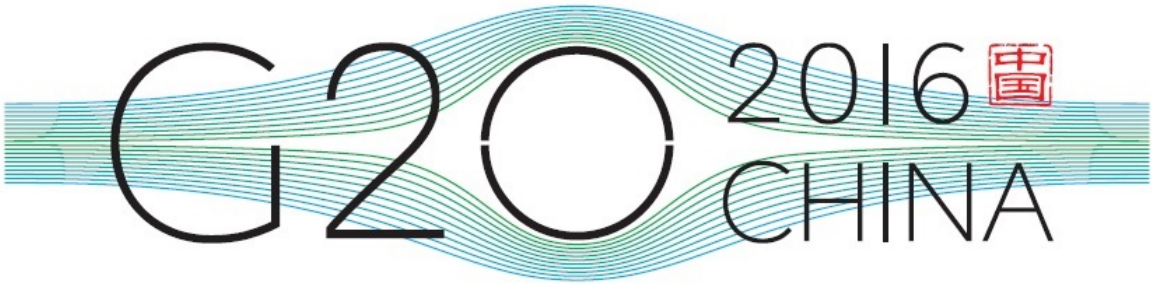

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Regional Trade Agreements and the Multilateral Trading System: Further Analysis of Specific Provisions in RTAs

Discussion Paper for the G20

Prepared by the World Trade Organization

Trade Ministers Meeting
Shanghai, China
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(The views expressed in this paper do not necessarily represent those of G20 members.)

REGIONAL TRADE AGREEMENTS AND THE MULTILATERAL TRADING SYSTEM: FURTHER ANALYSIS OF SPECIFIC PROVISIONS IN RTAS

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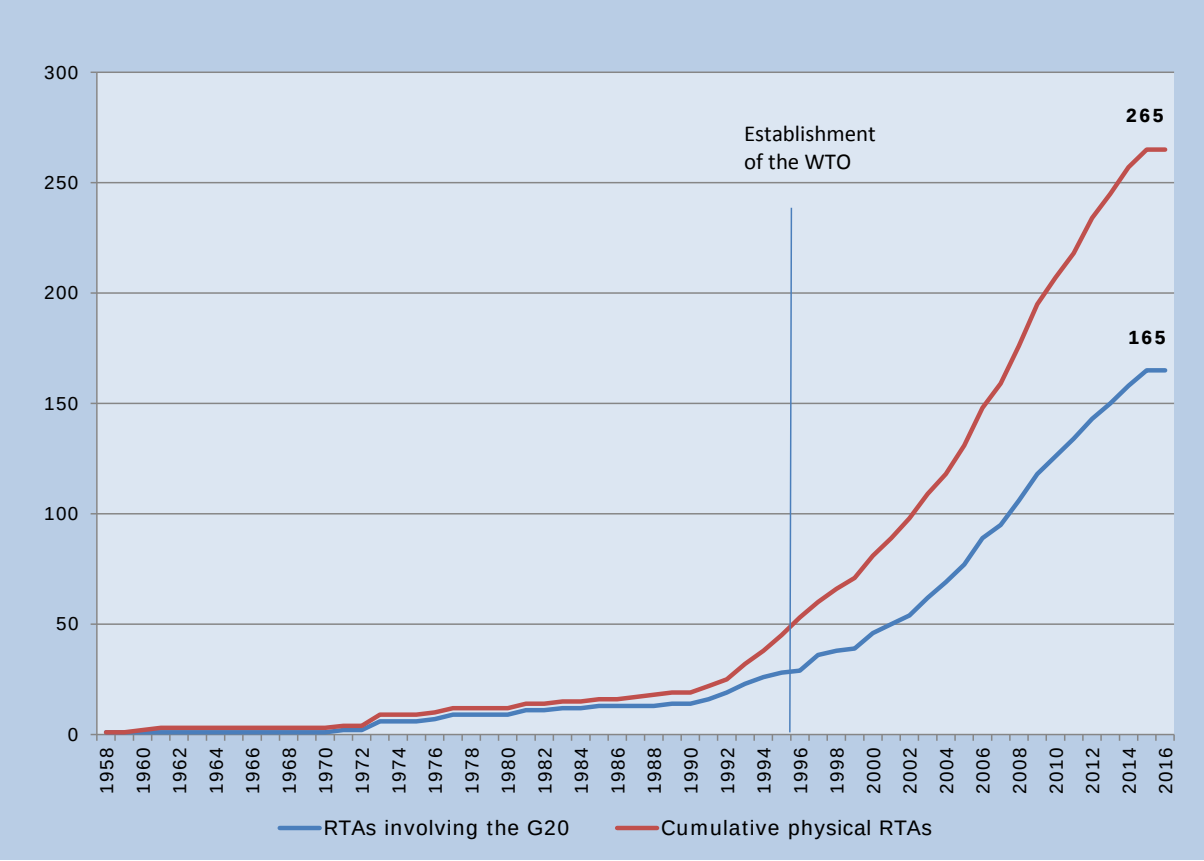
29 June 2016

1 INTRODUCTION AND BACKGROUND

1.1. As of May 2016 265 RTAs had been notified to the WTO and were in force. Of these, 62% involve the G20 economies. In addition, like other WTO members, G20 economies continue to negotiate new RTAs, including bilateral but also large plurilateral negotiations such as the Trans-Pacific Partnership (TPP) Agreement, the Regional Comprehensive Economic Partnership (RCEP) negotiations, the Trans-Atlantic Trade and Investment Partnership (T-TIP) negotiations, and the Tripartite Agreement and the Continental Free Trade Area in Africa; several of these negotiations involve more than one G20 economy.

Chart 1: Evolution of RTAs notified and in force: total and G20, May 2016

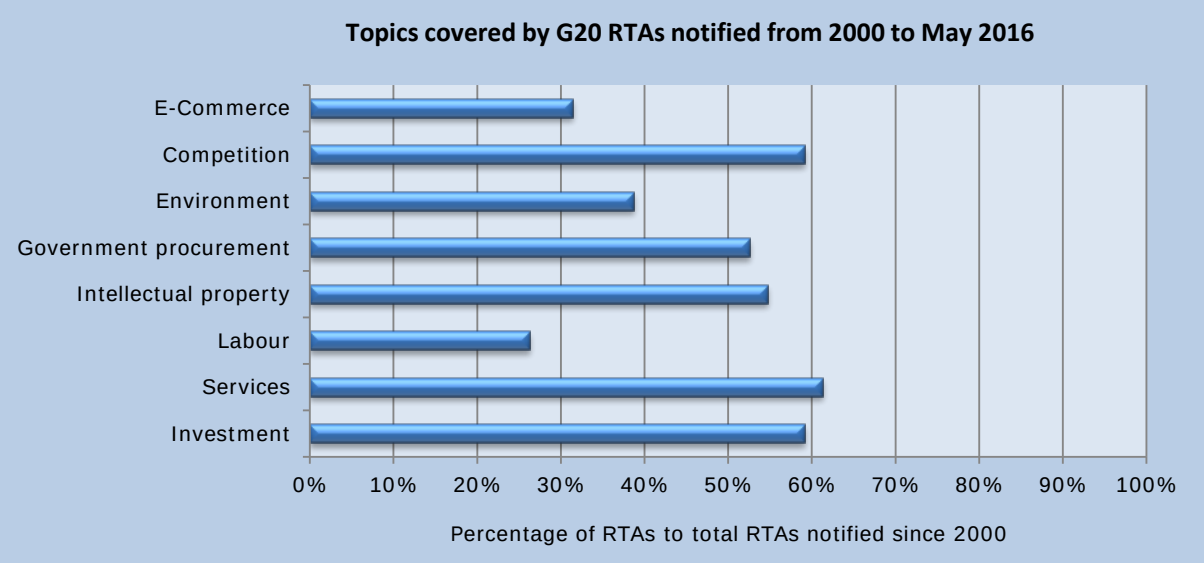


Source: WTO RTA Database

1.2. Over time there has been a steady increase in the number of RTAs that cover not only trade liberalization in goods (and accompanying rules such as on standards, SPS and trade defence measures) and services, but increasingly "behind the border" issues such as investment, government procurement, competition, labour, environment and electronic commerce. We estimate that of RTAs involving the G20 notified to the WTO since 2000 almost 60% address investment and competition issues, while over 50% of G20 RTAs contain provisions on government

procurement and almost 40% have sections or chapters addressing environmental issues (Chart 2).

Chart 2: Topics covered by G20 RTAs (2000-May 2006)



Source: WTO RTA Database

1.3. A discussion paper on RTAs and the multilateral trading system prepared for the G20 in 2015 found that while in general RTAs discriminate against third parties, there are reasons to believe that in some areas that divergence is less marked. The issues which suggest **greater divergence** between RTAs and the multilateral trading system include market access in goods and services. However, this trend is less clear cut in the area of rules. For some provisions such as anti-dumping, there appears to be practically no divergence between RTA provisions and WTO rules, with most Members opting to maintain their rights and obligations under the WTO rules. For others like safeguards, SPS and TBT provisions, there is some divergence but only for a selected number of issues and countries. There are also a number of issues found in RTAs for which there are no WTO rules at present (such as competition, investment beyond mode 3, electronic commerce, environment and labour) and where the potential for divergence between RTAs and the multilateral system is therefore greatest.

1.4. The work by the WTO found, however, that even in cases where RTAs diverge from the multilateral trading system and its commitments and rules, **common approaches** can be identified in RTAs. In the case of services and investment rules and for rules of origin, for instance, distinct approaches are followed by different groups of countries, often based on geographic regions. In services and investment the NAFTA based negative approach to services and investment liberalization contrasts with the GATS based positive list approach which is followed by a different group of countries. While liberalization in these agreements is of course based on the market access considerations of the RTA partners, the architecture of the agreements remains the same or similar to others who follow the same approach (either NAFTA or GATS based). In rules of origin moreover, usually cited as a potential barrier to trade, certain rules that permit diagonal cumulation among a group of countries (such as the Pan-Euro-Mediterranean regime which groups together over 40 countries) may reduce the restrictiveness of these rules.

1.5. Certain features of RTAs may also lend themselves more easily to be **extended to third parties**. These include, in the area of rules of origin, diagonal cumulation, tolerance rules and outward processing schemes. More generally, some agreements contain accession clauses which suggest they may be more open to extension to third parties. Diagonal cumulation rules can also be used to attenuate the complexity of modern rules of origin and permit the development of regional value chains and production networks. Finally, in the area of rule-making, a number of the new provisions such as competition, environment, and labour that are being introduced in RTAs, lend themselves on a practical basis to **non-discrimination**. Furthermore, in the area of

intellectual property rights, the TRIPS Agreement does not permit a GATT Article XXIV type derogation and therefore all changes to IP legislation made as a result of an RTA must be extended to all WTO Members on an MFN basis.

2 ANALYSIS OF SPECIFIC PROVISIONS IN RTAS

2.1. The WTO continues to build on its previous work on RTAs by looking more comprehensively at certain provisions which go beyond current WTO rules. In this section we present the results of recent work by the Secretariat on provisions in RTAs on investment, Government procurement, competition, environment and small and medium sized enterprises. They play a key role in supporting international trade and economic growth and their importance has been acknowledged by G20 members in their RTAs.

2.2. For some of these issues, there are as yet no WTO rules. Nevertheless, while RTAs are creating new rules in these key areas, some of them at least would be applied in a non-discriminatory manner as it makes little practical sense to do otherwise, and would therefore be applicable to all trading partners. They therefore have potential positive spillovers for non-parties and the multilateral trading system.

2.1 Investment provisions in RTAs[1]

2.1.1 Overview

2.3. International investment is a key source of capital especially for developing countries and has been an important engine for international trade and economic growth. The important contribution of investment has been acknowledged by an increasing number of WTO Members in their RTAs as a key policy instrument to facilitate trade. Research by the WTO Secretariat shows that more than half of G20 RTAs contain investment provisions and almost half of these have dedicated investment chapters. Furthermore, in over 60% of G20 RTAs, there exists a separate bilateral investment treaty (BIT) concluded between the parties or, in the case of plurilateral RTAs, between some of the RTA parties.

2.4. Further analysis of G20 RTAs containing a separate investment chapter shows that, like for other provisions, RTAs can be classified according to preferred "models". The NAFTA model, which applies national and MFN treatment to pre and post establishment together with disciplines on minimum standards of treatment and expropriation, is the most common and is employed by more than half of G20 RTAs with an investment chapter. In addition, most RTAs that use the NAFTA model also tend to include investor-State dispute settlement (ISDS) as part of their dispute settlement provisions (a few RTAs based on the NAFTA model do not include ISDS). The NAFTA model tends to be favoured by the parties to NAFTA (Canada in all its RTAs, the US in most of its RTAs, Mexico in all its RTAs except those with the EU and EFTA), but also by some RTAs signed by India, Japan and Korea.

2.5. The second most commonly used model is that based on the right of establishment where the emphasis is on the liberalization of investment flows rather than investment protection; it is mostly found in RTAs signed by the EU with third parties. Some of these are pre-accession agreements to the EU. A deeper form of integration characterized by an investment chapter based on the right of establishment coupled with provisions on market access is found in the Treaty establishing the European Union and the agreement forming the European Economic Area, as well as in more recent agreements between the EU and third parties.

2.1.2 Scope of the Investment Framework

2.6. The scope of the investment framework is determined by defining both the investor and the investment and by setting out exclusions from the scope of the investment chapter. Most investment chapters of RTAs are uniform in allowing both natural persons and legal entities to become investors and benefit from their investment provisions. When it comes to the determination of the nationality of legal entities, most investment chapters require such entities to

[1] Based on Crawford, J.-A., V. Chornyi, and M. Nerushay, "A Survey of Investment Provisions in Regional Trade Agreements", *WTO Staff Working Paper, 2016, forthcoming*.

be incorporated or constituted by other means in the territory of an RTA party. Some RTAs impose additional requirements. Almost half of G20 RTAs with substantive investment chapters make use of indicative characteristics that an asset or transaction must possess in order to qualify as an investment. The most commonly used characteristics are the commitment of capital, the assumption of risk and the expectation of profit.

2.7. Denial of benefits clauses allow a party to an RTA to not apply its obligations under the investment or services chapter to an enterprise of another party if it is under foreign control or ownership (usually third party, but may also apply to entities owned or controlled by the nationals of the denying party). This can be done for foreign policy reasons or because such an enterprise has no substantive business operations in the territory of the other party. More than two thirds of G20 RTAs with substantive investment chapters contain a denial of benefits clause and more than half of these RTAs set forth two grounds for the denial of benefits – foreign policy and a lack of substantive business operations.

2.8. A denial of benefits clause may be viewed as a provision that complements the definition of the investor. In a broad sense, both determine the range of persons that may benefit from the agreement. Thus, when RTA parties wish to narrow the circle of the RTA's "beneficiaries", they could do so either by including additional conditions that must be met by companies in order for them to qualify as investors or by adding a denial of benefits clause. The EU's RTAs do not contain a denial of benefits clause, but instead employ the former technique, requiring for instance that a juridical person that has only its registered office or central administration in the territory of any the parties must conduct the operations that possess a real and continuous link with the economy of one of the parties in order to be considered a juridical person, i.e. an investor.

2.9. Most RTAs with substantive investment chapters exclude subsidies and government procurement from all or specified obligations of the investment chapter and some exclude services supplied in the exercise of governmental authority. Taxation is also routinely excluded from most obligations of the investment chapter, subject to carve-outs and exceptions.

2.1.3 The Entry and Establishment of Investment

2.10. Provisions governing the entry and establishment of investment include national treatment, MFN (both applying to the pre establishment stage), market access provisions, performance requirements, senior management and nationality requirements, and scheduling.

2.11. Investment chapters of RTAs tend to deviate from the (mostly) investment-protection-only logic of BITs and provide for disciplines such as the national treatment obligation that covers the pre-establishment or entry stage of investment, requiring host states to remove all discriminatory market access barriers for foreign investment. An alternative approach is providing for a comprehensive right of establishment as in the EU Treaty, the EEA Agreement and the EFTA Convention. Our analysis shows that the national treatment obligation covers the entry stage of foreign investment in over 80% of G20 RTAs with substantive investment chapters. Exceptions include most of China's RTAs. Comparatively fewer investment chapters contain an MFN obligation covering the entry of foreign investment – just over 60% of all G20 RTAs with substantive investment chapters.

2.12. Performance requirements are measures of host countries that require investors to behave in a particular way or to meet prescribed goals. RTAs do not usually define the concept, but instead list those performance requirements that the parties are not allowed to impose. Performance requirements usually cover not only compulsory requirements but also non-mandatory prescriptions the compliance with which is necessary in order to receive a certain benefit. The same types of requirements may function as compulsory prescriptions or as conditions for receiving investment incentives. Over 60% of G20 RTAs with substantive investment chapters contain performance requirement obligations, more than half of which are modelled on the performance requirements provision of the NAFTA, with some degree of variation in drafting. These provisions tend to be complex, with multiple carve-outs and exceptions. G20 RTAs that do not have performance requirements obligations include those of the EU and some of China's RTAs.

2.13. Slightly less than half of all G20 RTAs with substantive investment chapters have a provision prohibiting RTA parties from requiring that an enterprise owned or controlled by the investor

appoint to senior management positions individuals of any particular nationality. EU RTAs approach the issue differently, by requiring host states to allow the employment of key personnel. This obligation might provide a similar level of protection to the one sought through a senior management and nationality requirements provision.

2.14. The scheduling of commitments or reservations by RTA parties is a means to give practical effect to certain treaty obligations, i.e. their scope and conditions of application. Three techniques of scheduling may be distinguished: positive list, negative list and the mixed approach. A positive list approach implies that the obligations subject to scheduling apply only to those sectors that are specifically mentioned in the schedule and on the conditions stipulated in the schedules. A negative list approach is based on the opposite logic – the obligations subject to scheduling apply to all sectors, except those that are listed in the schedule, and subject to any specific reservations recorded therein. When the mixed approach is employed, a negative list usually applies to an MFN obligation and a positive list is used for other liberalization disciplines.

2.15. A scheduling approach is often apparent from the formulation of liberalization provisions. In the majority of cases, however, the text of the RTA will provide a scheduling provision that contains rules for scheduling, which may include standstill and ratchet obligations. A standstill obligation requires the parties to list reservations or non-conforming measures that exist at the time of scheduling. A ratchet obligation locks in any future liberalization of an existing non-conforming measure by requiring that any subsequent amendment of the measure does not decrease the conformity of the measure as it existed immediately prior to the amendment.

2.16. A relevant policy question is whether the negative list approach with standstill and ratchet obligations is more investment liberalizing than a positive or mixed list without any standstill or ratchet mechanisms. In this regard, a comparison of the schedules of commitments or reservations with the regulatory framework before and after the agreement was concluded is necessary to determine which type of agreement leads to greater liberalization. Consequently, it is not possible to determine a priori which of the techniques is more liberalizing: a detailed analysis of the schedules of commitments or reservations is necessary to determine which type of agreement leads to greater liberalization. However, the negative list approach accompanied by a standstill obligation is often perceived as more transparent in comparison to a mixed or positive listing.

2.1.4 The Procedural Use of MFN and the Subnational Application of National Treatment

2.17. The procedural use of MFN is the practice whereby an investor of a party to an investment agreement relies on an MFN provision of this agreement in order to benefit from more favourable conditions of access to investor-state dispute settlement provided under another investment agreement (usually an agreement of a host state with a third country). In such a scenario, an investor will initiate arbitration proceedings on the basis of the procedural provisions of the other agreement, while claiming the violation of substantive obligations of the former agreement. In response to the increased attempts by investors to use MFN for these purposes, many countries add clarifications to MFN clauses that exclude ISDS provisions from their scope. Currently, out of around 60 G20 RTAs with substantive investment chapters that contain an MFN clause, 20 stipulate that it does not cover dispute settlement mechanisms.

2.18. The subnational application of national treatment typically requires that a regional government of a party treats investors of the other party no less favourably than it treats domestic investors from other regions. At the same time, the subnational application of national treatment does not oblige regional governments to treat domestic investors from other regions the same way it treats domestic investors from within its region. This is a useful clarification for federal states and supra-national treaty parties (like the EU) that have regional (constituent) governments with a great degree of autonomy. About a third of G20 RTAs that have substantive investment chapters have national treatment obligations that apply at the sub-national level.

2.1.5 Investment Protection

2.19. Investment protection disciplines include minimum standard of treatment, transfers provisions, protection of investors in war and civil strife, conditions on expropriation, and disciplines on subrogation. Standard of treatment disciplines in RTAs set a minimum threshold that

a host state must fulfil in its treatment of investors of the other party, regardless of the regime provided to domestic or third country investors. The most common are fair and equitable treatment and full protection and security. Almost 70% of G20 RTAs with substantive investment chapters provide for both fair and equitable treatment and full protection and security. A majority of these RTAs explicitly limit fair and equitable treatment and full protection and security to customary international law.

2.20. Provisions granting the free transfer of funds are a necessary component of RTAs seeking to establish an investment framework conducive to the liberalization of investment flows and the subsequent protection of the established investment. All G20 RTAs with substantive investment chapters contain a transfer provision. Most transfer provisions appear to be quite uniform in permitting transfers into and out of the country, providing a list of the types of transfers (either exhaustively or illustratively) that are covered by the provision, and listing the permitted exceptions.

2.21. An additional element of protection offered by RTAs is the treatment of investors in the case of war or civil strife, usually in the form of non-discriminatory treatment of the investors of the other party who have suffered a loss or damage as a result of armed conflict, national emergency, riots or similar events. A majority of G20 RTAs (though not those of the EU) offer such protection.

2.22. Expropriation provisions are included in the investment chapters of RTAs and investment agreements generally in order to protect against one of the most severe forms of state interference with investment – the taking of property. Expropriation provisions typically prohibit a host state from expropriating or nationalizing investment, either directly or indirectly through measures equivalent to expropriation or nationalization, unless it complies with certain conditions. A majority of G20 RTAs with substantive investment chapters contain expropriation provisions that explicitly cover both its direct and indirect forms. The EU's RTAs (which primarily focus on investment liberalization) do not have an expropriation provision.

2.23. In recognition of the risks a private company runs when it invests in a foreign market, some states establish insurance programmes designed to protect their investors abroad. In addition to state-run or supported schemes, private insurance operators also offer their services to potential investors. In the event an insurance effect is triggered and an insurance company pays out, it legally acquires the investor's rights and obligations against the host state. About half of G20 RTAs with substantive investment chapters contain such a subrogation clause. The RTAs of the United States and the EU omit a subrogation clause.

2.1.6 Investor-State Dispute Settlement

2.24. Two thirds of G20 RTAs with substantive investment chapters include investor-state dispute settlement in their RTAs. The remaining RTAs leave disputes about investment matters to their inter-state dispute settlement procedures. G20 RTAs without ISDS include the EU's current RTAs and some of the RTAs of Australia, China and Japan. While the depth of detail in ISDS provisions varies across agreements, the current trend is to include a comprehensive set of procedural rules.

2.25. The material scope of ISDS or the range of issues that may be considered by an arbitral tribunal varies considerably. About 70% of G20 RTAs that provide for ISDS subject the entirety of their investment chapter obligations to ISDS. The remaining RTAs list the provisions for which ISDS is made available or explicitly exclude specific investment provisions from ISDS. A number of RTAs (particularly those concluded by the US and Canada) extend ISDS beyond the provisions of the investment chapter to obligations contained in contracts concluded by the investor with the host state or in authorizations granted by its authorities, on which the investor or the covered investment relies in establishing their investment. Investment contracts may be limited to specific sectors, such as the exploitation of natural resources, the development of infrastructure projects or the supply of services to the public on behalf of a state.

2.26. Exclusions and limitations on the material scope of ISDS can take the form of the exclusion of screening decisions and exceptions for national security measures. For instance, some RTAs, in particular those involving Canada and Mexico, tend to unilaterally exclude screening decisions from ISDS in the text of the agreement. In addition, a large number of RTAs provide for exceptions to allow states to protect their national security interests.

2.27. While most RTAs contain provisions on the interaction of ISDS with domestic or international proceedings, there appears to be a high degree of heterogeneity among them. The techniques included in different RTAs include waiver requirements, fork-in-the-road clauses and mandatory recourse to domestic administrative review procedures.

2.28. Other procedural elements of ISDS include provisions relating to claims without merit, provisional measures, binding interpretations and non-disputing party interventions. About a third of G20 RTAs that provide for ISDS includes provisions on the avoidance of frivolous or unmeritorious claims through expedited procedures and additional rules on the allocation of costs. Slightly more than half of G20 RTAs that provide for ISDS contain an explicit provision enabling a tribunal to order interim measures of protection. The RTA parties that wish to retain a certain degree of control over their treaty rights and obligations establish mechanisms that allow them to intervene through the ISDS proceedings. Two such mechanisms were found: provisions that allow the parties to issue joint interpretations of the RTA that are binding on the arbitral tribunal; and provisions that allow non-disputing RTA parties to intervene in the ongoing ISDS proceedings through submissions regarding the interpretation of the RTA's provisions.

2.29. In response to widespread criticism of the prevailing confidentiality of ISDS proceedings, a number of RTAs have introduced transparency obligations of varying breadth. Pioneered by the US and Canada after the 2004 review of their model BITs, the most recent RTAs concluded by the US, Canada and Australia provide for the most far reaching transparency obligations applicable to ISDS proceedings. These provide for mandatory public disclosure of the key documents submitted to the tribunal by the disputing parties as well as the tribunal's transcripts, awards and other decisions. Moreover, a number of RTAs require hearings to be publicly accessible and grant the admissibility of amicus curiae submissions.

2.1.7 Provisions Supporting the Investment Framework

2.30. Provisions supporting the investment framework include transparency provisions and disciplines on the temporary entry of natural persons. A commitment to transparency is a common feature of RTAs. The scope of transparency obligations varies, ranging from the minimum requirements to publish or make all relevant measures publicly available and fulfil specific information requests from other parties to a more comprehensive set of obligations that inter alia impose requirements on the treatment of investors in administrative proceedings.

2.31. Barriers to the entry of business visitors may hinder the operation of investment. About 75% of G20 RTAs with substantive investment chapters allow the temporary entry of natural persons in connection with an investment. Most RTAs of the United States do not include such provisions.

2.1.8 Host State Flexibilities Provisions

2.32. The obligations that parties undertake in their RTAs, especially in services and investment, tend to be quite far-reaching in terms of constraining their regulatory policies. In order to permit interventions to address negative externalities, mechanisms are built into RTAs to allow flexibility. These include exceptions and special formalities and information requirements.

2.33. RTAs usually contain general exceptions that apply across all chapters of the agreement. The catalogue of such exceptions is often identical or similar to the exceptions enumerated in Article XX of the GATT or Article XIV of the GATS. Second, RTAs typically provide for a national security exception akin to Article XXI of the GATT or Article XIV bis of the GATS applicable horizontally to all chapters of the RTA. More than two thirds of G20 RTAs with substantive investment chapters contain some sort of general exception provision applicable to investment. None of the RTAs to which the US or Mexico is a party and some of China's RTAs do not include such exceptions.

2.34. National security exceptions typically apply horizontally across the entire agreement, including its investment and services chapters. National security exceptions are often drafted in a broad manner, leaving room for the host state to take measures it considers necessary to safeguard its essential security interests. Almost all G20 RTAs with substantive investment chapters contain a national security exception.

2.35. More than half of G20 RTAs with substantive investment chapters contain provisions that allow host states to maintain measures that fall into the categories of special formalities or information requirements. Special formalities may include residency requirements for investors or a requirement that investments be legally constituted under the laws or regulations of the host state. The application of host state formalities is usually permitted on condition that they do not materially impair the investment protections afforded by the RTA in question.

2.1.9 Investment Promotion and Institutional Cooperation

2.36. About a third of all G20 RTAs (including those that only cover trade in goods) contain provisions on investment promotion. Typical promotion clauses may require a party to promote investments in its territory or endeavour to maintain favourable and transparent investment conditions for investors of the other party. Specific examples of promotion activities may include exchanges of information on investment opportunities between the parties and the establishment of linkages between the parties' investment agencies. More elaborate provisions on cooperation may foresee the setting up of joint ventures, technology transfers and the exchange of expertise, technical assistance and capacity building.

2.37. RTAs with investment chapters sometimes provide for the establishment of a standing institutional body specific to international investment. This mechanism, most often established in the form of a sub-committee instituted under the framework of the RTA and under the supervision of an RTA Committee, can serve as a useful platform for monitoring the effective implementation of investment promotion goals and overseeing further liberalization efforts undertaken by the Parties.

2.1.10 Sustainable and Socially Responsible Investment

2.38. RTAs integrate sustainable development and corporate social responsibility into their investment framework through the inclusion of issues such as the environment, public health, labour standards or corporate social responsibility. About two thirds of G20 RTAs with substantive investment chapters contain provisions of this kind. To prevent the erosion of existing health, environmental or labour standards, the parties to an RTA may adopt provisions that seek to uphold such standards in the context of their investment framework.

2.39. Some RTAs include references to the fundamental labour principles elaborated by the International Labour Organization or encourage compliance with social corporate responsibility standards. Finally, numerous RTAs include commitments to cooperate on matters of social concern and enumerate in particular in which areas cooperation should take place. Thus, RTA parties may agree to cooperate on labour issues and the environment or against bribery and corruption, taking into account their national priorities and available resources. However, such provisions remain largely aspirational and rarely contain concrete policies and mechanisms for their implementation.

2.1.11 Conclusions

2.40. The liberalization and protection of investment flows has become an increasingly indispensable pillar of economic integration. RTAs increasingly include investment provisions. While the influence of North American treaty practice is evident, there is also considerable heterogeneity in the design of individual investment provisions in RTAs. In addition treaty practice is evolving in response to investment case law and the need to strike a workable balance between ensuring investment protection and liberalization versus maintaining the desired regulatory space. As more countries embrace ISDS in their RTAs, the complexity of procedural rules increases. It is also evident that this form of dispute settlement is currently undergoing significant changes reflecting a broader trend towards its judicialization in order to better accommodate the public nature of investment disputes.

2.2 Competition provisions in RTAs[2]

2.2.1 Overview

2.41. A recent survey of 216 RTAs included in the WTO's Regional Trade Agreements Database (Laprévote et al 2015) finds that in total 88% of the agreements that are currently in force – including agreements between developed countries; between developed and developing countries; and between developing countries - contain either specific provisions or entire chapters addressing the subject matter of competition policy.

2.42. In addition to serving other purposes, often, the relevant provisions or chapters: (i) call for the adoption or maintenance of general competition laws by the participating governments; (ii) address issues concerning designated monopolies and/or state-owned enterprises; and/or (iii) promote capacity building and inter-agency cooperation in competition law enforcement. The stated rationales for such provisions include: (a) ensuring that the potential gains from trade liberalization are not undermined by anti-competitive practices; (b) promoting economic efficiency, development and prosperity; and (c) ensuring that competition law enforcement respects core principles such as non-discrimination, transparency and procedural fairness. Moreover, in many cases, disciplines regarding competition law enforcement are exempted from binding dispute settlement procedures.

2.43. The prevalence of provisions relating to competition law/policy in RTAs attests to their perceived relevance to trade policy concerns on the part of a broad cross-section of WTO Members. It also suggests that, from a technical standpoint, it would not be difficult to replicate similar provisions in a multilateral or plurilateral agreement. A related possibility would be an agreement at the multilateral level that would involve different possible levels of commitments, along the lines of the Agreement on Trade Facilitation.

2.2.2 Rationales for including competition provisions in RTAs

A number of rationales have been put forward for the inclusion of competition policy provisions in RTAs. Often, these are referred to specifically in the relevant agreements or chapters:

- **ensuring that the potential gains from trade liberalization are not undermined by anti-competitive practices**. The underlying concern here is that, while trade liberalization aims to improve economic welfare by permitting enhanced competition, expanding output and lowering prices, if left unchecked, anti-competitive practices such as cartels and abuses of a dominant position produce the contrary results: they reduce competition, limit output and raise prices;

- **promoting economic efficiency, development and prosperity**. In the past decade, much solid evidence has accumulated that anti-competitive practices including cartels and monopolies or abuses of a dominant position harm the welfare of citizens, for example through: (i) raising the prices of internationally traded input goods including fertilizers and other inputs to agricultural production on which developing country producers are extensively reliant; (ii) raising the prices of business infrastructure services including rail, port and railway facilities that are essential for getting products to market; and (iii) otherwise raising the costs of both business inputs and final goods and services to consumers; and

- **ensuring that competition law enforcement respects core principles such as non-discrimination, transparency and procedural fairness ("due process")**. The concern here is that, in the absence of these disciplines, competition law itself may be

[2] This analysis is based principally on information collated in Laprévote, F.-C., S. Frisch, B. Can, "Competition Policy within the Context of Free Trade Agreements", *E15 Initiative Paper, 2015*; also drawing on the insights of Teh, R., "Competition Provisions in Regional Trade Agreements", *Regional Rules in the Global Trading System, 2009*; Anderson, R.D., and S. Evenett, "Incorporating Competition Elements into Regional Trade Agreements: Characterization and Empirical Analysis", *Unpublished Manuscript, 2008*; and Solano, O. and A. Sennekamp, "Competition Provisions in Regional Trade Agreements", *OECD Trade Policy Paper Series, No. 31, 2006*. The analysis covers not only the disciplines that are incorporated in RTA chapters on competition policy as such, but also those in chapters addressing closely-related topics such as state-owned enterprises (SOEs) and state-designated monopolies.

applied in ways that adversely affect business confidence and/or may be strategically employed to favour domestic as compared to foreign enterprises.

2.2.3 General Approaches or Models for the inclusion of Competition Policy Provisions in RTAs

2.44. Although the details of competition policy provisions in RTAs can vary even across agreements involving similarly-situated countries, analysts have identified certain "generic" approaches to the content and structure of competition chapters and provisions that are associated with particular regions. Laprévote et al (2015), building on Solano and Sennekamp (2006), posit the existence of three broad approaches to the design of relevant provisions/chapters, namely: (i) a European approach; (ii) a NAFTA-based approach; and (iii) an "Oceanian" approach, embodied in the Australia New Zealand Closer Economic Relations-Trade Agreement (ANZCERTA).

2.45. According to their analysis the EU, and to a lesser extent the EFTA countries, favour relatively detailed provisions requiring the parties to prohibit specific anti-competitive practices to the extent that they affect trade between an agreement's parties, and to regulate state aids and enterprises that are entrusted with special or exclusive rights. Generally, such provisions correspond to relevant articles of the Treaty on the Functioning of the European Union (TFEU) or (where relevant) the EFTA Agreement. By contrast, often, EU and EFTA RTAs do not deal extensively with cooperation and coordination in competition law enforcement, probably because these topics tend to be dealt with in more specific agreements between participating competition agencies in European and neighbouring jurisdictions. In a sense, the TFEU itself is the quintessential example of the European approach in that it incorporates substantive provisions on competition policy as an underpinning of the Union itself.[3]

2.46. NAFTA-based or inspired RTAs typically include provisions on cooperation and coordination in competition law enforcement in addition to SOEs and designated monopolies (often, the latter are treated in chapters that are separate from the chapters on competition policy per se). Such agreements may contain only generic references to the “anti-competitive conduct” against which the parties are committed to take measures. Some RTAs associated with this approach also impose significant requirements relating to non-discrimination, transparency and/or procedural fairness that apply to competition law enforcement, to ensure that due process is respected and competition law is not itself used to harass competitors.

2.47. The Oceanian approach, which has not been extensively replicated in other regions, in a sense represents the most advanced model for addressing competition-related issues in an RTA. It requires Australia and New Zealand to harmonize their respective competition laws and align them with the objectives of the ANZCERTA. The removal of trade defenses between the parties is also intrinsic to this approach.

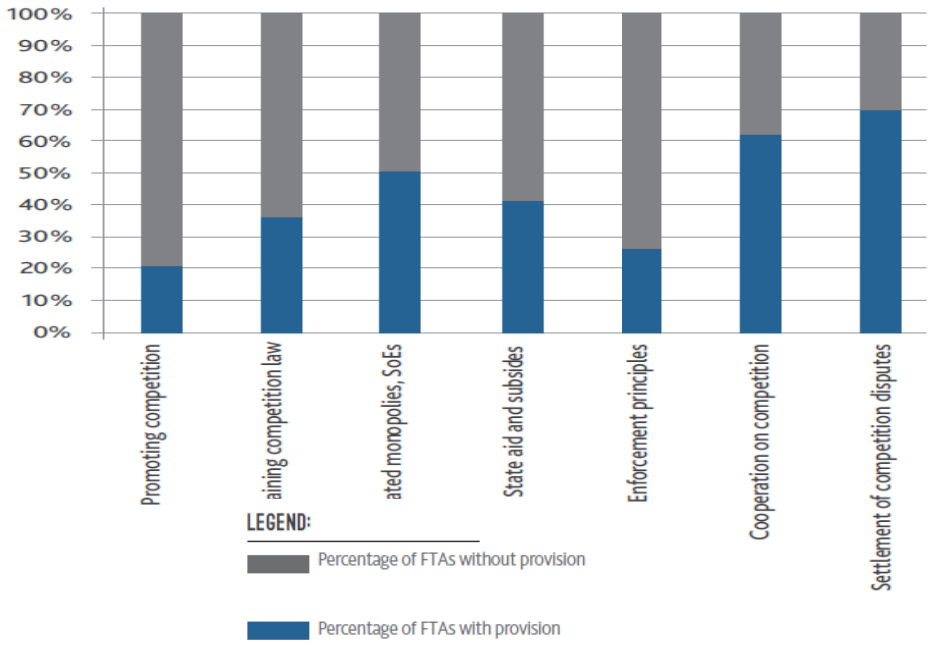
2.2.4 The specific contents of competition chapters in RTAs

Competition-related chapters and provisions cover a range of issues. As shown in Figure 2, these range from: (i) general obligations to promote competition; (ii) requirements to adopt or maintain national competition laws; (iii) commitments regarding the regulation of designated monopolies and/or state-owned enterprises (SOEs) and enterprises entrusted with special or exclusive rights; (iv) the regulation of state aids and subsidies; (v) principles for the enforcement of competition law; (vi) cooperation and coordination in competition law enforcement, including capacity building; and (vii) the settlement of disputes.[4]

[3] Anderson R. and A. Heimler, "What has Competition Done for Europe? An Inter-disciplinary Answer", *Aussenwirtschaft, No. 4, 2007*.

[4] Laprévote *et al,* above note 1. See also Teh, above note 1, and Anderson and Evenett, above note 1.

Chart 3 - Types of Competition-related Provisions in FTAs



Source: Adapted from Laprévote et al (2015).

2.48. Further to the above, about 21% of the sampled RTAs include general undertakings by the parties to promote competition in their respective markets. Some, especially those involving EFTA countries, refer broadly to an agreement between parties to "promote competition in their economies" without further explanation as to how to interpret this concept. Others go into greater detail, requiring that parties promote competition by:

- adopting or maintaining competition laws (see below);
- "addressing anticompetitive practices in [their] territory and adopting and enforcing such measures as [they] deem appropriate and effective to counter such practices;"
- "establish[ing] mechanisms to facilitate and promote the development of competition policy and ensure the application of rules on free competition;" or
- maintaining a high-level government commitment to promote competition.

2.49. Around 37% of the RTAs surveyed include provisions requiring the parties to adopt, maintain, or apply laws, legislation, or measures regulating anti-competitive conduct. Generally, the NAFTA-inspired RTAs also require the parties to "take appropriate action with respect thereto." While RTAs between the EU and potential accession candidates often include an obligation upon the latter to ensure the compatibility of their legislation with EU competition law, other RTAs go to great lengths to preserve the parties' sovereignty, expressly stating that each party "maintain[s] its autonomy in developing and enforcing its competition laws."

2.50. The range of conduct addressed by this category of provisions is broad and diverse. On the one hand, some RTAs contain simple obligations to adopt "measures" or "laws" against anticompetitive practices without further defining the content of such laws or measures or the practices to be regulated. On the other hand, numerous RTAs specifically define the anti-competitive practices to be regulated and/or the measures to be implemented to that effect, although the level of detail may vary. These practices cover (i) anticompetitive agreements, (ii) abuses of market power, and (iii) anti-competitive mergers.[5]

2.51. In addition to horizontal provisions on anti-competitive practices that apply broadly across the participating economies, RTAs may also contain sector-specific obligations and commitments

[5] See, for a more detailed discussion, Lapévote et al, above note 1.

on such practices.[6] Around 27% of the RTAs surveyed - especially though not exclusively those following a variation of the NAFTA model - contain provisions that substantially replicate Article 1 of the WTO Basic Telecommunications Reference Paper, requiring the parties to implement competitive safeguards in the telecommunications sector. Some RTAs to which the EU and/or its neighbours are party also incorporate parallel competitive safeguards for the postal and courier sector, consistent with Article 1 of a 2005 EU proposal for a WTO Postal/Courier Reference Paper.

2.52. Obligations for RTA parties to regulate designated monopolies, SOEs and/or undertakings entrusted with special or exclusive rights are also among the most common competition-related elements of RTAs (as noted, these are often included in separate chapters addressing such undertakings as opposed to chapters addressing competition law or policy per se). According to Laprévote et al (2015), such provisions fall broadly into four categories:

- First, NAFTA-inspired RTAs often contain provisions that are similar to but may go further than GATT Article XVII and Article XVIII as applied to state trading enterprises. These RTAs may require, in particular, that private or government monopolies and SOEs: (i) be subject to appropriate regulatory controls; (ii) act in accordance with commercial considerations; (iii) act in a non-discriminatory manner; and (iv) refrain from using their monopoly power to engage in anti-competitive conduct;

- Alternatively, some RTAs drawing inspiration from NAFTA appear to go even further, in particular respects. For example, some RTAs require assurances from parties that designated monopoly powers will not be abused;

- Third, RTAs to which the EU or EFTA are party may require that public and private enterprises entrusted with special or exclusive rights be subject to competition law, extend general abuse of dominance provisions to such enterprises;

- Fourth, a limited number of RTAs to which countries with a significant SOE presence are party include provisions intended to neutralize and/or reduce government intervention in relevant markets. For example, the US-Singapore RTA imposes on Singapore an obligation to refrain from using direct or indirect decisive influence over government enterprises, and limits the involvement of the government in these enterprises to using its voting rights as a shareholder.

2.53. Concerning State aids and subsidies, typically, the RTAs of the EU impose broad State aid obligations prohibiting aid that distorts/potentially distorts competition by favouring particular entities. Such provisions derive directly from EU law (some RTAs even refer to specific TFEU provisions). RTAs of Caucasian and Central Asian countries often resemble the EU approach. In a few instances, RTAs provide less rigid obligations, such as requirements to use best endeavour to remove distorting effects on competition, recognition of the fact that State aids may have distortive effects, and reaffirmation of related commitments in WTO Agreements.

2.54. The majority of RTAs do not embody enforcement principles relating specifically to competition policy (general obligations for trade-related matters may cover enforcement policies, even if not expressly provided). RTAs that do contain competition enforcement principles, usually require transparent and/or non-discriminatory enforcement practices along with requirements for procedural fairness and in rarer instances, timeliness and comprehesiveness. US RTAs, and to a lesser extent EU RTAs, may also stress the importance of consumer welfare and economic efficiency as guiding principles for competition law enforcement.

2.55. Regarding dispute settlement, in many cases, the disciplines on competition policy and competition law enforcement that are incorporated in RTAs are excluded from the application of dispute settlement provisions. This is particularly true of agreements that broadly follow the "NAFTA model". This reflects, in part, the known reluctance of competition agencies to see their decisions subjected to case-specific or other international dispute settlement procedures.

2.56. There are, to be sure, limits to the exclusion of competition policy disciplines from RTA dispute settlement procedures. In particular, such exclusion is usually limited to competition-

[6] These may be found in RTA chapters other than those dealing with competition law or policy per se, for example chapters dealing with services commitments or SOEs.

specific provisions of RTAs. Provisions that appear elsewhere in the RTA and indirectly impact competition policy or enforcement (for example, non-discrimination) typically are not excluded from the dispute settlement mechanism of the RTAs. Additionally, sometimes the exclusion is only partial, for example, limited merely to disputes concerning limited monopolies and SOEs or to State-aid related disputes.

2.2.5 Conclusions

2.57. WTO Members, including both developed and developing country Members, have made clear, in relevant RTAs, the importance they attach to competition disciplines as a dimension of trade policy making in the present global environment. A key consideration underlying such disciplines is the realization that, if left unchecked, anti-competitive practices have considerable potential to undermine the gains that accrue, or are expected to accrue, from trade liberalization. In addition to potentially detailed commitments on the prevention of anti-competitive practices, strong interest has been shown in the negotiation of safeguards to ensure non-discriminatory and competitive behaviour by state-owned enterprises/other entities enjoying special privileges.

2.58. The prevalence of such provisions in WTO Members' RTAs clearly attests to the perceived relevance of competition policy to trade policy concerns on the part of a broad cross-section of Members. It also suggests that, from a technical standpoint, it would not be difficult to replicate similar provisions in a multilateral or plurilateral agreement.[7]

2.3 Government procurement provisions in RTAs[8]

2.3.1 Overview

2.59. Government procurement, it is estimated, accounts for around 15% of the GDP, on average, of both developed and developing countries. It is an essential input to public services such as the development of public and business infrastructure including transport, energy, and telecommunications. Well-designed, open and fair procurement systems are, therefore, important in order to allow governments to achieve value for money and procure the best available goods and services internationally, which in turn benefits taxpayers and other users of the goods and services in relevant markets. Government procurement has, however, been carved out of the main disciplines established by the multilateral rules that cover all WTO Members. Instead, procurement rules and commitments are addressed by the WTO's plurilateral Agreement on Government Procurement (GPA) which currently has a membership of 18, counting the EU as one party.[9]

2.60. As of May 2016 around half (48%) of all RTAs notified to the WTO and in force since 2000 have government procurement provisions and commitments. These include agreements between WTO Members that are already parties to the WTO's GPA, but also between GPA parties and non-parties and among non-GPA parties. Altogether, around eighty WTO Members have undertaken, on at least one occasion, trade liberalization in the area of government procurement, either via the GPA or an RTA. This represents approximately 50% of the WTO's membership. Around 43% of RTAs involving the G20 and notified since 2000 have government procurement provisions. Canada, France, Germany, the European Union, Italy, Japan, the Republic of Korea, the United Kingdom and the United States, among the G20, are covered by the WTO's GPA; Argentina, Australia, China, India, Indonesia, the Russian Federation, Saudi Arabia and Turkey are observers, with Australia and China currently negotiating accession. The Russian Federation and Saudi Arabia have

[7] Anderson R. and A.C. Müller, "Competition Law/Policy and the Multilateral Trading System: A Possible Agenda for the Future, *E15 Initiative Paper, 2015*.

[8] Based on Anderson, R. D., A.C. Müller and P. Pelletier, "Regional Trade Agreements and Procurement Rules: Facilitators or Hindrances?", forthcoming; and Anderson, R.D., A.C. Müller, K. Osei-Lah, J. Pardo de Leon and P. Pelletier, "Government Procurement Provisions in Regional Trade Agreements: A Stepping Stone to GPA Accession?" in Arrowsmith and Anderson (eds), *The WTO Regime on Government Procurement: Challenge and Reform*, 2011.

[9] If the EU's member states are counted separately, the total membership of the GPA is 46 WTO Members. In addition, in September 2015, a decision was taken by the GPA Committee signalling the conclusion of negotiations on Moldova's accession to the Agreement. Eight other Members of the WTO are in the process of acceding to the Agreement (i.e. Albania, Australia, China, Georgia, Jordan, Kyrgyz Republic, Oman and Tajikistan). In addition, seven WTO Members have undertaken commitments, in their accession to the WTO, to initiate their accession to the Agreement. They are: Afghanistan, the former Yugoslav Republic of Macedonia, Mongolia, Kazakhstan, the Russian Federation, Saudi Arabia and Seychelles.

undertaken commitments, in their accessions to the WTO, to seek accession to the GPA. Brazil, Mexico, and South Africa are neither parties nor observers to the GPA. Of the RTAs involving the G20 in force and notified to the WTO up to May 2016, around 70% involve at least one G20 GPA party and 14% are between GPA parties.

2.61. The inclusion of provisions on government procurement in RTAs has increased significantly over the years, and around a third of RTAs contain separate detailed chapters on government procurement, thereby acknowledging the importance procurement plays in the parties' economies. The main provisions contained in such RTAs tend to follow the approach taken in the WTO's GPA. This is true even for Agreements concluded between non-GPA Parties.[10] The relevant provisions include rules dealing with non-discrimination (national and MFN treatment); procurement procedures; the prohibition (or limitations in the use) of offsets (mandatory local content and similar requirements); and dispute settlement provisions. Also similar to the GPA, such RTAs typically include detailed market access commitments that are set out in Annexes on Central, sub-Central and other entities covered by the Agreement, as well as in annexes on goods, services, and construction services covered. The annexes also specify the threshold values above which individual procurements are subject to the disciplines of the RTA.

2.62. Other Agreements that address government procurement without containing detailed procedural rules and coverage commitments, recognize the importance of non-discriminatory frameworks for government procurement and may contain rendez-vous clauses regarding future negotiations.

2.63. The RTAs that do not contain commitments on procurement include older agreements negotiated among the Commonwealth of Independent States (CIS) countries, other older bilateral agreements such as EU-Egypt, EU-Jordan, and some RTAs in Asia (India-Japan, India-Korea, Japan-Indonesia and Japan-Philippines), as well as a number of plurilateral agreements which appear to have no provisions on Government procurement either. This category includes some of the older RTAs notified to the WTO and is not necessarily indicative of current trends. For example, the Eurasian Economic Union between the Russian Federation, Belarus, Kazakhstan, Armenia and the Kyrgyz Republic now contains a detailed chapter on government procurement, and recent bilateral agreements concluded by the EU and other GPA Parties now routinely include government procurement chapters.

2.3.2 Market access commitments in government procurement

2.64. An increasing number of RTAs concluded with or between GPA Parties, but also between non-GPA Parties, contain not only procedural, transparency and non-discrimination rules, but also clearly defined market access commitments. The depth and extent of these commitments tends to vary across different categories of agreements.

2.65. Market access commitments in RTAs among GPA parties, for the most part, tend to be based on the level of market access that the parties have provided in their GPA commitments while also providing limited "top-ups" e.g. with regard to lower thresholds or a few additional entities. Some of the additional coverage commitments found in older RTAs have subsequently been "plurilateralized" in the course of the re-negotiation of the GPA.

2.66. With regard to RTAs between GPA parties and non-parties, the GPA parties generally stay behind the coverage that they provide under the GPA, in particular with regard to the number of entities listed in their RTA annexes.[11] What is interesting however is that in such agreements the non-GPA parties often provide substantial access to their government procurement markets.

2.67. Finally, even RTAs involving only non-GPA Parties often include GPA-style market access commitments. In the case of some countries, such as Mexico, the threshold levels for Government procurement are linked to commitments under the NAFTA or other agreements also involving GPA parties. Another group of countries that has increasingly signed RTAs with some GPA parties and liberalized its government procurement market is the countries of Latin America. The level of market access commitments is relatively high, although there appears to be a tendency to make

[10] An exception is the Eurasian Economic Union Treaty.

[11] There are a limited number of exceptions. For instance, the Republic of Korea has a lower threshold in its RTAs with Chile and Singapore, while Canada has a lower threshold with Colombia and Panama.

more extensive commitments with other countries in the region than in RTAs with countries outside the region. In sum, it can be said that the structure and extent of market access commitments regarding government procurement in RTAs is influenced both by the GPA itself and the particular situations of participating countries.

2.3.3 General and procedural provisions on government procurement in RTAs

2.68. The majority of RTAs containing government procurement provisions provide national treatment with respect to procurement that is covered in their market access schedules. This is not, however, the case for MFN treatment which frequently is not included in procurement chapters in RTAs. RTAs between GPA parties and non-parties, in particular, typically do not grant MFN treatment. The absence of MFN commitments suggests that GPA parties aim to prevent third parties (particularly non-GPA parties) from free riding on their commitments in any particular RTA.

2.69. With regard to procurement procedures, the majority of RTAs again tend to follow closely the GPA structure. This "template" approach is also found in other chapters of RTAs, notably investment as discussed above and also in other areas.[12] Like those found in the GPA, procedural provisions on government procurement in RTAs aim to ensure a fair, transparent, equitable and non-discriminatory environment for goods, services and suppliers. This includes ensuring that information is publicised and accessible by all eligible suppliers, specifying that, where possible, the procurement of goods and services should be based on international standards; ensuring that suppliers' capabilities are assessed on the basis of objective and relevant criteria as set out in a transparent manner in the tender documentation; providing sufficient time for suppliers to react and prepare responsive bids and proposals; ensuring that the results of the tendering process are made publically available; and providing appropriate information to suppliers that were not successful as to why this was so. These requirements, in turn, are based on the participating governments' experience with respect to best practices in the procurement field.

2.70. Almost half of the Agreements containing government procurement provisions expressly prohibit the use of offsets in regard to procurements that are covered by the agreements. Other Agreements may include provisions regulating, rather than prohibiting, the use of offsets. Such offsets, as also mentioned in the section discussing provisions on small and medium sized enterprises below, where and to the extent permitted, can provide RTA parties with policy space to assist local industry or services activities.

2.71. An important additional trend in recent RTAs containing government procurement chapters, as in the GPA, is to include provisions relating to the prevention or avoidance of conflicts of interest and corrupt practices. This shows a clear recognition of the harm caused by such practices and the importance of preventing corruption in this sector as an aspect of the global struggle for good governance.

2.72. A significant number of RTAs with government procurement provisions also contain dispute settlement mechanisms established by the agreement that apply to the government procurement commitments. Other issues that may be included are cooperation, including technical assistance; and best endeavour commitments to accede to the GPA.

2.3.4 Conclusions

2.73. At the level of the WTO, government procurement is carved out of the main GATT/WTO rules regarding non-discrimination and national treatment. The WTO's GPA aims to fill the resulting gap. In addition, a growing number of RTAs include separate chapters on government procurement providing rules and procedures to govern procurement between the parties. A significant share of these agreements also contain specific commitments on market access, including annexes on the goods and services and entities covered as well as thresholds above which procurement is subject to the rules of the agreement. It is also significant that many of these agreements either link GPA parties and non-parties or cover only non-parties to the GPA. This suggests that, while particular non-GPA parties have historically been reluctant to join the WTO GPA, increasingly, they are willing to open their procurement markets to trading partners on a bilateral or regional basis. They may, therefore, eventually be in a position to consider joining

[12] Details of such families of approaches can be found in the discussion paper prepared by the WTO, in consultation with the World Bank Group and the OECD, for the G20 in 2015.

the GPA itself. At a minimum, the proliferation of government procurement provisions similar to the GPA in RTAs is spreading the reach of the GPA's principles beyond the membership of the GPA per se.

2.74. An examination of the scope and extent of market access commitments in relevant RTAs shows that the GPA parties have generally tended, in these agreements, to follow or stay behind the level of commitments that they have made in the GPA (with exceptions where an RTA covers WTO Members that are already GPA parties). Furthermore, the rules and procedures on government procurement in RTAs generally follow those of the GPA. As a result, far from creating a spaghetti bowl of different rules and commitments, in the majority of cases RTAs containing provisions on government procurement reinforce and extend the reach of the GPA's principles, encouraging participating countries to align themselves with international best practices.

2.4 Environmental provisions in RTAs[13]

2.4.1 Overview

2.75. Around a third of RTAs notified to the WTO between 2000 and April 2016 contain a specific environment chapter or section devoted to environmental issues. Among the G20 economies, that share is higher at almost 40% of their RTAs. In addition, the environment, which cuts across many issues covered in RTAs is also found in other parts of the text, including the preamble, as well as in chapters on exceptions, investment, technical barriers to trade, SPS, services commitments intellectual property rights, and cooperation. The environment is also an issue which has often been the subject of separate agreements or side letters between the parties to RTAs.[14] As the other issues identified in this discussion paper, the incidence of environment related provisions has been rising in RTAs especially in recent years, suggesting that more and more WTO Members are becoming aware of and concerned about the linkages between trade and the environment.

2.76. Recent work on environment provisions in RTAs done by the WTO Secretariat shows that while such provisions are quite disparate, there are certain common features that can be identified. Many RTAs (45% of all notified RTAs) include references to the environment in their preambles, thus indicating that sustainable development, environmental protection, natural resource management are issues that concern them and form part of the overall objectives of their trade agreements. The language used is mainly to encourage the parties of these agreements to implement the agreement in accordance with the overall objective of protecting their environmental goals. A second issue is cooperation, with around 44% of RTAs calling for further cooperation between the parties to achieve their trade and environmental objectives. Environmental objectives or laws are also frequently excluded from various provisions of the RTA so the parties have policy space to implement their environmental goals and policies; the environment is often referred to in the general exceptions chapter which is found in most RTAs today. The relationship between the RTA and multilateral environmental agreements (MEAs) is also referred to by a growing number of RTAs, and finally environmental governance issues are also becoming increasingly important.

2.4.2 Trade in environmental goods, services and technologies

2.77. The provisions on trade in environmental goods, services and technologies are mainly found in RTAs between developed and developing economies (39 RTAs) but also between developing economies (12 RTAs). There has been a significant increase in such provisions since 2008. Commitments related to goods in RTAs mainly aim to facilitate and promote the development and trade in environmental goods and services as well as in goods derived from sustainable managed natural resources such as forestry and fisheries. A few agreements make commitments to eliminate tariffs on an agreed list of environmental goods. To further facilitate the development of environmental goods, services and technologies, some agreements (10% of all notified RTAs) have cooperation provisions on environmental related goods and services, including organic food, and goods derived from sustainably managed natural resources. Other forms of promoting trade in

[13] Based on J.-A. Monteiro, "Typology of Environment-Related Provisions in Regional Trade Agreements", *WTO Staff Working Paper*, 2016, forthcoming.

[14] Around 14% of RTAs covered by the study were found to have side letters or agreements on the environment.

sustainable products for example under fair and ethical trade schemes, through eco-labelling and through corporate responsibility schemes are also recognized explicitly in some RTAs.

2.78. In services a number of RTAs (37% of all notified agreements) have specific commitments in their services schedules to liberalize environmental services such as sewage services, refuse disposal services, sanitation services, noise abatement services, natural and landscape protection services and other environmental protection services. In a number of cases these commitments go beyond the parties commitments under the GATS.

2.4.3 Exceptions

2.79. The majority of RTAs today (97% of all notified agreements) contain a chapter or section on general exceptions to the provisions of the RTA. In most cases these are based on Article XX of the GATT with regard to goods, and Article XIV of the GATS for services. In an increasing number of RTAs with such exception clause, an explicit reference to the environment is added, thereby providing policy space to governments to implement policies to protect the environment without breaching the provisions of the RTA.

2.80. In addition to the general exceptions, RTAs also have exceptions in other chapters, notably the investment chapter, the chapter on government procurement, intellectual property rights and any specific environment chapters or sections. The most common exception relating to investment allows the parties to adopt or maintain measures, including environmental measures necessary to protect human, animal or plant life or health, or necessary for the conservation of living or non-living exhaustible natural resources, as long as they are not arbitrary or a disguised restriction to international trade or investment. For government procurement the language is similar and permits the parties to take measures necessary to protect human, animal or plant life or health, as long as they are not applied in a manner that would constitute a means of arbitrary or unjustifiable discrimination between the parties. The investment chapter in some RTAs also has provisions exempting cases of expropriation from the procedures required by the agreement if it is for environmental considerations. For intellectual property rights around 13% of RTAs permit the parties to exclude from patentability inventions to protect animal or plant life or health to avoid prejudice to the environment. A growing number of RTAs also make specific links to biodiversity and traditional knowledge (mainly agreements involving Latin American countries such as Peru, Colombia, Panama including with the U.S. and the EU).

2.81. Environment related exceptions are also found in other chapters such as technical barriers to trade which permits the parties to take exceptions on transparency and not notify its standards related measures to the other party if they are threatened by an urgent problem relating to the protection of animal or plant life or health or the environment. Measures may also be implemented without granting the other party a reasonable amount of time to comment on any notifications in exceptional circumstances including for environmental considerations.

2.82. Another exception that is found in a number of RTAs is provisions which allow the parties to maintain or adopt new domestic environmental legislation; 41% of RTAs recognize the parties right to adopt measures necessary to protect the environment, including animal and plant life and health, while around 15% encourage or commit the parties to ensure that their existing domestic environmental laws provide for high levels of environmental protection and continue to improve them. Furthermore around 28% of RTAs prohibit the parties from weakening or failing to enforce domestic environmental laws to encourage trade or investment.

2.83. While high levels of protection are increasingly encouraged in RTAs, there is nevertheless the recognition that each party retains the right to establish its own levels of environmental protection and to adopt or modify its environmental laws accordingly. This right is generally repeated and reaffirmed through different chapters and sections of RTAs such as on TBT, SPS, and investment. Nevertheless, the parties are encouraged to follow international standards. References to international or multilateral environmental agreements (MEAs) are found in around 47% of all RTAs notified to the WTO. The number of such agreements has increased significantly since 2006 and mainly involves agreements between developed and developing countries (involving notably the U.S. Canada, EU) but also some developing countries (eg. Korea-Peru and Korea-Turkey and Nicaragua-Chinese Taipei). The provisions range from reaffirming the importance of MEAs to requiring the parties to accede to certain MEAs to which they are not party, and some clarify the

relationship between the RTA and the MEA in case of inconsistency between the two (usually in favour of the MEA).

2.4.4 Cooperation

2.84. Environment-related cooperation issues are mentioned in 44% of notified RTAs. Around half of these agreements mention environment along with other issues as a goal for cooperation between the parties. In addition around 70% of these agreements have specific goals for environment related cooperation. These include issues such as water management and related issues, but also broader matters such as pollution, marine and coastal resources management, natural resources management, energy conservation and promotion of alternative energy, and climate change. Environmental cooperation is also mentioned in sector-specific chapters or sections of RTAs such as forestry, industry, agriculture, fisheries, tourism, energy, transport and with respect to biological diversity conservation. Cooperation can take various forms, including information exchange, training and exchange of professionals, joint projects, conferences and partnerships between the parties to share their knowledge and experience. In some cases the transfer of technology is also specified as a form of cooperation while others agree to facilitate duty free entry or reimbursement of taxes on equipment imported under such cooperation programmes.

2.85. Cooperation provisions are found not just in RTAs between developed and developing economies, but also increasingly between developing economies.

2.4.5 Governance and public awareness

2.86. A number of RTAs build on Principle 10 of the UN Rio Declaration relating to transparency, public participation and access to justice. Transparency with respect to environmental issues is raised in around 28% of RTAs, either in the text of the RTA itself (70 RTAs) or in side letters, environmental cooperation agreements, MOUs and joint statements of environmental cooperation and protocols on environmental management (25 RTAs). The provisions on transparency vary widely from acknowledging the importance of transparency, to commitments to publish and notify the other party and exchange information on environmental laws and policy. In addition to transparency, some RTAs also aim to increase awareness of environmental laws and policy through education and cooperation between the parties.

2.87. Several RTAs also encourage public participation in environmental matters. The importance of public participation is recognized in some RTAs and some go further by encouraging participation by civil society in addressing environmental issues. Public participation is also encouraged in around 26 RTAs on environment related cooperation activities. Another important form of public participation is in the implementation of the environmental chapter and/or side letter. Such provisions are found in 33 RTAs and range from the possibility for public participation to and obligation to solicit and take into account views of the public, and accommodate their requests to discuss implementation. In some cases institutional mechanisms such as national consultative or advisory committees are established by the RTA which include representatives of environmental and business organizations as well as the general public, which provide advice on implementation. Such mechanisms are found in RTAs involving the U.S., Canada and the EU.

2.88. A limited but increasing number of agreements (22 RTAs) have provisions on corporate environmental stewardship or corporate social responsibility. Such provisions are mainly found in recent RTAs involving the United States, Canada, the EU but also in a few RTAs among developing countries. These are all voluntary schemes to encourage the use of sound principles of corporate governance. Other voluntary measures include adopting internationally recognized standards of corporate responsibility and encouraging the use of incentives to achieve and maintain high standards of environmental protection.

2.89. Recourse to judicial procedures in case of violation of environmental law is also sometimes part of the overall system of governance of environmental provisions. Around 28 RTAs have provisions related to procedural guarantees and access to justice in environmental matters either in the RTA text itself or in side agreements, with 13 RTAs requesting the parties to provide sanctions and remedies in case of such violations.

2.4.6 Consultations and dispute settlement procedures

2.90. Several RTAs (56 RTAs), provide for consultations for any environment-related matter arising under the RTA's environment chapter and/or side environmental agreements. Such agreements that allow for consultations are mostly negotiated between developed and developing economies. Recourse to dispute settlement within the RTA or through MEAs for any matters arising under the environment chapter is also provided for in a relatively small number of agreements (21 RTAs). Conversely, the RTA's dispute settlement chapter does not apply to the environment chapter of the remaining 26 RTAs.

2.4.7 Conclusions

2.91. Environmental provisions are found in a growing number of RTAs. They are by nature cross cutting and therefore provisions on the environment tend to be found in a large number of chapters or sections of RTAs, in addition to any specific environment chapter. The provisions mainly affirm the parties' resolve to protect the environment and therefore not to lower their environment standards to attract trade and investment. In addition most Governments in their RTAs give themselves policy space to draft their own environmental legislation, based on international environment agreements, and most RTAs provide for exceptions for the environment. Other key provisions include cooperation, with a number of RTA parties agreeing to cooperate, including on issues relating to the environment, so as to learn from each other. There is also a greater recognition of the role played by the private sector, the public and non-governmental agencies in promoting better practices: a small but growing number of agreements include provisions on corporate responsibility, and provisions to solicit the opinions of the public when drafting or implementing environmental legislation.

2.5 Provisions on small and medium sized enterprises (SMEs) in RTAs[15]

2.5.1 Overview

2.92. Small and medium sized enterprises (SMEs) play a key role in most economies and are a key source of employment creation. According to the World Bank, formal SMEs contribute up to 45% of total employment and up to 33% of GDP in emerging economies, with the figures being significantly higher when informal SMEs are included. The OECD estimates the contribution of SMEs to be around 60%-70% of jobs in the OECD area. Because of their size, SMEs face particular challenges, especially relating to access to credit, and regulatory burdens and lack of transparency in regulation. To ease such difficulties, many countries have specific programmes to assist SMEs. Such programmes and the need to assist SMEs has also become increasingly part of RTA policy for some countries.

2.93. As of February 2016 around half (49%) of all RTAs notified to the WTO had provisions relating to small and medium sized enterprises (SMEs).[16] That share rises to almost 80% when RTAs that entered into force during 2011-2015 are taken into account. The trend therefore appears to be that such provisions are becoming more frequent in RTAs. The extent to which RTAs refer to SMEs, however, is wide ranging. References to SMEs in RTA texts range from a recognition of the importance of SMEs to cooperation activities in favour of SMEs and exemptions for SMEs from certain provisions in the RTA; SMEs are also referred to in sections or chapters relating to transparency. Different terminology is also used to identify SMEs, with an increasing number of provisions referring explicitly to micro enterprises. Nevertheless the frequency and importance of provisions on SMEs in RTA texts has increased over the years suggesting that RTA parties are increasingly using their RTAs to affirm the importance of and improve the involvement of SMEs in their mutual trade.

2.5.2 Cooperation provisions for SMEs in RTAs

2.94. The majority of references to SMEs in RTAs are included in chapters on cooperation, followed by government procurement, electronic commerce and customs and trade facilitation.

[15] Based on J.-A. Monteiro, "SME's-Related Provisions in Regional Trade Agreements", *WTO Staff Working Paper*, 2016, forthcoming.

[16] The extent to which such provisions are found in RTA texts can vary from a footnote in a chapter to an entire chapter dedicated to SMEs.

Frequently, reference may also be made to SMEs in an annex to the agreement. Around 68% of RTAs containing references to SMEs have provisions on cooperation, either along with other issues that the parties agree to cooperate on or as a standalone topic of cooperation. Cooperation on SMEs includes the exchange of information between the parties on SMEs, training, the promotion of business partnerships and exchange of experience including through an exchange of professionals, to training and technical cooperation including through conferences and dialogue between the parties; a few RTAs also include financial support provisions. Among the G20 economies some of the more detailed SME provisions on cooperation are found in the RTAs involving the European Union and Japan.[17] In addition, China has also included cooperation provisions for SMEs in several agreements including with Costa Rica, Peru, Chile, Hong Kong, China and Macao, China. Several RTAs also establish institutional mechanisms to ensure cooperation between the parties and to identify ways of deepening cooperation. This trend is being continued and strengthened in RTAs that are still to enter into force. For instance the Trans-Pacific Partnership (TPP) Agreement has a separate chapter on SMEs and sets up a Committee to, *inter alia,* identify ways to assist SMEs including through information sharing, workshops and seminars and develop programmes to assist SMEs to integrate better into global value chains.

2.95. In Government procurement, cooperation provisions aim at facilitating access by SMEs to the Government procurement markets of the parties. This includes providing access to SMEs through procurement procedures and focus on their special needs. Some agreements also facilitate this through cooperative activities such as an exchange of each others' respective approaches to procurement, with a view to improving access for SMEs to procurement markets. Several RTAs also set up committees on procurement whose activities include focusing on SMEs and suggesting ways to improve opportunities for SMEs. These trends are continued in agreements that have yet to enter into force such as the TPP Agreement under which the parties agree to cooperate to facilitate the participation by SMEs in procurement activities. The TPP also sets up a Committee on Government procurement with the aim of facilitating the participation of SMEs. In addition a separate Article of the chapter specifically addresses the facilitation of participation by SMEs including through the provision of comprehensive procurement related information in a single portal, electronically, and take into account the subcontracting role played by SMEs in their procurement contracts.

2.96. Cooperation provisions specifically for SMEs are also found in the investment chapter or section of RTAs which focuses on facilitating and promoting investment by SMEs in general and in electronic commerce provisions which focus on cooperation to promote and facilitate the use of electronic commerce by SMEs. Other provisions address regulatory barriers or other obstacles encountered by SMEs in the use of electronic commerce. Frequently, institutional arrangements or other forms of cooperation between the parties are also used to affirm the importance of and facilitate inter alia SME use of electronic commerce.

2.97. Another issue that is of special concern to SMEs, and which makes it difficult for them to export their products, is border and other procedures and formalities. Although customs procedures have usually always been included in RTAs, recent RTAs with trade facilitation provisions have grown. The issues of concern to SMEs that are included in these RTAs include cooperation but also recommendations to take into account the interests of SMEs when developing and implementing trade facilitation measures; in a few cases (involving EU agreements) the language goes further by the parties agreeing that their customs legislation shall inter alia aim to reduce costs and increase predictability for economic operators, including SMEs.

2.98. Cooperation as far as SMEs are concerned is also an issue included in the chapter or section on intellectual property rights. Generally, the cooperation provisions found aim at stimulating innovation and research by SMEs including through the exchange of information on their respective legal frameworks for intellectual property protection and enforcement and cooperation in science and technology. The Agreement between Japan and Thailand furthermore agrees that the parties shall take appropriate measures to provide assistance to SMEs for the acquisition of IPRs, including the reduction of official fees. An institutional framework is also created by some RTAs, including provisions such as utilization and commercialization of IPRs by SMEs.

[17] The agreement identified with the most detailed provisions on cooperation related to SMEs for instance was the EU's RTA with Central America. It contains provisions on cooperation and technical assistance for SMEs in the context of employment and social protection, services, technical barriers to trade, artisanal goods and organic goods. There is also a specific article on cooperation for MSMEs.

2.5.3 Exemption for SMEs in RTAs

2.99. The second most common SME related provision found in RTAs (42% of RTAs with SME provisions) is one that exempts the application of certain provisions of the RTA to SMEs. They ensure that Governments maintain their policy space to provide support to SME development without violating the provisions of the RTA. Such exemptions are found mostly in chapters or Articles related to Government procurement (67% of all RTAs providing exemptions); followed by financial services (35% of all RTAs providing exemptions); and services (26%).

2.100. In Government procurement most language included in RTAs carves out programmes for supporting SMEs or preferences provided to SMEs from the Chapter or Article dealing with Government procurement. Agreements negotiated by the United States and Canada for instance state that at least one provision in the Chapter does not apply to set asides in favour of small and minority owned businesses. The TPP Agreement also permits the provision of preferential treatment for SMEs as long as it as well as the criteria for eligibility, is transparent. In a small number of agreements the parties reserve their rights to continue or provide price preferences to SMEs. Other provisions include recognizing the importance of SME participation in government procurement.

2.101. In services and investment, SMEs are explicitly mentioned in some of the reservations taken by the parties in their services and investment schedules. These relate most often to financial services and provide similar policy space to the parties to continue programmes of assistance to SMEs without violating the Agreement. In some cases other sectors are also mentioned such as fishing and mining, which explicitly provide exceptions for the small scale sector.[18]

2.5.4 Other SME related provisions in RTAs

2.102. Transparency has become an important part of the texts of RTAs either through a separate Chapter on Transparency or transparency provisions in other chapters or both. In some of the RTAs involving the European Union for example contain specific provisions on SMEs through which the Parties aim to pursue, provide or establish and maintain an efficient and predictable regulatory environment for economic operators in the territories, especially small operators including SMEs.[19]

2.5.5 Conclusions

2.103. While the number and depth of provisions on SMEs in RTAs has increased over the years, much of the language remains that of best endeavour and seeks to ease trading conditions for SMEs and help them to participate more easily. This is done mainly through provisions to increase cooperation between the parties and provide assistance through information sharing on best practices, and encourage the development of SMEs by giving parties policy space to implement preferential programmes for SMEs. Provisions on SMEs are also notably not subject to the dispute settlement provisions of the Agreement.

2.104. To the extent that the provisions aim to increase participation by SMEs in international trade through cooperation and exchange of information, they would appear to be non-discriminatory. Discriminatory treatment for SMEs is nevertheless permitted by some RTAs.

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[18] The US-Chile RTA for instance limits registration for small scale fishing activities to Chilean natural or juridical persons and foreign natural or juridical persons with permanent residency in Chile. In US-Morocco, the mining of certain metals in Morocco is reserved for small scale miners from the particular region concerned.

[19] For instance the EU's agreements with the Republic of Korea, Georgia and Ukraine.