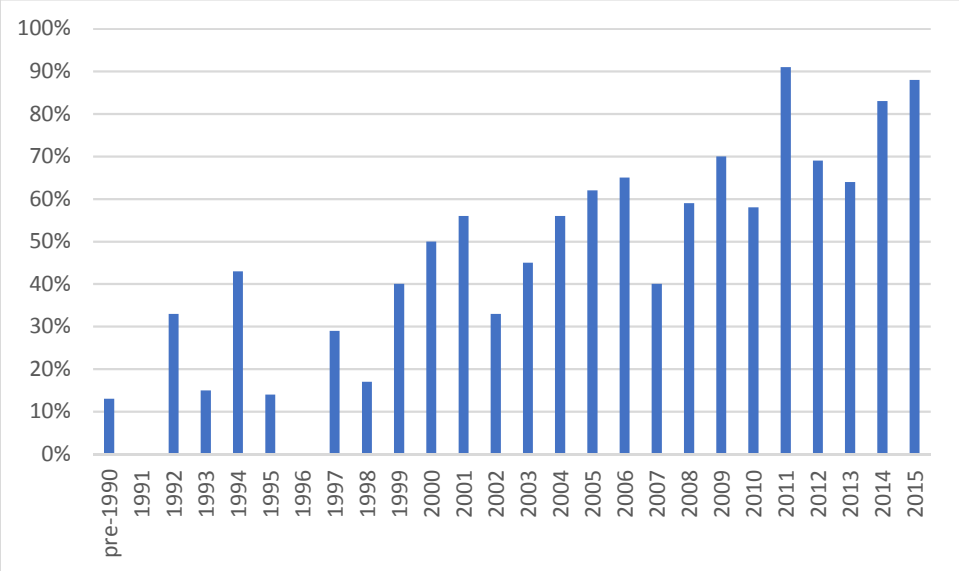
At the global level, there is significant interest in SMEs, with programmes designed to assistance them in the World Bank, UN agencies and regional development banks. The WTO does not specifically mention SMEs in many areas but is nonetheless highly relevant to them. The core WTO agenda that has seen tariffs cut substantially and bound has been a major factor in assisting all firms, including SMEs, to trade with other economies. Agreements which address technical barriers to trade, sanitary and phytosanitary measures and trade-related aspects of IP are among a number that are helpful to SMEs, while the new Trade Facilitation Agreement goes to the heart of difficulties faced by firms, small and large, in moving goods

[106] These data need to be interpreted with caution because the definition of SMEs varies across different economies. They also refer to different years.

across borders. The WTO has promoted increased transparency in a number of areas, which is particularly beneficial to SMEs. In addition, SMEs in some cases benefit from partial exclusions from WTO disciplines. For example, the WTO Anti-Dumping Agreement has been interpreted to require less information for complainant firms when the industry in question is highly fragmented. The Subsidies and Countervailing Measures Agreement permits some SME support programmes (WTO 2016, pp.135-136).

At the regional level, detailed analysis by the WTO indicates that of 270 'physical' agreements in force and notified to the WTO up to May 2016, 136, or around half, had at least one provision concerning SMEs. Some 92 of these RTAs had provisions concerning cooperation on SMEs, while 67 had provisions that allowed for SME flexibilities or exemptions from disciplines in the agreements (such as provisions to allow programmes giving preferences of otherwise supporting SMEs in government procurement). The percentage of RTAs that include provisions on SMEs has been trending upward over many years (see Chart 1). But there are still only a small number of agreements that have dedicated chapters on SMEs. Dedicated chapters have been a feature of agreements concluded between Japan and some ASEAN economies – namely Malaysia, the Philippines, Viet Nam, Singapore and Thailand (WTO 2016, pp.116-121; Monteiro 2016, p.2). The Japan-Thailand Economic Partnership Agreement is discussed in Box 1.

Chart 1
Share of New RTAs with an SME Provision



Source: WTO 2016, p.117

Table 1

SMEs: Regional Trade Agreements: 1958-2015

Percentage of Agreements Entering into Force

			APEC	
	World	**Non-APEC**	**All APEC**	**Intra-APEC**
Coverage				
1958-2015	15%	12%	18%	18%
2001-2015	18%	15%	20%	20%
pre-1996	9%	10%	8%	0%
1996-2000	8%	7%	14%	0%
2001-2005	15%	20%	11%	18%
2006-2010	15%	6%	23%	26%
2011-2015	25%	27%	24%	14%
Legally enforceable				
1958-2015	6%	2%	10%	10%
2001-2015	7%	1%	12%	11%
pre-1996	4%	3%	4%	0%
1996-2000	0%	0%	0%	0%
2001-2005	4%	4%	4%	9%
2006-2010	9%	0%	16%	16%
2011-2015	9%	0%	12%	7%
Dispute settlement				
1958-2015	2%	2%	2%	0%
2001-2015	2%	1%	2%	0%
pre-1996	4%	3%	4%	0%
1996-2000	0%	0%	0%	0%
2001-2005	2%	4%	0%	0%
2006-2010	1%	0%	2%	0%
2011-2015	2%	0%	2%	0%

Source: World Bank database documented in Annex A.

Information on SMEs is also available from the World Bank database discussed in Annex A to this report. For provisions involving SMEs, it is summarised in Tables 1 and 2. The definition of an SME provision is somewhat narrower in the World Bank database than in the WTO database: policy areas are only covered if they involve 'an article, chapter or provision, providing some form of undertaking'. Moreover, the definition of an SME provision covers 'technical assistance, facilitation of access to finance' (Hofmann, Osnago and Ruta 2017, pp.5-6, 29). This would exclude a number of general references to SMEs captured by the WTO data.

Table 1 looks at trends in the proportion of agreements covering SMEs and those where these provisions were legally enforceable. Like the WTO data, it shows the SME coverage of regional trade agreements rising over time, from nine per cent prior to 1996 to 25 per cent over 2011-15. There is also a trend towards increased coverage over time for agreements involving an APEC economy. Globally and for agreements involving an APEC member, there has been a rise in the proportion regarded by the World Bank as legally enforceable. The shares subject to dispute settlement, both for the world and for APEC, have fluctuated without any clear trend, but are very small (Table 1). Trends in intra-APEC agreements are not clear, but need to be viewed with some caution in any case given that there were only a small number of agreements of this type prior to 2001.

Table 2
SME Coverage of Regional Trade Agreements: 2001-2015
Developed, Developing and Transition Economies
Percentage of Agreements Entering into Force

			APEC	
	World	**Non-APEC**	**All APEC**	**Intra-APEC**
Coverage in agreements between:				
Developed economies	18%	20%	18%	25%
Developed-Developing & transition	22%	23%	22%	12%
Developing & transition economies	10%	0%	19%	67%
Legally enforceable in agreements between:				
Developed economies	12%	20%	11%	13%
Developed-Developing & transition	8%	0%	14%	8%
Developing & transition economies	4%	0%	8%	33%
Dispute settlement in agreements between:				
Developed economies	6%	20%	4%	0%
Developed-Developing & transition	1%	0%	2%	0%
Developing & transition economies	0%	0%	0%	0%

Source: World Bank database documented in Annex A.

For the period 2001-2015 that is of principal interest here, agreements involving an APEC member score about the same as global agreements in terms of both SME coverage and of being legally enforceable. However, many SME provisions are on a best endeavours basis. Accordingly, both globally and for agreements involving an APEC member, the proportion legally enforceable provisions is much lower than those classified as covered. The percentage subject to dispute settlement provisions in the agreement is lower still (Table 1): in many agreements provisions on SMEs do not include dispute settlement.

Table 2 shows that coverage over 2001-2015 is highest for agreements involving developed economies, although agreements among developing and transition economies where an APEC member is involved also score very well. This may partly reflect the work APEC has carried

out on SMEs and the relatively strong commitment of APEC's developing economies towards building more modern economies drawing on the contribution made by SMEs. Agreements where all parties are developed economies score best on dispute settlement, as might be expected (Table 2). Intra-APEC results for developing and transition economies again need to be viewed with caution given the small number that can be involved.[107]

As noted already, cooperation is the principal area for provisions on SMEs, though they vary considerably. Monteiro, using the WTO database, identifies more than 14 different types of cooperative activity, ranging from information exchange, training and promoting business partnerships through to exchanging experiences and capacity building. Aid for trade is an important theme. As might be expected, cooperation on SMEs is a focus mainly in agreements between high-income and low-income economies, or between low-income economies.

Box 1
The Japan-Thailand Economic Partnership Agreement

According to the WTO, the Japan-Thailand Economic Partnership Agreement, which entered into force in November 2007, is the agreement with the most provisions related to SMEs of those notified and in force up to May 2016.

A dedicated chapter on cooperation on SMEs is included in the Implementing Agreement for the EPA. This recognises 'the fundamental role' of SMEs 'in maintaining the dynamism and enhancing competitiveness of the economies', as well as the integral role of the private sector in this regard. It refers to a number of areas of cooperation, such as capacity building, improving financial access for SMEs and exchanging information on SME policies. It states that the parties 'shall cooperate in facilitating investments of Japanese SMEs in Thailand', and that they shall encourage the formation of business alliances between SMEs in the two economies. To this end, it establishes a sub-committee of officials, with participation if appropriate from the private sector, to review the implementation of the chapter and to discuss further cooperation.

The Intellectual Property Chapter of the Basic Agreement includes other provisions concerning SMEs. Article 142 states that each party shall assist SMEs to acquire IP rights, possibly by reducing official fees, while part of Article 143 provides for the Sub-Committee on Intellectual Property formed under the agreement to address 'utilisation and commercialisation of IP rights' for SMEs.

General cooperation aside, there are a number of other areas in RTAs where SMEs can be mentioned. They include the following:

- Services and investment. Thirty of the RTAs examined by the WTO include reservations to the services and investment provisions of the agreements. As one example, the agreement between the United States and Chile effectively limits small scale fishing to Chilean natural persons or those with permanent residency. Thirty three RTAs under this heading involve cooperation on services and investment for SMEs (WTO 2016, p.122).
- Government procurement. According to Monteiro (2016, pp.19-20), the most common provisions of this type involve exclusions from some of the disciplines of the agreement for small and medium businesses. This occurred in 38 agreements. Cooperation is again

[107] For example, the figure of 67 per cent SME coverage for intra-APEC agreements involving developing and transition economies in Table 2 refers to only two out of three agreements.

important under this heading, but there were only 12 agreements where provisions of this type referred to SMEs.

- E-commerce. Provisions on e-commerce mostly apply to firms of any size, but Monteiro identifies 21 agreements with provisions on e-commerce specifically mentioning SMEs. The principal form these provisions take is an affirmation of the importance of e-commerce for SMEs. Other provisions deal with cooperation in this area (2016, pp.21-22): for example, the Japan-Australia Economic Partnership Agreement states that 'The Parties shall cooperate to overcome obstacles encountered by small and medium enterprises in the use of e-commerce'.
- Trade facilitation. Monteiro (2016, pp.22-24) identifies 18 RTAs which include provisions on trade facilitation specifically mentioning SMEs. Ten agreements include what is essentially a recommendation to consider the interests of SMEs, while six involve some form of commitment or obligation. Others involve cooperation such as information exchange and training in areas related to trade facilitation.
- Intellectual property. The Japan-Thailand Economic Partnership Agreement discussed in Box 1 includes provisions under this heading, but this agreement is, according to Monteiro, unique in the way these are phrased. More general and more common provisions, included in seven RTAs, indicate that the parties shall cooperate to promote innovation and IP, particularly with regard to SMEs (Monteiro 2016, pp.24-25).
- Transparency. The EU-ROK Agreement is an example of one that includes specific reference to SMEs as part of a transparency chapter. It states that 'the Parties shall pursue an efficient and predictable regulatory environment for economic operators, especially small ones doing business in their territories'.

Differing Treatment of SMEs in Selected Agreements

The provisions on SMEs in the agreements being reviewed closely in these Annexes vary greatly. The main text of the ASEAN Trade in Goods Agreement contains two references to SMEs. The first, in the chapter on rules of origin, sets out the function of a Sub-Committee on Rules of Origin, giving as one of these making recommendations that 'encourage the development of Small and Medium Enterprises'. The second reference referring to the objectives of work on trade facilitation states, as one aim, helping business, 'including small and medium-sized enterprises ... to save time and reduce costs'. The ASEAN Framework Agreement on Services and the ASEAN Comprehensive Investment Agreement do not refer to SMEs. AANZFTA similarly contains only a light treatment of SMEs. In the main text, there is just one provision on cooperation in e-commerce that refers to 'assisting small and medium enterprises to overcome obstacles encountered in the use of e-commerce'.[108] Notwithstanding the somewhat sparse treatment of SMEs in these two agreements, ASEAN is strongly committed to developing its SMEs so that they benefit from the increased trade and investment expected to flow from the formation of the ASEAN Economic Community (Box 2).

[108] The World Bank database does not acknowledge coverage of SMEs in the ASEAN Free Trade Area or in AANZFTA. Coverage of SMEs is, however, recorded in the Japan-ASEAN and Korea-ASEAN agreements.

Box 2
ASEAN's Plan for SME Development

Its Strategic Action Plan for SME Development to 2025, endorsed by ASEAN Economic Ministers in August 2015, envisages a wide range of actions intended to achieve globally competitive and innovative micro, small and medium enterprises (MSMEs). Key objectives include:

- Raising productivity and promoting innovation
- Increasing MSME access to finance
- Improving market access and internationalisation
- Strengthening the policy and regulatory environment
- Encouraging entrepreneurial activity and strengthening human capital formation.

The objective of improved market access and internationalisation is to be largely achieved by increasing information on market access opportunities, encouraging partnership arrangements with larger enterprises, promoting the use of e-commerce and the like. However, it is also envisaged that ASEAN would take steps to increase utilisation of Rules of Origin and self-certification for exports (ASEAN 2015).

In the case of the Pacific Alliance, the Additional Protocol contains a number of references to MSMEs. On government procurement, Article 8.21 states that the parties shall, insofar as practicable, facilitate involvement of MSMEs, including by providing information, issuing procurement documents free of charge and identifying MSMEs interested in business partnerships with companies in other parties. However, the Article also states that parties will endeavour to reduce preferences for MSMEs in government procurement. Article 8.22 contains a reference to MSMEs in the context of developing cooperation on government procurement. In notes to the chapter, Colombia excludes government procurement contracts of up to US$125,000 intended to benefit MSMEs, while Peru excludes 'procurement programmes to promote micro and small businesses'. The e-commerce chapter includes more general provisions: a statement recognising the importance of facilitating its use by MSMEs and another reaffirming the importance of cooperation on this issue.

The EU-Canada CETA contains some references to SMEs. As Monteiro (2016, p.26) points out, the most novel references concern the Investor-State Dispute Settlement (ISDS) mechanism. This allows consultations to occur though video-conferencing where the investor is an SME. It also encourages the respondent to give 'sympathetic consideration' to any request by an SME investor that one tribunal member conduct the hearing. There is provision for the development of rules by the CETA Joint Committee to reduce the financial burden on SME claimants. Regarding other parts of CETA, Chapter 8 notes a recognition by the parties of the importance of facilitating the use of e-commerce by SMEs, while Chapter 19 provides for the Committee on Government Procurement to consider initiatives to facilitate access for SMEs. There are some reservations to CETA or derogations from chapters. For example, some Canadian provinces may derogate from the government procurement chapter to support small firms in regional economic development programmes.

The TPP-11 Agreement includes a dedicated chapter on SMEs that requires the parties to maintain a publicly accessible website to provide information to SMEs on the Agreement,

preferably in English. It also establishes a Committee on SMEs, consisting of government representatives and with broad functions to exchange information, to 'develop and promote' workshops to inform SMEs of the opportunities arising from the Agreement and to 'explore opportunities for capacity building'. The chapter is not, however, subject to the dispute settlement provisions of the agreement. There are a number of other references to SMEs throughout the agreement. Among other things, the government procurement chapter aims to encourage participation in procurement by SMEs, for example by providing information, to the extent possible, on a single electronic portal and making tender documents available free of charge. In notes to the chapter, a number of economies (including Australia, Canada, Chile, New Zealand and Viet Nam) state that the chapter shall not apply to preferences (and in some cases other forms of support) to SMEs (for Peru a similar exemption applies to micro and small enterprises and for the United States to small businesses).[109] There are also provisions for cooperation in areas such as IP and labour, the latter with the aim of raising labour productivity for SMEs.

A Forward Agenda on SMEs

Data on SMEs' participation in global value chains (GVCs) and their utilisation of free trade agreements are hard to come by, although there have been some studies which have sought to tackle these questions. These studies suggest that firm size is an important factor. For example, an econometric study by Arudchelvan and Wignaraja (2015, pp.12, 14) on Malaysia finds that even among SMEs, the probability of firms participating in GVCs rises from around 0.16 to 0.37 when firm employment increases from 25 to 100, while the probability of utilising RTAs rises from around 0.17 to 0.44. Tambunan and Chandra, in a study of ASEAN RTAs, suggest several public policy initiatives which could help to lift utilisation rates. These include a strong, institutionalised information campaign, measures to facilitate access to finance for MSMEs and the simplification of rules of origin and certificates of origin (2014. pp.157-159). These are issues that have long been discussed within APEC and its member economies: Japan, for example, hosted an APEC workshop to discuss increasing RTA utilisation by SMEs in 2012. However, there may be a case for revisiting these issues in the light of rapid changes occurring in the region.

What is clear from this brief survey is that there is growing interest in SME provisions on the part of governments negotiating RTAs; that there are very considerable differences among these provisions; and that there are significant innovations occurring that would be usefully reflected in new RTAs being negotiated so as to further promote SME participation in global value chains. To this point, APEC has not yet prepared a model chapter on SMEs. It might be useful to do this and to develop model provisions on SMEs for the other key sections of agreements that affect them – such as government procurement, investment, e-commerce, trade facilitation, IP and transparency.

[109] The wording of these provisions varies somewhat with each economy.

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L. Trade and the Environment

Following a familiar pattern, environment-related provisions in RTAs have increased appreciably in number, scope and depth over the last 10-15 years. Also following a familiar pattern, environmental provisions have evolved strongly from their roots in multilateral trade rules and now differ markedly from them in some key respects, particularly in the breadth and depth of environmental commitments undertaken by governments, and in areas like environmental governance and cooperation.[110] Further, the gap between multilateral rules and rules being developed in RTAs continues to widen: for a decade at least, RTAs have been at the centre of innovation on trade and environment. And, perhaps inevitably given the prominence of RTAs as innovators, environment-related provisions have both converged around a number of new themes and disciplines while becoming more varied in scope, depth and enforceability as provisions have become more detailed, complex, numerous and, above all, substantive.

This annex looks briefly at three issues: the growing proportion of RTAs with environment-related provisions in the APEC region and globally from 2000; the ever expanding scope and increasing depth of environmental provisions; and the variety of approaches and commitments economies are making on the environment.

The explosion of environment-related provisions in RTAs

The inclusion of environment-related provisions in RTAs was slow to gather momentum. The treaty setting up the European Economic Community (1957) contained the world's first reference to environment-related provisions in an RTA. The European Free Trade Area (1960) treaty contained the next reference. But neither was especially definitive: the language was general and based on the GATT. The North American Free Trade Agreement (which entered into force in 1994) was the first RTA to contain detailed rules on trade and the environment, including commitments on domestic environmental laws and standards and institutional machinery to enforce them.

NAFTA lit the fuse[111], but it was still slow burning at first: in the five or six years that followed its entry into force, just three of the seven RTAs involving APEC economies included provisions on the environment: the Canada-Chile FTA (1997), the Chile-Mexico FTA (1999) and the EU-Mexico agreement (2000). More RTAs followed in the early 2000s, but it was only after 2005-08 that the pace quickened decidedly with a surge of basic agreements negotiated among developing economies and a surge in developed-developing economy agreements that incorporated environment-related provisions going beyond the WTO in areas like services, investment, IP rights, cooperation, and governance (Monteiro 2016, p.8).

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[110] Basic provisions on the environment in RTAs pre-1992 (and subsequently) were based on GATT/WTO rules. The most common environment-related provision, then and now, was the environmental exception rule based on GATT Article XX and GATS Article XIV: i.e. nothing in a given trade agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures necessary to protect human, animal or plant life or health. Specialized agreements such as the Agreement on Technical Barriers to Trade (on product regulations) and the Agreement on Sanitary and Phytosanitary Measures (on food safety and animal and plant health) also guaranteed that contracting parties could adopt trade-related measures to protect the environment.

[111] In a strictly legal sense, what lit the fuse was a side agreement to NAFTA known as the North American Agreement on Environmental Cooperation. The two agreements are legally separate and both entered into force on 1 January 1994.

The pace was set by the United States, Canada, New Zealand, and the European Union using their strong political mandates to advance progressively more elaborate environmental provisions in their RTA negotiations.[112] While the trade and environment nexus continued to remain sensitive for many economies, developed economy influence was then reinforced by economies like Korea, Chile and later China subsequently including environmental provisions or environmental chapters in their RTAs with developing economies and other trade partners (George 2014, p. 10).[113] At a global level, it was reinforced too by pressure from some business sectors and growing public interest in the environmental cooperation elements of RTAs and, at a government level, by the view that RTAs could be a more straightforward way – or at least another way - to achieve specific environmental objectives than multilateral processes. The economic and political weight of the United States, of course, mattered a lot: its requirement that environmental issues must be included in RTAs as a non-negotiable element of its template was crystal clear.

The strong upward trend in RTAs with environment-related provisions after 2000 is demonstrated in Table 1. But two other features are important. First, the table shows the central role of agreements between developed and developing economies in advancing WTO-X provisions on the environment globally, among APEC economies and between APEC and non-APEC economies. And second, it underlines the critical importance of APEC in advancing the trade and environment agenda: APEC economies were involved in negotiating the great bulk of RTAs with WTO-X provisions on the environment in 2001-10 and especially after 2006. To a significant extent, this reflected the ambitions of the United States, Canada and New Zealand and, later, of Chile and Korea.

[112] US trade agreements are required by Congress to include commitments on the implementation of Multilateral Environmental Agreements (MEAs) and the enforcement of environmental legislation. These commitments are subject to the same dispute-settlement procedures and sanctions as commercial provisions (George 2011, p.7; George 2014, p. 4). Canada, New Zealand and the European Union have all included a range of substantive provisions on the environment in most of their RTAs, particularly recent agreements, in line with their strong political mandates (George 2014, p. 10).

[113] Korea is a good example. Since signing trade agreements with the United States and the European Union, it requires environmental provisions or a chapter on trade and the environment in its RTAs (Policy Research Center for Environment and Economy 2017).

Table 1
Regional Trade Agreements: 2001-2015
WTO-X: Environment Laws: Coverage
Developed, Developing and Transition Economies
Number of Agreements Entering into Force

			APEC	
	World	**Non-APEC**	**All APEC**	**Intra-APEC**
2001-2015				
Total agreements	188	75	113	44
Total agreements covering environmental laws	90	29	61	30
Agreements covering environmental laws between:				
Developed economies	21	4	17	11
Developed - Developing & transition	54	16	38	16
Developing & transition economies	15	9	6	3
2001-2005				
Total agreements	53	25	28	11
Total agreements covering environmental laws	18	10	8	5
Agreements covering environmental laws between:				
Developed economies	5	2	3	3
Developed - Developing & transition	11	6	5	2
Developing & transition economies	2	2	0	0
2006-2010				
Total agreements	79	35	44	19
Total agreements covering environmental laws	33	10	23	13
Agreements covering environmental laws between:				
Developed economies	4	1	3	1
Developed - Developing & transition	18	2	16	9
Developing & transition economies	11	7	4	3
2011-2015				
Total agreements	56	15	41	14
Total agreements covering environmental laws	39	9	30	12
Agreements covering environmental laws between:				
Developed economies	12	1	11	7
Developed - Developing & transition	25	8	17	5
Developing & transition economies	2	0	2	0

Source: World Bank database documented in Annex A.

Coverage and depth: convergence

Alongside this surge in the number of RTAs with environmental provisions, there was a similar surge in the breadth of coverage of environment-related issues. It did not happen uniformly across economies either in the APEC region or globally, but in broad terms coverage of WTO-X provisions in RTAs rose steadily through the 2000s, both in agreements struck among

developed economies and between developed and developing/transition economies.[114] It then accelerated after 2008-10 for both groups (Table 2). Before that time, RTAs typically had non-specific environmental provisions as part of preambles, exceptions provisions and regulations relating to product standards, human, plant and animal health, and perhaps government procurement. After that time, RTAs also typically had provisions on environmental cooperation as well as provisions on issues that could include specific commitments on domestic environmental law, multilateral environment agreements, biodiversity, environmental goods and services, trade in natural resource products, environmental governance, and cooperation (Monteiro 2016, p. 12).

Table 2
Regional Trade Agreements: 2001-2015
WTO-X: Environmental Laws: Coverage
Developed, Developing and Transition Economies
Percentage of Agreements Entering into Force

			APEC	
	World	**Non-APEC**	**All APEC**	**Intra-APEC**
2001-2015				
Coverage in agreements between:				
Developed economies	64%	80%	61%	69%
Developed - Developing & transition	52%	36%	64%	64%
Developing & transition economies	29%	35%	23%	100%
2001-2005				
Coverage in agreements between:				
Developed economies	50%	100%	38%	50%
Developed - Developing & transition	42%	46%	38%	40%
Developing & transition economies	12%	20%	0%	
2006-2010				
Coverage in agreements between:				
Developed economies	44%	50%	43%	50%
Developed - Developing & transition	40%	11%	62%	64%
Developing & transition economies	44%	50%	36%	100%
2011-2015				
Coverage in agreements between:				
Developed economies	86%	100%	85%	88%
Developed - Developing & transition	78%	67%	85%	83%
Developing & transition economies	20%	0%	25%	

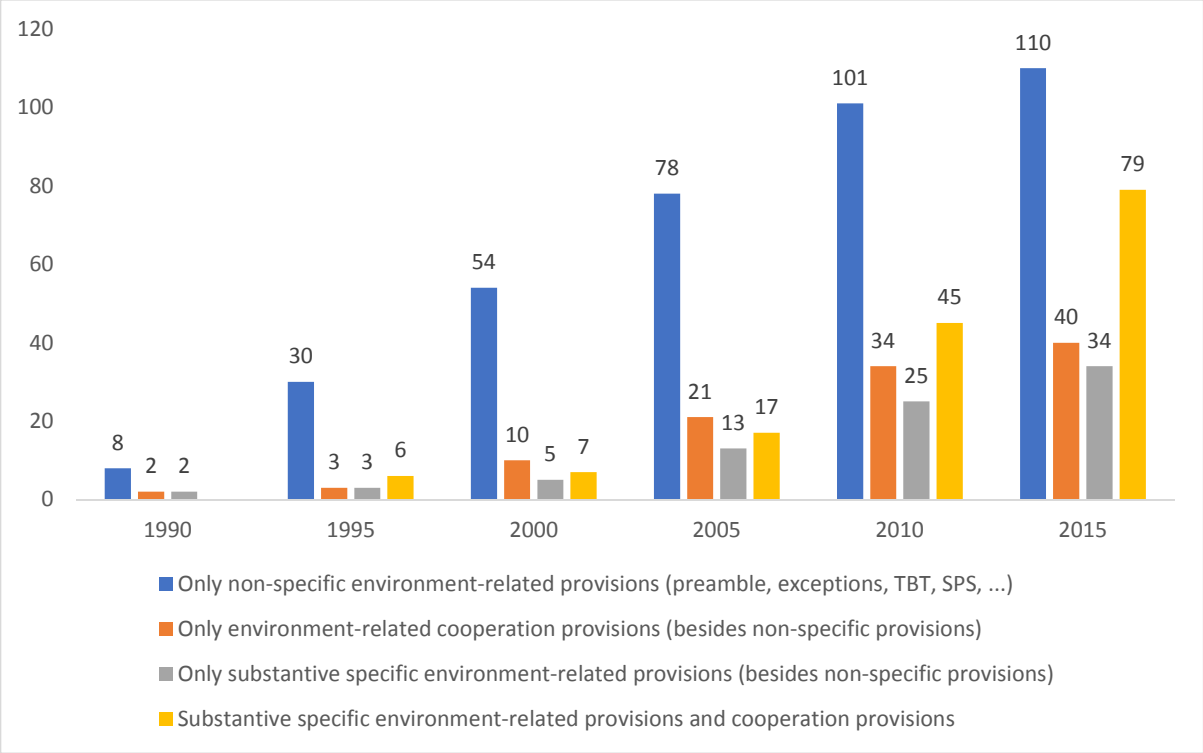
Source: World Bank database documented in Annex A. Note: the data for intra-APEC RTAs with WTO-X provisions on the environment are distorted by the fact that only three agreements were struck between 2001 and 2015, all three during 2006-10.

[114] Following Hofmann, Osnago and Ruta (2017, pp. 5-6), a policy area is considered to be covered by an agreement if it contains an article, chapter or provision that provides some form of undertaking in a particular field.

Chart 1 provides more granularity on this transition at the global level. It shows that the strong upward trend in RTAs with only non-specific environment-related provisions faltered after 2005 and stagnated over recent years, and that the upward trend in RTAs with environmental cooperation and substantive specific environment-related provisions gathered pace, particularly from 2005-10. Environmental cooperation took off either to help facilitate treaty commitments – particularly in the case of developed-developing country agreements – or to address specific environmental challenges identified by the parties or both. Prior to 2008, specific environment-related provisions in RTAs negotiated by the European Union applied only to cooperation. It was similar among several APEC economies: for example, Malaysia's FTA with Chile (2012), China's FTAs with Chile (2006), New Zealand (2008), Singapore (2009), and Peru (2010), and ASEAN's agreements with Korea (2007) and Japan (2008) all limited environment-specific provisions to cooperation.

Chart 1

Number of RTAs with environment-related provisions: 1990-2015



Source: Monteiro 2016, p. 107.
Note: the chart is based on the WTO RTA database.

About the same time as the upsurge in environmental cooperation, there was a similar upsurge in RTAs that combined both cooperation and substantive specific provisions on the environment. Economies like the United States had been doing this for several years in their RTAs, but its significance for APEC – and for the world more broadly – is that it embraced more countries[115] and pushed the boundaries of environment-related provisions. The range of specific commitments broadened to include institutional arrangements, though with a high degree of variability in areas like environmental impact reviews and consultation and dispute

[115] RTAs between Japan and Indonesia, Brunei Darussalam and the Philippines, and between the European Union and Korea and Peru are examples of the broadening trend to combine substantive specific provisions and cooperation on the environment.

settlement processes. And, most recently, it then broadened further to include, again with much variability, specific commitments on liberalizing environmental goods and services; commitments on biotechnology, climate change and natural resources management; and provisions to enhance transparency and access to information on environmental laws and regulations (Monteiro 2016, pp. 12-15).

The Trans Pacific Partnership (TPP-11) Agreement and the European Union-Canada Comprehensive Economic and Trade Agreement (CETA) are good examples of this expanding reach (Boxes 1 and 2) and, in the case of TPP-11, of how very diverse economies with different national priorities and approaches to trade and the environment can coalesce around ambitious and binding initiatives. But these agreements need to be put in context: most RTAs in the Asia Pacific region and beyond are not as comprehensive or definitive, particularly on matters like monitoring outcomes, legal enforcement and dispute settlement – a theme taken up in the next section.

Box 1
EU-Canada Comprehensive Economic and Trade Agreement: Trade and Sustainable Development

CETA contains substantive provisions, including:

- commitments to international environment standards and agreements
- commitments to the effective implementation of Multilateral Environmental Agreements
- protection of the right of each Party to regulate as each deems necessary or appropriate, while providing for high levels of protection
- guarantees that environmental standards are not misused in a trade context, both as a form of disguised protectionism or by relaxing domestic environmental laws or their implementation to encourage trade and investment unfairly
- engagements to promote the sustainable use and trade of natural resources such as forest and fish products
- promotion of trade and investment practices supporting sustainable development objectives, such as Corporate Social Responsibility – where specific reference is made to the OECD Guidelines for Multinational enterprises – and sustainability assurance schemes, such as eco-labelling and fair trade
- strong monitoring and a high degree of transparency, including involvement of civil society
- procedures for the resolution of any disagreement based on government consultations and an independent third-party review mechanism, based on a panel of experts whose reports are public and require follow-up.

Implementation will be overseen by a dedicated governmental body and carried out with the involvement of civil society both domestically and on a bilateral basis. A dedicated binding mechanism to address disputes, including review by an independent panel of experts and a high degree of transparency and monitoring, is established.

Source: European Commission

Box 2
CPTPP: Provisions on Environment

Effective enforcement of domestic environmental laws: The environment chapter includes provisions to ensure that interested persons may request investigations into alleged violations of a CPTPP Party's laws, and to ensure that transparent judicial or administrative enforcement mechanisms and sanctions are available in each Party's domestic legal system.

The chapter requires CPTPP Parties to commit to high standards of transparency and to consultation with respect to environmental laws. Members of the public in a CPTPP Party may make written submissions about the implementation of the chapter, to which the CPTPP Party must respond.

Work to address international environmental challenges: The chapter requires CPTPP Parties to take measures to control production, consumption and trade of certain substances that can significantly deplete or otherwise modify the ozone layer. It also recognises the importance of protecting the marine environment and requires CPTPP Parties to take measures to prevent the pollution of the marine environment from ships.

In relation to marine fisheries, CPTPP Parties are required to operate science-based fisheries management systems designed to prevent overfishing and overcapacity, and to implement measures to combat illegal fishing and deter illegal trade in fish products. Parties also are required to prohibit subsidies for fishing that negatively affect overfished stocks and subsidies for vessels engaged in illegal fishing.

Each CPTPP Party has committed to promote the conservation of sharks, marine turtles, sea birds and marine mammals by implementing and enforcing conservation and management measures, such as measures to limit by-catch from fishing and finning prohibitions.

The chapter includes provisions promoting cooperation among CPTPP Parties on matters of mutual interest related to the conservation and sustainable use of biological diversity. Areas of cooperation may include protection of ecosystems and access to, and sharing of benefits from utilising, genetic resources.

Other provisions: CPTPP Parties have agreed to work together to address potential barriers to trade in environmental goods and services. The chapter provides for CPTPP Parties to undertake cooperative activities related to chapter implementation.

The chapter is subject to a robust enforcement mechanism that includes a consultation process for CPTPP Parties to use in seeking to resolve disputes. If they fail to resolve a dispute through consultations, they may use procedures in the CPTPP dispute settlement chapter.

Source: DFAT, Fact Sheet, 2015
Note: Unlike the agreement concluded in 2015 (TPP), there is no longer a requirement for CPTPP economies to take measures to combat trade in wild flora and fauna taken or traded in economies that are not party to the CPTPP, that are in violation of the wildlife trafficking laws of said economy..

Three things standout about the coverage of WTO-X provisions on the environment. First and most important, the majority of economies in the Asia-Pacific region and globally are now negotiating RTAs that incorporate more provisions on the environment. This applies equally to developed and developing economies.

Second, APEC economies are in the vanguard of these developments: the coverage of WTO-X provisions in agreements between developed economies is similar for APEC economies and globally, but coverage in agreements between developed and developing economies has been

consistently higher for at least a decade in the APEC region compared with the world as a whole.

And third, there is considerable convergence around defining environmental objectives, basic principles, cooperative frameworks and institutional arrangements (Kuriyama 2015; Policy Center for Environment and Economy 2017).To some extent, this reflects the impact of APEC's work on model measures a decade or so ago.[116] Its timing was fortuitous: as the focus in RTAs moved from non-specific environmental provisions to specific provisions and more elaborate approaches to cooperation, there was a ready market for ideas that could be turned into practical policies and processes.

Variations across RTAs

The convergence that undoubtedly has occurred in RTAs across the region and beyond on environmental provisions conceals some significant differences between economies in the scope and depth of agreements. Among APEC economies; the United States, Canada and New Zealand have tended to incorporate more varied types of substantive environment-related provisions in their agreements, particularly with developing economies, than economies like Japan and Australia. Similarly, economies like Chile, China, Korea and Mexico have incorporated a wider range of environment provisions than many developing and transition economies. And economies like Russia have, on the whole, incorporated a limited number of environment-related provisions in their RTAs (Monteiro 2016, p. 17; George 2014, pp. 6-12).

Different views on how environmental and trade priorities should be advanced in a fast developing policy space explains much of this. The bilateral and regional linkage between trade and the environment is sensitive for many economies, just as it is multilaterally. For some economies, the main policy driver for including substantive environmental provisions in RTAs is to contribute to sustainable development. For others it is to create a level playing field or ensure that laudable environmental provisions do not have unintended protectionist consequences. For still others, it is to strengthen practical cooperation on specific projects (George 2014, p. 6). Tensions between potential winners and losers, resource deficiencies in some developing and transition economies that make it harder to assess economic and environmental outcomes and national advantage, and the difficulty for some economies of negotiating environment-related provisions in RTAs when their national systems for environmental management are still evolving, all add to the sensitivity.

A good indicator of sensitivity is the reluctance of many economies to take on substantive obligations in areas like adopting environmental laws; enforcing laws and regulations, including to fulfil commitments in multilateral environment agreements (MEAs); acceding to MEAs; agreeing to lists of duty free environmental goods; setting up civil society advisory committees on trade and the environment; and developing the machinery for handling dispute settlement. These are at the heart of the new wave of environment-related commitments in RTAs but have been taken up sparingly by many economies (Monteiro 2016, p. 12). To some degree, this must reflect their newness, but it also presumably reflects a degree of caution among many governments in a situation where the balance of trade and environmental outcomes may be unclear. And it must too reflect the nature of political systems - public

[116] APEC has been involved in work relating to trade and the environment for more than two decades. For example, environmental goods and services were one of nine priority sectors agreed by APEC Leaders in 1997 under the Early Voluntary Sectoral Liberalisation initiative.

consultation processes, for example, are kept at a minimum in some economies (Yamaguchi and Steenblik 2017, p. 3).

Tables 3 and 4 provide some insight into the legal enforceability and dispute settlement arrangements for environment-related provisions in RTAs in APEC economies and for the world as a whole. Table 3 (and Chart 2) show that legal enforcement of environment-related provisions has risen appreciably in each five-year period from 2001, more than doubling in the case of all APEC RTAs and still rising from a reasonably high base level in the case of intra-APEC RTAs. But in neither case was the (unweighted average) increase sufficient to push legal enforcement above 50 per cent. Further, Table 3 shows that provisions on dispute settlement are still by far the exception rather than the rule,[117] confirming Monteiro's global assessment that, while many RTAs provide for consultations procedures on environment-related matters, "Only a limited number of RTAs provide … specific dispute settlement procedures established under the RTA's environment chapter or environmental side agreement. Conversely, several RTAs explicitly exclude the environment chapter from the RTA's dispute settlement chapter" (Monteiro 2016, p. 108).

[117] They are the rule in the case of agreements to which the United States is a party.

Table 3

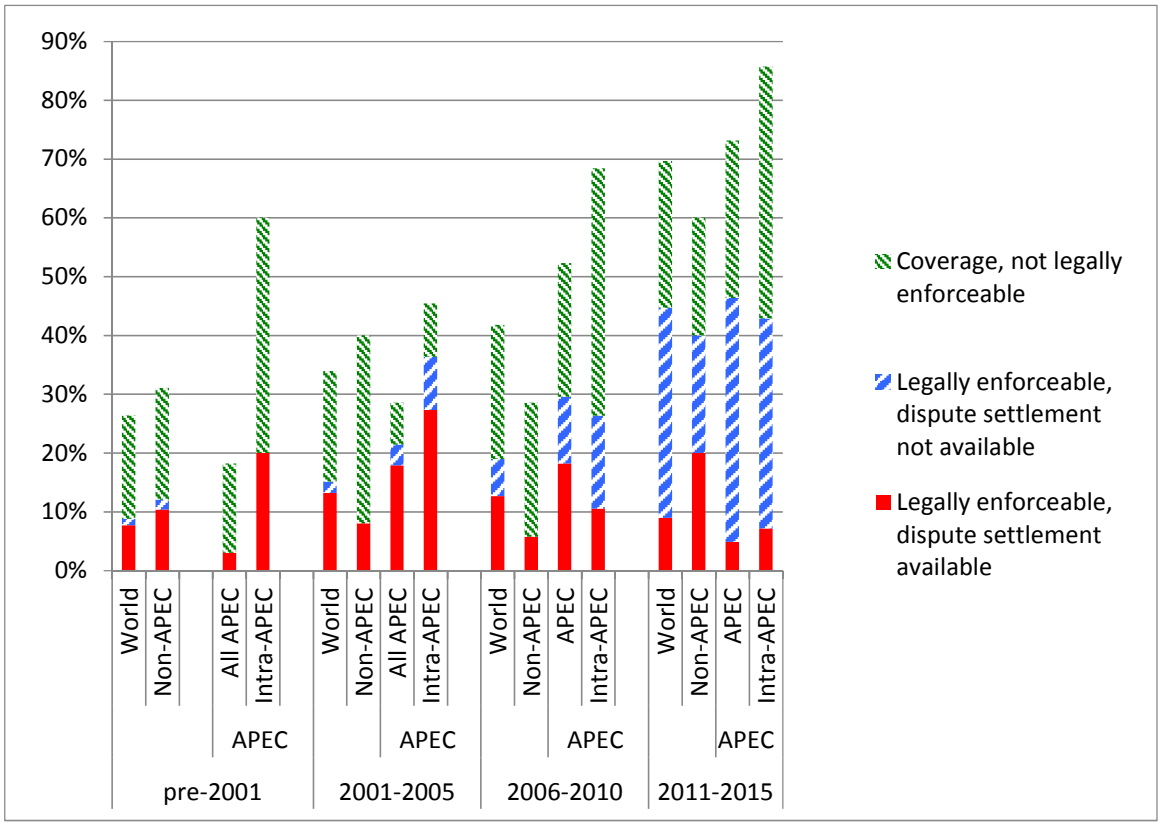
Regional Trade Agreements: 2001-2015
WTO-X Environmental Laws
Developed, Developing and Transition Economies

Percentage of Agreements Entering into Force

	World	Non-APEC	APEC All APEC	Intra-APEC
Coverage				
2001-2015	48%	39%	54%	68%
2001-2005	34%	40%	29%	45%
2006-2010	42%	29%	52%	68%
2011-2015	70%	60%	73%	86%
Legally enforceable				
2001-2015	26%	13%	34%	34%
2001-2005	15%	8%	21%	36%
2006-2010	19%	6%	30%	26%
2011-2015	45%	40%	46%	43%
Dispute settlement				
2001-2015	12%	9%	13%	14%
2001-2005	13%	8%	18%	27%
2006-2010	13%	6%	18%	11%
2011-2015	9%	20%	5%	7%

Source: World Bank database documented in Annex A.

Chart 2
WTO-X: Coverage and Legal Enforceability
Environmental Laws



Source: World Bank database documented in Annex A.

Table 4 takes the analysis a step further by showing differences in coverage of legal enforcement and dispute settlement provisions between different groups of economies. In RTAs among developed economies, the coverage of legally enforceable provisions is similar (at around 45 per cent) globally, regionally and in RTAs negotiated between developed APEC economies and other developed economies. It is lower for intra-APEC agreements between developed and developing economies but, interestingly, is much higher for intra-APEC RTAs between developing/transitional economies compared with the world as a whole. The story on dispute settlement provisions is entirely predictable. Coverage is low for all groups of economies and is almost entirely missing from agreements between developing/transitional economies.

Table 4

Regional Trade Agreements 2001-2015
WTO-X Environmental Laws
Developed, Developing and Transition Economies
Percentage of Agreements Entering into Force

			APEC	
2001-2015	**World**	**Non-APEC**	**All APEC**	**Intra-APEC**
Coverage in agreements between:				
Developed economies	64%	80%	61%	69%
Developed - Developing & transition	52%	36%	64%	64%
Developing & transition economies	29%	35%	23%	100%
Legally enforceable in agreements between:				
Developed economies	45%	60%	43%	44%
Developed - Developing & transition	31%	16%	42%	28%
Developing & transition economies	2%	0%	4%	33%
Dispute settlement in agreements between:				
Developed economies	24%	60%	18%	19%
Developed - Developing & transition	14%	9%	17%	12%
Developing & transition economies	0%	0%	0%	0%

Source: World Bank database documented in Annex A.

Conclusions

Powerful forces are shaping environmental provisions in RTAs around common goals, principles and shared ambitions and, equally, there are countervailing forces delivering greater heterogeneity. The former is seen most dramatically in CPTPP where economies with vastly different approaches and histories on trade and environment issues agreed to take on substantive, wide-ranging and, in many cases, legally enforceable commitments. The latter is evident in deep-seated differences on issues like monitoring, enforcement and dispute settlement, but also in the very nature of RTAs as vehicles that promote experimentation and innovation in addressing new issues and challenges.

These twin realities present important opportunities for the WTO and APEC. For APEC, there is an opportunity to place its stamp on the next generation of environment-related provisions in RTAs through a new model chapter. And for the WTO, it is more than time that the laboratory created by RTAs plays a more prominent role in informing multilateral processes like negotiations for the Environmental Goods Agreement and liberalising trade in environmental services.

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M. Trade and Labour

Linking trade and internationally recognised workers' rights is a highly sensitive issue for many economies. In fact, in the years leading up to launching the Doha Round, it arguably inspired more intense debate among member governments than any other issue discussed at the World Trade Organization (WTO 2001). The United States and European Union, among others, have been strong proponents of this linkage multilaterally, arguing that it is necessary to protect workers' rights and the rules applying to working conditions and industrial relations. Equally, there have been strong counter arguments from others, particularly developing economies and some developed ones, that the 'labour linkage' amounts to disguised protectionism, potentially undermines the comparative advantage of developing economies and may reduce, or at least delay, improvements in living standards and working conditions. Issues of national sovereignty also are powerful factors in the mix since economies'' labour standards apply predominantly to their own citizens and reflect their political, social and cultural circumstances and institutions (Productivity Commission 2010, pp. 277-78).

The overall outcome is that WTO discussions on trade and labour have not progressed.[118] Stasis there contrasts with significant progress on the trade and labour linkage in RTAs.

The surge in labour provisions in RTAs

The basic numbers of RTAs with trade-related labour provisions are revealing. Agreements containing substantive references to trade and labour – provisions, articles or chapters – were by far the exception in the early 2000s. In 2001-05, three agreements entered into force globally between developed economies and five between developed and developing economies with substantive provisions. APEC economies were involved in most of them: the proportion of intra-APEC agreements with labour provisions was roughly double the global average. A decade later, the number of agreements globally entering into force with labour provisions had increased almost four-fold and again APEC economies were well represented, including agreements struck between developing/transitional economies. By 2011-15, well over half of agreements entering into force globally and those involving one or more APEC economies contained substantive provisions on labour (Tables 1 and 2).

[118] WTO ministers agreed in 1996 to renew "our commitment to the observance of internationally recognized core labour standards. The International Labour Organization (ILO) is the competent body to set and deal with these standards, and we affirm our support for its work in promoting them. We believe that economic growth and development fostered by increased trade and further trade liberalization contribute to the promotion of these standards. We reject the use of labour standards for protectionist purposes, and agree that the comparative advantage of countries, particularly low-wage developing countries, must in no way be put into question. In this regard, we note that the WTO and ILO Secretariats will continue their existing collaboration" (WTO 1996). This position still holds (Aryada 2016, p. 4).

Table 1

Regional Trade Agreements: 2001-2015
WTO-X: Labour Market Regulation
Developed, Developing and Transition Economies

Number of Agreements Entering into Force

			APEC	
	World	**Non-APEC**	**All APEC**	**Intra-APEC**
2001-2015				
Agreements with coverage entering into force between:				
Developed economies	18	4	14	8
Developed – Developing & transition	35	9	26	12
Developing & transition economies	8	2	6	2
2001-2005				
Agreements with coverage entering into force between:				
Developed economies	3	1	2	2
Developed – Developing & transition	5	1	4	2
Developing & transition economies	0	0	0	0
2006-2010				
Agreements with coverage entering into force between:				
Developed economies	4	2	2	0
Developed – Developing & transition	12	1	11	8
Developing & transition economies	5	2	3	2
2011-2015				
Agreements with coverage entering into force between:				
Developed economies	11	1	10	6
Developed – Developing & transition	18	7	11	2
Developing & transition economies	3	0	3	0

Source: World Bank database documented in Annex A

Table 2

Regional Trade Agreements: 2001-2015
WTO-X: Labour Market Regulation: Coverage
Developed, Developing and Transition Economies
Percentage of Agreements Entering into Force

			APEC	
	World	**Non-APEC**	**All APEC**	**Intra-**
Coverage				
2001-2015	32%	20%	41%	50%
pre-1996	16%	28%	4%	33%
1996-2000	6%	3%	14%	0%
2001-2005	15%	8%	21%	36%
2006-2010	27%	14%	36%	53%
2011-2015	57%	53%	59%	57%

Source: World Bank database documented in Annex A

In the words of the International Labour Organisation (ILO), trade-related labour provisions in RTAs have now become 'more commonplace' in a trend that shows every sign of continuing to accelerate: almost two-thirds of trade agreements struck globally with labour provisions entered into force after 2008, and this applies to over 80 per cent of agreements since 2013 (ILO 2016, p. 1; ILO 2017, p. 2). The trend, however, is by no means uniform across economies, suggesting that at least some of the sensitivities leading to stalemate in the WTO continue to apply in RTAs.

Table 3 shows that the coverage of trade-related labour provisions in RTAs was over 50 per cent between 2001 and 2015 among developed economies globally and in APEC; was a little over one third for the world as a whole and close to one half for agreements involving developed and developing APEC economies; and was only 15 per cent among agreements struck between developing/transitional economies at the global level and 23 per cent for agreements between developed and developing economies involving at least one APEC economy.

Table 3 also shows that, while overall coverage increased considerably in all country groupings between 2001-05 and 2011-15, there were still marked differences in coverage globally and within APEC between developed economies, developed and developing economies, and especially between developing/transitional economies. By 2011-15, over three quarters of all APEC RTAs involving developed economies contained substantive labour provisions; the proportion was just over one-half for agreements between developed and developing APEC economies.

Table 3
Regional Trade Agreements: 2001-2015
WTO-X: Labour Market Regulation: Coverage
Developed, Developing and Transition Economies
Percentage of Agreements Entering into Force

			APEC	
	World	**Non-APEC**	**All APEC**	**Intra-APEC**
2001-2015				
Coverage in agreements between:				
Developed economies	55%	80%	50%	50%
Developed – Developing & transition	34%	20%	44%	48%
Developing & transition economies	15%	8%	23%	67%
2001-2005				
Coverage in agreements between:				
Developed economies	30%	50%	25%	33%
Developed – Developing & transition	19%	8%	31%	40%
Developing & transition economies	0%	0%	0%	
2006-2010				
Coverage in agreements between:				
Developed economies	44%	100%	29%	0%
Developed – Developing & transition	27%	5%	42%	57%
Developing & transition economies	20%	14%	27%	67%
2011-2015				
Coverage in agreements between:				
Developed economies	79%	100%	77%	75%
Developed – Developing & transition	56%	58%	55%	33%
Developing & transition economies	30%	0%	38%	

Source: World Bank database documented in Annex A

So what produced the upsurge of RTAs with trade-related labour provisions and why was it still so uneven across economies? The most important factor in the upsurge is stasis in the WTO. This created policy space for trade-related policy provisions to evolve outside the WTO. The United States and European Union in particular used that space to link trade and labour in their bilateral and multiparty RTAs. In the case of the United States, Congress requires that all RTAs agreed by the US Government must contain substantive labour provisions: all agreements have satisfied this requirement since the North American Agreement on Labor Cooperation was negotiated as part of negotiating NAFTA (1994).[119] Similarly, the European

[119] The 2007 Bipartisan Agreement negotiated between the US Administration and Congress stipulates that US trade agreements must incorporate enforceable obligations whereby parties must adopt and maintain in their national legislation the principles of freedom of association; right to collective bargaining; elimination of all forms of forced or compulsory labour; abolition of child labour and prohibition of the worst forms of child labour;

Union has included labour provisions in all its RTAs since the mid-1990s, particularly via cooperation on financial and technical issues (Haberli, Jansen and Monteiro 2012, pp. 5-8). As in the case of the United States, its trading partners must take on specific commitments on labour issues to secure market access and other benefits from trade agreements.

Others too, including Canada, Chile and New Zealand, have been active in using RTAs as vehicles to promote labour standards. Their effectiveness in linking trade and labour rights and standards cannot reasonably be explained in terms of trade leverage. It has much more to do with mega trends operating across regions and around the world like:

- Fears in some parts of the labour movement in developed economies that there will be a 'race to the bottom' in wages and the regulation of labour markets given that capital is mobile and global and regional value chains can easily shift to draw in new suppliers.
- The emergence of a big international labour force (ranging from people sewing clothing to assembling electronic equipment) joined together through value chains that is poorly paid compared to the work forces in more developed economies and that often lacks basic labour rights like free association, collective bargaining and basic health and safety protections. These rights, either on their own or seen in the context of fundamental human rights, are being pushed hard by labour movements and other stakeholders, including the media, in many economies.
- The increasing visibility of global capital and commerce. Rapidly changing technology has opened up multinational companies to greater scrutiny from governments, shareholders and civil society, and has made them more accountable for their conduct and practices at multiple points along these chains. Accountability is linked to brand identity – labour rights problems can quickly damage brands – and to issues of corporate social responsibility, which are emerging in recent RTAs.
- Governments' keenness to develop economic and legal rules for regional and global business. Labour provisions are just one element of this, albeit a contentious one, as governments, especially since the Global Financial Crisis, attempt to achieve a better balance between economic and social outcomes.

These 'drivers' impact on all economies to varying extents but, as Table 3 demonstrates, the labour linkage is taken up with a great deal of caution by many economies. This might be based on high principle: a view, for example, that labour issues are better advanced in more specialised fora, and that linking them to trade risks measures adopted for good public policy reasons being used, perhaps unintentionally, for protectionist purposes. Or cautiousness might be based on pragmatic considerations: a view, for example, that enforcing compliance with (often undefined) labour standards through trade agreements cannot realistically have a significant impact on working conditions and living standards in the informal and non-trade sectors of developing economies where the bulk of the labour force work. But however it is explained, it is clear that some developed economies, such as Australia and Japan, have traditionally been most uncomfortable with the linkage, and that many developing/transitional economies have preferred to place social policies in the development section of their RTAs and deal with substantive labour provisions – if any - through non-binding references to ILO standards and by stressing the primacy of domestic regulation (Haberli, Jansen and Monteiro 2012, p. 4).

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and elimination of discrimination in respect of employment and occupation. Violations of labour obligations are addressed by government-to-government dispute settlement procedures using the same remedies and procedures used to address commercial obligations on a bilateral basis (Aryada 2016, p. 6).

China is a good example of developing/transitional economy caution: it is wary on labour rights but quite active on labour exports (where it has a strong and increasing interest) and on labour-related aspects of cooperation. ASEAN is another good example. There appear to be no binding labour provisions in its RTAs. For example, the ASEAN–Japan Comprehensive Economic Partnership agreement (2008) establishes economic cooperation programmes in areas like IP and agriculture, but not in labour. The ASEAN–Korea Free Trade Agreement (2010) reserves domestic labour legislation. And the ASEAN-Australia-New Zealand Free Trade Agreement (2010) recognises the need to 'protect the domestic labour force and permanent employment in the territories of the Parties' but does not go much beyond this (Haberli, Jansen and Monteiro 2012, p. 13). Further, ASEAN's Economic Blueprint to 2025 is detailed on approaches to generating jobs and producing a more people-centred economy by strengthening micro-small-medium- enterprises (MSMEs), strengthening the roles of the private sector and public private partnerships, narrowing ASEAN's development gap between Cambodia, Laos, Myanmar and Vietnam and the rest, and strengthening ASEAN's internal and external connectivity, but it has little to say, if anything, on labour provisions in RTAs (ASEAN Secretariat 2015).

Trade-Related Labour Provisions in RTAs

The great bulk of labour provisions in RTAs cite in various ways the ILO's 1998 Declaration on Fundamental Principles and Rights at Work, referring to freedom of association, effective recognition of the right to collective bargaining, elimination of all forms of forced or compulsory labour; effective abolition of child labour, and elimination of discrimination in employment and occupation. Some RTAs also refer to ILO conventions or the Decent Work Agenda that embody principles relating to job creation, rights at work, social protection and social dialogue, with gender equality as a crosscutting objective.

Beyond reaffirming ILO obligations, RTAs with labour provisions typically cover:

- enforcing or implementing or improving laws, regulations and labour standards
- not waiving or derogating from laws, regulations and labour standards to attract foreign trade or investment
- promoting public awareness of labour and laws, transparency and communication to the public
- developing implementation mechanisms – monitoring, technical cooperation, capacity building, and maybe dispute settlement arrangements
- ensuring access to tribunals to uphold labour laws and standards, and
- providing procedural guarantees to ensure the effective application of labour laws, regulations and standards (ILO 2017, pp. 1-13).

Just like many other new generation trade and investment issues reviewed in this stocktake, convergence around specific labour standards, values and programs often disguises differences in negotiating approaches and priorities, differences in the depth of commitments, and differences arising out of the increasing complexity of agreements. As a general principle, greater complexity begets greater variance in the normative content of RTAs as when parties choose to implement international agreements on labour broadly or narrowly; or introduce gender equality issues – usually in the form of cooperation on research, technical assistance and information exchanges; or choose between an ever wider variety of cooperative arrangements to support the implementation of agreements; or determine to expand agreements to include migrant works (as Canada has in all its trade agreements since 2009) or as Australia

has done for temporary unskilled workers from the Pacific in side agreements to PACER Plus (2017).

This growing complexity is to be expected: it is part and parcel of the natural evolution of RTAs. But it sits on top of quite different approaches by APEC members and other economies to incorporating trade-related labour provisions in RTAs. These differences emerged early, as might be expected given vigorous discussion on these issues in the GATT and WTO. They also have persisted in broad terms over time.

Among the principal protagonists, the US model was shaped by the North American Agreement on Labour Co-operation and Labour Chapters in the subsequent agreements. It focuses on adopting and maintaining the fundamental principles and rights at work as stated in the 1998 *ILO Declaration on Fundamental Principles and Rights at Work* enforcing domestic labour legislation and regulations, and in the latest agreements, applying trade sanctions for non-compliance. The Canadian model is similar, but applies a system of financial compensation for non-compliance. The EU model[120] includes strict regulatory commitments, adherence to a broad range of international labour commitments and principles, and strong civil society participation in monitoring labour standards and settling disputes. In particular, it emphasizes dialogue to promote labour standards and does not subject labour or sustainable development commitments to RTA dispute settlement mechanisms. And, finally, the Chilean and New Zealand models are based on substantive commitments and cooperation and exclude trade sanctions for non-compliance (Lazo-Grandi 2009, pp. vii-viii; ILO 2016).

In line with earlier discussions in the GATT and WTO, Australia and Japan rejected the labour linkage on principle, but came to accept references to labour standards in RTAs, in Australia's case with the United States (2005) and Chile (2009). Also in line with earlier multilateral discussions, RTAs among developing/transitional economies tend to contain few labour provisions beyond standard references to ILO core labour standards and cooperation. RTAs avoid references to binding commitments and enforcement mechanisms (Häberli, Jansen and Monteiro 2012, p. 4).

The enduring nature of these different approaches is revealed in Table 4 from the perspectives of legal enforceability: 25 per cent of all APEC RTAs entering into force between developed economies in 2001-05 had legally enforceable labour provisions compared with 15 per cent between developed and developing/transitional economies. By 2011-15, the proportions were more or less balanced at 45-46 per cent. The trend was similar in RTAs for these groups of economies for the world as a whole with the caveat that the gap between legal enforceability in agreements between developed economies and between developed/transitional economies remained significant.

[120] The EU model is highly relevant to APEC economies given RTAs that have already entered into force between the European Union and Mexico (2000), Chile (2005) and Korea (2015); RTAs that have been signed with Singapore (2014), Vietnam (2016), Canada (2017), and Japan (2017); on-going RTA negotiations with the United States, Australia and New Zealand, and the prospect of region-to-region negotiations with ASEAN.

Table 4

Regional Trade Agreements: 2001-2015
WTO-X: Labour Market Regulation: Legal Enforcement and Dispute Settlement
Developed, Developing and Transition Economies

Percentage of Agreements Entering into Force

			APEC	
2001-2015	**World**	**Non-APEC**	**All APEC**	**Intra-APEC**
Legally enforceable in agreements between:				
Developed economies	42%	80%	36%	38%
Developed – Developing & transition	23%	14%	31%	24%
Developing & transition economies	8%	0%	15%	33%
Dispute settlement in agreements between:				
Developed economies	24%	80%	14%	13%
Developed – Developing & transition	12%	9%	14%	12%
Developing & transition economies	6%	0%	12%	0%
2001-2005				
Legally enforceable in agreements between:				
Developed economies	30%	50%	25%	33%
Developed – Developing & transition	12%	8%	15%	20%
Developing & transition economies	0%	0%	0%	
Dispute settlement in agreements between:				
Developed economies	30%	50%	25%	33%
Developed – Developing & transition	12%	8%	15%	20%
Developing & transition economies	0%	0%	0%	
2006-2010				
Legally enforceable in agreements between:				
Developed economies	44%	100%	29%	0%
Developed – Developing & transition	18%	5%	27%	29%
Developing & transition economies	4%	0%	9%	33%
Dispute settlement in agreements between:				
Developed economies	44%	100%	29%	0%
Developed – Developing & transition	13%	5%	19%	14%
Developing & transition economies	0%	0%	0%	0%
2011-2015				
Legally enforceable in agreements between:				
Developed economies	50%	100%	46%	50%
Developed – Developing & transition	41%	33%	45%	17%
Developing & transition economies	30%	0%	38%	
Dispute settlement in agreements between:				
Developed economies	7%	100%	0%	0%
Developed – Developing & transition	9%	17%	5%	0%
Developing & transition economies	30%	0%	38%	

Source: World Bank database documented in Annex A

The enduring nature of these different approaches is revealed more broadly in some of the most recent RTAs. Boxes 1 and 2 provide brief overviews of trade-related aspects of labour in the European Union-Canada Comprehensive Economic and Trade Agreement (2017) and CPTPP (2018). Both agreements are exemplars of the considerable development of labour provisions in ambitious RTAs: the breadth of undertakings across core labour standards and issues like minimum wages, hours of work and occupational health and safety issues; the strength of regulatory commitments; the breadth of cooperative activities; and links to issues like gender equality. But both also are exemplars of the 'conditional' approach to the labour linkage that fundamentally reflects US and Canadian thinking in TPP/CPTPP – that is, labour provisions are subject to dispute settlement and sustained or recurring non-enforcement can result in suspension of benefits - and the European Union's 'promotional' approach based around sustainable development and broad-based dialogue with partners to promote labour standards.

Box 1
EU-Canada Comprehensive Economic and Trade Agreement (CETA): labour provisions

Labour provisions are part of a broad sustainable development framework that brings together trade and labour and the environment. CETA contains substantive provisions on:

- respecting ILO core labour standards, other labour rights such as occupational health and safety, and ratifying and implementing fundamental ILO Conventions
- protecting each Party's right to regulate labour and the environment as it deems appropriate, while providing for high levels of protection
- guaranteeing that labour and environmental standards are not misused for trade and investment through disguised protectionism or by relaxing domestic labour and environmental laws and how they are implemented
- promoting trade and investment practices supporting sustainable development objectives, such as Corporate Social Responsibility –specific reference is made to OECD Guidelines for Multinational Enterprises
- strong monitoring combined with transparency, including the involvement of civil society
- resolving disagreements through government consultations and an independent third-party review mechanism, based on an expert panel whose reports are made public and require follow-up.

Implementation will be overseen by a dedicated governmental body and involve civil society both domestically and bilaterally. A dedicated binding mechanism to address disputes, including review by an independent panel of experts, transparency and monitoring, will be established.

Source European Commission

Box 2
CPTPP: outcomes on labour

The Chapter reaffirms CPTPP Parties' obligations as members of the ILO and requires Parties to have laws at the federal level of government that enshrine the rights stated in the ILO Declaration.

Building on internationally recognised labour rights (freedom of association, collective bargaining, elimination of compulsory labour, abolition of child labour, and elimination of discrimination in respect of employment and occupation), CPTPP Parties are required to have laws governing acceptable conditions of work relating to minimum wages, hours of work and occupational health and safety. CPTPP Parties will, where appropriate, liaise and collaborate with international organisations such as the ILO and APEC.

CPTPP Parties recognise that it is inappropriate to encourage trade or investment by weakening the protections of labour laws or their enforcement. Accordingly, the Chapter prohibits CPTPP Parties from weakening the protections afforded to workers under their labour laws, or from failing to enforce them in a manner affecting trade and investment. The Chapter also promotes initiatives to discourage imported goods produced by forced or compulsory labour, including child labour.

The CPTPP promotes cooperation between Parties on labour issues. Areas identified for cooperation include job creation, sustainable growth and skill development, promotion of equality, elimination of discrimination against women, and protection of vulnerable workers.

CPTPP Parties have agreed to form a Labour Council with representatives from each Party. The Council's responsibilities will include: establishing priorities for cooperation and capacity building, facilitating public participation and awareness, and reviewing implementation of the Chapter to ensure it operates effectively.

Each CPTPP Party will be required to have a National Contact Point for labour issues, whose responsibilities will include communication with the public. The Chapter requires each Party to maintain a national labour consultative or advisory body, so members of the public may provide views on matters regarding the TPP Labour Chapter.

Should a dispute arise between CPTPP Parties under the terms of the Chapter, Parties must make every effort to resolve the dispute through cooperation and consultation. However, should that process fail, CPTPP Parties will have access to the same CPTPP dispute settlement procedure that applies to other Chapters in the Agreement

Source: DFAT Fact Sheets, 2015
Note: The chapter texts on labour in TPP and CPTPP have not changed.

Forward Agenda

Facilitating movements of labour from informal to formal sectors of economies, improving living standards and strengthening worker protection - including for women and other vulnerable groups - are key development objectives for many economies in the APEC region and beyond. RTAs have a role to play in supporting this transformation in areas from trade-related labour issues and micro-small-medium enterprises to trade facilitation and economic and social development.

This stocktake has demonstrated significant progress in incorporating labour provisions in RTAs regionally and globally. It also has demonstrated great variability in the approach and content of different trade agreements. This variability presents two challenges. The first is the difficulty of developing a unified approach in mega RTAs, though CPTPP and potentially RCEP provide guidance. CPTPP in particular suggests that diverse economies can agree on approaches that would normally be outside their comfort zones if the overall trade and economic package is large enough and if transitional arrangements are available.

In helping to chart a course, APEC could play a valuable role by re-working the model RTA chapter on labour. A great deal has changed since the last model chapter was developed a decade ago. An update would be timely. And second, stepping back from negotiations, a major challenge is to understand why there are so many variations between trade agreements in core labour content and implementation arrangements. Gaining a better understanding of these differences, why they have endured and how they might be harnessed in promoting regional labour standards, would be highly useful. Again, this could present an opportunity for APEC.

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