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Advancing Free Trade
for Asia-Pacific Prosperity

Trends and Developments in Provisions and Outcomes of RTA/FTAs Implemented in 2014 by APEC Economies

APEC Policy Support Unit
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KEY FINDINGS

- The proliferation of RTA/FTAs in the APEC region became more evident in the 2000s. When the multilateral trade negotiations in WTO failed to meet deadlines, more bilateral, plurilateral and regional initiatives started to emerge worldwide. Moreover, in order to reduce "trade diversion" effects and avoid losing market share overseas, those economies outside existing RTA/FTAs started to negotiate their own RTA/FTAs.

- A growing percentage of trade in APEC takes place with RTA/FTA partners. Between 1996 and 2014, the share of exports in APEC under RTA/FTAs almost doubled from 23 to 44 percent. The share of imports grew almost four times from 10 to 39 percent. The structure of RTA/FTAs has also evolved. It is becoming more common to include chapters related to topics which are not covered under WTO rules or are dealt within WTO in a very limited way (for example, competition policy, environment, labor, and investment).

- WTO-plus characteristics are included in many of the chapters, including in those considered as "traditional" chapters. In general, RTA/FTAs in APEC are incorporating many of the model measures in the APEC Model Measures for RTA/FTAs. The analysis of the six agreements put in force by at least one APEC economy in 2014 shows that despite the many similarities that exist among them, there are some areas with striking differences and this would make convergence very difficult to achieve.

- Only three of the six agreements include a chapter with clauses related to bilateral investment liberalization. They provide national treatment to both pre- and post-establishment stages and they have clauses to resolve disputes between one of the parties and an investor of the other party. The Most Favored Nation Treatment (MFN) treatment is not offered in all agreements.

- In the Customs-related chapters, many WTO-plus issues have been included in RTA/FTAs since the early 2000s, in particular on the use of information technologies and risk management systems. The recent WTO Agreement on Trade Facilitation (TFA) has incorporated many of these new elements that already are present in several RTA/FTAs. In fact, RTA/FTAs in APEC include a number of provisions which go beyond the scope of the TFA.

- The chapters on Sanitary and Phytosanitary Measures (SPS) mostly recognize or incorporate what has already been included in the WTO SPS Agreement. Nevertheless, there are still some WTO-plus characteristics, such as the timeline to start consultations and the submission of certain notifications.

- Some of the common features of the Competition Policy chapters are the inclusion of provisions on cooperation and their references to curtail or remove anticompetitive practices. Not all agreements include provisions on monopolies and state-owned enterprises.

- The Environment chapters recognize that environmental laws and regulations cannot be used for trade protectionist measures. They focus mostly on establishing cooperation and consultation links, but their emphasis in some RTA/FTAs are only on the trade-related aspects.

1. INTRODUCTION

In May 2014, at the APEC Ministers Responsible for Trade Meeting, the APEC Information Sharing Mechanism on RTA/FTAs was welcomed as an initiative to enhance transparency among the trade agreements put in place by APEC economies[1]. This initiative included the organization of annual dialogues and the elaboration of reports on RTA/FTA matters, among others.

Subsequently, in August 2014, the APEC Committee on Trade and Investment (CTI) endorsed the terms of reference of this study, the intention of which is to facilitate discussions of APEC economies on the elements that a RTA/FTA should include to be considered a comprehensive and high-quality agreement, as well as to provide inputs on how RTA/FTAs could serve as building blocks towards a broader regional and multilateral trade integration[2].

This report, the first to be produced on an annual basis, analyzes the evolution of the number of RTA/FTAs signed and enforced by APEC economies in the past two decades and researches on the general structure of those RTA/FTAs coming into force in 2014: Australia-Korea; Canada-Honduras; Chile-Hong Kong, China; China-Iceland; China-Switzerland; and Singapore-Chinese Taipei. Moreover, the report analyzes specific topics in these six RTA/FTAs, and examines provisions in selected chapters to identify possible common patterns or recent trends. Where possible, the report will compare those provisions with the APEC RTA/FTA model measures endorsed in 2008[3] and examine the WTO-plus commitments included in those agreements.

Two of the selected RTA/FTA chapters in this study, regarding Customs Administration/Procedures and Sanitary and Phytosanitary Measures (SPS), are considered "traditional" as they are included in most RTA/FTAs. These two chapters usually include provisions encouraging trade facilitation among the parties involved. The analysis of these two topics is becoming very relevant now. As tariffs have been declining significantly in the last two decades, significant gains could come from trade facilitation and the elimination of trade-restrictive non-tariff measures.

This report also includes the analysis of the RTA/FTA chapters on Investment. Early RTA/FTAs only included provisions on trade in goods. However, there has been an increasing number of trade agreements including chapters on investment since the 1990s, noting that investment flows as well as policies affecting investments can have an impact on trade. In addition, the multilateral trading system only includes minor provisions on investment, which created an incentive to address investment matters on bilateral or regional RTA/FTAs. In recent

[1] APEC (2014), "Meeting of APEC Ministers Responsible for Trade – Qingdao Statement", 17-18 May 2014, http://www.apec.org/Meeting-Papers/Ministerial-Statements/Trade/2014_trade.aspx
[2] APEC Committee on Trade and Investment (2014), "FTA Study: Terms of Reference for Policy Support Unit", 2014/SOM3/CTI/007rev1, http://mddb.apec.org/Documents/2014/CTI/CTI3/14_cti3_007rev1.pdf
[3] The APEC RTA/FTA Model Measures can be found in the following document: APEC Committee on Trade and Investment (2008), "Annual Report to Ministers", pp. 54-104, http://www.apec.org/Groups/Committee-on-Trade-and-Investment/~/media/441C73DB54E746E4835F883BF7154612.ashx

years, the inclusion (or exclusion) of provisions concerning some investment issues has been the subject of broad discussion, such as those related to the investor-state dispute settlement.

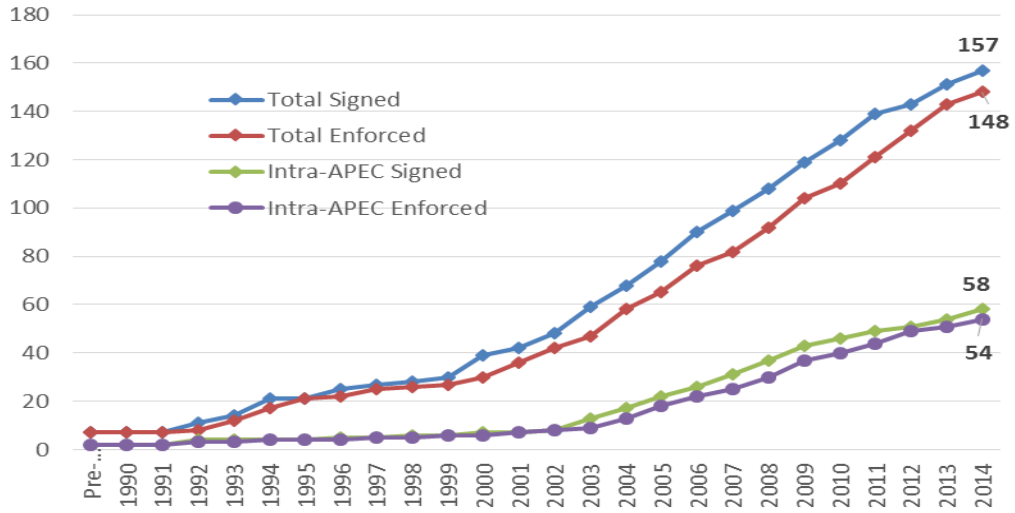
The report also includes the analysis of two "non-traditional" RTA/FTA chapters: Competition Policy and Environment, topics with no specific agreements under WTO. Some RTA/FTAs include these topics because the parties involved in the negotiation considered them closely interlinked with trade. As the interest to discuss possible pathways to realize a high-quality and comprehensive Free Trade Area of the Asia Pacific has increased in recent times, it becomes pertinent to learn more about the provisions in those "non-traditional" chapters. Recent agreements put in place by some APEC economies could shed some light on the different approaches undertaken to incorporate those topics in RTA/FTAs.

2. RTA/FTAs WITHIN THE APEC REGION

Proliferation of FTAs is more evident since the 2000s

An APEC Policy Support Unit study by Pasadilla et.al. (2015) noted that trade agreements started to proliferate in the 1990s and that the number of RTA/FTAs enforced by APEC member economies increased by more than 20 times since the 1990s[4]. Figure 1 shows the evolution of the number of RTA/FTAs signed and enforced by APEC economies. By December 2014, 148 RTA/FTAs including at least one APEC economy had been in force, 54 of them being intra-APEC.

Figure 2.1: Number of RTA/FTAs Signed and Enforced by APEC Economies



Source: APEC Secretariat, Policy Support Unit

Figure 1 shows that the proliferation of RTA/FTAs in the APEC region became more evident in the 2000s. The difficulties encountered during the WTO multilateral trade negotiations known as the Doha Round, and the failure to conclude successfully these negotiations by the

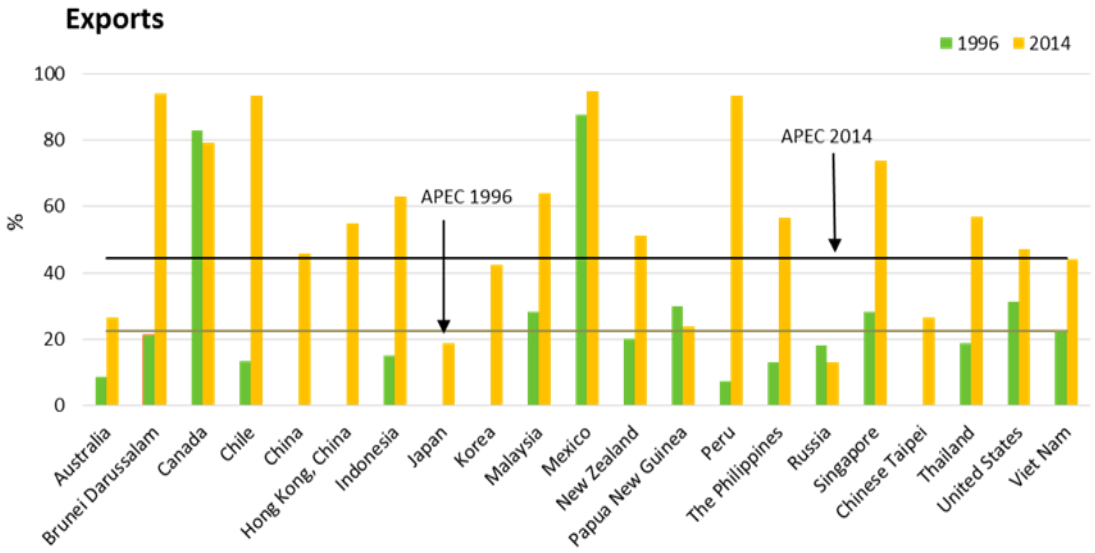
[4] Pasadilla, Gloria, Emmanuel San Andres, Andre Wirjo and Rhea Hernando. (2015), "Key Trends and Developments Relating to Trade and Investment Measures and Their Impact on the APEC Region: Do FTAs Matter for Trade?, APEC Secretariat, Policy Support Unit, p. 1

2005 original deadline, were some of the main drivers explaining the sudden increase in RTA/FTAs. As multilateral negotiations showed no sign of progress, more bilateral, plurilateral and regional initiatives started to emerge around the world. APEC economies have a prominent role in the proliferation of RTA/FTAs, explaining around 53 percent of the global number of RTA/FTAs[5]. Another reason for this proliferation is the "trade diversion" effects that RTA/FTAs could have on non-signatory parties, since they would lose their market share in the markets of the signatory parties. If one economy signs a trade agreement, others may be compelled to follow suit.

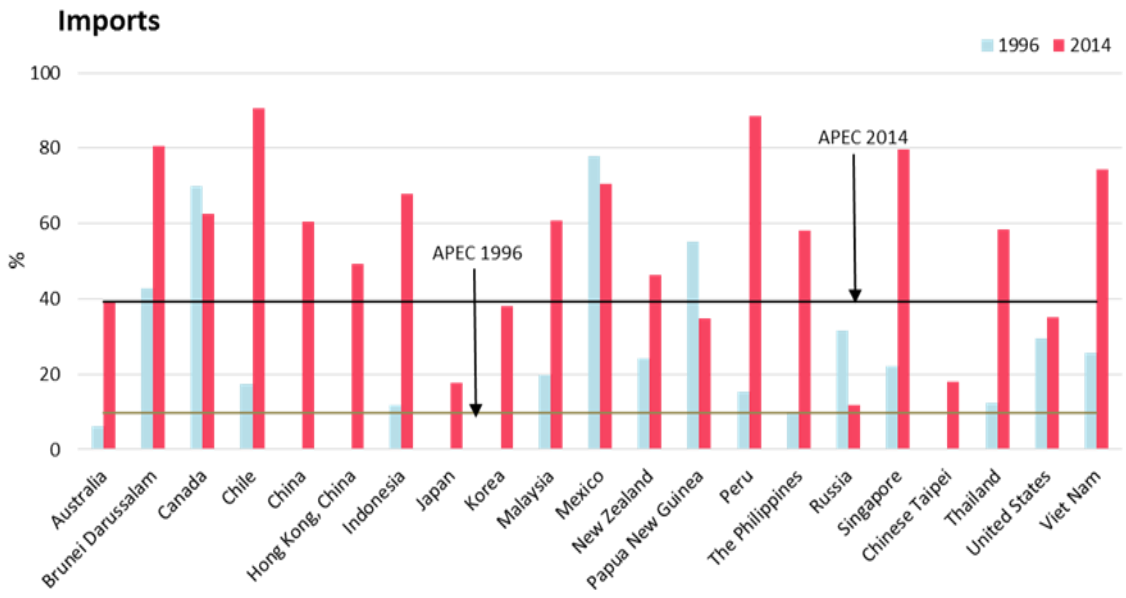
More trade flows are increasingly covered by RTA/FTAs

A growing percentage of APEC economies' trade is with RTA/FTA partners. 23 percent of APEC's total exports and 10 percent of APEC's total imports were covered by RTA/FTA partners in 1996[6]. In 2014, APEC's trade with RTA/FTA partners explained a much larger share: 44 percent of APEC's total exports and 39 percent of APEC total imports[7].

Figure 2.2: APEC Economies' Share of Trade with RTA/FTA Partners



[5] Ibid.
[6] APEC Policy Support Unit (2014), "APEC in Charts 2014", APEC Secretariat, p. 13.
[7] These figures reflect the percentage of trade with RTA/FTA partners. They do not reflect the percentage of trade that is duty free or enjoying preferential treatment. Some RTA/FTAs exclude a list of products from the tariff liberalization schedule.



Source: International Monetary Fund - Direction of Trade Statistics, Chinese Taipei's Ministry of Economic Affairs, Bureau of Foreign Trade. APEC Secretariat, Policy Support Unit calculations

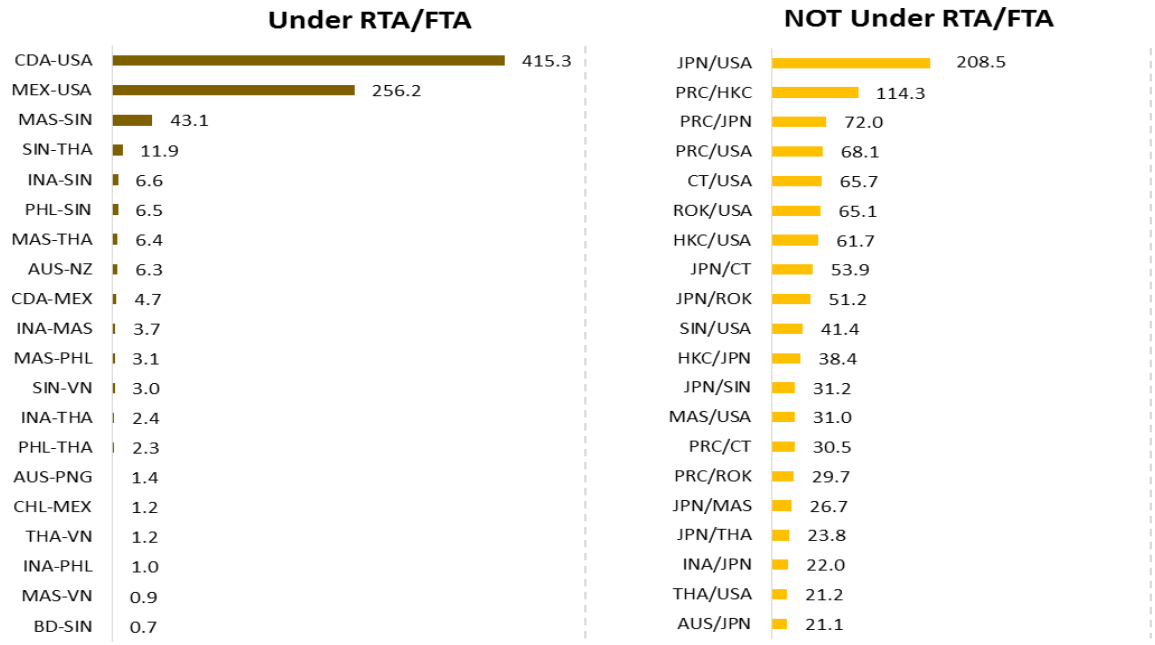
The impact of RTA/FTAs on trade seems to be positive. According to Pasadilla et.al. (2015), "(…) the average exports five years after an FTA is enforced is higher and statistically significant vis-à-vis the average exports five years before."[8] In fact, the analysis found out that RTA/FTAs is a significant determinant of exports and suggests that the size of the RTA/FTA does matter[9].

Within APEC, RTA/FTAs seem to have caused a positive effect on trade. Between 2000 and 2014, intra-APEC trade grew by 174 percent, from USD 2.3 trillion to USD 6.3 trillion. During this period, the number of intra-APEC RTA/FTAs in force increased substantially from 7 to 54 (See Figure 2.1).

Trade flows among the signatory parties of intra-APEC RTA/FTAs in force in year 2000 totaled USD 780 billion, and explained nearly 35 percent of the total intra-APEC trade[10]. Most of this trade was explained by NAFTA, which accounted for 86.7 percent of that trade. The bilateral trade between Canada and the United States (USD 415 billion); and Mexico and the United States (USD 256 billion) constituted the largest trade flows covered by RTA/FTAs in APEC in 2000 (Figure 2.3). Besides the trade flows between Malaysia and Singapore (USD 43 billion); and Singapore and Thailand (USD 12 billion), the rest of the trade flows under RTA/FTAs in force did not exceed USD 10 billion.

[8] Pasadilla, Gloria et.al. (2015), Op.cit. See Executive Summary.
[9] Pasadilla, Gloria et.al. (2015), Op.cit. p. 6-7.
[10] Some trade agreements are not formally named using the term Free Trade Agreement (FTA). For simplicity, all trade agreements will be referred in this report with the term RTA/FTAs, which denotes any preferential trade agreement signed between APEC economies.

Figure 2.3: Top 20 Bilateral Trade Flows under RTA/FTAs in 2000 (USD billion)



Source: International Monetary Fund - Direction of Trade Statistics, Chinese Taipei's Ministry of Economic Affairs, Bureau of Foreign Trade. APEC Secretariat, Policy Support Unit calculations

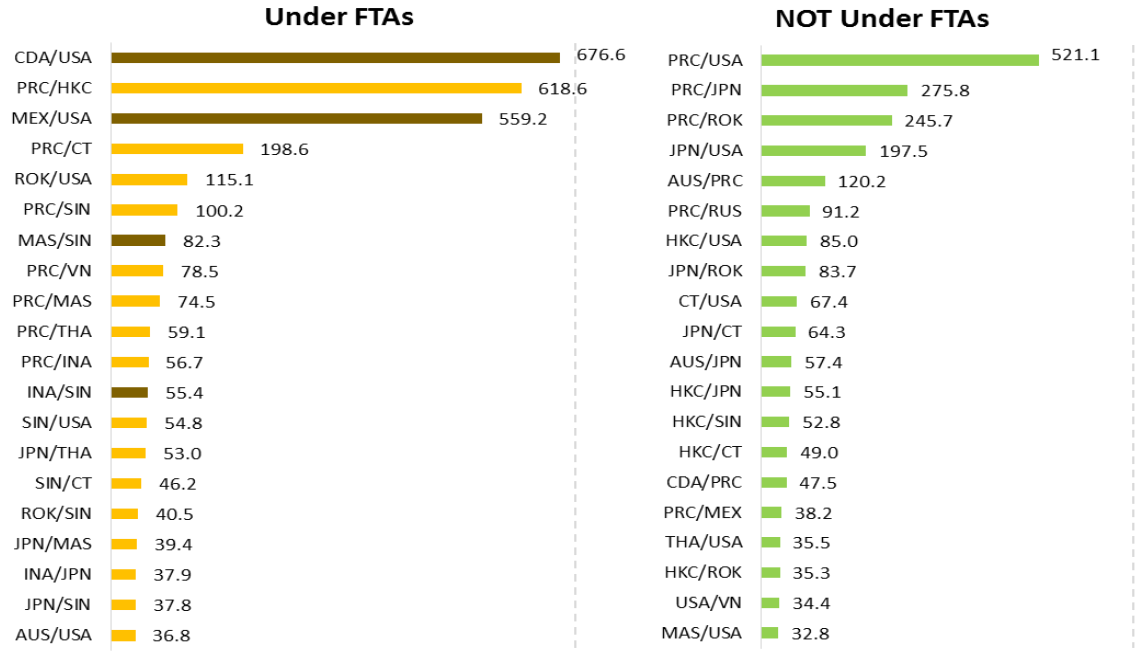
As seen in Figure 2.3, large trading economies in the region–such as China; Japan; and Korea–were not a party to any RTA/FTA by 2000. Therefore, some important bilateral trade flows within APEC were not covered by RTA/FTAs at that time, for instance trade between China and Hong Kong, China; Korea and the United States; Singapore and China; and Japan and Thailand. After 2000, China put into force seven intra-APEC RTA/FTAs with 13 APEC members. Japan also did the same with 12 intra-APEC RTA/FTAs covering 11 APEC members. Similarly, Korea enforced six intra-APEC RTA/FTAs with 11 APEC economies.

Other APEC economies also started to actively engage in RTA/FTAs. For example, after 2000, Chile and Peru implemented nine intra-APEC RTA/FTAs; Australia and Singapore enforced eight new intra-APEC RTA/FTAs; and New Zealand participated in seven new intra-APEC RTA/FTAs.

By 2014, 54 intra-APEC RTA/FTAs had already been in force and the trade flows among the corresponding RTA/FTA signatory parties accounted for USD 3.7 billion, explaining 59 percent of the intra-APEC trade.

Figure 2.4 shows the top 20 bilateral trade flows in the APEC region between RTA/FTA signatory economies in 2014. A comparison with that of 2000 shows many differences. Only four of the top 20 trade flows covered by RTA/FTAs in 2000 appeared in the 2014 list. In 2014, many of those new in the top 20 trade flows correspond to trade agreements involving China with Hong Kong, China; Chinese Taipei and ASEAN members; as well as those concerning the United States with Korea, Singapore, and Australia. Bilateral trade flows between Japan and ASEAN members also appear in this list.

Figure 2.4: Top 20 Bilateral Trade Flows under RTA/FTAs in 2014 (USD billion)



Note: Brown columns identify those trade flows that were already under RTA/FTAs in year 2000. Orange columns identify bilateral trade flows under RTA/FTAs only after year 2000.
Source: International Monetary Fund - Direction of Trade Statistics, Chinese Taipei's Ministry of Economic Affairs, Bureau of Foreign Trade. APEC Secretariat, Policy Support Unit calculations

However, despite the proliferation of RTA/FTAs within APEC, there still are important bilateral trade relationships that are not covered by any trade agreement. The two notable ones are the trade flows between China and the United States; and China and Japan, which are the fourth and fifth most important bilateral intra-APEC trade flows after those between Canada and the United States; China and Hong Kong, China; and Mexico and the United States.

It is important to highlight some important bilateral flows that were not under RTA/FTAs in 2014, as shown in Figure 2.4, will be covered by RTA/FTAs in the near future. For example, Australia and Japan just put in force a trade agreement on 15 January 2015[11]. Also, China signed new free trade agreements with Korea and Australia on 1 June 2015[12] and 17 June 2015[13], respectively, and which are expected to be implemented shortly.

In addition, trade negotiations involving several APEC economies, concerning the Trans-Pacific Partnership (TPP) and the Regional Comprehensive Economic Partnership (RCEP), are ongoing. Should these negotiations conclude successfully, the percentage of intra-APEC trade covered by RTA/FTAs will increase significantly. At present, 12 APEC economies are involved in TPP negotiations. Similarly, 12 APEC economies (plus Cambodia, India, Laos and Myanmar) are involved in the RCEP negotiations.

[11] Department of Foreign Affairs and Trade (2015), "JAEPA Enters into Force", http://dfat.gov.au/trade/agreements/jaepa/news/Pages/jaepa-enters-into-force.aspx
[12] Ministry of Trade, Industry and Energy (2015), "Republic of Korea and China Formally Sign FTA To Provide Institutional Framework for Future Cooperation", http://english.motie.go.kr/?p=5777
[13] Department of Foreign Affairs and Trade (2015b), "Signature of the China-Australia Free Trade Agreement", http://dfat.gov.au/trade/agreements/chafta/news/Pages/signature-of-the-china-australia-free-trade-agreement.aspx

3. GENERAL STRUCTURE OF RTA/FTAs IN FORCE 2014

A quick mapping with respect to the structure of RTA/FTAs implemented in 2014 shows that the traditional chapters in trade agreements, such as Trade in Goods, Rules of Origin, Customs Provisions/Administration and Dispute Settlement appear in all of these RTA/FTAs (see Table 3.1).

Table 3.1: Chapter Structure of RTA/FTAs

Chapters \ RTA/FTAs	Australia-Korea	Canada-Honduras	Chile-Hong Kong, China	China-Iceland	China-Swizerland	Singapore-Chinese Taipei
Trade in Goods	■	■	■	■	■	■
Rules of Origin	■	■	■	■	■	■
Customs Administration /Trade Facilitation	■	■	■	■	■	■
Technical Barriers to Trade	■	■	■		■	■
Sanitary and Phytosanitary Measures	■	■	■		■	■
Emergency Action		■				
Trade Remedies	■		■		■	
Cross Border Trade in Services	■	■	■	■	■	■
Financial Services	■	■	■			
Telecommunications	■	■				
Movement of Business People	■	■				
Investment	■	■		■	■	■
Government Procurement	■	■	■			■
Intellectual Property	■			■	■	■
Competition Policy	■	■	■	■	■	■
E-Commerce	■	■				■
Cooperation / Promotion	■			■	■	
Labor	■	■				
Environment	■	■	■		■	
Transparency	■	■	■			■
Dispute Settlement	■	■	■	■	■	■

Source: APEC Secretariat, Policy Support Unit

Other traditional chapters, such as those on Sanitary and Phytosanitary Measures (SPS) and Technical Barriers to Trade (TBT), appear in all RTA/FTAs, except in the China-Iceland agreement, which includes specific provisions on those matters in the trade in goods chapter. Table 3.1 also confirms the positive trend in recent years regarding the inclusion of chapters on Cross-Border Trade in Services. The six RTA/FTAs entering into force in 2014 include commitments on a list of specific services, or comprehensive commitments on national treatment, market access and local presence with a list of exceptions (i.e. non-conforming measures). Some agreements such as the Australia-Korea FTA and the Canada-Honduras FTA, also include chapters on specific services sectors, such as financial services, telecommunications and e-commerce. Similarly, these agreements have a specific chapter for mode 4 of services provision (i.e. movement of natural/business persons).

In the same way, Table 3.1 also corroborates the increasing interest of including investment chapters in RTA/FTAs. Five of the RTA/FTAs entering into force in 2014 include a specific chapter on Investment. The Chile-Hong Kong, China agreement is the only one without an Investment chapter. However, both economies exchanged notes agreeing to enter into negotiations on an investment agreement, which should include a series of elements that are usually present in RTA/FTA investment chapters[14].

As for the other topics, all RTA/FTAs analyzed in this study include a chapter on Competition (or Competition Policy). Most of them include provisions related to cooperation between competition authorities and consultations. Others go further and deal with issues concerning the interpretation and application of competition laws, monopolies and state enterprises, among others.

Chapters on Government Procurement, Environment, Transparency and Intellectual Property also appear in four out of the six RTA/FTAs. However, the depth of their provisions differs. Topics such as cooperation and labor appear as individual chapters in only three and two agreements, respectively. However, in all agreements, clauses promoting cooperation among relevant authorities can be found in the other individual chapters. For example, chapters on Customs Procedures include provisions to strengthen cooperation among border agencies in mutually determined areas.

4. ANALYSIS OF THE STRUCTURE OF SPECIFIC RTA/FTAs CHAPTERS

4.1 Investment

Among the six assessed RTA/FTAs, three of them include comprehensive chapters on Investment (Australia-Korea; Canada-Honduras; and Singapore-Chinese Taipei), with provisions relating to bilateral investment liberalization. The agreement between China and Iceland includes an Investment chapter, but in reality, it only includes provisions on information exchange on investment laws, policies and investment promotion information, among others, and recognizes the importance of a Bilateral Investment Treaty signed in 1994. The agreement between China and Switzerland also contains an Investment chapter, but only to promote information exchange on mainly investment promotion, and establish a channel to provide information, under request, of measures affecting investments.

The Singapore-Chinese Taipei agreement has the particularity of including clauses on financial services (as defined in GATS) and prudential measures. On the other hand, the Australia-Korea and Canada-Honduras agreements include chapters on Financial Services, where those type of clauses are usually placed.

Investment chapters in RTA/FTAs are usually considered WTO-plus since they include a broad range of disciplines and WTO rules on investment matters are confined to the Agreement on Trade-Related Investment Measures (TRIMS), which states that parties shall not implement

[14] See http://www.tid.gov.hk/english/trade_relations/hkclfta/files/LetterOnInvestment.pdf

measures that discriminate against foreign products or lead to quantitative restrictions[15]. These types of provisions are usually included in the RTA/FTAs' Investment chapters.

It is not possible to compare the provisions in the recent RTA/FTAs signed by APEC economies with the Model Measures for RTA/FTAs, since APEC economies could not agree on model measures for an Investment chapter, when this initiative was endorsed back in 2008.

a. Definition of Investment

In general, the Australia-Korea and Singapore-Chinese Taipei agreements define investment as every asset that an investor owns or controls directly or indirectly, but assets must have the characteristics of an investment (for example, assets involving the commitment of capital, the expectation of gain or profit, or the assumption of risk). This includes enterprises, movable and immovable property, stocks, shares, futures, options, intellectual property rights, licenses and permits, among others.

One of the main differences is on the treatment of bonds, loans or other debt instruments of an enterprise. While the Singapore-Chinese Taipei agreement is less prescriptive and only highlights that those instruments must be related to business activities and not personal activities, the Australia-Korea FTA mentions that bonds, debentures and long-term notes might have the characteristics of investments while other forms of debt might not. The Canada-Honduras FTA also restricts these instruments as investments in specific cases (for example, a loan or a debt security is an investment if the original maturity is at least for 3 years).

b. National Treatment

The Australia-Korea, Canada-Honduras and Singapore-Chinese Taipei agreements provide for national treatment at both pre-establishment and post-establishment phases by using a negative list approach. In other words, the parties, in similar circumstances, have to give a treatment no less favorable to the investor from the counterpart in relation to domestic investors.

c. Most Favored Nation Treatment (MFN)

Only the Australia-Korea and Canada-Honduras FTAs include MFN provisions in their Investment chapters. These provisions accord treatment no less favorable to the investor from the counterpart in relation to the treatment obtained by investors from third parties in similar circumstances. Those two agreements provide for MFN treatment for both pre-establishment and post-establishment phases. However, the Canada-Honduras FTA additionally specifies that the MFN treatment does not apply to dispute settlement mechanisms.

d. General Treatment

The three assessed agreements provide for minimum standard of treatment in accordance to customary international law in terms of "fair and equitable treatment" and "full protection and security" for investments. There are some small differences with regards to "fair and equitable

[15] See https://www.wto.org/english/tratop_e/invest_e/invest_info_e.htm

treatment" since the Australia-Korea and Singapore-Chinese Taipei agreements additionally specify the obligation not to deny justice in accordance to the due process principle in the principal legal systems in the world.

e. Performance Requirements & Senior Management and Board of Directors

In general, the Australia-Korea; Canada-Honduras; and Singapore-Chinese Taipei agreements do not allow performance requirements (e.g. to export a given level or a percentage of goods and services to operate in the market of the signatory party). However, the scope differs among these agreements. For instance, the Australia-Korea and Singapore-Chinese Taipei agreements include a provision which states that the prohibition of performance requirements for technology transfer will not apply in cases in accordance with Article 31 of the TRIPS Agreement and consistent with Article 39 of TRIPS Agreement[16]. On the other hand, the Canada-Honduras agreement does not have a limitation in this area.

There are similar restrictions in the scope of prohibiting the use of performance requirements. For example, the Australia-Korea and Singapore-Chinese Taipei agreements state that the prohibition does not apply in certain cases concerning government procurement, as well as qualification requirements for goods and services regarding export promotion and foreign aid programs. The Canada-Honduras agreement does not include this type of restriction.

In terms of requirements concerning the senior management and board of directors, none of the agreements establish nationality requirements for senior management positions. For the board of directors, they establish that the parties may ask for the majority of the board of directors (i.e. Canada-Honduras and Singapore-Chinese Taipei) or less than a majority (i.e. Australia-Korea) to be of a particular nationality or a resident in the territory of the party, as long as it does not impair the ability of the investor to exercise control over its investment.

f. Expropriation and Compensation

The three agreements refer to similar conditions for a lawful expropriation: for a public purpose; on a non-discriminatory manner; in accordance to the due process of the law; and on payment of a prompt, adequate and effective compensation. The investment chapters in all these agreements state that the compensation shall be made in a freely usable currency. All agreements also clarify that an expropriation could be direct or indirect.

g. Transfers

The intention in each agreement is to make sure that the parties allow the free transfer of capital and without delay. The Australia-Korea; Canada-Honduras; and Singapore-Chinese Taipei agreements establish that transfers may be prevented or delayed according to the parties' laws in cases relating to bankruptcy; issuing of securities; criminal offenses; financial reporting to assist law enforcement; and compliance with orders in judicial proceedings.

[16] The TRIPS Agreement refers to trade-related aspects of intellectual property rights. For more information, please see https://www.wto.org/english/tratop_e/trips_e/trips_e.htm

The Singapore-Chinese Taipei agreement has an exception to capital transactions in cases related to problems with the balance of payments or at the request of the International Monetary Fund (IMF).

h. Settlement of Disputes between a Party and an Investor of the Other Party[17]

The three agreements with an investment chapter include clauses aiming to resolve disputes between a party and an investor of the other party, and encourage the claimant and respondent to resolve the dispute through consultation and negotiations. If the dispute cannot be resolved at that stage, the claimant may submit it for arbitration.

In the case of the Canada-Honduras and Singapore-Chinese Taipei agreements, arbitration is possible when consultations cannot resolve the dispute after six months since the disputing investor notified the party on its intent to submit a claim. The Australia-Korea FTA establishes that this could happen six months after the events which originated the claim. All agreements state that no claim can be submitted for arbitration if more than three years have passed from the time the claimant knew of an alleged breach.

For arbitration, the claim could be submitted to any mechanism agreed by the parties, such as the United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules or the International Centre for Settlement of Investment Disputes (ICSID) Convention, as in the case of the Australia-Korea and Canada-Honduras FTAs. The Singapore-Chinese Taipei agreement does not involve the use of the ICSID Convention. Instead, claims could be submitted under the International Chamber of Commerce (ICC) Arbitration Rules.

There is also a time limit to select the arbitrators of the tribunal to discuss the claim once the claim for arbitration is submitted. Whilst the Canada-Honduras and Singapore-Chinese Taipei agreements establish 90 days to select the arbitrators, the Australia-Korea FTA gives 75 days to complete that task.

If there has been a breach by the party against the investor of the other party, the three agreements state that the tribunal may award only payment of monetary damages and any applicable interest and/or the restitution of property. Costs may be awarded in accordance with the applicable arbitration rules. The Australia-Korea FTA also allows the attorney's fees to be awarded. In terms of the enforcement of the award, the Australia-Korea and Canada-Honduras FTAs allow for 120 days if the award is made under ICSID Convention and 90 days if under ICSID Additional Facilities Rules or UNCITRAL Arbitration Rules. The Singapore-Chinese Taipei agreement does not establish any time limit to seek enforcement of the final award.

[17] In some agreements, this is under a section or article called "Investor-State Dispute Settlement".

Box 1: Debate on the Investor-State Dispute Settlement (ISDS) Clauses

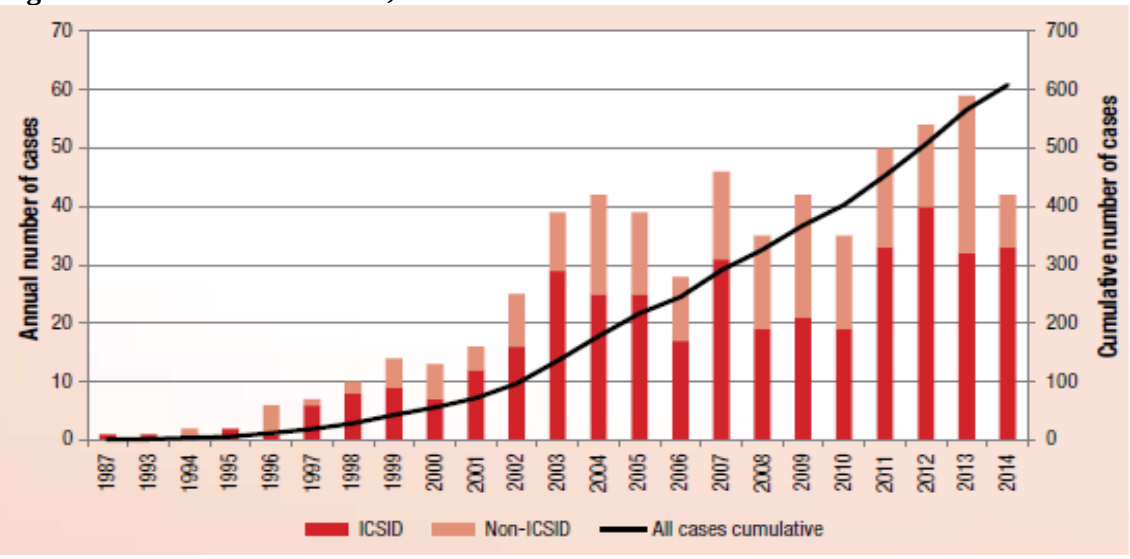
In recent years, there has been a debate over the convenience of including ISDS clauses in RTA/FTAs. On the one hand, those supporting the inclusion of ISDS clauses claim they would help in attracting foreign investors, by establishing clear rules and procedures to start a dispute with the host government, in case of an alleged breach of any obligation. An effective ISDS system would protect investors against arbitrary government decisions (for example, expropriation without due compensation).

Also, ISDS clauses provide investors with an effective way to settle disputes; give a right to challenge a decision in certain circumstances without government approval; and use arbitrators which are familiar with the issues under dispute, as domestic courts may not necessarily have the autonomy or proper experts to deal with those matters.

On the other hand, opponents argue that ISDS clauses affect the sovereignty of the parties, since the ruling by the arbitral tribunal will not be subject to domestic laws and arbitrators have ample room for interpretation of the RTA/FTA. In addition, companies may take advantage of the system to make claims and seek compensation. Other issues raised by the opponents include the fact that challenging an arbitral award is very limited; many of the procedures involve secrecy; and it is not required to consider precedents when deciding on the adjudication of the award.

According to UNCTAD, the number of known ISDS cases initiated pursuant to Bilateral Investment Treaties (BITs) or RTA/FTAs grew year by year from 2010 to 2013. In 2014, 42 new claims using the ISDS mechanisms were started, lower than the 59 known cases started in 2013. However, it is possible that the number of cases is higher, since UNCTAD highlights that many agreements allow for fully confidential arbitration. Figure 4.1 shows that the number of cases has been increasing in recent years and the accumulated number of known ISDS-related cases reached 608 by 2014.

Figure 4.1: Known ISDS Cases, Annual and Cumulative



Source: UNCTAD (2015), "IIA Issues Note", No. 1, February, p. 5, Figure 2.

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According to UNCTAD, by the end of 2014, 356 of the known cases had been concluded. However, arbitral tribunals have mostly ruled in favor of the governments (132 cases, 37 percent) rather than the investors (87 cases, 25 percent). 101 (28 percent) of the cases were settled. On the amount awarded, a study by Franck (2007) mentioned that most of the compensations granted to investors amounted to less than USD 10 million. A recent paper by Abbott, Erixon and Ferracane (2014) shows that amounts awarded were in most cases much lower than the amounts sought.

Table 4.1: Results of Concluded Cases

Result	Number of Cases	Percentage
In favor of government	132	37%
Settled	101	28%
In favor of investor	87	25%
Discontinued	29	8%
Breach but no damages	7	2%
Total	**356**	**100%**

Source: UNCTAD (2015), "IIA Issues Note", No. 1, February, p. 8, Figure 5.

Sources:

- Abbott, Roderick, F. Erixon and M.F. Ferracane (2014), "Demystifying Investor-State Dispute Settlement (ISDS)", ECIPE Occassional Paper No. 5/2014
- Franck, Susan D. (2007), "Empirically Evaluating Claims about Investment Treaty Arbitration", North Carolina Law Review, Vol 86.
- Johnson, Lise, L. Sachs and J. Sachs (2015), "Investor-State Dispute Settlement, Public Interest and U.S. Domestic Law", CCSI Policy Paper, May.
- The Economist (2014), "The Arbitration Game", 11 October.
- UNCTAD (2015), "IIA Issues Note", No. 1, February

4.2 Customs Administration, Procedures and Trade Facilitation

The six RTA/FTAs analyzed in this report include a chapter on Customs-related matters. In general, the nature of the provisions seeks to improve trade facilitation and establish links between customs and other relevant institutions among the signatory parties.

However, not all chapters have a similar structure. One of the main differences is the inclusion of clauses relating to the certification of origin in order to qualify for preferential market access and the process of origin verification. The Canada-Honduras FTA includes these types of clauses in the Customs Procedures chapter, while the rest of the agreements deal with those matters in the Rules of Origin chapter. In addition, this FTA includes many of the customs-related provisions in a separate Trade Facilitation chapter.

All the agreements include articles on advance rulings, review and appeal, and cooperation among competent authorities. Similarly, all agreements include references with respect to the use of effective automated (electronic) systems, in line with modern customs systems. Most agreements include clauses on risk management and confidentiality as well.

Currently, WTO rules on trade facilitation are based on GATT Articles V (Freedom of Transit), VIII (Fees and Formalities) and X (Transparency). WTO also agreed on rules on customs valuation, which are reflected in the Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade 1994, known as the WTO Customs Valuation Agreement. The disciplines on Customs have been very limited in WTO, at least until before the WTO Agreement on Trade Facilitation (TFA). These limitations encouraged negotiators to include new disciplines in RTA/FTAs' Customs and Trade Facilitation chapters, in order to reduce trade transaction costs and uncertainty.

The APEC Model Measures for RTA/FTAs on Customs Administration and Trade Facilitation, suggested provisions in many new disciplines such as the release of goods, automation, risk management, express shipments, review and appeal, and advance rulings. Indeed, it is very common to find in RTA/FTAs enforced by APEC economies provisions concerning these disciplines.

The TFA, once it is in force, is going to incorporate many of these new disciplines into the multilateral trading system. Nevertheless, there will still be many WTO-plus clauses in RTA/FTAs. For instance, the TFA states that WTO members shall provide advance rulings to applicants regarding the tariff classification and the origin of the goods planned to be imported. In other specific areas, WTO members are only encouraged to provide advance rulings. Some FTAs analyzed in this report state that the parties shall issue advance rulings in other areas as well, such as the application of customs value criteria for a particular case.

a. General Principles, Objectives and Scope

One of the main targets in customs-related chapters is the simplification of procedures. However, the scope shows subtle differences among some agreements. In the case of the Australia-Korea; Chile-Hong Kong, China; and Singapore-Chinese Taipei agreements, the simplification applies to customs procedures of the parties. Whilst in the case of the Canada-Honduras; China-Iceland and China-Switzerland FTAs, the chapter aims to facilitate trade procedures, which goes beyond customs issues.

b. Transparency

All FTAs in this report include provisions related to the publication of laws, regulations and procedures relevant to the scope of the customs-related chapter. Some agreements specify the means of publication. The Australia-Korea; China-Iceland; China-Switzerland and Singapore-Chinese Taipei agreements state that the publication should be done on the internet. The Chile-Hong Kong, China FTA mentions that it could take place either on the internet or in printed form.

The specification on the use of the English language in the publication of these documents is present in the China-Iceland and China-Switzerland FTAs. This language requirement also applies to the appointed contact points for these two agreements. The contact points should be able to address inquiries in English. Other agreements include provisions on the establishment of the contact points but without any specification on the use of the English language.

In the case of the China-Iceland and China-Switzerland FTAs, the transparency article also includes the publication of draft laws and regulations relevant to international trade for comments from the public.

Restrictions to the publication of law enforcement procedures and internal operation guidelines related to conducting risk analysis and targeting methodologies are found in the Singapore-Chinese Taipei agreement.

c. Customs Valuation

The Chile-Hong Kong, China; China-Iceland; China-Switzerland and Singapore-Chinese Taipei agreements establish that the customs value should be in accordance with GATT Article VII and the Customs Valuation Agreement. In the case of the Australia-Korea FTA, it includes the possibility of consultations on customs valuation matters and cooperation in terms of the implementation and operation of the Customs Valuation Agreement.

d. Paperless Trading and Automated Systems

All of the agreements make references to the use of information technology to support customs operations. Except for the Singapore-Chinese Taipei agreement, the rest makes references to use to the extent possible, the standards, recommendations or new developments within the World Customs Organization (WCO).

The Singapore-Chinese Taipei agreement includes a provision on single windows instead, which establishes that each party shall maintain a single window, so that documentation and data requirements only have to be submitted once. In the same way, authorities only need to access the single window to obtain any information.

e. Authorized Economic Operators (AEOs)

The China-Iceland and China-Switzerland FTAs encourage that parties negotiate mutual recognition of authorization and security measures to facilitate trade and at the same time ensure proper customs control. These FTAs mention that the mutual recognition should draw on international standards, such as the WCO's Framework of Standards.

f. Risk Management

The six agreements include clauses referring to adopting or using resources on risk management. With the exception of the China-Switzerland FTA, all agreements explicitly mention that the intention of the risk management system is to focus on high-risk goods and facilitate the clearance of low-risk goods. The China-Switzerland FTA refers to the use of risk management in a way that will not create arbitrary or unjustifiable discrimination, or disguised restriction on trade.

g. Release of Goods

The Australia-Korea and Chile-Hong Kong, China FTAs include an article on the release of goods. The Chile-Hong Kong, China FTA mentions that the release of goods should take place within 48 hours of arrival, except in very specific circumstances. The Australia-Korea FTA is not specific in terms of the time, as it only mentions that the release of goods should take place no later than the period required to ensure compliance with domestic laws and regulations. However, it mentions that parties shall endeavor to keep a system working 24 hours a day to obtain customs clearance in cases of urgency.

The China-Iceland and China-Switzerland FTAs only make reference about importers obtaining release of goods prior to meeting all import requirements, if the importer provides sufficient and effective guarantees and no further examination of the merchandise is required.

h. Temporary Admission of Goods

The China-Iceland; China-Switzerland: and Singapore-Chinese Taipei agreements include a provision on temporary admission of goods. The intention is to relieve these goods from the payment of customs duties subject to certain conditions: the goods have to be imported for a specific purpose, be intended for re-exportation within a specific period, and without having undergone any change except normal depreciation.

i. Express Shipments

The Chile-Hong Kong, China FTA is the only agreement with provisions on express consignments such as providing for pre-arrival processing of information related to those consignments; allowing the submission of a single document (by physical or electronic means) providing all goods in the express consignment; and minimizing the documentation required for the release of these express consignments.

j. Advance Rulings

As mentioned earlier, all FTAs analyzed in this report include provisions on advance rulings that any importer (in the territory of the party), exporter and producer (in the territory of the other party) can obtain from the corresponding customs authority. However, the areas where advance rulings could be requested vary among the agreements.

All FTAs allow for the issuance of customs rulings with regards to the origin of a good. Except for the Canada-Honduras FTA, the rest of the agreements allow for written advance rulings regarding the tariff classification of a product. The Canada-Honduras FTA allows checking in advance if the material imported from a third party undergoes a change in tariff classification as a result of the production of a good occurring in the territory of one of the parties.

In addition, all agreements except the China-Iceland and China-Switzerland FTAs specify that advance rulings can be issued concerning the customs value criteria.

The Canada-Honduras FTA is the only one that explicitly establishes the possibility to request advance rulings for re-entered goods (i.e. if the good that re-enters into the territory after being exported to the other party for repair or alteration qualifies for duty-free treatment).

In terms of the validity of the advance rulings, the Chile-Hong Kong, China; China-Iceland and China-Switzerland FTAs establish that this may be subject to the period determined by the domestic law. The Australia-Korea FTA mentions that the advance ruling shall be valid for no less than five years.

As for the time frame to issue an advance ruling, only the Singapore-Chinese Taipei agreement establishes a time of 90 days since the receipt of all the necessary information, which is the time included in the APEC Model Measures for RTA/FTAs. Besides this agreement, only the Canada-Honduras FTA establishes a time period to issue advance rulings (120 days).

k. Cooperation

All the analyzed agreements include articles on cooperation within their Customs chapters. However, the degree of cooperation differs among these agreements. The Australia-Korea; Chile-Hong Kong, China; and the Singapore-Chinese Taipei agreements focus on the cooperation of customs authorities in customs matters allowing the implementation and operation of the provisions of the agreement. While the Australia-Korea FTA includes the exchange of information and assistance in investigating cases of infringements of customs laws, the Singapore-Chinese Taipei agreement leaves open the possibility to explore cooperation projects to further simplify customs procedures and share advanced technical skills. The Chile-Hong Kong, China FTA focuses more on the exchange of information.

The Canada-Honduras FTA focuses on technical cooperation programs in several areas such as risk assessment; prevention and detection of illegal activities; and implementation of the Customs Valuation Agreement; among others.

The cooperation clauses on the China-Switzerland and China-Iceland FTAs are mostly related to the need to strengthen cooperation in multilateral fora on trade facilitation issues. No details are given on specific customs topics.

l. Confidentiality

With the exception of the Chile-Hong Kong, China FTA, the rest of the agreements include confidentiality provisions in their Customs chapters. Most agreements include provisions explaining how the information provided by the other party should be used. The Australia-Korea and Canada-Honduras FTAs establish that a party needs to notify the other party with no delay if the information is disclosed for a different purpose to which it was provided, or because it is required by the domestic law. The China-Iceland and China-Switzerland FTAs establish that information is confidential and only could be disclosed if the person or authority providing the information allows it.

Two agreements (Australia-Korea and Singapore-Chinese Taipei) determine limits to the disclosure of information, such as in cases where the disclosure would be contrary to public interest as determined by law; be contrary to any laws (including to those protecting personal privacy or financial affairs of individuals or companies); or impede law enforcement. The Singapore-Chinese Taipei agreement also reserves the right to provide information if this is going to prejudice the competitive position of the person giving the information.

m. Review and Appeal

All agreements provide the opportunity to review and appeal. However, the scope differs among them. For example, the Canada-Honduras FTA specifies the review and appeal to importers and decisions on the determination of origin and advance rulings. The Australia-Korea FTA makes similar specifications, but it also allows exporters and producers to provide information to the party conducting the review. The Chile-Hong Kong, China; China-Iceland and China-Switzerland FTAs do not restrict the review to cases of origin or advance rulings; they give importers, exporters and producers the right to review and appeal. In the case of the Singapore-Chinese Taipei agreement, the right to review and appeal only applies to exporters and importers.

All parties are given the chance to have at least one level of administrative review and judicial appeal. Five of the FTAs (Chile-Hong Kong, China; Canada-Honduras; China-Iceland; China-Switzerland; and Singapore-Chinese Taipei) state that this has to be done in accordance to the domestic law.

In terms of the administrative review, except for the Singapore-Chinese Taipei agreement, the rest of the FTAs mention that the review should be independent. On the contrary, the Singapore-Chinese Taipei agreement mentions that the administrative review should be conducted by the authority supervising the customs administration.

n. Penalties

Only the Canada-Honduras FTA includes an article on penalties that the parties could adopt for violations of laws or any regulation relating to the FTA customs chapter.

o. Committee on Customs Procedures

Three agreements (Australia-Korea; Canada-Honduras; and China-Switzerland) establish the formation of a committee or sub-committee covering customs matters. The rules and functions in each of the agreements differ. For example, the Australia-Korea FTA indicates that the committee shall resolve matters concerning the chapters on Customs Administration and Trade Facilitation and Rules of Origin. The Canada-Honduras FTA specifies the areas where the sub-committee can make decisions and it includes issues concerning market access, rules of origin and customs maters. The China-Switzerland FTA refers specifically to customs matters and deals with issues related to the exchange of information; technical amendments; interpretation, application and administration of the chapter; and tariff classification and customs valuation;

among others. This FTA also gives the opportunity to business representatives to participate in the meetings organized by the Sub-Committee on Customs Procedures on a case-by-case basis.

4.3 Sanitary and Phytosanitary Measures (SPS)

The six agreements analyzed in this report include provisions on SPS. While the Canada-Honduras; Chile-Hong Kong, China; China-Switzerland; and Singapore-Chinese Taipei agreements contain a chapter on SPS, the Australia-Korea FTA includes SPS provisions in one of the sections of the TBT/SPS chapter and the China-Iceland FTA incorporates an article on SPS within the Trade in Goods (market access) chapter. The structure of SPS provisions also differs among these agreements.

All SPS chapters incorporate or reaffirm the rights and obligations under the WTO Agreement on the Application of Sanitary and Phytosanitary Measures (i.e. SPS Agreement). There are some WTO-plus elements in certain SPS chapters, such as the establishment of a number of days to carry out consultations after receiving the request from the other party (e.g. Chile-Hong Kong, China; and China-Switzerland FTAs). In cases of urgency, the number of days could be even shorter (e.g. China-Switzerland FTA). Issues related to inspections also include some WTO-plus features, such as the possibility for the importing side to audit the exporting side's inspection and certification systems (e.g. China-Switzerland FTA). Other additional WTO-plus features are related to notifying the importer of the reasons when goods are detained at the port of entry due to a perceived failure to meet SPS requirements (e.g. China-Switzerland FTA).

The APEC Model Measures for RTA/FTAs on SPS are very general and include provisions on objectives, scope, WTO rights, trade facilitation, exchange of information, consultations, cooperation, and contact points. All SPS chapters analyzed in this report have incorporated many of these model measures and even gone further. One clear example is the model measure on consultations, which makes reference to the use of consultations to resolve matters related to SPS that are affecting or may affect trade between the parties. As mentioned earlier, some of the FTAs go beyond that by establishing a time period for the consultations to take place.

a. Objectives

Except for the Australia-Korea FTA, the rest of the agreements contain a specific article on the objective(s) of the SPS provisions. In general, the objectives aim to facilitate bilateral trade or avoid unfair distortions in trade, as in the case of the Chile-Hong Kong, China; China-Iceland; China-Switzerland; and Singapore-Chinese Taipei agreements. Two of the agreements (Chile-Hong Kong, China; and China-Iceland) also refer to the need to resolve trade issues related to SPS.

The agreements state as one of the objectives the facilitation or improvement of cooperation between the parties. This is the case of the Chile-Hong Kong, China; and China-Switzerland FTAs. The Chile-Hong Kong, China FTA also includes additional objectives concerning the implementation of the SPS Agreement and applicable international standards. The Canada-Honduras FTA seeks to affirm the rights and obligations under the SPS agreement.

b. Scope

The Australia-Korea; Canada-Honduras; Chile-Hong Kong, China; and Chile-Switzerland FTAs mention that the SPS provisions should apply to all sanitary and phytosanitary measures of a party that may affect trade between the parties. All of them, with the exception of the Canada-Honduras FTA, specify that those measures could be directly or indirectly affecting bilateral trade.

c. Affirmation of the SPS Agreement

All agreements affirm the rights and obligations of the SPS Agreement. The China-Switzerland and the Singapore-Chinese Taipei agreements even incorporate the SPS Agreement into them. In addition, the Singapore-Chinese Taipei agreement states that SPS measures should not be applied in a way that will constitute a means of arbitrary discrimination or a disguised restriction on trade. They could only be applied to the extent of protecting human, animal or plant life or health, based on scientific evidence.

d. Equivalence and Harmonization

Only the Chile-Hong Kong, China and the China-Iceland FTAs include equivalence provisions, in which Article 4 of the SPS Agreement (equivalence) is recognized. The Chile-Hong Kong, China FTA mentions that the determinations of equivalence should be consistent to the SPS Agreement, decisions and recommendations of the WTO Committee on SPS Measures and relevant international standards, and guidelines and recommendations from relevant international organizations. The China-Iceland FTA mentions that for recognizing the equivalence, the exporting party has to demonstrate that its measures achieve the importing party's appropriate level of SPS protection.

The Singapore-Chinese Taipei agreement also includes a provision on equivalence, intention of which is to give favorable consideration to accepting the equivalence of each other's SPS measures consistent with the purpose of the SPS chapter.

The China-Switzerland FTA is the only one with a clause on harmonization of SPS measures, which says that the parties should base their SPS measures on international standards, guidelines and recommendations by relevant international organizations.

e. Risk Assessments

No agreement which entered into force in 2014 has specific provisions regarding risk assessment, with the exception of the China-Switzerland FTA (see the next section on Regionalism). For all agreements, the rules under the WTO SPS Agreement are applied to conduct risk assessments and define appropriate levels of protection.

f. Regionalism

The Chile-Hong Kong, China and China-Switzerland FTAs include clauses related to the adaptation to regional conditions. In particular, both agreements consider the establishment of pest-free or low-prevalence areas, which need to be consistent with Article 6 of the WTO SPS Agreement. The China-Switzerland FTA states that in case the free or low prevalence of a pest/disease is affected in a particular region, the parties should do their best to re-establish the pest/disease-free or low prevalence status based on risk assessments taking into account international standards and guidelines.

g. Inspections and Certification Systems

The China-Switzerland FTA is the only one with provisions on this matter. The intention is to enhance cooperation with regards to the assessment of inspection and certification systems. The agreement states that the importing party has to take into account the standards and guidelines established in the Codex Alimentarius.

h. Border Measures

The China-Switzerland FTA includes an article on border measures, which establishes that any party detaining goods failing to comply with SPS requirements should notify the importer on the matter and explain the reasons for the detention.

i. Transparency and Exchange of Information

The Chile-Hong Kong, China FTA follows the commitments as per Article 7 and Annex B of the WTO SPS Agreement. Any food safety issue needs to be notified in writing to the other party through the contact points. The China-Iceland FTA also refers to the contact points as being responsible for the exchange of information on any SPS issue concerning bilateral trade or measures that might affect bilateral trade.

The Australia-Korea; China-Switzerland; and Singapore-Chinese Taipei agreements also establish the importance of having contact points or coordinators, whose roles are to either facilitate the exchange of information or assist in the operation of the SPS chapter.

j. Consultations, Cooperation and Committee on SPS

The Australia-Korea; Chile-Hong Kong, China; China-Iceland; China-Switzerland; and Singapore-Chinese Taipei agreements include clauses on cooperation which allow the parties to explore opportunities of collaboration in mutual areas of interest. The China-Switzerland FTA also makes a reference to a parallel agreement on this area signed by the sanitary and phytosanitary authorities of both sides in order to exchange information and carry out joint projects on SPS matters.

The China-Iceland FTA also includes a clause on expert consultations, which is activated when one of the parties calls for consultations after considering that the other party has implemented

a SPS measure that is affecting or likely to affect access to that market. The Chile-Hong Kong, China FTA also includes provisions on consultations, which have to take place within 30 days of receiving the request. In the case of the China-Switzerland FTA, the consultations should take place within 60 days. A shorter time period is established for urgent matters (20 days).

The Canada-Honduras; Chile-Hong Kong, China; and China-Switzerland FTAs have established a Committee or Sub-Committee on SPS. In the case of the Australia-Korea FTA, it has only been agreed to hold bilateral technical meetings on SPS. There are differences in the functions of these groups. For example, the Committee on SPS in the Canada-Honduras FTA focuses the discussions on the effectiveness of SPS regulations and the facilitation of discussions in order to avoid disputes. The Australia-Korea; Chile-Hong Kong, China and China-Switzerland FTAs look at activities concerning the implementation of the chapter and dialogue to discuss SPS bilateral or multilateral matters.

k. Dispute Settlement

The agreements include diverging provisions regarding the application of the SPS chapter and dispute settlement. On the one hand, the Australia-Korea FTA mentions that any matter arising from the SPS chapter cannot be brought to dispute settlement. The Canada-Honduras FTA also mentions in its Dispute Settlement chapter that it does not apply to the SPS chapter. On the other hand, the Chile-Hong Kong, China FTA mentions that the consultations under the SPS chapter shall be without prejudice to the rights and obligations of the parties under the FTA's Dispute Settlement chapter. The Singapore-Chinese Taipei agreement establishes that issues concerning the SPS chapter are under the scope of the Dispute Settlement chapter unless it is stated otherwise.

4.4 Competition Policy

The six RTA/FTAs analyzed in this report include Competition Policy chapters, but they cover a different range of issues. Many agreements incorporate clauses promoting competition and establishing cooperation links among their corresponding authorities.

The APEC Model Measures for RTA/FTAs on Competition Policy include broad provisions referring to specific issues such as objectives, application of competition laws, cooperation, consultations and dispute settlement. The Competition Policy chapters in the six FTAs include many provisions that are inspired by the model measures. They also contain provisions regarding other issues such as monopolies, state enterprises, competitive neutrality and consumer protection. Moreover, the transparency provisions in some of the FTAs go beyond the model measures, which establishes the need for a response after consultations are made. In these FTAs, parties need to take a more proactive approach by also notifying the other party when implementing measures - such as decisions to create a monopoly or enforcement activities - which could affect the other party.

Competition Policy chapters are part of the new issues included in many recent RTA/FTAs. The content of these chapters are considered WTO-plus, as there are no existing rules on the

matter in WTO. In fact, the interaction between trade and competition policy is no longer one of the topics being discussed in the Doha Round negotiations[18].

a. Objectives and Purpose

All the agreements contain a reference on anti-competitive practices. In the case of the Canada-Honduras and China-Iceland FTAs, the parties need to adopt measures to proscribe or remove those practices. The Australia-Korea and Singapore-Chinese Taipei agreements refer to the curtailment of anticompetitive practices, while the Chile-Hong Kong, China; and China-Switzerland FTAs acknowledge that these type of practices can affect trade, in a way that they could either create distortions, limit benefits or obstruct the functioning of the FTAs.

In addition, the Australia-Korea; Chile-Hong Kong, China; and Singapore-Chinese Taipei agreements include as an objective the promotion of competition policies or fair competition.

b. Application of Competition Laws

The Australia-Korea FTA indicates that specific businesses or sectors could be exempted from the application of competition laws on the grounds of public policy or public interest. Those exemptions have to be determined in a transparent manner.

The Singapore-Chinese Taipei agreement also makes a reference on the need for one of the parties to provide public information on the exemptions provided under its competition laws.

c. Definition of Anti-Competitive Practices

The Australia-Korea and Singapore-Chinese Taipei agreements provide examples of business actions that are considered as anti-competitive. The list is non-exhaustive. The examples mainly refer to abuse of market power/dominant position; anti-competitive arrangements between companies; and anti-competitive mergers and acquisitions.

d. Transparency

Some agreements maintain transparency requirements in relation to the enforcement of the chapter. For example, the Australia-Korea FTA includes a general clause specifying that one of the parties needs to notify the other party of any enforcement activity that may affect the interests of the other party. Another example is the Canada-Honduras FTA, which states that any party designating a monopoly that may affect the other party needs to provide a written notification.

The Singapore-Chinese Taipei agreement also includes provisions in this area. The parties have to notify enforcement activities regarding anti-competitive practices affecting the other party. In addition, they have to make available public information concerning the enforcement of measures prohibiting the anti-competitive business practices.

[18] See https://www.wto.org/english/tratop_e/comp_e/comp_e.htm

e. Monopolies and State Enterprises

In terms of monopolies, two of the agreements (Canada-Honduras and Singapore-Chinese Taipei) indicate that the parties have the right to designate or maintain a monopoly. The Canada-Honduras FTA establishes conditions that monopolies shall meet, such as acting in a manner that is consistent to the obligations in the agreement and according to commercial considerations; providing non-discriminatory treatment to investors, goods and services providers from the other party; and not using its monopoly position to engage in anti-competitive practices. The Singapore-Chinese Taipei agreement specifies that companies with special or exclusive rights shall be subject to the rules of competition.

The China-Iceland and China-Switzerland FTAs also refer to monopolies, as they mention that the Competition chapter shall not make it difficult for entities to be involved in activities ("undertakings") with special and exclusive rights authorized by the law. However, they also mention that the Competition chapter shall not create any legal binding relations to these undertakings.

The Canada-Honduras FTA includes a provision which excludes government procurement from the application of this chapter.

In terms of state enterprises, the Australia-Korea; Canada-Honduras; and Singapore-Chinese Taipei agreements include provisions on that matter. However, the content of those provisions differs from one another. In the case of the Australia-Korea FTA, the provision is incorporated under the article on competitive neutrality, which highlights that the governments should not give any advantage to firms just because they are state enterprises. The Canada-Honduras FTA maintains the rights of the parties to constitute state enterprises and mentions that these firms should treat in a non-discriminatory way investors from the other party when it comes to the sale of their goods or services. The Singapore-Chinese Taipei agreement establishes that measures on public enterprises cannot distort trade in goods and services and these firms have to be subjected to the rules of competition.

f. Cooperation

Five of the agreements include provisions concerning cooperation among the parties. However, the topics differ in some cases. For example, exchange of information is emphasized in the Chile-Hong Kong, China FTA. This topic is also included in the Australia-Korea and China-Iceland FTAs.

While enforcement of the competition laws is the focus in the Australia-Korea and Singapore-Chinese Taipei agreements, the China-Switzerland FTA focuses more on cooperation to fight anti-competitive practices. The China-Iceland FTA is more generic in this topic, as it mentions that the parties shall cooperate in any matter related to the Competition chapter.

Technical cooperation with regards to the development or enforcement of competition law is mentioned in the Australia-Korea and Chile-Hong Kong, China FTAs.

g. Consultations

The Australia-Korea; Chile-Hong Kong, China; China-Switzerland; and Singapore-Chinese Taipei agreements specify that the consultations should be on issues affecting trade and/or investment, such as anti-competitive practices. In the case of the China-Iceland FTA, the consultation stage is referred to as the level where dispute on competition-related issues have to be settled.

h. Consumer Protection

Only the Australia-Korea FTA includes provisions regarding the cooperation and coordination between the parties in areas related to consumer protection, including the enforcement of their consumer protection laws.

i. Dispute Settlement

In some agreements, issues under the Competition chapter are excluded from the use of the procedures established in the Dispute Settlement chapter. This is the case of the Australia-Korea; China-Iceland; China-Switzerland; and Singapore-Chinese Taipei agreements. The Canada-Honduras FTA allows the use of the investor-state dispute settlement mechanism included in the agreement for specific competition-related issues related to monopolies and state enterprises.

4.5 Environment

Four of the RTA/FTAs analyzed in this report include chapters on environment (Australia-Korea; Canada-Honduras; Chile-Hong Kong, China; and China-Switzerland FTAs). In general, while the structure of the agreements is very different from one another, a great deal of their focus is on establishing consultation and cooperation links.

In addition, two agreements make references to bilateral side agreements or understandings. The China-Iceland FTA includes a provision on environmental cooperation, referring to a Memorandum of Understanding on Environmental Protection signed by both parties. The Canada-Honduras FTA makes reference to the Agreement on Environmental Cooperation between Canada and the Republic of Honduras, which is mentioned as a complementary agreement to the FTA.

None of these side agreements are bound to FTA obligations. Since they are not part of the China-Iceland FTA or the Canada-Honduras FTA, their content will not be analyzed in detail in this report.

The APEC Model Measures for RTA/FTAs regarding the chapter on Environment include provisions on objectives, principles and commitments (including the application of environmental laws), cooperation, institutional arrangements and consultations. In general, the analyzed FTAs follow the spirit of these model measures. Many of the provisions are similar

or share a similar purpose. In addition, both the model measures and the FTAs focus on trade-related matters, by recognizing that it is inappropriate to use environmental laws and regulations for trade protectionist purposes, and to relax or fail to enforce these laws and regulations in order to attract more trade and investment.

WTO does not have any agreement on environment, but under GATT Article XX, it allows for the implementation of trade-related measures to protect the environment under particular circumstances. All FTAs analyzed in this report incorporate or acknowledge this article in a provision on general exemptions, which is placed outside the Environment chapters.

a. Objectives

The Chile-Hong Kong, China and China-Switzerland FTAs include provisions on objectives. The former refers to encouraging sound environmental policies, improving capacities, promoting commitments and facilitating dialogue between the parties, while the latter focuses on the cooperation of environmental issues "as part of a global approach to sustainable development"[19].

b. Levels of Protection and Application of Environmental Laws

The Australia-Korea; Canada-Honduras and Chile-Hong Kong, China FTAs recognize that parties have the right to establish their own levels of domestic environmental protection. In addition, the Australia-Korea FTA mentions that environmental laws, regulations and policies shall provide for high levels of environmental protection.

The Australia-Korea; Chile-Hong Kong, China; and China-Switzerland FTAs also highlight the concern that environmental laws, regulations or standards could be used as trade protectionist measures. They recognize that these measures shall not be used for those purposes. In the same way, these agreements acknowledge that it is inappropriate to encourage trade and investment by relaxing these environmental measures.

The Australia-Korea FTA goes further than the other FTAs by specifying that parties cannot waive or offer to waive or derogate measures to reduce environmental protections and thus, encourage trade or investments.

c. Multilateral Environmental Agreements

Both the Australia-Korea and China-Switzerland FTAs include provisions on the matter and acknowledge the importance of the multilateral environmental agreements that each party is part of. However, differences in the depth of the provisions are found. For example, the Australia-Korea FTA only recognizes that the implementation of those multilateral agreements are critical to achieving environmental objectives, but the China-Switzerland FTA reaffirms the commitment of the parties to implement the principles and obligations of those multilateral environmental agreements in their own laws.

[19] See Article 12.1, paragraph 2 of the China-Switzerland FTA.

d. Cooperation

Agreements including clauses on environmental cooperation list a number of areas or activities, on a non-exhaustive basis, which in theory allows the parties to include any mutually agreed environmentally-related area or activity.

The emphasis of the cooperation is not necessarily the same in all agreements. For instance, the environmental cooperation focus in the Australia-Korea FTA resides on trade-related aspects of environmental policies. In the case of the China-Switzerland FTA, the provisions on cooperation are very general, but encourage the parties to strengthen their cooperation not just at the bilateral level, but also in the international fora. The Chile-Hong Kong, China FTA makes reference to having a collaborative framework to advance common commitments on environmental protection under this agreement.

The Canada-Honduras FTA refers to the Agreement on Environmental Cooperation between both sides, which includes a list of indicative areas identified by Honduras, for consideration. These areas are related to the strengthening of environmental management systems and institutional capacity for enforcement of domestic laws, promotion of best practices for sustainable development; strengthening of mechanisms for public participation; and promotion of best practices of corporate social responsibility; among others.

e. Institutional Mechanisms, Consultations and Dispute Settlement

None of the agreements analyzed in this report apply their Dispute Settlement chapters to their corresponding chapters on Environment. The Chile-Hong Kong, China; and China-Switzerland FTAs mention that in the case of any issue concerning the non-compliance of provisions under these chapters, consultations should take place with the intention of resolving the matter.

The China-Switzerland FTA mentions that parties may discuss those issues in the Joint Committee administrating the agreement. The Chile-Hong Kong, China FTA establishes that the issues can only be referred to the Commission if the parties failed to resolve the issue for six months counting from the time of the request for consultations.

In the case of the Australia-Korea FTA, if consultations fail to resolve the matter, any of the parties may request the establishment of an ad-hoc Committee to endeavor to agree on a resolution.

All agreements indicate the designation of contact points to facilitate consultations between the parties.

5. CONCLUDING REMARKS

For most APEC economies, an increasing percentage of their trade is being covered by RTA/FTAs. The proliferation of RTA/FTAs since the beginning of the 2000s has led the APEC region to increase their share of trade covered under RTA/FTAs. The share of exports in APEC

under RTA/FTAs almost doubled between 1996 and 2014, growing from 23 to 44 percent. The share of imports under RTA/FTAs in APEC expanded by almost four times, from 10 to 39 percent in the same period. RTA/FTAs are therefore playing an increasing important role in the APEC region.

The proliferation of RTA/FTAs has also been accompanied by the inclusion of new disciplines. In fact, RTA/FTAs include chapters on topics that are not dealt with under WTO rules (e.g. Competition Policy) or where their treatment in WTO are very limited (e.g. Investment). Chapters on Investment, Services, Competition Policy, E-commerce and Environment, among others, are becoming a more common feature in trade agreements. In addition, RTA/FTAs are including several WTO-plus characteristics in many of the chapters, including those considered as "traditional" chapters. RTA/FTAs are also incorporating many of the APEC Model Measures for RTA/FTAs.

Since this report analyzes only the Investment, Customs, SPS, Competition Policy and Environment chapters in the six trade agreements which entered into force in 2014, it is not possible to determine whether there are distinctive new trends in RTA/FTAs with regards to the inclusion or omission of specific matters or the approach undertaken to deal with certain topics. This requires the analysis of a greater number of RTA/FTAs that were put in force in recent years.

However, the analysis of those chapters has helped in identifying some interesting similarities and differences. Whilst many similarities exist, there are some striking differences among the agreements. Convergence would therefore be very challenging to achieve in some areas.

Among some of the main similarities and differences, in terms of the Investment chapter, only three of the FTAs include chapters with clauses related to bilateral investment liberalization. They provide for national treatment to investors at the pre-establishment and post-establishment stages as well as establish a system to resolve disputes between one party and the investor of the other party (i.e. investor-state dispute settlement). Nevertheless, only two of them provide MFN treatment in these two stages.

In the case of the Customs-related chapters, it is noticeable that more issues are being included in recent years, which is related to the use of new technologies and systems to facilitate the departure and arrival of goods, and at the same time, have a better control system. Many WTO-plus issues also have been added to Customs-related chapters since the early 2000s. Nowadays, it is common to find in RTA/FTAs references to the use of information technology and risk management systems. In addition, to strengthen trade facilitation, trade agreements include provisions on the release of goods, express shipments and advance rulings, among others. However, some differences exist in their coverage and scope, such as references on the time to release goods and the areas in which customs authorities have to issue advance rulings.

The recent WTO Agreement on Trade Facilitation (TFA) has incorporated many of these new elements that are already present in several RTA/FTAs. Once the TFA is ratified by WTO members and put into force, it will significantly help to reduce trade transaction costs. However,

RTA/FTAs in APEC also play a role in reducing these costs, as they include a number of provisions where the scope goes beyond the TFA (e.g. on the areas to issue advance rulings).

The SPS chapters contain many references to the SPS Agreement and they basically recognize or incorporate what has been agreed in WTO. The structure of SPS chapters differs though. For example, three agreements include provisions on equivalence and only one on harmonization of SPS. Similarly, the treatment of some disciplines is different as well. An example will be the use of the Dispute Settlement chapter in SPS matters which is explicitly not allowed in two FTAs but is clearly allowed in the other two FTAs. Among the main WTO-plus characteristics in SPS chapters are those related to the establishment of the number of days to start consultations, with a shorter period to address urgent cases, as well as the notification to the other party in case a shipment is detained for an alleged infringement to meet SPS requirements.

One of the commonalities among the Competition Policy chapters is their references to anti-competitive practices. Their objectives are related to curtailing or removing them, or to acknowledging the distorting nature they may have on trade and therefore, affect the functioning of trade agreements. In addition, it is a common practice to include provisions on cooperation even though they could have some differences in the focus. While some FTAs focus mostly on the exchange of information, others focus on the enforcement of the competition law or technical cooperation. Some other variations among these chapters are related to the inclusion and the depth of provisions on monopolies and state enterprises.

As for the Environment chapters, which are included in four out of six FTAs analyzed in this report, one of the similarities resides in the recognition that environmental laws, regulations or standards cannot be used for trade protectionist measures, and that parties could not relax environmental rules in order to attract more trade and investment. Another similarity among the Environment chapters is their interest to establish cooperation and consultation links, but their emphasis could differ in the agreements, as some agreements prefer to focus on only the trade-related aspects. Other FTAs emphasize on cooperation in the implementation of environmental commitments, and the discussion of general environmental matters at the bilateral and multilateral level.

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