



**Asia-Pacific  
Economic Cooperation**

**Advancing** Free Trade  
for Asia-Pacific **Prosperity**

# **Trends and Developments in Provisions and Outcomes of RTA/FTAs Implemented in 2015 by APEC Economies**

---

**APEC Policy Support Unit**  
September 2016

Prepared by:  
Carlos Kuriyama  
Asia-Pacific Economic Cooperation Policy Support Unit  
Asia-Pacific Economic Cooperation Secretariat  
35 Heng Mui Keng Terrace  
Tel: (65) 6891-9600 Fax: (65) 6891-9690  
Email: [PSUGroup@apec.org](mailto:PSUGroup@apec.org) Website: [www.apec.org](http://www.apec.org)

Produced for:  
APEC Senior Officials  
Asia-Pacific Economic Cooperation

APEC#216-SE-01.9



This work is licensed under the Creative Commons Attribution-NonCommercial-ShareAlike 3.0 Singapore License. To view a copy of this license, visit <http://creativecommons.org/licenses/by-nc-sa/3.0/sg/>.

---

The author would also like to thank Genevieve Ann Jeffrey for her research assistance and Denise Cheok for her editorial assistance. The views expressed in this paper are those of the author and do not necessarily represent those of APEC Member Economies.

---

## CONTENTS

KEY FINDINGS.....	1
1. INTRODUCTION .....	3
2. RTA/FTAs WITHIN THE APEC REGION .....	5
3. GENERAL STRUCTURE OF RTA/FTAs IN FORCE 2015.....	10
4. ANALYSIS OF THE STRUCTURE OF SPECIFIC RTA/FTAs CHAPTERS .....	12
4.1 Rules of Origin.....	12
4.2 Cross-Border Trade in Services .....	18
4.3 Investment .....	24
4.4 Intellectual Property .....	31
5. CONCLUDING REMARKS .....	37
REFERENCES .....	39

### List of Figures

Chapter 2	
Figure 2.1: Cumulative Number of RTA/FTAs Signed and Enforced by APEC Economies ...	5
Figure 2.2: Top 20 Bilateral Trade Flows under RTA/FTAs in 2005 (USD Billion) .....	7
Figure 2.3: Top 20 Bilateral Trade Flows under RTA/FTAs in 2015 (USD Billion) .....	8
Chapter 4	
Figure 4.1: Known ISDS Cases Initiated.....	29
Figure 4.2: Cumulative ISDS Cases Initiated .....	29
Figure 4.3: ISDS Cumulative Cases with APEC Economies as Respondent vis-à-vis as Home of Claimant.....	30

### List of Tables

Chapter 2	
Table 2.1: Intra-APEC Trade Pairings Covered by RTA/FTAs .....	6
Table 2.2: Total APEC Trade Flows with the World .....	6
Chapter 3	
Table 3.1: Chapter Structure of RTA/FTAs .....	10
Chapter 4	
Table 4.1: Maximum Value of Importations to Waive Declarations/Certificates of Origin ...	16
Table 4.2: Concluded Cases.....	30

### List of Boxes

Box 1: The Evolution of ISDS Cases in the APEC Region.....	29
--	----

## KEY FINDINGS

- The number of RTA/FTAs in the APEC region shows a rising trend since the early 2000s. 163 RTA/FTAs had been signed by at least one APEC economy as at December 2015, of which 158 of them have already been enforced. In 2015, nine new RTA/FTAs were put in place, three more than in 2014.
- Among APEC members, the number of FTAs is increasing. In 2005, only 45 of the bilateral trade relationships between APEC economies were covered by any RTA/FTA (21% of total relationships). By the end of 2015, this number more than doubled, as 98 of these intra-APEC bilateral trade relationships were covered by any RTA/FTA (47% of total relationships). The share of intra-APEC trade covered by RTA/FTAs also went up from 37% to 48% during the same period. Likewise, the share of APEC trade with the world (intra and extra-APEC trade) under RTA/FTAs increased from 29% to 47%.
- Some of the reasons for the proliferation of RTA/FTAs are the following: i) the slower pace of the multilateral trade negotiations in the context of the Doha Round; ii) the changing face of trade, with non-traditional trade areas such as services trade, investment, intellectual property, among others, are becoming increasingly important and are not necessarily covered in a comprehensive manner at WTO; iii) interest from governments to establish clear rules to gain preferential access and address issues going beyond the traditional areas; iv) minimizing the effect of trade diversion caused by RTA/FTAs signed by other parties; and v) political and economic considerations, based on each party development level and size.
- The structure of RTA/FTAs is evolving. More agreements are incorporating chapters on Trade in Services and Investment. It is also more common to find RTA/FTAs with specific sectoral services chapters, such as Financial Services and Telecommunications. RTA/FTAs are also including more frequently chapters on Intellectual Property.
- The analysis of the nine RTA/FTAs analyzed in this report shows both areas of similarities and areas with striking differences that would make convergence very difficult to achieve. In general, the RTA/FTAs include many WTO-plus elements, but some WTO-minus elements have been found as well. For example, in some Cross Border Trade in Services chapter, it is possible to find WTO-plus clauses on transparency issues, but WTO-minus issues in domestic regulation, as some agreements do not include a clause on nullification or impairment, which establishes that parties cannot apply requirements that nullify or impair services commitments in ways that are not based on objective and transparent criteria.
- In terms of the Investment chapters. All agreements provide Most Favored Nation Treatment (MFN) treatment to both pre- and post-establishment stages with some exceptions. All of the RTA/FTAs analyzed provide national treatment for post-establishment, but only four of them offer it for the pre-establishment stage. Except one RTA/FTA, the rest include clauses on investor-state dispute settlement.
- With regards to the Intellectual Property (IP) chapters, their depth differs across the analyzed RTA/FTAs. They all include general provisions, such as the reaffirmation of the TRIPS Agreement and other international intellectual property agreements, enforcement provisions and national treatment on the application of IP. Most of the chapters also

include clauses on co-operation and some include issues concerning technology transfer as part of the co-operation activities among the parties. IP chapters usually include some specific types of IP, being trademarks and copyrights the most common ones. While some chapters include articles concerning intellectual property and public health, none of them contain specific sub-sections on pharmaceutical products, such as the case of TPP.

- In the Rules of Origin chapters, all agreements include product-specific rules of origin to qualify for preferential market access. The change of tariff classification and the qualifying value content are the two most utilized criteria used in these product-specific rules. All agreements also include *de minimis* provisions to facilitate meeting the origin criteria, as well as clauses on accumulation/cumulation of origin. Cross-cumulation is not present in any of the RTA/FTAs analyzed, but some of them acknowledge that provisions on the matter could be incorporated in the future. On the declaration/certification of origin, divergences remain among RTA/FTAs, since some of them only accept a certification by entities, while others only do self-certification. Nevertheless, the agreements enforced by Australia with China and Japan could provide a solution, as they accept both schemes.

## 1. INTRODUCTION

Following a similar report produced last year, as part of the APEC Information Sharing Mechanism on RTA/FTAs agreed in 2014<sup>1</sup>, this report analyzes the evolution of the number of RTA/FTAs by APEC economies in the past two decades and examines the general structure of the RTA/FTAs that APEC economies put in force during 2015. Nine agreements were included in this report, namely: the Australia-China; Australia-Japan; Canada-Korea; Chile-Thailand; China-Korea; Korea-New Zealand; Korea-Viet Nam; Malaysia-Turkey and Mexico-Panama FTAs<sup>2</sup>.

This report analyzes specific topics in these nine RTA/FTAs, and examines provisions in selected chapters to identify possible common patterns or recent trends. Where relevant, the report will examine the WTO-plus commitments included in those agreements; and compare those provisions with those agreed at the recent Trans-Pacific Partnership (TPP) Agreement.

One of the selected RTA/FTA chapters in this study, regarding Rules of Origin, is considered “traditional” as it is included in all RTA/FTAs to determine the requirements that goods need to meet in order to obtain preferential treatment in the markets of the signatory parties (for example, what percentage of inputs/materials need to be originating from the parties, how parties should certify that the product is originating from the parties, among others). This topic is increasingly relevant, with the proliferation of RTA/FTAs and the interest of firms to expand to new markets. Firms may be subjected to different rules under different RTA/FTAs, which could increase their costs as they adjust their production processes to meet the requirements imposed by each agreement to enjoy preferential market access.

This report also includes the analysis of the RTA/FTA chapters on Trade in Services and Investment. Early RTA/FTAs only included provisions on trade in goods, but an increasing number of trade agreements in recent years are including separate chapters on trade in services and investment.

The inclusion of services-related chapters are very relevant in current RTA/FTAs. Services are the most significant contributors in the APEC economy. They account for nearly 66% of the value added production in the APEC region<sup>3</sup>. Services sectors are important not just per se, but also as supporting economic activities for primary and manufacturing producers.

For the second consecutive year, we include an analysis of the investment chapters, noting the close links between trade and investment. There have also been broad public discussions on some investment-related topics, such as the inclusion (or exclusion) of investor-state dispute settlement provisions.

The report also includes the analysis of RTA/FTA chapters on Intellectual Property Rights, since RTA/FTAs are increasingly including chapters related to this area. Many stakeholders believe that RTA/FTAs should include provisions on intellectual property, given its association with trade. It is recognized that intellectual property could support trade liberalization efforts,

---

<sup>1</sup> 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](http://www.apec.org/Meeting-Papers/Ministerial-Statements/Trade/2014_trade.aspx)

<sup>2</sup> Not all the agreements included in this report are termed as Free Trade Agreements. For example, the official name of the Australia-Japan FTA is “Agreement between Australia and Japan for an Economic Partnership”. For simplicity, all trade agreements in this report are referred as FTAs.

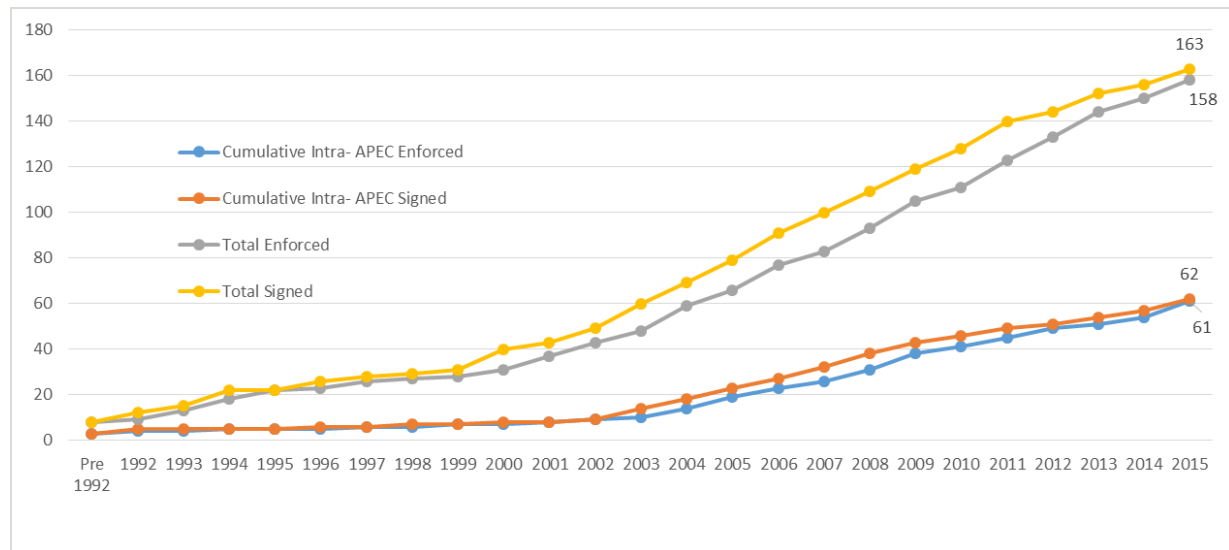
<sup>3</sup> Figure from year 2013 obtained from StatsAPEC ([http://statistics.apec.org/index.php/apec\\_psu/index](http://statistics.apec.org/index.php/apec_psu/index))

as it is welfare enhancing and motivates innovation. However, excessive intellectual property protection could have an opposing effect by increasing trade protectionism. A balance in the level of intellectual property protection therefore needs to be attained in order to support trade. Recent RTA/FTAs could provide some hints on what governments have done to strike this balance in their intellectual property chapters.

## 2. RTA/FTAs WITHIN THE APEC REGION

The number of trade agreements being signed by APEC economies has been on a rising trend and has accelerated in the last decade. Figure 2.1 illustrates the rapid increase in the number of RTA/FTAs being signed. As of December 2015, 163 agreements with at least one APEC economy had been signed and 158 of them had already been in force. Many of these RTA/FTAs had been negotiated among APEC members. 62 intra-APEC RTA/FTAs were also signed in the same period and all except one are currently in force.

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



Source: APEC Secretariat, Policy Support Unit

### *Reasons for the proliferation of RTA/FTAs*

In general, the driving forces behind the rapid proliferation of RTA/FTAs can be linked primarily to the failure of concluding multilateral trade negotiations in the context of the Doha Round<sup>4</sup>. In light of this failure, many economies have pushed to finalize agreements with other economies in order to obtain preferential access to other markets. This initial push also led economies to pursue further integration by signing more FTAs in order to offset trade diversion effects if they were left out of other FTAs<sup>5</sup>.

Table 2.1 shows that the percentage of trade pairings within the APEC region with an RTA/FTA in place more than doubled between 2005 and 2015, from 21% to 47%. In terms of trade flows, the increase in percentage of intra-APEC trade flows covered by RTA/FTA partners increased from approximately 37% to 48%.

<sup>4</sup> APEC Policy Support Unit (2015), "Trends and Developments in Provisions and Outcomes of RTA/FTAs Implemented in 2014 by APEC Economies", APEC#215-SE-01.14, APEC Policy Support Unit, p. 4-5.

Hartman, Stephen W. (2013), "The WTO, the Doha Round Impasse, PTAs and FTAs/RTAs". *The International Trade Journal*, 27:411-430, p. 421-427.

<sup>5</sup> APEC Policy Support Unit (2015), Op.Cit.,p. 5.



**Table 2.1: Intra-APEC Trade Pairings Covered by RTA/FTAs**

Year	Intra-APEC Trade Pairings	Intra-APEC Trade Pairings with RTA/FTAs	% of Intra-APEC Trade Pairings with RTA/FTAs	Intra-APEC Trade Flows (USD Billion)	Intra-APEC Trade Flows by RTA/FTA Partners (USD Billion)	% of Intra-APEC Trade Flows by RTA/FTA Partners (USD Billion)
2005	210	45	21%	6,647.9	2,487.6	37%
2015	210	98	47%	11,447.3	5,497.6	48%

Source: International Monetary Fund – Direction of Trade Statistics, Chinese Taipei’s Ministry of Economic Affairs, Bureau of Foreign Trade APEC Secretariat, APEC Secretariat, Policy Support Unit, Policy Support Unit Calculations

Likewise, in terms of the total APEC trade with the world, 29% of that trade took place with RTA/FTA partners in 2005. As seen in Table 2.2, this percentage increased to 47% in 2015, which highlights the importance of RTA/FTAs for APEC members and reflect their interest to strengthen economic integration through these types of agreements.

**Table 2.2: Total APEC Trade Flows with the World**

Year	Total APEC Trade Flows with RTA/FTA Partners (USD Billion)	Total APEC Trade Flows With the World (USD Billion)	% of APEC Trade Flows under FTA/RTA of APEC Trade Flows With the World
2005	2,808.8	9,794.8	29%
2015	7,769.5	16,509.1	47%

Source: International Monetary Fund – Direction of Trade Statistics, Chinese Taipei’s Ministry of Economic Affairs, Bureau of Foreign Trade APEC Secretariat, APEC Secretariat, Policy Support Unit, Policy Support Unit Calculations

Another factor driving the formation of RTA/FTAs is the changing face of trade, since non-traditional areas such as digital trade, services trade, intellectual property rights and foreign direct investments, are becoming increasingly important to economies. Current WTO multilateral agreements do not necessarily cover these areas to the extent that many governments prefer and many of the RTA/FTAs signed in recent years are including chapters on these topics addressing these concerns. For example, recent chapters on cross-border trade in services tend to include comprehensive disciplines and commitments.

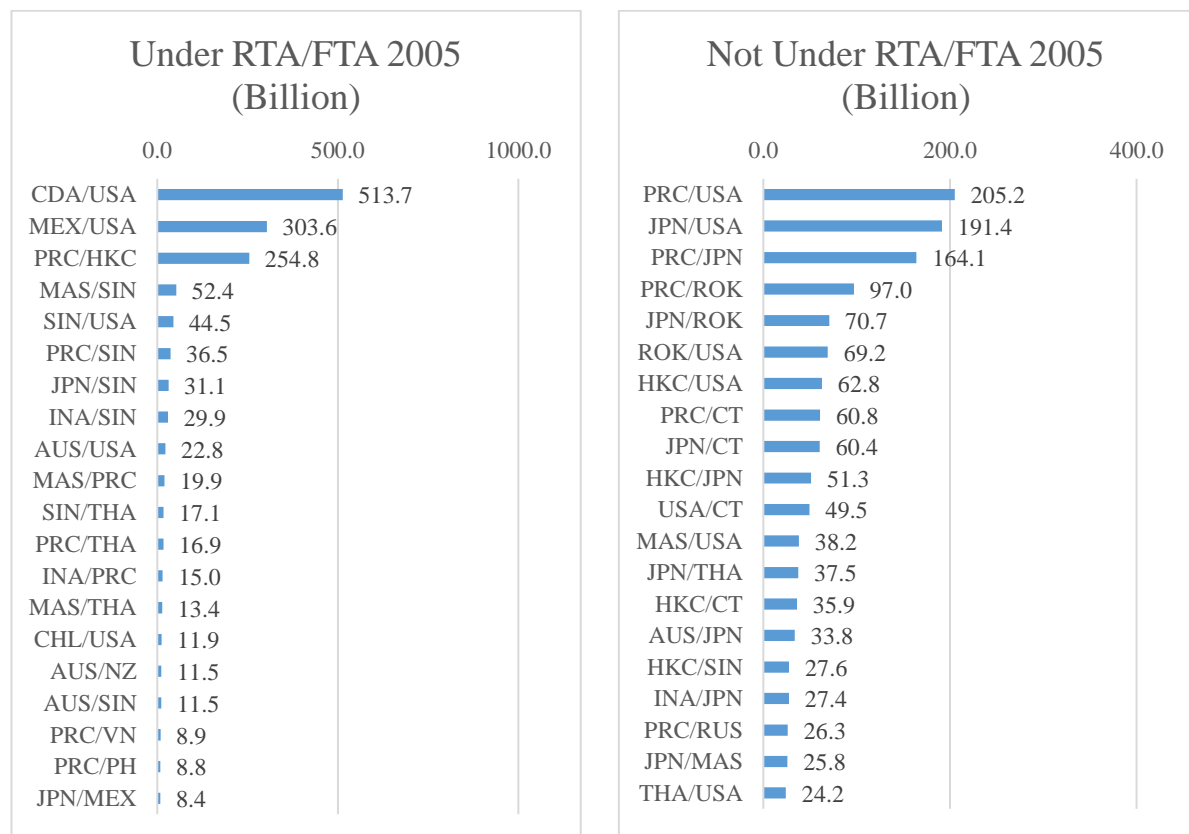
In the context of declining tariffs, RTA/FTAs seek to promote trade and investment by establishing clear rules to gain preferential access and addressing issues that go beyond traditional spheres. In many cases, the implementation of RTA/FTAs have triggered the implementation of behind-the-border reforms that have generated positive spillovers in terms of increased efficiency, lower transaction costs and higher economic growth.

Another factor that affects the formation of RTA/FTAs is the political economy that governments face. Both political and economic considerations are taken into account to start negotiations towards a trade agreement. These considerations could explain both the formation and the lack of RTA/FTAs amongst some key economies. In general, for small and developing economies that have been actively seeking RTA/FTAs, their interest has been to implement

these agreements with their largest trade partners. For large and developed economies, their interest to find RTA/FTA partners is more strategic, in both economic and political terms, as these agreements can be used by them as tools to maintain an economic presence and gain political influence with the other signatory parties.

By 2005 all 21 member economies of APEC had engaged in at least one RTA/FTA. Figure 2.2 shows that some important bilateral trade flows had already been covered by RTA/FTAs, such as the intra-NAFTA trade and that between China and Hong Kong, China. In addition, important intra-ASEAN trade flows had been covered by the ASEAN Free Trade Agreement (AFTA), such as those between Malaysia and Singapore; Indonesia and Singapore; Singapore and Thailand; and Malaysia and Thailand. Figure 2.2 also shows that in 2005 some large bilateral flows in APEC had not been covered by any RTA/FTAs, such as those amongst China, Japan and the United States, as well as other bilateral trade flows between Northeast Asian economies (i.e. China, Japan and Korea) and other partners.

**Figure 2.2: Top 20 Bilateral Trade Flows under RTA/FTAs in 2005 (USD Billion)**

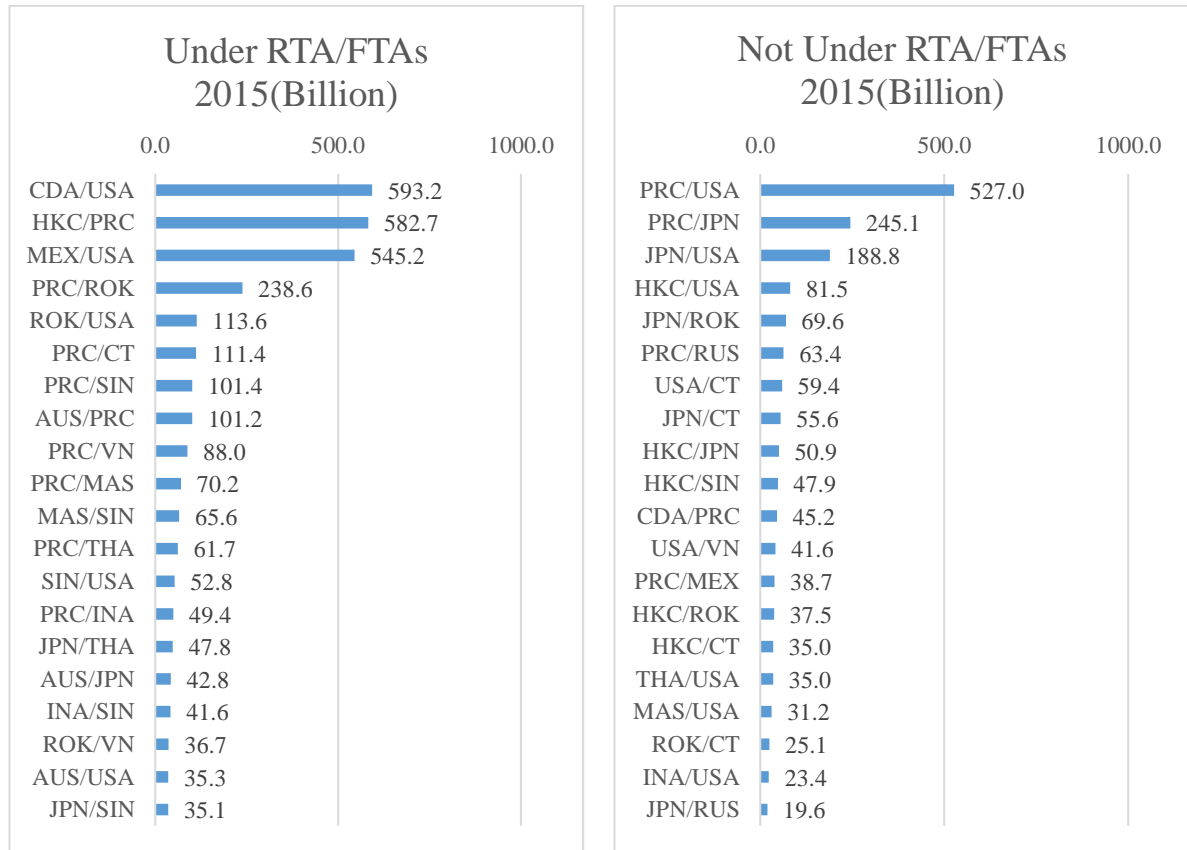


Source: International Monetary Fund – Direction of Trade Statistics, Chinese Taipei’s Ministry of Economic Affairs, Bureau of Foreign Trade APEC Secretariat, Policy Support Unit Calculations

Within the APEC region, the interest to engage deeper through RTA/FTAs has increased in recent years. Around 30% of the top 20 bilateral trade pairings not subjected to any RTA/FTA in 2005 had finally been covered under an RTA/FTA by 2015. Figure 2.3 illustrates that many bilateral trade flows by China, Japan and Korea in 2015 had finally been covered by RTA/FTAs. However, it is noticeable that trade flows among the three largest APEC economies (i.e. China, Japan and United States) are still not covered by any RTA/FTA. Figure 2.3 also shows that after the recently signed TPP is in force, important bilateral trade flows currently not under an RTA/FTA, will then be covered by the TPP, being the most significant that between Japan and

the United States. Other top 20 bilateral trade flows in APEC not currently under any RTA/FTAs will also be covered by TPP, such as those by the United States with Viet Nam and Malaysia, respectively.

**Figure 2.3: Top 20 Bilateral Trade Flows under RTA/FTAs in 2015 (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

Table 2.3 gives an idea about the relevance of TPP for all signatory parties. In 2015, 36% of the trade amongst TPP signatories was covered by a RTA/FTA. With the enforcement of the TPP, the percentage covered would increase to 43%. From an aggregate perspective, given the large share of trade, this signals the importance of TPP partners going forward and signals the importance of strengthening ties with these partners. From the individual perspective, the TPP will help their members to have access to a larger market with preferential access. APEC economies, such as Japan, New Zealand, United States and Viet Nam will experience a significant increase in the share of “intra-TPP trade” covered by an FTA. Even for APEC economies with a significant number of enforced bilateral/sub-regional RTA/FTAs with TPP partners, the implementation of the TPP means that many of their goods, services and investments will be able to enjoy improved market access conditions.

**Table 2.3: Trade by TPP Parties (Year 2015, USD billion)**





TPP Party	2015 Trade with the World (USD Billion)	Trade with TPP Partners (USD Billion)		Share of Trade with TPP Partners	
		With FTA before TPP	With All TPP Partners	With RTA/FTA before TPP	With All TPP Partners of Trade with the World
Australia	409.6	118.2	128.7	29%	31%
Brunei Darussalam	12.1	5.3	5.7	43%	48%
Canada	870.0	613.7	639.5	71%	74%
Chile	124.7	40.7	40.7	33%	33%
Japan	1272.8	159.9	368.3	13%	29%
Malaysia	375.9	119.0	153.4	32%	41%
Mexico	815.5	579.7	585.2	71%	72%
New Zealand	71.3	16.8	30.7	24%	43%
Peru	75.0	23.7	24.5	32%	33%
Singapore	648.6	193.1	194.5	30%	30%
United States	3746.2	1264.1	1533.6	34%	41%
Viet Nam	378.0	52.1	105.6	14%	28%
<b>Total TPP Parties</b>	<b>8799.8</b>	<b>3186.3</b>	<b>3810.4</b>	<b>36%</b>	<b>43%</b>

Source: International Monetary Fund – Direction of Trade Statistics, APEC Secretariat, APEC Secretariat, Policy Support Unit, Policy Support Unit Calculations

### 3. GENERAL STRUCTURE OF RTA/FTAs IN FORCE 2015

A quick mapping with respect to the structure of RTA/FTAs implemented in 2015 shows that the traditional chapters in trade agreements, such as Trade in Goods, Rules of Origin, Customs Provisions/Administration, Technical Barriers to Trade, Sanitary and Phytosanitary Measures and Dispute Settlement appear in all of these RTA/FTAs (see Table 3.1).

**Table 3.1: Chapter Structure of RTA/FTAs**

Chapters	Australia-China	Australia-Japan	Canada-Korea	China-Korea	Chile-Thailand	Korea-New Zealand	Korea-Viet Nam	Malaysia-Turkey	Mexico-Panama
Trade in Goods	Yellow	Yellow	Yellow	Yellow	Yellow	Yellow	Yellow	Yellow	Yellow
Rules of Origin	Yellow	Yellow	Yellow	Yellow	Yellow	Yellow	Yellow	Yellow	Yellow
Customs Administration/Trade Facilitation	Yellow	Yellow	Yellow	Yellow	Yellow	Yellow	Yellow	Yellow	Yellow
Technical Barriers to Trade	Yellow	Yellow	Yellow	Yellow	Yellow	Yellow	Yellow	Yellow	Yellow
Sanitary and Phytosanitary Measures	Yellow	Yellow	Yellow	Yellow	Yellow	Yellow	Yellow	Yellow	Yellow
Trade Remedies	Yellow	Diagonal	Yellow	Yellow	Yellow	Yellow	Yellow	Yellow	Yellow
Cross Border Trade in Services	Yellow	Yellow	Yellow	Yellow	Yellow	Yellow	Yellow	White	Yellow
Financial Services	Vertical Stripes	Yellow	Yellow	Yellow	Yellow	Yellow	Vertical Stripes	White	Yellow
Telecommunications	Vertical Stripes	Yellow	Yellow	Yellow	White	Vertical Stripes	Vertical Stripes	White	Yellow
Movement of Business People	Yellow	Yellow	Yellow	Yellow	Yellow	Yellow	Vertical Stripes	Yellow	Yellow
Investment	Yellow	Yellow	Yellow	Yellow	Yellow	Yellow	Yellow	Yellow	Yellow
Government Procurement	Yellow	Yellow	Yellow	Yellow	Yellow	Yellow	Yellow	Yellow	Yellow
Intellectual Property	Yellow	Yellow	Yellow	Yellow	Yellow	Yellow	Yellow	Yellow	Yellow
Competition Policy	Yellow	Yellow	Yellow	Yellow	Yellow	Yellow	Yellow	Yellow	Yellow
E-Commerce	Yellow	Yellow	Yellow	Yellow	Yellow	Yellow	Yellow	Yellow	Yellow
Co-operation/Promotion	Yellow	Yellow	Yellow	Yellow	Yellow	Horizontal Stripes	Yellow	Yellow	Yellow
Labor	Yellow	Yellow	Yellow	Yellow	Yellow	Yellow	Yellow	Yellow	Yellow
Environment	Yellow	Yellow	Yellow	Yellow	Diagonal	Yellow	Yellow	Yellow	Yellow
Transparency	Yellow	Yellow	Yellow	Yellow	Yellow	Yellow	Yellow	Yellow	Yellow
Dispute Settlement	Yellow	Yellow	Yellow	Yellow	Yellow	Yellow	Yellow	Yellow	Yellow
Agriculture, forestry and fisheries co-operation	Yellow	Yellow	Yellow	Yellow	Yellow	Yellow	Yellow	Yellow	Yellow
Food Supply	Yellow	Yellow	Yellow	Yellow	Yellow	Yellow	Yellow	Yellow	Yellow
Energy and Mineral Resources	Yellow	Yellow	Yellow	Yellow	Yellow	Yellow	Yellow	Yellow	Yellow
 Included in the Trade in Goods chapter									
 Addressed in Trade in Services chapter and its annexes									
 Addressed in the Economic Cooperation chapter									
 Other chapters include articles on co-operation related to specific topics.									

Source: APEC Secretariat, Policy Support Unit

Other traditional chapters, such as those on Trade Remedies, appear in all RTA/FTAs, except in the Australia-Japan agreement, which includes specific provisions on anti-dumping,

countervailing duties and safeguards 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. All RTA/FTAs entering into force in 2015, except one, 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). In addition, more agreements are including chapters on specific services sectors. For instance, the Australia-Japan; Canada-Korea; China-Korea and Mexico-Panama FTAs include chapters on financial services and telecommunications, as well as a chapter on mode 4 of services provision (i.e. movement of natural/business persons). The Chile-Thailand FTA also includes a separate chapter on trade in financial services.

Table 3.1 also corroborates an increasing interest of including chapters on Investment and Intellectual Property in RTA/FTAs. Seven of the RTA/FTAs entering into force in 2014 include a specific chapter on these two areas. The Chile-Thailand and Malaysia-Turkey FTAs are the only agreements without these chapters.

As for the other topics, there is also a rising trend to incorporate Transparency and E-Commerce chapters in RTA/FTAs. In fact, all RTA/FTAs put in force in 2015 include a specific chapter on Transparency and six of them also include a chapter on E-Commerce. Chapters on Competition Policy appear in five out of the nine RTA/FTAs; chapters on Government Procurement and Environment are present in three RTA/FTAs; and chapters on Labor are part of two RTA/FTAs

Economic Co-operation/Promotion is addressed in several RTA/FTAs, but in different ways. Five FTA/RTAs include a general chapter on this topic, addressing several areas (i.e. Australia-Japan; China-Korea; Chile-Thailand; Korea-Viet Nam; and Malaysia-Turkey FTAs), but some agreements include chapters addressing co-operation in specific areas. For example, the Korea-New Zealand FTA incorporates a chapter on Agriculture, Forestry and Fisheries Co-operation.

The Australia-Japan FTA includes two *sui generis* chapters on Food Supply, and Energy and Mineral Resources, which do not appear in other RTA/FTAs. These chapters basically incorporate commitments for the parties not to use any prohibitions or restrictions to the exports of essential food, as well as energy and mineral resources.

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

### 4.1 Rules of Origin

In order to qualify for preferential access in the market of any RTA/FTA counterpart, it is necessary to determine if the product originated from a party that is part of the RTA/FTA. Preferential access is only offered to products that are either wholly obtained or produced within the territory of the parties or meet specific rules agreed by the RTA/FTA parties regarding the production process, the origin and/or the value of the raw materials and intermediate products used to produce the final good. For example, if economy A and economy B have implemented an FTA establishing that the rule for instant coffee to gain preferential market access is that the coffee beans are harvested from either economy A or B, then it means that any instant coffee produced in economy A with beans from economy C cannot be exported to economy B enjoying this preferential access.

All trade agreements include chapters or clauses on rules of origin. The proliferation of RTA/FTAs has triggered many debates with respect to the usefulness of RTA/FTAs as a tool to expand trade and strengthen regional economic integration. One of the debates is related to the rules of origin, more precisely, whether having different rules of origin among RTA/FTAs is detrimental for the international trading system or not. On the one hand, those agreeing with the “spaghetti bowl” effect of trade agreements<sup>6</sup>, argue that the conundrum of not having the same rules of origin harms trade as it increases trade transaction costs to companies. On the other hand, others recognize those costs, but argue that FTAs and their rules of origin may have more benefits than costs, as they have helped companies to expand their businesses<sup>7</sup>.

Simpler rules of origin and the harmonization of these rules across trade agreements can certainly facilitate trade and help expand it. This section aims to compare the provisions in the Rules of Origin chapters among the RTA/FTAs implemented by APEC economies in 2015, and identify converging features.

#### *a. Product-Specific Rules*

None of the nine agreements analyzed in this report include a fixed general rule to determine that a products meets the origin criteria to enjoy preferential treatment. Instead, the criteria differ depending on the product. All agreements include an annex of Product-Specific Rules in which the criteria is detailed. All of the agreements also include the following criteria from the APEC Model Measures for RTA/FTAs:

- Wholly obtained or produced in the territory of the parties
- If not produced entirely with originating products and non-originating products are used, they must satisfy a specific requirement such as:

---

<sup>6</sup> The term “spaghetti bowl” was first coined by Professor Jagdish Bhagwati in 1995. For more information, see Bhagwati, Jagdish (1995), “US Trade Policy: The Infatuation with FTAs”, Discussion Paper Series No. 726, Columbia University, April. Available at: [http://www.columbia.edu/cu/libraries/inside/working/Econ/ldpd\\_econ\\_9495\\_726.pdf](http://www.columbia.edu/cu/libraries/inside/working/Econ/ldpd_econ_9495_726.pdf)

<sup>7</sup> For example, see Kawai, Masahiro & Ganeshan Wignaraja (2010), “Free Trade Agreements in East Asia: A Way Toward Trade Liberalization?”, ADB Briefs, No. 1, June. Available at: <http://www.adb.org/publications/free-trade-agreements-east-asia-way-toward-trade-liberalization>

- Change of tariff classification (i.e. the product has undergone a transformation that it falls into a different tariff classification to those applied to the inputs or components used)
- Qualifying value content (i.e. a minimum percentage of value that needs to be added)
- Specific transformation (i.e. meeting a specific production process)
- A combination of the above or one criteria among two or three listed.

Most of the FTAs use all the criteria, with the change of tariff classification and qualifying value content criteria being the two most likely used. In fact, agreements such as the Chile-Thailand and the China-Korea FTAs include mostly those two requirements in their Product-Specific Rules, together with the wholly obtained criterion. The rest of the agreements also include specific transformation requirements, which are also used in the TPP's Product-Specific Rules. These transformation requirements are generally seen in sectors such as textiles and apparel. Chemical products also are conferred with origin in the Australia-China; Australia-Japan; Canada-Korea and Chile-Thailand FTAs if they meet a chemical reaction criterion<sup>8</sup>.

The Product-Specific Rules are usually negotiated using the Harmonized System (HS) at the 6-digit level (subheadings). However, in some cases, most of the Product-Specific Rules could be negotiated at the 4-digit level (headings), as it is the case of the Canada-Korea and Malaysia-Turkey FTAs.

*b. Qualifying Value Content*

In the case of products that are subject to a qualifying or regional value content to meet the origin criteria, most RTA/FTAs mention that the product must have qualifying value content of not less than a certain percentage, which can vary depending on the agreements and the sectors<sup>9</sup>. For all agreements, except the Canada-Korea and Malaysia-Turkey FTA, the method used is the indirect or build-down method:

$$QVC = (V - VNM) / V \times 100\%$$

where: V= value of the transaction of the product

VNM= value of the non-originating materials

As it is the case of TPP, the Korea-New Zealand and Korea-Viet Nam FTAs also use the direct or build-up method in some cases as follows:

---

<sup>8</sup> For example, the Australia-China FTA mentions that “notwithstanding the applicable product specific rules of origin, any good of Chapters 27 to 40 that is the product of a chemical reaction shall be considered to be an originating good if the chemical reaction occurred in the territory of a Party. For the purposes of this Section, a “chemical reaction” is a process (including a biochemical process) which results in a molecule with a new structure by breaking intramolecular bonds and by forming new intramolecular bonds, or by altering the spatial arrangement of atoms in a molecule.”(Annex II, Section B).

<sup>9</sup> For example, the cases of QVC in the Korea-New Zealand FTA varies between 30% and 40%. Previous studies in APEC have shown that the required qualifying content could range between 20% and 80% among different FTAs. See APEC Committee on Trade and Investment (2009). “Identifying Convergences and Divergences in APEC RTAs/FTAs”, p.20. Available at: [http://www.apec.org/~media/Files/Groups/RTAs\\_FTAs/Convergences\\_Divergences\\_in\\_APEC\\_RTAs-FTAs.doc](http://www.apec.org/~media/Files/Groups/RTAs_FTAs/Convergences_Divergences_in_APEC_RTAs-FTAs.doc)



$$QVC = VOM/V$$

where VOM = value of the originating materials

The Canada-Korea FTA does not specify a formula for a qualifying value, but states that the value of non-originating materials cannot exceed a given percentage of the transaction value. The Canada-Korea FTA also establishes a different method to calculate the qualifying value of some vehicles and their parts and components, by establishing that the value of non-originating materials cannot exceed a given percentage of the net cost of the product. Similar to the TPP approach, this agreement establishes the specific activities that could be included in the calculation of the net cost<sup>10</sup>.

### c. *De Minimis*

All the agreements in this report include *de minimis* clauses, allowing products not meeting the Product-Specific Rules criterion of change in tariff classification to be considered as originating, if the value of the non-originating materials represent at most a given percentage of the value of the product. This is consistent with the APEC Model Measures concerning this issue. Some agreements, for particular products, such as textiles and apparel, use the weight instead of the value of the materials/product as criterion.

The scope of the application of the *de minimis* clause varies among RTA/FTAs. For example, the Australia-China and Chile-Thailand FTAs include a *de minimis* for non-originating materials equivalent to 10% of the value of the product for all goods that do not meet the change in tariff classification requirement. In the case of the Australia-Japan; Canada-Korea; China-Korea; Korea-New Zealand; Korea-Viet Nam and Mexico-Panama FTAs, they also include the same *de minimis* percentage on the value, but exclude the application to textiles and apparel. For textiles and apparel, the *de minimis* is applicable on the weight of non-originating materials. Except the Mexico-Panama FTA, where the weight of these materials cannot exceed 7% of the value of the merchandise, the rest of FTAs with this type of *de minimis* clause establish a 10% threshold instead.

Exceptions to the application of the *de minimis* clause are also found in some RTA/FTAs for the case of some products within the HS chapters 01-24 (agriculture and other food-related products), in which the non-originating materials used in the production of those goods belongs to a different HS sub-heading from that of the good for which the origin is being determined. For example, the China-Korea; Korea-New Zealand and Mexico-Panama FTAs.

---

<sup>10</sup> For example, Article 3.4, Paragraph 4 of the Canada-Korea FTA establishes three ways that the producer could use to calculate the net cost: (a) calculate the total cost incurred with respect to all goods produced by that producer, subtract any sales promotion, marketing and after-sales service costs, royalties, shipping and packing costs, and non-allowable interest costs that are included in the total cost of all those goods, and then reasonably allocate the resulting net cost of those goods to the good; (b) Calculate the total cost incurred with respect to all goods produced by that producer, reasonably allocate the total cost to the good, and then subtract any sales promotion, marketing and after-sales service costs, royalties, shipping and packing costs and non-allowable interest costs that are included in the portion of the total cost allocated to the good; or (c) reasonably allocate each cost that forms part of the total cost incurred with respect to the good so that the aggregate of these costs does not include any sales promotion, marketing and after-sales service costs, royalties, shipping and packing costs, or non-allowable interest costs.

The Malaysia-Turkey FTA has a more complex *de minimis* system, as it uses different percentages and units of measurement (i.e. ex-works price, weight of the final product, weight of the yarn, weight of the fabric) depending on the product.

*d. Accumulation/Cumulation*

All agreements include clauses on accumulation/cumulation which helps producers to meet the origin criteria. The intention is for one FTA party to consider as originating materials those that are originating from the other FTA party.

Some agreements such as the Canada-Korea; Korea-New Zealand and Mexico-Panama FTAs also specify that an originating good can be produced in the territory of one or both parties by one or more producers. The TPP also includes a similar provision.

The Malaysia-Turkey FTA provides a more flexible scope to accumulate origin, as it states that materials falling under HS chapters 25 to 97, originating in the European Union and ASEAN could be considered as originating when incorporated into a product being processed in Malaysia or Turkey. For this to happen, the operations in Malaysia or Turkey need to go beyond insufficient/minimal working or processing as stated in the agreement (i.e. simple painting, ironing of textiles and simple mixing of products, among others).

Some agreements are also including provisions in which the parties could review or incorporate other forms of cumulation via cross-cumulation or including partners from other economic integration agreements.

*e. Declaration and Certification of Origin*

In order to apply for preferential treatment, the declared goods need to be accompanied for a preferential declaration/certificate of origin. The procedures to issue the certificate of origin varies across agreements.

One of the main differences relates to how the origin of a good is certified. In the cases of the Chile-Thailand; Korea-Viet Nam; Malaysia-Turkey and Mexico-Panama FTAs, the certificate of origin must be issued by entities, either a competent authority or an authorized body by the party involved. In the Canada-Korea and Korea-New Zealand FTAs, the approach is similar to the TPP, as it uses a self-certification system in which exporters need to produce the certificate in order for importers to claim preferential treatment. The Australia-China and Australia-Japan FTAs have a particular feature, as they accept both self-certification and the certificate of origin issued by authorized bodies. For self-certification, while the Australia-Japan FTA indicates that the declaration of origin can be completed by any importer, exporter or producer, the Australia-China FTA mentions that this declaration can be completed by exporters or producers only.

In terms of the characteristics of the declaration/certificate of origin, except the Australia-Japan FTA, all FTAs certifying origin through competent authorities or authorized entities require the use of a specific form agreed by the parties. The Australia-Japan FTA does not follow any specific format, it only establishes the minimum information required for the certificate to be valid. In the case of the FTAs using self-certification, both the Canada-Korea and Korea-New Zealand FTA provide guidelines to prepare the certificates of origin.

Regarding language, the Australia-China; Chile-Thailand; China-Korea; New Zealand-Korea; New Zealand-Viet Nam; and Malaysia-Turkey FTAs establish that the documents accrediting the origin declaration/certification must be done in English. The Canada-Korea FTA allows a declaration or a translation to Korean or English for goods exported to Korea, and to English or French, for goods exported to Canada. The Australia-Japan FTA does not make any explicit reference to language, as it only refers that the documentation needs to be in accordance to laws and regulations of the importing party. However, it is understood that the customs authorities from both parties use English. Only the Mexico-Panama FTA establishes a different language, as it states that the certificates must be filled out in a specific format in Spanish.

*f. Validity of Declarations/Certificates of Origin*

With the exception of the Canada-Korea and Korea-New Zealand FTAs, the duration of the certificates of origin for the other agreements is equivalent to 1 year since the date it was signed, similar to the duration agreed at TPP. In the case of the Korea-New Zealand FTA, the duration is for two years. The Canada-Korea FTA also indicates two years of validity, but it allows longer periods as specified in importing party's laws and regulations.

*g. Waiver of Declaration/Certificate of Origin*

In certain circumstances, FTA parties do not require the certificate of origin. One of the most common reasons is for low-value importations, as stated in the APEC RTA/FTA Model Measures. The certification is not required if the import does not exceed a certain value. The amounts vary across FTAs. The following table shows the limits in each FTA for low-value importations:

**Table 4.1: Maximum Value of Importations to Waive Declarations/Certificates of Origin**

<b>RTA/FTA</b>	<b>Maximum Value</b>
Australia-China	AUD 1,000 (Australia); RMB 6,000 (China)
Australia-Japan	AUD 1,000 (Australia); JPY 100,000 (Japan)
Canada-Korea	USD 1,000
Chile-Thailand	USD 200
China-Korea	USD 700
Korea-New Zealand	USD 1,000
Korea-Viet Nam	USD 600
Malaysia-Turkey	EUR 500 (small packages for Turkey); EUR 1,200 (travelers' personal luggage for Turkey); USD 200 (Malaysia)
Mexico-Panama	USD 1,000

Source: FTA texts. Compiled by the APEC Secretariat, Policy Support Unit

All agreements note that the waiver will not apply in cases that the imports are part of a series of importations that may reasonably be conducted with the purpose of avoiding the submission of the documentation declaring/certifying origin. They also note that this waiver could also take place in the cases that the importing party authorizes.

*h. Verification of Origin*

All the FTAs included in this report includes clauses to conduct an ex-post verification of origin. The intention is to make sure the rules to comply with origin have been followed and the imported products duly got preferential treatment. All agreements establish detailed procedures to verify origin. The procedures are not necessarily similar across all agreements and timelines for the exporting side to provide information or respond a request to the importing side also differ. For example, while the Mexico-Panama FTA states that the authorities of the exporting side have 60 days to provide to the authorities of the importing side the requested information for the investigation; the Malaysia-Turkey FTA establishes a 90-day period from the time the written request is made to provide the information.

The ways that the verification of origin are conducted are not necessarily similar. While the processes in general include the request of information to the exporting party authorities, exporters and/or producers, requests to validate documents, and visits to the exporters or producers; each FTA could have different procedures to conduct each step. For example, before conducting a verification visit, the Korea-New Zealand FTA establishes that the importing party needs to notify the exporter or producer and the customs administration of the exporting party of their intentions, and obtain a written consent of the exporter or producer within 30 days of the receipt of notification. The Chile-Thailand FTA establishes that the notification of the intention to visit the exporting/producer premises has to be done at least 90 days before the intended day of the visit, and the competent authority of the exporting party needs to obtain the consent from the exporter or producer.

*i. Records and Confidentiality*

For the purpose of post-verification checks, parties usually establish an obligation to keep records for a number of years. For most of the FTAs included in this report, copies of the certificates/declarations of origin need to be kept for at least five years since the document was signed. The exceptions are the Australia-China; China-Korea and Malaysia-Turkey FTAs, which includes a minimum period of 3 years for record keeping.

Only six FTAs include clauses on confidentiality (i.e. Australia-Japan; Canada-Korea; Chile-Thailand; China-Korea; Korea-Viet Nam and Mexico-Panama FTAs). This clause notes that the disclosure of certain information could prejudice the competitive position of a firm, and by providing assurances on the confidentiality of the information, firms could be more willing to collaborate with the authorities in the origin verification process. There are some minor differences in the scope of the confidentiality provisions. For example, the Australia-Japan; Chile-Thailand and Mexico-Panama FTAs only assures the confidentiality of the information provided to the authorities as confidential, but the Canada-Korea; China-Korea and Korea-Viet Nam FTAs assures the confidentiality of all the information provided to the authorities. Under certain circumstances and conditions, some agreements, such as the Australia-Japan; Canada-Korea; China-Korea and Korea-Viet Nam FTA, allow the parties to release this information.

*j. Review and Appeal*

The Canada-Korea FTA provides an explicit clause on review and appeal with regards to the determination of origin of a product. In this agreement, the parties agreed to “(a) provide access to at least one level of administrative review independent of the official or office responsible for the determination under review; and (b) in accordance to domestic law, judicial or quasi-

judicial review of the determination or decision taken at the final level of administrative review.”<sup>11</sup>.

The Malaysia-Turkey and Mexico-Panama FTA also include a clause on review and appeal, but they apply it to a wider array of topics, not just to the determination/certification of origin. For example, the Malaysia-Turkey FTA allows to review and appeal any matters concerning the eligibility of preferential treatment, in accordance with domestic laws and regulations. The Mexico-Panama FTA states that the review and appeal process can be about any matter covered by the Rules of Origin chapter.

*k. Sanctions*

Six agreements include specific provisions on sanctions (i.e. Australia-Japan; Canada-Korea; Chile-Thailand; Korea-Viet Nam; Malaysia-Turkey and Mexico-Panama FTAs). All of them, except the Mexico-Panama FTAs, specify that the penalties are imposed in accordance to the domestic laws. While the focus of the provision in the Australia-Japan and Chile-Thailand FTAs is on false documentation to obtain a certificate of origin or declare origin, the other agreements emphasize other matters. For example, the Korea-Viet Nam FTA discusses the sanctions on violations regarding tariff classification, customs valuation, origin and claims for preferential treatment. The Malaysia-Turkey FTA states that penalties shall be imposed to anyone using false information to obtain preferential treatment. The Canada-Korea FTA includes a more comprehensive clause by saying that penalties can be imposed to any violation of laws and regulations related to the Rules of Origin chapter.

## 4.2 Cross-Border Trade in Services

As mentioned by the APEC Policy Support Unit (2015), there has been a positive trend in recent years to include services-related chapters in FTAs<sup>12</sup>. Of the nine trade agreements enforced by APEC economies in 2015, eight of them include services chapters (Australia-China; Australia-Japan; Canada-Korea; China-Korea; Chile-Thailand; Korea-New Zealand; Korea-Viet Nam and Mexico-Panama FTAs). Whilst some agreements such as the Australia-Japan; Canada-Korea; China-Korea; Chile-Thailand and Mexico-Panama FTAs, include disciplines on financial services and/or telecommunication services in different chapters; the Australia-China; Korea-New Zealand and Korea-Viet Nam FTAs do not include separate sectorial chapters and all the services sectors are ruled by the Trade in Services chapter<sup>13</sup>.

In general, all the Services chapters include coverage of the four modes of services provisions according to GATS<sup>14</sup> and include commitments that are considered GATS-plus, meaning that

---

<sup>11</sup> See Article 4.11, paragraph 2 of the Canada-Korea FTA.

<sup>12</sup> APEC Policy Support Unit (2015), Op.Cit. p. 9.

<sup>13</sup> This section will not analyze the provisions of sectoral services chapters. It will only cover the analysis of the general chapter on cross-border trade in services.

<sup>14</sup> As mentioned in the APEC Policy Support Unit's Second-Term Review of APEC's Progress towards the Bogor Goals (2016, forthcoming), there are four modes of services provision. Cross-border supply (mode 1) is defined to cover services flows from the territory of one Member into the territory of another Member (e.g. banking or architectural services transmitted via telecommunications or mail); consumption abroad (mode 2) refers to situations where a service consumer (e.g. tourist or patient) moves into another Member's territory to obtain a service; commercial presence (mode 3) implies that a service supplier of one Member establishes a territorial presence, including through ownership or lease of premises, in another Member's territory to provide a service (e.g. domestic subsidiaries of foreign insurance companies or hotel chains); and presence of natural persons (mode

the signatory parties tend to offer market access and national treatment conditions in ways that go beyond what they offered in the GATS multilateral negotiations or in their commitments to accede to WTO. Moreover, Services chapters tend to contain some WTO-plus disciplines, which go further to what was agreed in GATS, for instance, on transparency issues.

Unfortunately, it is not possible to make a comparison of the services provisions in recent RTA/FTAs with the Model Measures for RTA/FTAs since APEC economies could not agree on Trade in Services or Cross-Border Trade in Services model measures, when this initiative was endorsed in 2008.

*a. Scope and Coverage*

All agreements specify that the Services chapter applies to measures adopted or maintained by the signatory parties affecting trade in services, with some exceptions in place. These exceptions are very standard across all RTA/FTAs and are related to the provision of air transport services, government procurement, subsidies and measures affecting people seeking employment. Most agreements also include an exception for services provided by the government in its territory in the exercise of its authority. Also, some agreements do not apply the chapter to financial services, either because they are covering this sector in a specific chapter on that matter or they are leaving open the possibility to negotiate disciplines in financial services in the future. One particular exemption is found in the Korea-Viet Nam FTA, which states that the Services chapter does not apply to activities of cabotage in maritime transport services.

In terms of the FTAs' approaches to sectoral coverage of the services provisions, four of the agreements, namely the Australia-Japan; Canada-Korea; Korea-New Zealand and Mexico-Panama FTAs, use a negative list to make their sectoral commitments, similarly to the approach used in TPP. The negative list approach means that market access, national treatment, local presence and other commitments are extended to all services sectors, except for the specific reservations listed in the annexes of non-conforming measures. The Chile-Thailand; China-Korea and Korea-Viet Nam FTA use a positive list approach instead, which states that the sectoral services commitments apply only to those sectors listed in the schedule of specific commitments in the noted terms and conditions.

The Australia-China FTA used a mixed approach instead, allowing for the use of both the positive and negative list approach. In this regard, China's sectoral services commitments are included using a positive list approach, while Australia has incorporated their services commitments using a negative list approach.

Among those agreements using a negative list, all of them include ratchet obligations, in which any relaxation of non-conforming measures by one of the parties, which could restrict more obligations on national treatment, market access, most-favored nation treatment and local presence, are not applicable to the other party. In other words, ratchet obligations in the Services chapter binds the obligations assumed by the FTA parties, as well as any further unilateral liberalization implemented by these parties. This is similar to the approach undertaken by TPP.

---

4) consists of persons of one Member entering the territory of another Member to supply a service (e.g. accountants, doctors or teachers).

*b. National Treatment*

All agreements include a clause giving not less favorable treatment to foreign services and services suppliers as they do to their own local services and services suppliers. However, agreements such as the Canada-Korea; Korea-New Zealand; Korea-Viet Nam and Mexico-Panama FTA, introduce a clarification, saying that this treatment is granted to foreign services and service suppliers only in similar circumstances (“like circumstances”). This clarification is also included in TPP.

The Australia-Japan FTA also include an additional exception in the national treatment clause by stating that dispute settlement procedures will not apply to this article in cases of a measure falling within the scope of international agreements on the avoidance of double taxation.

*c. Most Favored Nation Treatment (MFN)*

Six agreements, the Australia-China; Australia-Japan; Canada-Korea; Korea-New Zealand; Korea-Viet Nam and Mexico-Panama FTAs, include a MFN treatment clause to offer treatment not less favorable than that offered to non-party services or service suppliers. The Canada-Korea; Korea-New Zealand; Korea-Viet Nam and Mexico-Panama FTAs specify that this is granted in similar circumstances (“like circumstances”).

Some FTAs, such as the Australia-China and Korea Viet Nam FTAs, include restrictions to the application of the MFN treatment, by allowing the signatory parties to keep a more favorable treatment to non-parties than that offered to parties in the FTA in accordance to international agreements that entered into force before the FTA did. The Korea-Viet Nam FTA also include a provision allowing not to extend preferential treatment as agreed in any bilateral or plurilateral agreement among ASEAN members.

*d. Market Access*

All FTAs based their provisions on GATS’ Article XVI, which states that parties should not maintain quantitative restrictions (e.g. quotas), unless otherwise specified, on the number of service suppliers, the total value of service transaction or assets, the total number of service operations (or service output), the total number of natural persons that may be employed in a particular service sector/service supplier, and on measures to restrict or require specific types of legal entity/joint venture to supply a service.

GATS’ Article XVI also states that: “parties shall not maintain limitations on the participation of foreign capital in terms of maximum percentage limit on foreign shareholding or the total value of individual or aggregate foreign investment”. However, similar to the case of the TPP, the Canada-Korea; Korea-New Zealand and Mexico-Panama FTAs do not include this clause.

Another difference among agreements is related to the inclusion of the footnote #8 of GATS’ Article XVI, which allows for the transfer of capital related to market access commitments. This footnote is included in the Australia-China; Australia-Japan; China-Korea; and Korea-Viet Nam FTAs.

*e. Local Presence*

The Australia-Japan; Canada-Korea; Korea-New Zealand and Mexico-Panama FTAs include a provision in which none of the parties may require a service supplier of the other party to maintain a representative office or any form of enterprise, or to be a resident, as a condition to supply the service. This is similar to the provision included in the TPP.

*f. Domestic Regulation*

All the analyzed FTAs include a provision on domestic regulation, which is based on GATS' Article VI. These agreements ensure that measures relating to qualification requirements and procedures, technical standards and licensing requirements do not constitute unnecessary barriers to trade in services. For this reason, these requirements need to comply with the following criteria: 1) to be based on objective and transparent criteria; 2) to be not more burdensome than necessary to ensure the quality of the service; and 3) in the case of licensing procedures, to not be a restriction on the supply of a service.

Whilst the China-Korea and Korea-Viet Nam FTAs incorporate GATS' Article VI as it is, others include some modifications to it. For example, among the provisions for the cases where authorization to supply a service is required, some agreements such as the Australia-China and Australia-Japan FTA provide a GATS-plus element, by stating that in the case of an incomplete application, under request, the party has to identify the additional information required to complete the application.

However, some agreements also have GATS-minus structures, such as the Australia-Japan; Canada-Korea; Chile-Thailand; Korea-New Zealand and Mexico-Panama FTAs do not include a clause on nullification or impairment, in which the parties cannot apply requirements that nullify or impair services commitments in ways that they are not based on objective and transparent criteria, they are more burdensome to ensure the quality of a service, or they represent a restriction on the supply of a service.

*g. Transparency*

Only three of the FTAs analyzed in this report include a specific transparency article in the Services chapter (i.e. Australia-China; China-Korea and Korea-Viet Nam FTAs). Although only the China-Korea FTA follows a similar structure to GATS' Article III on Transparency, all of them pursue similar interests, which are to publish regulations of general application relevant to the operation of the Services chapter and to provide a mechanism in which the parties establish a communication channel with the public for specific reasons such as responding requests on certain policies; or providing information concerning the status of the application of a license.

*h. Recognition*

All agreements in this report that include a Services chapter, contain articles about the recognition of professional degrees or professional experience and incorporate many of the elements in GATS' Article VII. Among the common features of the recognition clauses, all FTAs in this report acknowledge that they should not accord recognition in a way that would constitute a means of discrimination between parties. One departure from GATS is that all FTAs also clarify that the Most Favored Nation (MFN) clause is not applicable in the cases



that one of the parties recognizes the education, experience, requirements met, licenses or certifications obtained in a territory of a non-party.

With the exception of the Chile-Thailand FTA, the rest includes a provision in which recognition is accorded between a party and a non-party, the party should afford adequate opportunity to negotiate its accession.

*i. Transfers and Payments*

Except the Chile-Thailand FTA, the rest of agreements with Services chapters include provisions prohibiting the parties to apply restrictions on transfers and payments. However, the scope of the prohibition differs. For instance, the restriction on the application of restrictions is for current transactions related to the specific services commitments in the Australia-China; China-Korea and Korea-Viet Nam FTAs; whilst the Canada-Korea; Korea-New Zealand and Mexico-Panama FTAs mention that this is for transactions relating to cross-border trade in services. The Australia-Japan FTA simply mentions that these restrictions should not apply to trade in services.

Exceptions to the non-application of this restriction are possible under the Australia-China; Australia-Japan; China-Korea and Korea-Viet Nam FTAs, in order to safeguard the balance of payments.

*j. Denial of Benefits*

All FTAs included in this report state that a party may deny benefits of this agreement in the case of a service supplier owned or controlled by persons of a non-party and has no substantial business activities in the territory of the other party.

There are some special cases in which the denial of benefits is extended to specific cases. For example, the Australia-Japan FTA does it for the cases of the service supplier owned or controlled by persons of a non-party that the denying party does not maintain diplomatic relations.

*k. Amendment/Withdrawal of Commitments*

The Australia-China; Chile-Thailand and Korea-Viet Nam FTAs include clauses on the modification or withdrawal of specific services commitments.

The Australia-China and Korea-Viet Nam FTAs specify that this can only be done after three years have elapsed from the date the commitment entered into force. These two agreements also establishes that the party with the intention of make the amendment or withdrawal needs to notify the other party and enter in negotiations to agree on a compensatory adjustment. The Chile-Thailand FTA also highlights this feature to negotiate a compensatory adjustment, but does not include any clause specifying when the parties can already use this feature.

*l. Review/Future Liberalization*

Only the Australia-China FTA includes an article in order to start a review process with a view of further liberalizing trade in services. This agreement establishes that the review consultations could start within two years of the date of entry into force. The Chile-Thailand FTA includes a

review clause of the chapter as well, but the emphasis is on development and regulations on trade in services of the parties and progress made at WTO.

The Korea-Viet Nam FTA also provides the opportunity to renegotiate the services commitments if one of the parties, after the entry into force of the agreement, ratifies any FTA adopting a negative list approach with a non-party. In this situation, the other party can request a renegotiation of the Services chapter and annexes based on a negative list approach.

*m. Cooperation/Committees*

Five of the agreements (i.e. Australia-China; Australia-Japan; Chile-Thailand; China-Korea; and Korea-New Zealand FTAs) include provisions to establish a committee or sub-committee on services/trade in services in order to review the implementation and operation of the chapter. Most agreements allow additional functions related to recommending measures to promote trade in services, exchanging information and consult on diverse matters, among others.

The Australia-China FTA includes an article on cooperation that discusses the review of their bilateral taxation arrangements and trade in Traditional Chinese Medicine Services.

*n. Emergency Safeguards*

Only the Chile-Thailand FTA includes an article on emergency safeguards measures. It only states that after the end of the multilateral negotiations on the topic, as indicated by GATS' Article X, the parties will make a review and discuss appropriate amendments to the agreement and incorporate the results of those multilateral negotiations.

*o. Subsidies*

Only five agreements include an article on subsidies (i.e. Australia-Japan; China-Korea; Korea-New Zealand; Korea-Viet Nam and Mexico-Panama FTA). Except the Mexico-Panama FTA, the other four agreements mention that the parties can enter into consultations at the request of one of the parties, if it considers itself adversely affected by a subsidy of the other party.

With the exception of the Korea-Viet Nam FTA, the other agreements acknowledge reviewing the issue of subsidies related to trade in services, taking into account any disciplines agreed in the multilateral negotiations as indicated in GATS' Article XV.

*p. Monopolies and Exclusive Service Suppliers*

The Australia-China; Australia-Japan; China-Korea and Korea-Viet Nam FTAs include an article on monopolies and exclusive services suppliers. The content of this article is very similar in these four agreements. It ensures that the monopoly supplier of a service in its territory does not act in a manner in a way that is inconsistent with the obligations in the FTA. The articles also mention that if a monopoly supplier of a service that competes outside the scope of its monopoly rights, the supplier cannot abuse of its monopoly position and act inconsistently with the FTA obligations.

The Australia-China FTA includes an additional clause, which states that a party needs to notify to the other party if, after the FTA enters into force, one of the parties grants monopoly rights

concerning the supply of a service covered by its specific commitments. This has to be done within three months before the implementation of the grant of monopoly rights.

The Canada-Korea FTA includes instead some provisions on monopolies, with a similar intention, in the Competition Policy chapter.

### 4.3 Investment

Among the nine RTA/FTAs put in force in 2015, seven of them include comprehensive chapters on Investment (Australia-China; Australia-Japan; Canada-Korea; China-Korea; Korea-New Zealand; Korea-Viet Nam; and Mexico-Panama). One agreement, the Chile-Thailand FTA, does not have an investment chapter, but includes national treatment and market access commitments on commercial presence (mode 3) in the Trade in Services chapter. Another agreement, the Malaysia-Turkey FTA, does not include any chapter on Investment, but its chapter on Initial Provisions mention that the intention is to broaden the scope of the agreement to include bilateral investment topics in the future.

The Investment chapters of the RTA/FTAs analyzed in this report are WTO-plus. As mentioned by the APEC Policy Support Unit (2015), “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 measures that discriminate against foreign products or lead to quantitative restrictions”<sup>15</sup>.

It is not possible to make a comparison between RTA/FTAs provisions on investment and the APEC Model Measures on RTA/FTAs since this initiative does not include any model measures on investment. However, due to the relevance of the recent signing of the Trans-Pacific Partnership Agreement (TPP), this section compares, when relevant, the provisions of the RTA/FTAs implemented in 2015 with those included in the TPP legal texts.

#### *a. Definition of Investment*

The seven RTA/FTAs in force in 2015 with comprehensive investment chapters define investment as every asset owned or controlled by an investor that has the characteristics of an investment, such as the commitment of capital of other resources, the expectation of gain or profit or the assumption of risk. All these agreements, except the Korea-Viet Nam FTA, clarify that the investment could be direct (e.g. someone acquiring an asset) or indirect (e.g. a mutual fund acquiring an asset on your behalf). Also, the Canada-Korea FTA is the only one that specifies that one of the characteristics of an investment could be its duration.

All RTA/FTAs include examples of investments, such as enterprises; shares, stocks and other forms of equity; bonds, loans and other forms of debt; movable and immovable property; rights under contracts; and rights under concessions, among others. However, there are some differences with regards to the treatment of some assets, as it is the case of some forms of debt such as bonds, debentures and loans. For example, the Canada-Korea; Korea-New Zealand; and Korea-Viet Nam FTAs clarify that some forms of debt are more likely to have the characteristics of an investment than others, as TPP also does. The Mexico-Panama FTA establishes that debt instruments must have an original maturity of at least 3 years.

---

<sup>15</sup> APEC Policy Support Unit (2015), Op.Cit, p. 10-11.

Another difference is in the treatment of futures, options and other derivatives. Only the Australia-Japan; Canada-Korea; and Korea-New Zealand FTAs list explicitly these instruments as investments, which is similar to the position adopted at TPP.

*b. National Treatment*

All agreements provide for national treatment on the post-establishment phase. The Australia-Japan; Canada-Korea; Korea-New Zealand; and Mexico-Panama FTAs are offering this treatment through a negative list approach; while the China-Korea FTA uses a positive list approach.

National Treatment for the pre-establishment phase is granted by the Australia-Japan; Canada-Korea; Korea-New Zealand; and Mexico-Panama FTAs

The Australia-China FTA offers a hybrid model, in which Australia offers China national treatment in pre and post-establishment phases, using a negative list, while China offers Australia national treatment in only post-establishment through a positive list.

The Korea-Viet Nam FTA includes a national treatment provision on both pre and post establishment, but it will only be applicable after both parties finalize the negotiations of the non-conforming measures.

*c. Most Favored Nation Treatment (MFN)*

All agreements offer a MFN clause for both pre and post-establishment phases, in which investors are given from the counterpart no less favorable treatment than investors from third parties in similar circumstances. While the Canada-Korea FTA does not make exceptions in the application of the MFN clause, other FTAs do restrict its use. For example, the Australia-China; Australia-Japan; China-Korea; Korea-New Zealand and Mexico-Panama FTAs do not apply this clause to international dispute settlement provisions. The TPP also includes this restriction for international dispute resolution procedures or mechanisms.

Another restriction to the application of the MFN clause is found in agreements such as the Australia-China; China-Korea and Korea –Viet Nam FTAs, which also establish that the parties do not need to offer MFN if they are offering a more favorable treatment to non-parties than that offered to parties in the FTA, in accordance to international agreements that entered into force before the FTA did. It is interesting that the Korea-Viet Nam FTA also restricts the application of MFN in the case of future preferential treatment accorded between or among ASEAN member states.

The Australia-China and China-Korea FTA also reserves the right to apply MFN for future measures concerning three sectors: aviation, fisheries and maritime matters, including salvage.

*d. General Treatment*

Except the Australia-China FTA, the rest of agreements included in this report provide for minimum standard of treatment in accordance with customary international law. The standard of treatment refers to “fair and equitable treatment” and “full protection and security”. Most of these agreements, except the Australia-Japan FTA, notes that “fair and equitable treatment” includes the obligation not to deny justice in accordance to the due process principle. They also

specify that “full protection and security” requires the need to provide the level of police protection to covered investments as required under customary international law.

None of the agreements include the clarification in the TPP establishing that actions by governments that may be inconsistent with investor’s expectations and subsidies or grants not issued, renewed or maintained do not constitute a breach of minimum standard of treatment.

*e. Performance Requirements & Senior Management and Board of Directors*

While the Australia-China FTA establishes that parties should establish negotiations of a comprehensive investment chapter including provisions on performance requirements and senior management and board of directors, the other agreements include provisions preventing: i) the use of performance requirements; ii) any citizenship requirement on senior management positions; and iii) any citizenship requirements in the board of directors that may impair the ability of the investor to exercise control over its investment.

On performance requirements, the agreements prevent the parties from requesting the export of a percentage of goods or services; achieving a minimum level of domestic content; and purchasing goods within the territory of the party, among others, in connection to any investment activity. Some agreements impose exceptions in the scope of prohibiting performance requirements. For example, the prohibition of certain performance requirements is not applicable to government procurement in the Australia-Japan; Korea-New Zealand; and Mexico-Panama FTAs, as well as for goods and services for export promotion and foreign aid programs. Another common exception is not to apply the prohibition of performance requirements to technology transfer in accordance with Article 31 of the TRIPS Agreement and Article 39 of the TRIPS Agreement<sup>16</sup>, as it is the case of the Canada-Korea and Korea-New Zealand FTAs. These exceptions are also present in the TPP.

The clauses on senior management and board of directors are very similar in all agreements. A minor difference appears in the Australia-Japan FTA with regards to the board of directors, since it establishes that the parties may ask not just for the majority of the board of directors, but also for less than a majority to be of a particular nationality or resident in the territory of the party, as long as it does not impair the ability of the investor to have control of its investment.

*f. Expropriation and Compensation*

The Australia-Japan; Canada-Korea; China-Korea; Korea-New Zealand; Korea-Viet Nam; and Mexico-Panama FTAs mention that expropriations can only occur if they meet the following conditions: 1) measure is undertaken for a public purpose; 2) it is implemented on a non-discriminatory basis; and 3) it is in accordance with the due process of law. All these agreements include the need for compensation to be paid without delay in a freely usable currency or convertible currency. Nevertheless, the Australia-Japan; Korea-New Zealand and Mexico-Panama FTAs also establish how the compensation should be calculated in case it is paid in a currency that is not freely usable, similar to what was agreed in TPP.

The Australia-Japan; Canada-Korea; Korea-New Zealand; Korea-Viet Nam; and Panama-Mexico FTAs have included a restriction for expropriation and compensation, as it is the case

---

<sup>16</sup> For more information of the TRIPS Agreement, please see [https://www.wto.org/english/docs\\_e/legal\\_e/27-trips.pdf](https://www.wto.org/english/docs_e/legal_e/27-trips.pdf)

of TPP, by stating that the issuance of compulsory licenses in relation to intellectual property rights are not subject to it. However, none of the agreements have included a provision which appears in TPP stating that not issuing, renewing or maintaining subsidies under certain conditions does not constitute an expropriation.

*g. Treatment in Case of Armed Conflict or Civil Strife*

The Australia-Japan; Canada-Korea; Korea-New Zealand; Korea-Viet Nam; and Panama-Mexico FTAs include clauses stating that parties should accord non-discriminatory treatment to investors of the other parties for losses suffered by investments in the other party's territory due to armed conflicts or civil strife. The Canada-Korea; Korea-New Zealand and Mexico-Panama FTAs have an additional provision, similar to that used at the TPP, stating that the compensations do not apply to existing subsidies or grants that could be inconsistent with national treatment, with the exception of those listed in the provision on non-conforming measures.

*h. Transfer of Capital*

Except for the Australia-China FTA, which allows its parties to negotiate a clause on transfers in the future, the other FTAs with investment chapters include a standard provision in which parties shall allow the free transfer of capital and without any delay. These agreements also acknowledge that the transfers may be prevented or delayed in cases relating to bankruptcy, insolvency; issuing/trading/dealing with securities, futures, options or derivatives; criminal offenses; financial reporting to assist law enforcement; and compliance with orders in judicial proceedings.

The Australia-Japan; China-Korea; and Korea-Viet Nam FTAs include a clause with temporary safeguard measures with regard to payments and capital movements in the case of serious balance of payments difficulties.

*i. Environmental Measures*

Clauses about environment and investment are usually included in two ways: 1) by recognizing it is inappropriate to relax environmental measures to attract or keep investments (Canada-Korea and China-Korea FTAs); and 2) by stating that nothing shall prevent parties to adopt measures that are going to be necessary to protect life or health or ensure investments to address environmental concerns (Australia-China and Canada-Korea FTAs).

*j. Settlement of Disputes between a Party and an Investor of the Other Party*

All the analyzed FTAs, except the Australia-Japan FTA, include clauses on investor-state dispute settlement (ISDS), in which a party and an investor of the other party can resolve a dispute by engaging in consultations and negotiations, or by sending the case to arbitration, in case that the parties could not reach a solution.

Whilst most of the agreements do not include a timeline to start consultations, the Australia-China FTA establishes that a written request for consultations may be submitted by the claimant after two months since the occurrence of the event causing the dispute. The Korea-Viet Nam FTA also mentions that consultations should be held within 30 days of the submission of the notice of intent to submit a claim to arbitration, unless otherwise agreed by

the parties. The Mexico-Panama FTA establishes a minimum period for consultations, equivalent to six months.

On the contrary, all agreements establish a timeline regarding when the claim can be submitted for arbitration. Some agreements state that the claimant can only send the case to arbitration after a certain period of time have passed since the event originating the claim occurred. For example, the Canada-Korea and Korea-Viet Nam FTA establishes that the case can go for arbitration only after six months since the event originating the dispute took place. In other cases, the claimant can only start the arbitration process if a solution cannot be reached through a minimum period of consultations (i.e. six months for the Mexico-Panama FTA). Other agreements accept an arbitration after a minimum period of consultations, but counting from the day of the submission of the request for consultations (i.e. four months for the China-Korea FTA<sup>17</sup>; 120 days for the Australia-China FTA; and six months for the Korea-New Zealand FTA).

All agreements mention that no claims can be submitted for arbitration if more than three years have passed since the claimant knew of the alleged breach. The exception is the Korea-New Zealand FTA which states a longer period, equivalent to three years and six months. The Australia-China FTA also adds that the claims cannot be subject to arbitration more than four years have passed since the occurrence of the event causing the alleged breach.

With regards to which arbitration mechanisms can be used by the parties, all agreements include standard clauses by establishing any agreed arbitration institution agreed by the parties and subject to the arbitration rules of each agreement. The United National Commission on International Trade Law (UNCITRAL) Arbitration Rules and the International Centre for Settlement of Investment Disputes (ICSID) Convention are two of the mechanisms explicitly mentioned in all agreements.

With exception to the China-Korea FTA, all the other agreements establish clauses regarding the constitution of the tribunal to rule on the claim. In general, FTAs mention that the tribunal should be comprised by three arbitrators, unless otherwise agreed. Usually, these agreements also set a time limit to appoint the arbitrators. The periods could differ. For instance, the Korea-New Zealand FTA gives 75 days to constitute the tribunal, whilst the Australia-China; Canada-Korea; Korea-Viet Nam; and Mexico-Panama FTAs gives 90 days to complete this task.

In terms of the awards against one of the disputing parties, all agreements mention that the tribunal may award monetary damages (including applicable interests) and/or restitution of property. Except the China-Korea FTA, the other FTAs allow the tribunal to award costs. The Australia-China; Canada-Korea; Korea-New Zealand; and Mexico-Panama FTA can also award attorney's fees.

For the enforcement of the award, the Australia-China; Canada-Korea; Korea-New Zealand; Korea-Viet Nam; and Mexico-Panama FTAs allow for 120 days if the award is made under the ICSID Convention and 90 days, under the ICSID Additional Facilities Rules and UNCITRAL Arbitration Rules. The China-Korea FTA does not establish any time limit, but mentions that the award has to be executed in accordance of laws and regulations in the party whose territory the execution of the award is sought.

---

<sup>17</sup> In the case of the China-Korea FTA, the four months are subject to the investor going through a domestic administrative review procedure, which cannot exceed more than four months from the date of the application for the review is filled (article 12.12, paragraph 7).

**Box 1: The Evolution of ISDS Cases in the APEC Region**

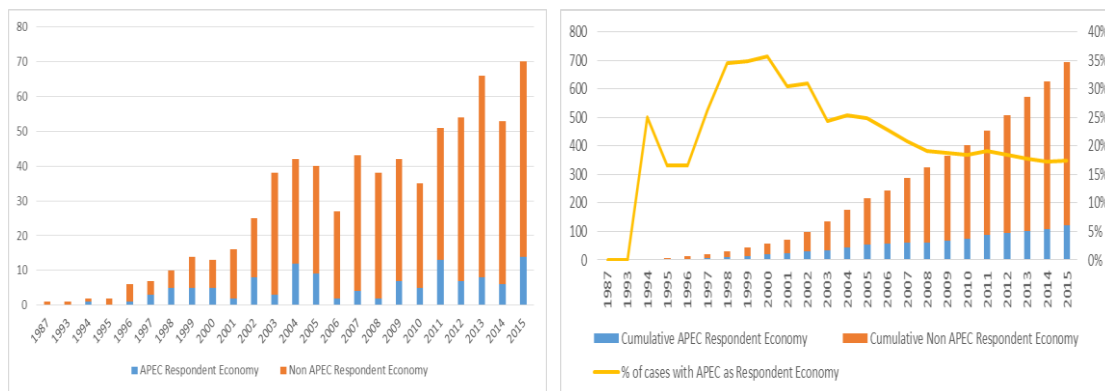
ISDS is usually included in the Investment chapters of the recent FTAs signed by APEC economies. Their purpose is two pronged, primarily protecting investors against discrimination from foreign governments while also protecting the right of the government to protect public interests through regulation. There has been a rise in ISDS cases over the years, with over 50% of the cases initiated in the last eight years. With evolving global concerns, the use of multiple arbitration tribunals and differing interpretations of provisions, recently signed agreements have used past cases to recognise the possible areas of vulnerability and have improved upon the clauses based on the interests of the signatory parties.

Following this trend, according to the Peterson Institute for International Economics (2016), the TPP comprising of 12 economies, all of which are APEC economies, has included ISDS provisions that not only protect investors but also to safeguard against petty unsubstantiated claims by allowing the assessment of costs against a losing party. Another step in the right direction is the clause on transparency that requires open hearings and public disclosure of documents between TPP members, barring trade secrets. Other relevant improvements have been in increased specification of what “fair and equitable”, “non-discrimination” and “minimum standard of treatment” entails and disallowing companies to search for the most sympathetic place to litigate in. TPP also disallows tobacco companies from filing ISDS claims in response to claims challenging tobacco control measures.

Looking at the ISDS cases worldwide in Figure 4.1, they have increased significantly in recent years. However, the share of APEC economies as respondent economies of the total ISDS cases initiated so far was equivalent to 17% by 2015 (Figure 4.2). The falling trend of APEC’s share over the years is a clear indication that APEC economies are less inclined to make arbitrary decisions or enact unfair discriminatory legislation against foreign investors and so are less likely to be sued.

**Figure 4.1: Known ISDS Cases Initiated**

**Figure 4.2: Cumulative ISDS Cases Initiated**

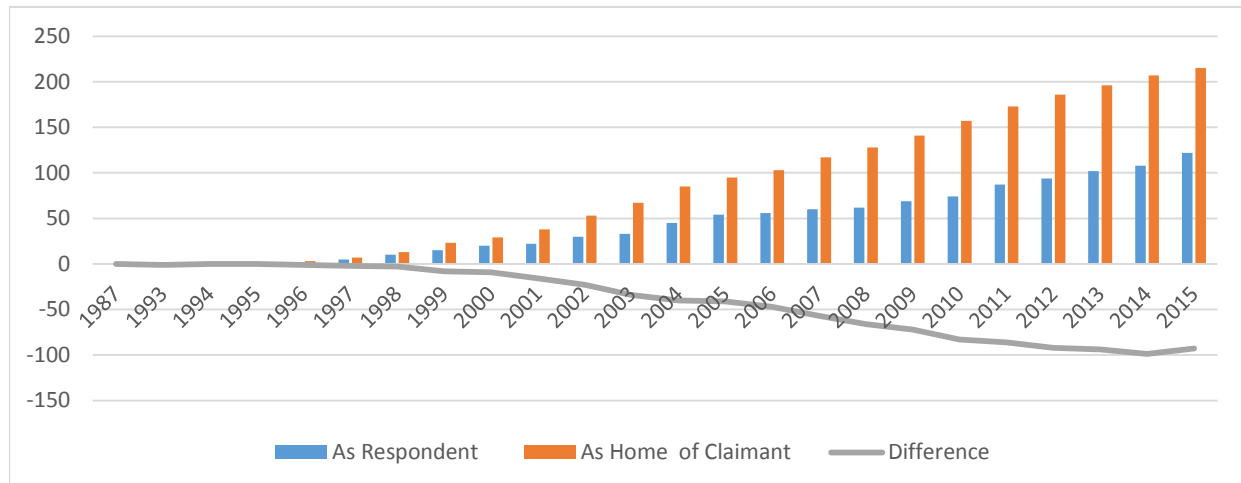


Source: UNCTAD – Investment Policy Hub; APEC Secretariat, Policy Support Unit calculations



Figure 4.3 shows that the participation of APEC economies in ISDS cases over the years has been more about companies home-based in the APEC region bringing cases against foreign governments for alleged discrimination or arbitrary decisions against their investments than APEC governments being sued by any investor.

**Figure 4.3: ISDS Cumulative Cases with APEC Economies as Respondent vis-à-vis as Home of Claimant**



Source: UNCTAD – Investment Policy Hub; APEC Secretariat, Policy Support Unit calculations

Regarding the concluded ISDS cases, claims against APEC governments have a higher chance of being decided in favor of the government. When companies from APEC member economies initiate new cases, the percentage awarded in favor of the investor is on par with the world total. Table 4.2 also shows that for cases with APEC member economies as the respondent state, the cases are less likely to be settled than those of the world total. Cases with APEC member economies as the home of the investor are also less likely to be settled, but by a lesser extent.

**Table 4.2: Concluded Cases**

Result	APEC as Respondent		APEC as Home of Investor		World Total	
	No. of Cases	Share	No. of Cases	Share	No. of Cases	Share
<b>Decided in favor of State</b>	39	45%	66	40%	162	36%
<b>Decided in favor of Investor</b>	23	26%	43	26%	117	26%
<b>Decided in favor of neither party (liability found but no damages awarded)</b>	1	1%	2	1%	8	2%
<b>Discontinued</b>	9	10%	19	12%	43	10%
<b>Settled</b>	15	17%	35	21%	114	26%
<b>Total Concluded</b>	87	100%	165	100%	444	100%

Source: UNCTAD – Investment Policy Hub; APEC Secretariat, Policy Support Unit calculations

Due to the fact that settled ISDS cases generally do not allow the release of the terms of settlement, it is not easy to find out whether these terms favored the governments or the investors. However, while examining the amounts awarded by arbitration tribunals, a recent study by Wellhausen (2016) used public information from 119 cases where the investor won and 50% of the awards were below US\$16 million. Also, in 86 cases where the investor won and the award sought was known, investors won less than 33% of the claim in 50% of these cases. There were only six instances in which the investors were awarded with at least the full amount sought. Wellhausen (2016) also found that there was a very small percentage of large awards (five ISDS cases with awards of US\$1 billion and more).

#### 4.4 Intellectual Property

The inclusion of intellectual property chapters in RTA/FTAs has opened a public debate on how this topic should be covered in these agreements. Frankel (2012) mentions that intellectual property can be welfare enhancing and some intellectual property protection is consistent with liberalizing trade, but too much intellectual property protection could mostly have an opposing protectionist effect<sup>18</sup>. In opinion of Frankel, “a high-quality intellectual property agreement ought to be one that balances the interests of the developing and developed worlds in a real and effective manner. A high-quality agreement is not one that merely focuses on increased intellectual property protection (...). A quality agreement (...) supports increased levels of innovation and creativity in all countries”<sup>19</sup>.

The inclusion of clauses on intellectual property (IP) in trade agreements is becoming a norm in FTAs. A recent WTO Working Paper by Valdes and McCann (2014) found that there is an increasing number of FTAs with IP provisions since the 2000s<sup>20</sup>. Within APEC, among the nine FTAs included in this report, seven of them include a specific chapter on the matter (i.e. Australia-China; Australia-Japan; Canada-Korea; China-Korea; Korea-New Zealand; Korea-Viet Nam; and Mexico-Panama FTAs) and one of them do not have a chapter, but include IP provisions on geographic indications in another chapter (i.e. Chile-Thailand FTA). Due to the distinct interests by the signatory parties of these agreements, it is possible to find some differentiated scope and structure in their IP chapters.

This section analyzes RTA/FTA clauses in selected IP issues and when necessary compares them with the provisions in the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS). Unfortunately, it is not possible to make any comparison to the APEC RTA/FTA Model Measures, as this APEC initiative did not include measures on intellectual property.

##### *a. Reaffirmation of TRIPS Agreement and Other Intellectual Property Agreements*

All the agreements analyzed in this section, except the Australia-Japan FTA, include a provision reaffirming their rights and obligations to TRIPS Agreement and other international agreements where both FTA members are also parties.

---

<sup>18</sup> Frankel, Susy (2012), “The Intellectual Property Chapter in the TPP”, in Lim, Elms and Low (eds), “The Trans-Pacific Partnership: A Quest for a Twenty-first Century Trade Agreement”, Cambridge University Press, p. 157.

<sup>19</sup> Ibid, p. 158.

<sup>20</sup> Valdes, Raymundo & Maegan Mc Cann (2014), “Intellectual Property Provisions in Regional Trade Agreements: Revision and Update”, Staff Working Paper ERSD-2014-14, World Trade Organization, Economic Research and Statistics Division, p. 9.

In addition, all agreements include either the explicit reaffirmation of some international IP agreements and/or a clause for the parties to comply with these agreements. The list of international agreements included in the FTA could differ, as it depends on factors such as the parties who are members of these agreements and the IP topics included in the agreement. Some of the most common international IP agreements included in these FTA are as follows:

- Berne Convention for the Protection of Literary and Artistic Works
- Budapest Treaty on the International Recognition of the Deposit of Microorganisms for the Purpose of Patent Procedure
- Convention on Biological Diversity
- International Convention for the Protection of New Varieties of Plants
- Madrid Agreement concerning the International Registration of Marks
- Nice Agreement Concerning the International Classification of Goods for the Purpose of the Registration of Marks
- Paris Convention for the Protection of Industrial Property
- WIPO Copyright Treaty
- WIPO Performances and Phonograms Treaty

*b. National Treatment*

All agreements use a standard clause in which parties shall accord to nationals of the other party treatment no less favorable than to their own nationals. Exceptions to the application of the national treatment clause apply to exceptions included in the TRIPS Agreement.

*c. Technical Cooperation*

With the exception of the Australia-Japan FTA, the rest of the agreements include specific provisions on cooperation in their Intellectual Property chapters. All of them include clauses concerning the exchange of information regarding IP issues and the development of contacts among parties.

Many FTAs also include capacity-building activities such as training, exchange of experts and workshops to raise awareness on IP issues, amongst others, as an important form of cooperation between the parties (i.e. Australia-China; Canada-Korea; China-Korea and Korea-Viet Nam FTAs). Some agreements also include examination and/or enforcement activities as part of the bilateral cooperation on IP matters (i.e. Australia-China; China-Korea; Korea-New Zealand and Korea-Viet Nam FTAs).

Technology transfer cooperation is also included in some agreements, especially in those FTAs with signatory parties with differentiated income levels. For example, the China-Korea FTA includes technology transfer cooperation on energy-saving and green technologies. The Korea-Viet Nam FTA also includes cooperation on international property commercialization and technology transfer. Additionally, the TPP includes cooperation on IP issues related to the generation, transfer and dissemination of technology.

*d. Enforcement Provisions for IP Matters*

All agreements include enforcement provisions regarding IP matters. Some FTAs basically acknowledge the importance of enforcement as set in Articles 41 to 61 of the TRIPS Agreement

(i.e. Korea-Viet Nam FTA) or state that the implementation of criminal procedures should be in accordance to the TRIPS Agreement (i.e. Australia-China FTA).

In many cases, the agreements include clauses on civil remedies and/or administrative procedures in case of infringements on IP (i.e. Australia-Japan; Canada-Korea; China-Korea and Korea-Viet Nam FTA). The Australia-Japan and China-Korea FTAs also contain specific provisions on criminal procedures and penalties, including imprisonment as one of the options. The Australia-China FTA does not include detailed provisions on criminal procedures, but states that imprisonment is one of the penalties that could be applied.

Other agreements, such as the Korea-New Zealand and Mexico-Panama FTAs, only mention that the parties shall ensure the availability of procedures, according to the domestic law, to act against IP infringements.

*e. Border Measures*

These measures aim to suspend the release of goods that are infringing intellectual property rights, for example: counterfeit trademark and pirated copyright goods, infringements to patents and industrial designs. Five of the agreements with IP chapters include these types of clauses (i.e. Australia-China; Australia-Japan; Canada-Korea; China-Korea; and Korea-Viet Nam FTA). Except the Korea-Viet Nam FTA, the rest of the agreements allow the *ex-officio* suspension of the release of goods, which means that no previous request of a right holder is necessary to proceed in that way.

In order to prevent abuse, the Canada-Korea and China-Korea FTAs also include a clause in which the authorities may request from the right holder reasonable evidence that there is an infringement in its intellectual property rights. The Korea-Viet Nam FTAs establishes that adequate evidence has to be presented when the right holder initiates procedures to suspend the release of goods.

Some FTAs also include clauses to destroy those goods found to have infringed intellectual property rights, such as the Australia-Japan; China-Korea and Korea-Viet Nam FTAs.

*f. Copyright and Related Rights*

While the Australia-China FTA only includes an article on fostering the collective management of copyrights through the establishment of appropriate bodies; the rest of the agreements with IP chapters include provisions on the rights of copyright holders. These provisions give the authors, performers and producers of phonograms the right to authorize or prohibit the reproductions of their works in any manner or form.

Some agreements are also taking into account the technological progress and provide protection against the circumvention of technological measures that authors may use to restrict their works. The Australia-Japan; China-Korea; Canada-Korea and Mexico-Panama FTAs include provisions on the matter.

*g. Trademarks*

All agreements with IP chapters include clauses on trademarks, which mention the protection of well-known trademarks and issues related to the registration of trademarks.

Regarding the protection of well-known trademarks, all agreements, except the Australia-Japan FTA, include a reference on these trademarks. The Canada-Korea; China-Korea; Korea-New Zealand; Korea-Viet Nam and Mexico-Panama FTAs allow for the protection of well-known trademarks without the condition of being registered in the parties. The Australia-China FTA makes a reference to TRIPS and the Paris Convention, which allows to refuse or cancel a registration and prohibit to use a trademark which is a copy of a mark well-known in another party.

On the registration of trademarks, the Canada-Korea; China-Korea; Korea-Viet Nam and Mexico-Panama FTAs provide a system which parties have to communicate the reasons an application is refused, and give affected parties the opportunity to contest and appeal the refusal of the registration. In addition, these agreements allow interested parties to oppose trademark applications. The China-Korea and Mexico-Panama FTAs also state that interested parties can seek the invalidation of a trademark after it has been registered.

The Australia-China; Canada-Korea and Korea-New Zealand FTAs also include a clause to protect collective and certification marks.

#### *h. Geographical Indications*

Some FTAs have provisions on geographical indications, which include the place of origin of the products in their names. These provisions guarantee that only those goods with certain characteristics that are attributable to the place of origin (for example, source of the inputs, unique production process, among others) can use that specific place of origin in their names. The Canada-Korea; Chile-Thailand and Mexico-Panama FTAs include a list of geographical indications to be respected by the signatory parties. The Australia-Japan FTA does not include a list, but indicates that geographical indications are “eligible for protection through a trade mark system or other legal means” (Article 16.10, paragraph 1).

#### *i. Industrial Designs*

Only the China-Korea FTA include a specific article ensuring a period of protection of industrial designs for 10 years. The intention is to protect the aesthetic aspects of a product, such as a specific shape, pattern or color. It does not protect the functional features of a product.

#### *j. Patents*

The Australia-China; Australia-Japan; Canada-Korea; China-Korea and Korea-Viet Nam FTAs include articles on patents. In the case of the Australia-China FTA, the agreement provides the opportunity to make amendments, corrections and observations on patent applications and establishes that patent applications must be published promptly after 18 months from its filing or earliest claimed priority date. The Australia-Japan FTA only includes a clause on cooperation to enhance the utilization of search and examination results. The other three FTAs include more comprehensive provisions stating when a product or process could qualify for a patent and what exclusions from patentability are allowed. Also, these FTAs state that parties may provide limited exceptions to the exclusive rights conferred by a patent if certain conditions are met.

In terms of what can be patented, the Canada-Korea; China-Korea and Korea-Viet Nam FTAs establish that this is possible for any invention that meets three requirements: 1) it is new; 2) it

involves an inventive step; and 3) it is capable of industrial application. The Canada-Korea FTA also adds that patents are also available for known products, provided that it meets the three requirements.

Regarding the exclusions from patentability, the Canada-Korea; China-Korea and Korea-Viet Nam FTAs indicates that this is possible in three cases: 1) inventions due to public order and morality reasons, need to protect human, animal and plant health and life, and environmental concerns; 2) diagnostic, therapeutic and surgical methods for the treatment of humans or animals; 3) plants and animals other than micro-organisms, and essentially biological processes for the production of plants or animals other than non-biological and microbiological processes, but the Canada-Korea FTAs clarifies that the protection of plant varieties is possible through a patent or other effective means. The TPP also considers the first two exclusions in the IP subsection on general patents, but on the third case, it considers animals only. Within TPP, plants could be included for patentability for inventions that are derived from plants.

*k. Plant Variety Protection*

Four of the FTAs included in this report contain provisions related to the protection of plants, but they deal with this matter in very different ways. As mentioned earlier, the Canada-Korea FTA allows the protection of plant varieties through patents or other unspecified means. The Australia-Japan FTAs specifies that this protection shall take place in accordance with the rights and obligations of the International Union for the Protection of New Plant Varieties (UPOV), which is one of the most utilized systems among those parties that do not provide patent protection for new plant varieties<sup>21</sup>. Similarly, the Mexico-Panama FTA also provides protection to plant varieties based on the UPOV, to the degree that their systems are compatible with it.

The China-Korea FTA acknowledges regulations to protect new plant varieties and breeders of new plant varieties. It lists some acts that require the authorization of the breeder, such as production or reproduction for commercial marketing, conditioning for the purpose of commercial propagation, offering for sale, selling or other marketing, and importing and exporting. The Australia-China FTA includes some general provisions to facilitate the protection and development of plant breeders.

*l. Genetic Resources, Traditional Knowledge and Folklore*

The Australia-China; China-Korea and Korea-New Zealand FTAs include a provision in which each party may implement measures to protect genetic resources and traditional knowledge. For the Australia-China and China-Korea FTAs, this must be done in accordance to each party's international obligations and domestic law. For the Korea-New Zealand FTA, it is only stated this has to be done subject to international obligations.

The Australia-China and Korea-New Zealand FTAs also mention that these measures could be implemented to protect folklore as well.

---

<sup>21</sup> Ibid, p. 26.

*m. Internet Service Providers*

In recent times, some agreements have started to include provisions on internet services providers. They basically include clauses to limit the liability of internet services providers for copyright infringements by internet users (i.e. Australia-China and Australia-Japan FTAs) and these providers take action to prevent access to materials infringing copyright (i.e. Australia-China; Australia-Japan and Canada-Korea FTAs). The Canada-Korea FTA also includes a provision in which under request of the competent authorities, the internet service provider has to disclose information about the subscriber which is allegedly infringing copyrights.

The Korea-Viet Nam FTA includes a provision “(...) to endeavor to provide measures to curtail repeated copyrights and related infringement on the internet” (Article 12.9, paragraph 15).

*n. Public Health*

None of the FTAs put in force by APEC economies in 2015 included in their IP chapter specific provisions concerning pharmaceutical products, such as the case of TPP. However, three of the agreements, namely the Australia-China; Canada-Korea and China-Korea FTAs included an article concerning intellectual property and public health, in which all of them recognize the principles adopted in the Declaration on the TRIPS Agreement and Public Health adopted in 2001 and confirm that the provisions of their IP chapters are without prejudice of this declaration. In addition, these FTAs also reaffirm the commitment of the parties to act in accord to the Decision of the WTO General Council to implement paragraph 6 of the aforementioned declaration (i.e. to find an expeditious solution to the problem in which WTO members with insufficient or no manufacturing capacities in the pharmaceutical sector could face difficulties in making effective use of compulsory licensing under the TRIPS Agreement) and the 2005 Protocol amending the TRIPS Agreement.

## 5. CONCLUDING REMARKS

The economic slowdown due to the Global Financial Crisis has brought about a complex scenario where opposition to strengthening economic integration has grown among certain groups of the society. Nonetheless, APEC members continue to support further economic integration by continue their engagement in the pursuit of new RTA/FTAs. Notably, this report shows that the number of RTA/FTAs signed and enforced by APEC economies is following an upward trend. More agreements were put in force in 2015 in comparison to 2014 and a greater percentage of the total APEC trade is being covered by RTA/FTAs every year.

In fact, APEC members are looking for more ambitious trade agreements. The successful conclusion of the TPP negotiations, the ongoing intensive negotiations of the RCEP and the preparation of a Collective Strategic Study on Issues Related to the Realization of the Free Trade Area of the Asia Pacific (FTAAP) are evidence of the interest by APEC economies to strengthen links to effectively promote a free and open trade and investment system.

There is also a shift in trade patterns away from the emphasis on goods. Trade in services is gaining relevance and more RTA/FTAs are including services-related chapters (i.e. on Cross-Border Trade in Services; Movement of Business Persons; Financial Services; Telecommunications and E-Commerce). In addition, trade is closely linked with investment and other disciplines such as Intellectual Property, Competition Policy, Environment and Labor, amongst others. RTA/FTAs are including chapters on these disciplines not just to reaffirm the commitments at the multilateral level, but also to expand the scope of the discipline to go beyond what WTO establishes or to deal with topics with very limited or no treatment under current WTO rules.

The analysis of the RTA/FTA chapters on Rules of Origin, Cross-Border Trade in Services, Investment and Intellectual Property has found that similarities exist among many of the agreements, but these RTA/FTAs show divergences that represent a challenge to APEC economies when pursuing new trade agreements.

There are some similarities and differences amongst the Investment chapters. For instance, the RTA/FTAs put in place in 2015 show that more RTA/FTAs are providing MFN treatment for pre-establishment and post-establishment stages. Also, it is noticeable to see more agreements including clauses concerning investor-state dispute settlement. However, there are still different viewpoints with regards to the provision of national treatment. Only a few of those agreements provided this treatment for pre-establishment stages.

Regarding Cross-Border Trade in Services, one of the main differences is in the approach of the sectoral coverage of the services provisions. While the services commitments are WTO (GATS) plus, nearly half of the RTA/FTAs put in place in 2015 opted for a negative list approach, while others opted for either a positive list approach, or a mixed approach. The Australia-China FTA shows that one of the parties used a positive list approach to list its sectoral services commitments, while the other party used a negative list approach. Another important difference is that in some RTA/FTAs, national treatment and MFN treatment are only conferred to foreign services suppliers in similar circumstances. Many of the services chapters include similar provisions to those in GATS, in particular in areas such as market access (i.e. GATS Article XVI, not to maintain quantitative restrictions; GATS Article VII on recognition, among others). In some topics, it is possible to find WTO (GATS)-plus provisions, such as those on transparency, but also it is possible to find chapters with some WTO (GATS)-



minus structures, like in issues on domestic regulation, in particular on nullification and impairment of services commitments.

Rules of Origin is the only topic of the four included in this report with existing APEC Model Measures for RTA/FTAs. In general, all of the RTA/FTAs analyzed follow these Model Measures. The structure of the Rules of Origin chapters are fairly similar, with some differences in the content. All agreements include product-specific rules to determine if a good meets the origin criteria for preferential treatment. Also, these agreements have a preference to use mostly change of tariff classification and qualifying value content criteria. However, while most agreements negotiated their product-specific rules at the HS 6-digit level, others did at the HS 4-digit level.

Similarly, all agreements include *de minimis* clauses to facilitate meeting the origin criteria, but with some nuances. For instance, while the most common threshold is the value of non-originating materials in the total value of a product, some RTA/FTAs use the weight of non-originating materials for the case of textiles and apparel. Other striking differences are in relation to the declaration or certification of origin, in which some RTA/FTAs require the use of entities to certify origin, while others require the use of self-certification, or both, such as the cases of the Australia-China and Australia-Japan FTAs.

The RTA/FTAs analyzed have some similarities regarding certain Intellectual Property (IP) issues. For example, all agreements include general provisions on the reaffirmation of the TRIPS Agreement and other international IP agreements, as well as enforcement provisions and national treatment on the application of IP. Co-operation clauses are also common, but their contents could differ. Despite these similarities, the chapters on Intellectual Property are probably those that have the greatest differences in terms of structure. For example, not all types of IP are included in all agreements. The types of IP included in most of the RTA/FTAs are trademarks and copyrights. The appearance of clauses on patents, geographic indications, industrial designs, new plants varieties, traditional knowledge and genetic resources, among others, is less frequent in these agreements. Also, not all agreements include specific provisions regarding public health and intellectual property.

## REFERENCES

- APEC Committee on Trade and Investment (2008), “Annual Report to Ministers”, pp. 54-104. Available from: <http://www.apec.org/Groups/Committee-on-Trade-and-Investment/~media/441C73DB54E746E4835F883BF7154612.ashx>
- APEC Committee on Trade and Investment (2008). “APEC Model Measures for RTAs/FTAs”. CTI Annual Report to Ministers 2008, Appendix 2, p.53-104. Available from: [http://mddb.apec.org/documents/2008/MM/MRT/08\\_mrt\\_005att2.doc](http://mddb.apec.org/documents/2008/MM/MRT/08_mrt_005att2.doc)
- APEC Committee on Trade and Investment (2009). “Identifying Convergences and Divergences in APEC RTAs/FTAs”. Available from: [http://www.apec.org/~media/Files/Groups/RTAs\\_FTAs/Convergences\\_Divergences\\_in\\_APEC\\_RTAs-FTAs.doc](http://www.apec.org/~media/Files/Groups/RTAs_FTAs/Convergences_Divergences_in_APEC_RTAs-FTAs.doc)
- APEC Policy Support Unit (2015), “Trends and Developments in Provisions and Outcomes of RTA/FTAs Implemented in 2014 by APEC Economies”, APEC#215-SE-01.14. Available from: [http://publications.apec.org/publication-detail.php?pub\\_id=1660](http://publications.apec.org/publication-detail.php?pub_id=1660)
- APEC Policy Support Unit (2016), “Second-Term Review of APEC’s Progress towards the Bogor Goals” (forthcoming).
- Asia-Pacific Economic Cooperation (2014), “Meeting of APEC Ministers Responsible for Trade – Qingdao Statement”, 17-18 May 2014. Available from: [http://www.apec.org/Meeting-Papers/Ministerial-Statements/Trade/2014\\_trade.aspx](http://www.apec.org/Meeting-Papers/Ministerial-Statements/Trade/2014_trade.aspx)
- Bhagwati, Jagdish (1995), “US Trade Policy: The Infatuation with FTAs”, Discussion Paper Series No. 726, Columbia University, April. Available from: [http://www.columbia.edu/cu/libraries/inside/working/Econ/ldpd\\_econ\\_9495\\_726.pdf](http://www.columbia.edu/cu/libraries/inside/working/Econ/ldpd_econ_9495_726.pdf)
- Frankel, Susy (2012), “The Intellectual Property Chapter in the TPP”, in Lim, Elms and Low (eds), “The Trans-Pacific Partnership: A Quest for a Twenty-first Century Trade Agreement”, Cambridge University Press, p. 157-170.
- Goode, Walter (2005), “Negotiating Free-Trade Agreements: A Guide”, Australian Government Department of Foreign Affairs and Trade. Available from: [http://www.apec.org/~media/Files/Groups/RTAs\\_FTAs/2005\\_negotiating%20free%20trade%20agreement\\_a%20guide.pdf](http://www.apec.org/~media/Files/Groups/RTAs_FTAs/2005_negotiating%20free%20trade%20agreement_a%20guide.pdf)
- Kawai, Masahiro & Ganeshan Wignaraja (2010), “Free Trade Agreements in East Asia: A Way Toward Trade Liberalization?”, ADB Briefs, No. 1, June. Available at: <http://www.adb.org/publications/free-trade-agreements-east-asia-way-toward-trade-liberalization>
- Peterson Institute for International Economics. (2016), “Assessing the Trans-Pacific Partnership VOLUME 1: Market Access and Sectoral Issues”. Washington D.C.: Peterson Institute for International Economics. Available from: <https://piie.com/publications/briefings/piieb16-1.pdf>

UNCTAD (2016), “Taking Stock of IIA Reform”, IIA Issues Note 1, March. Available from: <http://investmentpolicyhub.unctad.org/Publications/Details/142>

Valdes, Raymundo & Maegan Mc Cann (2014), “Intellectual Property Provisions in Regional Trade Agreements: Revision and Update”, Staff Working Paper ERSD-2014-14, World Trade Organization, Economic Research and Statistics Division. Available from: [https://www.wto.org/english/res\\_e/reser\\_e/ersd201414\\_e.pdf](https://www.wto.org/english/res_e/reser_e/ersd201414_e.pdf)

Wellhausen, Rachel. L. (2016). “Recent Trends in Investor–State Dispute”. *Journal of International Dispute Settlement*, Vol 7, No. 1, p. 117–135.

World Trade Organization (1994), ”Agreement on Trade-Related Aspects of Intellectual Property Rights”. Available from: [https://www.wto.org/english/docs\\_e/legal\\_e/27-trips.pdf](https://www.wto.org/english/docs_e/legal_e/27-trips.pdf)