Asia-Pacific Economic Cooperation

Advancing Free Trade for Asia-Pacific Prosperity

Trends and Developments in Provisions and Outcomes of RTA/FTAs Implemented in 2016 by APEC Economies

APEC Policy Support Unit

October 2017

Prepared by:
Carlos Kuriyama and Divya Sangaraju*
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 Website: www.apec.org

Produced for:
APEC Senior Officials
Asia-Pacific Economic Cooperation

APEC#217-SE-01.21

---

* The authors are Senior Analyst and Researcher at the APEC Policy Support Unit (PSU) and would like to thank Darren Aw Tsin Liang for his research assistance, the Committee on Trade and Investment and APEC Senior Officials for their comments. The views expressed in this paper are those of the authors and do not necessarily represent those of APEC Member Economies.

CONTENTS

LIST OF FIGURES

LIST OF TABLES

LIST OF BOXES

KEY FINDINGS

- Since the 2000s, there has been an increasing trend in the number of RTA/FTAs that APEC economies have signed or enforced within the APEC region and with the world. As of December 2016, 165 RTA/FTAs had been signed by at least one APEC member economy. 156 RTA/FTAs of them had already been in force, out of which 62 had been intra-APEC agreements.

- From the trade perspective, intra-APEC integration has been strengthening for the last two decades. Between 1996 and 2016, the number of intra-APEC trade pairings with an RTA/FTA in force went up from 13% to 48%. Similarly, the share of intra-APEC trade flows by RTA/FTA partners increased from 30% to 64% during the same period.

- Trade integration for APEC economies has not only increased within APEC, but also with the rest of the world. From the export side, this share increased from 23.1% to 49.4% of total APEC exports; while for the import side, it did so from 21.2% to 46% of total APEC imports. Overall, the share of trade with RTA/FTA partners has risen for most APEC economies between 1996 and 2016.

- The structure of the RTA/FTAs implemented in 2016 corroborates the trend that recent agreements have covered not just disciplines on trade in goods, but also on services and investments.

- The Investment chapters in the four RTA/FTAs analyzed in this report (Japan-Mongolia; Korea-Colombia; Pacific Alliance and Viet Nam-EAEU) are WTO-plus as they include a broad range of disciplines beyond those appearing in the WTO Agreement on Trade-Related Investment Matters (TRIMS). All of them make liberalization commitments through the use of a negative list, provide for national treatment and MFN at the post-establishment level, prohibit the use of certain performance requirements, guarantee the free transfer of capital without delay, consider environmental concerns to attract investments and include clauses concerning the application of ISDS.

- However, the study found some differences concerning the Investment chapters in areas such as the inclusion of national treatment and MFN treatment at the pre-establishment level; the recognition of fair and equitable treatment and minimum standard of treatment in accordance to international customary law or in accordance to domestic laws and regulations; the application of performance requirements to technology transfers; exceptions to free transfers of capital in cases of problems with the balance of payments; and diverging procedures regarding ISDS. In general, some of these contrasts may represent a challenge to APEC economies when pursuing new trade agreements, in particular when those involve a greater number of parties.

- The Customs chapters analyzed in this report include provisions in most of the disciplines that appear in the APEC Model Measures for RTA/FTAs on Customs Administration and Trade Facilitation. While the scope of the chapters may differ among the four RTA/FTAs, there are similarities in the areas of transparency

concerning customs-related laws and regulations and the acknowledgement of the importance of using information technology systems to facilitate trade.

- Differences in the Customs chapters relate to the requirements in submitting documentation, the time to complete certain procedures, as well as the level of cooperation among RTA/FTA partners. Nonetheless, these differences may not necessarily represent an obstacle in negotiating a regional agreement such as the Free Trade Area of the Asia Pacific (FTAAP), as the existing RTA/FTAs generally share similar objectives in this area.

- Technological advancements have been introducing new ways to deal with trade transactions. RTA/FTAs are also adapting to this new environment, with most of the RTA/FTAs put in force in recent years, including chapters or sections on E-Commerce. These E-Commerce chapters contain binding commitments which includes not charging customs duties on electronic transmissions. However, in some cases, these commitments do not have the same depth as suggested by the APEC Model Measures for RTA/FTAs.

- In general, all agreements acknowledge the growing importance of e-commerce to achieve economic growth and include relatively similar clauses regarding consumer protection and paperless trade. Most agreements also recognize the importance of avoiding the implementation of unnecessary barriers affecting electronic commerce transactions.

- However, there are divergences among Electronic Commerce chapters, which could be an issue of concern in the event that APEC economies would like to negotiate a comprehensive regional trade agreement. Some of the differences are related to the definition of digital products; the scope of application of e-commerce provisions; the use of national treatment and MFN treatment for digital products; the binding nature of provisions on electronic authentication and digital certificates; the inclusion of clauses concerning localization of computing facilities and source codes.

- Regarding Government Procurement chapters, not all agreements include chapters with binding provisions. However, many of the provisions included in the agreements with binding commitments on government procurement are based on those in the WTO Government Procurement Agreement (GPA). Looking at any process towards the FTAAP, the main difficulty of negotiating a Government Procurement chapter would be deciding if the agreement is comprehensive with binding provisions.

- One of the differences among Government Procurement chapters with binding provisions concerns market access conditions. Thresholds establishing the minimum value of public purchases open for suppliers from RTA/FTA counterparts differ across agreements. Furthermore, the number of public institutions covered by these chapters at the central, sub-central and other levels vary and reciprocal restrictions in market access are found in some agreements.

1. INTRODUCTION

This is the third annual report produced on recent RTA/FTAs implemented by APEC economies, as part of the APEC Information Sharing Mechanism agreed in 2014[1]. In this occasion, the report analyzes the increase in the number of RTA/FTAs within the APEC region, as well as the general structure of trade agreements put in place by at least one APEC economy in 2016. Four agreements were evaluated in this report, namely: Japan-Mongolia; Korea-Colombia; Pacific Alliance and Viet Nam-EAEU FTAs[2].

In addition, this report examines four chapters/topics within these agreements: Investment, Customs Administration/Procedures/Trade Facilitation, Electronic Commerce and Government Procurement. The intention is to recognize common patterns and differences, as well as recent trends. The report also identifies areas in which RTA/FTA signatory parties have included WTO-plus commitments. Similarly, when applicable, the analysis compares the content of these chapters with those of APECs Model Measures for RTA/FTAs.

For the third consecutive year, this report has included an analysis of Investment chapters. This is in response to the increasing number of RTA/FTAs incorporating provisions in this area and the growing interest in discussing issues such as investor-state dispute settlement (ISDS) and the application of national treatment to all investment phases, among others.

Another chapter studied in this report relates to Customs. The global economic slowdown after the Global Financial Crisis in 2009 has motivated increased emphasis on implementing measures aimed at facilitating trade. Also, as the WTO Trade Facilitation Agreement (TFA) entered into force on 22 February 2017, it is relevant to identify areas in which RTA/FTAs could still provide additional benefits to those obtained from the implementation of the TFA.

In recent years, technology has made significant progress and trade transactions have increasingly taken place through electronic means. The introduction of e-commerce is revolutionizing the interactions between consumers and firms. Furthermore, it has introduced regulatory challenges for policymakers as the difference between goods and services have become less clear in some cases and certain e-commerce features are not present in the traditional commerce. The analysis of Electronic Commerce chapters in recent RTA/FTAs represents a good opportunity to investigate how agreements have approached this topic.

Finally, this report analyzes the chapters on Government Procurement as it has been commonly included in recent RTA/FTAs. Signatory parties are increasingly exploring the possible gains that access to public procurement markets overseas could offer to firms. But at the same time have looked into safeguarding domestic interests, for example, by allowing governments to use set-asides to award certain contracts to micro, small and medium enterprises (MSMEs).

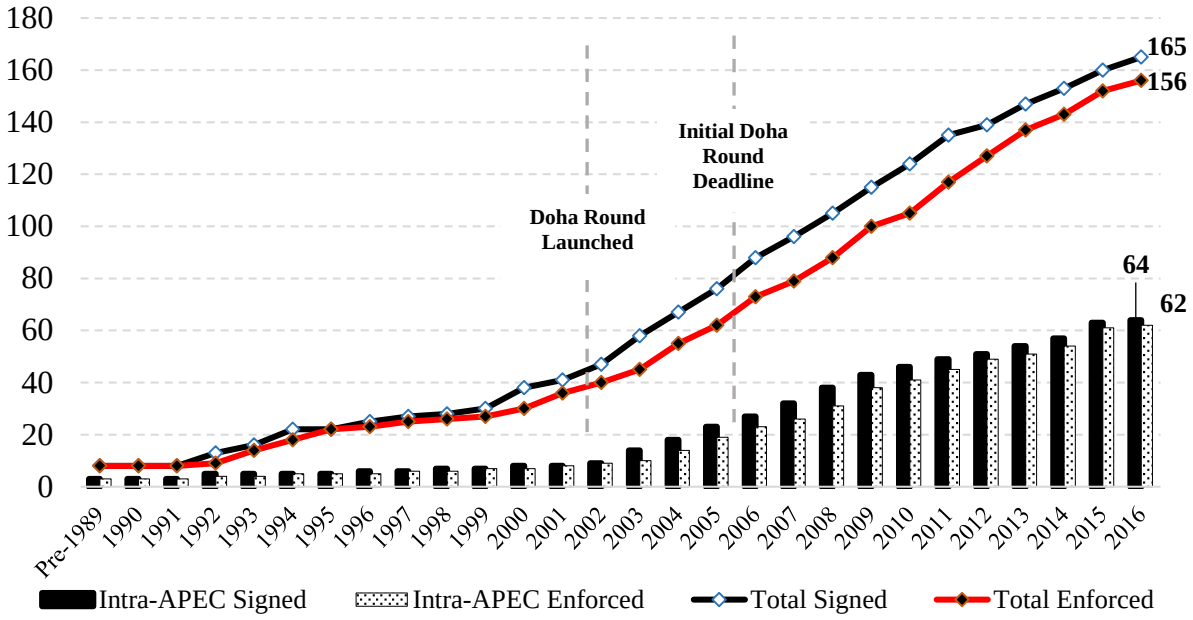
[1] APEC (2014), "Meeting of the APEC Ministers Responsible for Trade – Qingdao Statement", 17-18 May, https://www.apec.org/Meeting-Papers/Sectoral-Ministerial-Meetings/Trade/2014_trade

[2] Not all the agreements included in this report are termed as Free Trade Agreements. For example, the official name of the Pacific Alliance FTA is "Additional Protocol to the Framework Agreement of the Pacific Alliance" (the original title is in Spanish: *"Protocolo Adicional al Acuerdo Marco de la Alianza del Pacifico"*,).

2. RTA/FTAS WITHIN THE APEC REGION

Since the 1990s, trade agreements have been found to be increasingly attractive to APEC economies such that many have been eager to put RTA/FTAs in place with counterparts within and outside the APEC region. This is illustrated by Figure 2.1 which shows an upward trend in the number of RTA/FTAs that APEC economies have signed or enforced within the APEC region and with the world. As of 2016, 156 RTA/FTAs with at least one APEC member economy involved have been enforced, out of which 62 were intra-APEC agreements.

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



Source: APEC Secretariat, Policy Support Unit

In spite of the increase in the number of RTA/FTAs implemented by APEC economies, Figure 2.1 shows a slight deceleration in the implementation of new RTA/FTAs by APEC economies in 2016. The number of new agreements put in force declined to four in 2016 from nine in 2015. While the reasons for the slowdown could be attributed to many APEC economies having already put in place RTA/FTAs with their most important partners, it is also possible that the economic slowdown in recent years has made it increasingly difficult for some governments to obtain domestic support to carry out a comprehensive trade liberalization agenda, including the negotiation of new RTA/FTAs[3].

Proliferation of trade agreements since 2000s

While trade agreements in APEC economies have shown an increasing trend since the 1990s, a stronger momentum can be noted after the early 2000s. Some of the factors explaining this proliferation are as follows:

[3] Indeed, WTO noted that protectionist measures are accumulating. Since 2008, WTO recorded 2,978 trade-restrictive measures and only 740 had been removed by mid-October 2016. There was an increase of nearly 17% of these measures between mid-October 2015 and mid-October 2016. Also, the number of trade-restrictive measures that have been repealed since 2008 was below 25% by mid-October 2016. See https://www.wto.org/english/news_e/news16_e/trdev_09dec16_e.htm

Dissatisfaction with WTOs slow progress

Over the years, the failure to successfully finalize the Doha Development Round and the difficulties obtaining comprehensive commitments at the multilateral level have encouraged APEC members to pursue alternative avenues for trade liberalization, such as plurilateral agreements or bilateral/regional RTA/FTAs. In the 1990s, a number of APEC economies had not signed a single RTA/FTAs, as their priority had been to obtain concessions at the multilateral level. However, by the next decade, WTO missed the first deadline to conclude the Doha Round in 2005 and all APEC economies had already enforced at least one RTA/FTA[4].

APEC economies using RTA/FTAs as means to extend their economic and political interests

RTA/FTAs have also been used strategically by economies to extend their economic and political interests. For example, several APEC economies have signed RTA/FTAs with their main trade partners to secure preferential market access. RTA/FTAs have also been used to maintain economic presence in foreign markets and gain influence with trade partners[5].

RTA/FTAs "domino effect"[6]

The 'domino effect' describes the phenomenon whereby one economy entering into RTA/FTAs results in other non-member economies entering into similar agreements. As economies enter into RTA/FTAs, the preferential treatment accorded to only signatory parties, put non-signatory parties in a disadvantageous position to access the markets of signatory parties. In order to offset the negative consequences of being initially left out, those economies will attempt to negotiate and implement RTA/FTAs, otherwise they could be losing market opportunities, as its competitors would gain access to these markets on more favorable terms. Hence, it is common to find cases of economies – within and outside APEC –making efforts to expand their trade network after direct competitors negotiate or implement RTA/FTAs with common important partners.

Better coverage in FTA/RTAs

The proliferation of bilateral and regional agreements can also be attributed to the interest in obtaining commitments beyond those levels agreed in existing WTO agreements and to include areas that are not covered by WTO. RTA/FTAs signed in recent years tend to include a wider array of topics than those in traditional agreements which mostly only covers disciplines associated to trade in goods. Nowadays, RTA/FTAs tend to include chapters on topics such as competition policy, intellectual property rights, cross-border trade in services, investment, electronic commerce and movement of business persons, among others[7].

[4] Menon, J. (2008). Dealing with the Proliferation of Bilateral Free Trade Agreements. ERD Working Paper Series, 123rd ser., p. 10-12.
[5] APEC Policy Support Unit (2016), "Trends and Developments in Provisions and Outcomes of RTA/FTAs Implemented in 2015 by APEC Economies", APEC#215-SE-01.14, p. 6-7.
[6] Menon, op, cit.
[7] World Trade Organization. (2011). World Trade Report 2011: The WTO and preferential trade agreements (From co-existence to coherence). p 128-145.

Trade integration by APEC economies has intensified in recent decades

APEC economies are strengthening their integration from the trade viewpoint. Table 2.1 shows that trade pairings within APEC with RTA/FTAs in force have increased significantly in the last two decades and the percentage of intra-APEC trade flows covered by RTA/FTA partners has more than doubled. Between 1996 and 2016, the number of intra-APEC trade pairings with an RTA/FTA in force went up from 13% to 48%. Similarly, the share of intra-APEC trade flows by RTA/FTA partners increased from 30% to 64% during the same period[8].

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

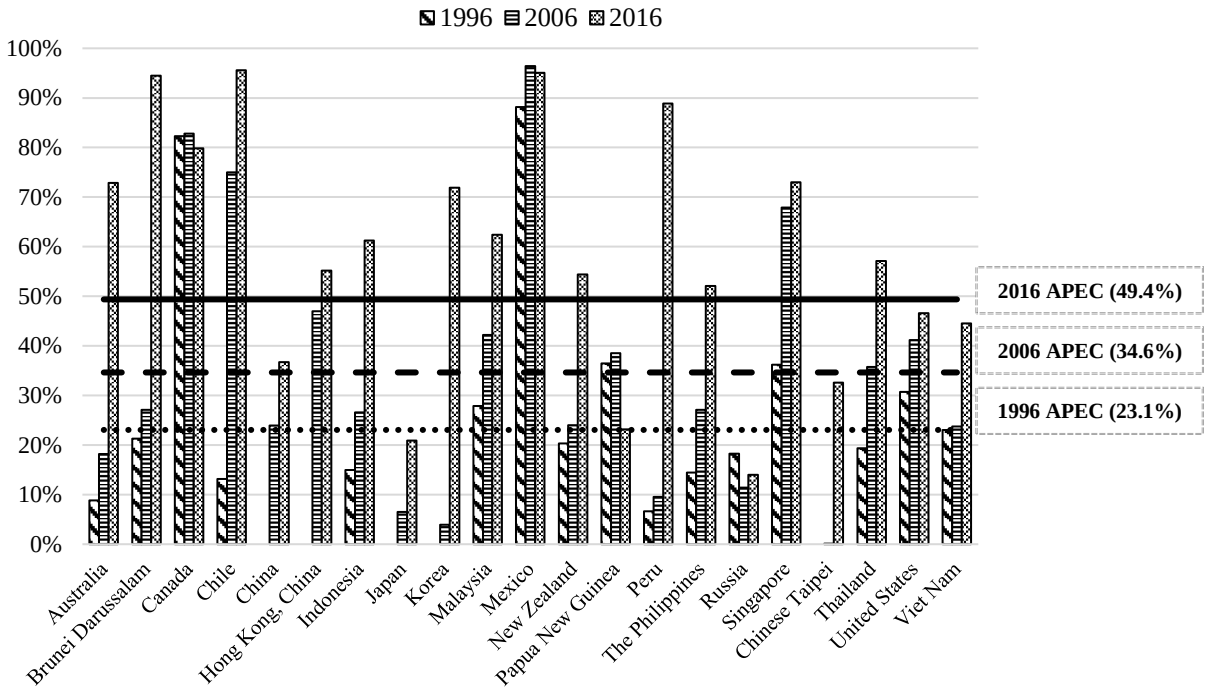
Year	Intra APEC Trade Pairings	Intra-APEC Trade Pairings with RTA/FTA	% Intra-APEC Trade Parings with RTA/FTAs	Intra-APEC Trade Flows (USD Billions)	Intra-APEC Trade Flows by RTA/FTA Partners (USD Billions)	% of Intra-APEC Trade Flows by RTA/FTA Partners
1996	210	27	13%	$ 1,796.67	$ 544.15	30.3%
2006	210	52	25%	$ 3,779.95	$ 1,748.28	46.3%
2016	210	101	48%	$ 5,551.26	$ 3,542.74	63.8%

Source: International Monetary Fund – Direction of Trade Statistics. Chinese Taipei's Ministry of Finance, External Trade Statistics. APEC Secretariat, Policy Support Unit calculations

The increased pace of trade integration by APEC economies has not just been within APEC, but also with the rest of the world. Figure 2.2 and Figure 2.3 show the share of trade of each APEC economy with their RTA/FTA partners from the export and import perspective. A noticeable trend is that the share of trade with RTA/FTA partners has risen for most APEC economies between 1996 and 2016. From the export side, this share went up from 23.1% to 49.4%; while for the import side, it did so from 21.2% to 46%. Overall, the share of trade for the whole APEC region with RTA/FTA partners has increased significantly. However, it is clear that there is still room for progress as APEC economies such as China, Japan, Russia, Chinese Taipei and United States still have a significant percentages of their trade with non-RTA/FTA partners.

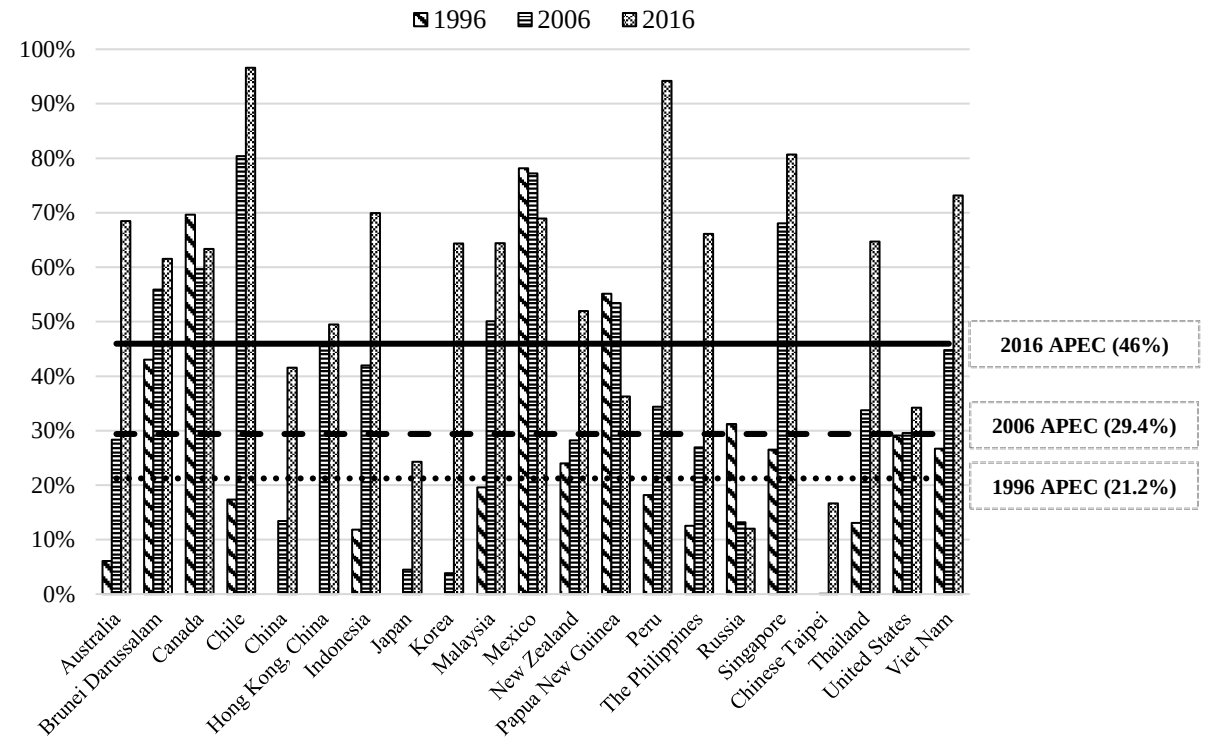
[8] For clarification, these numbers do not reflect the percentage of intra-APEC trade that is subject to preferential treatment through the use of RTA/FTAs. Trade between RTA/FTA partners include goods that are excluded from the tariff liberalization schemes agreed in those agreements.

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



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

Figure 2.3: APEC Economies' Share of Trade with RTA/FTA Partners (Imports)



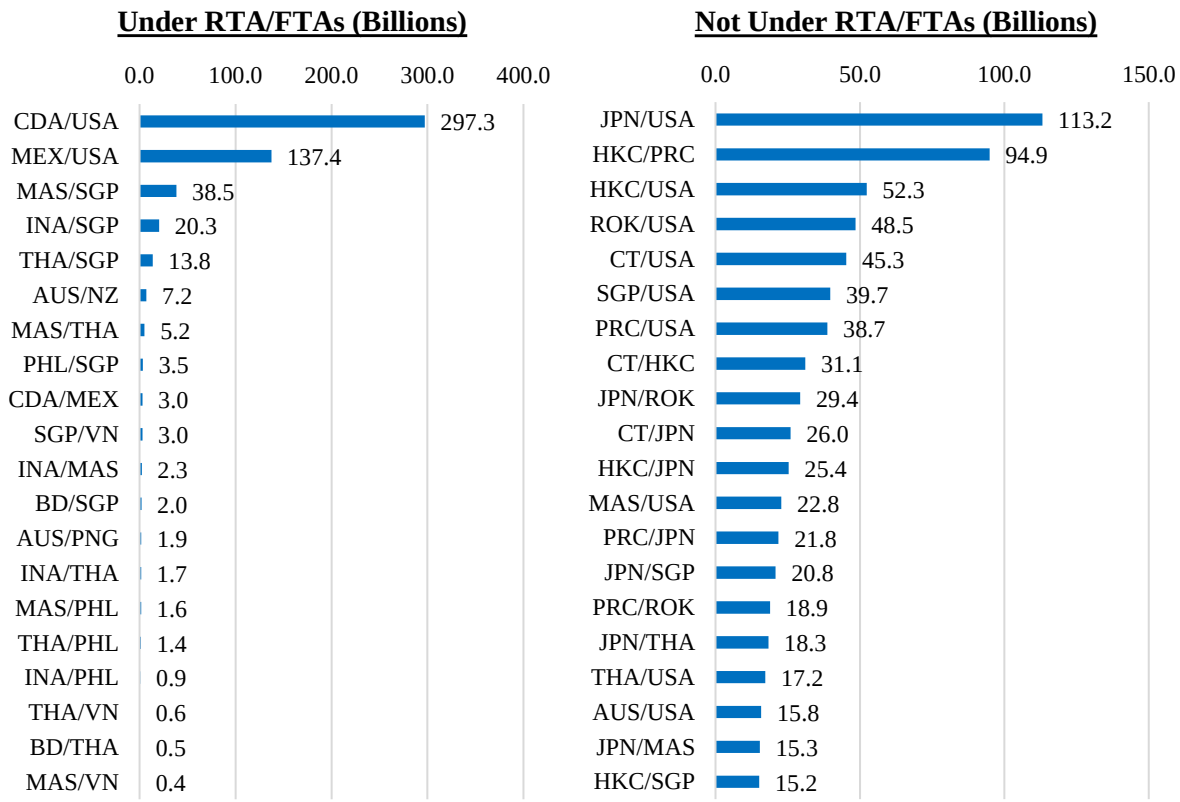
Source: International Monetary Fund - Direction of Trade Statistics. Chinese Taipei's Ministry of Economic Affairs, Bureau of Foreign Trade. Chinese Taipei's Ministry of Finance, External Trade Statistics. APEC Secretariat, Policy Support Unit calculations

1996: NAFTA and ASEAN – Most important RTA/FTAs within APEC

In 1996, most of the RTA/FTAs in the APEC region were sub-regional. The North American Free Trade Agreement (NAFTA) boasted the highest trade value among intra-APEC RTA/FTAs. In fact, the largest bilateral trade flows covered by RTA/FTAs were the Canada-United States and Mexico-United States, which accounted for USD 297.3 billion and USD 137.4 billion respectively.

ASEAN was the second largest RTA/FTA in APEC and its largest bilateral trade flows involved the participation of Singapore. The trade flow between Malaysia and Singapore was the largest one within ASEAN (USD 38.5 billion), followed by those between Indonesia and Singapore (USD 20.3 billion) and Singapore and Thailand (USD 13.8 billion). The third largest RTA/FTA was the Australia-New Zealand Closer Economic Relations, whose partners accounted for USD 7.2 billion in trade in the same year.

Figure 2.4: Top 20 Bilateral Trade Flows under RTA/FTAs in 1996 (USD Billions)



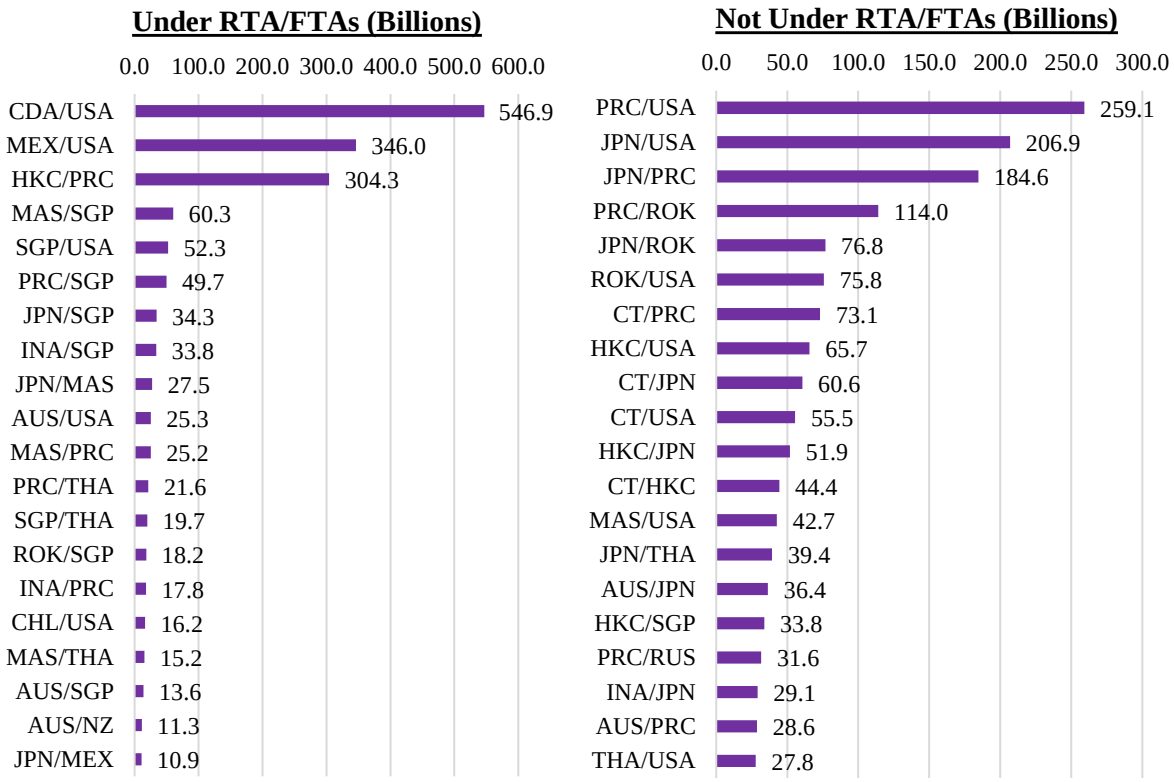
Source: International Monetary Fund - Direction of Trade Statistics. Chinese Taipei's Ministry of Economic Affairs, Bureau of Foreign Trade. Chinese Taipei's Ministry of Finance, External Trade Statistics. APEC Secretariat, Policy Support Unit calculations

2006: More bilateral deals and more APEC economies implementing RTA/FTAs

By the mid-2000s, when it was clear that the deadline to conclude the Doha Round was not going to be met, APEC economies' interest to look for bilateral trade negotiations intensified. In comparison to 1996, new players emerged among the top 20 bilateral trade flows in APEC under RTA/FTAs in 2006 (Figure 2.5). For example, China and Japan appear on the list, in particular due to their trade agreements with ASEAN members, as well as the Mainland and Hong Kong Closer Economic Partnership Arrangement (CEPA) between China and Hong Kong, China. Latin American economies also appear on the list, due to their increasing interest in signing trade deals with their most important economic partners.

However, despite the expansion of the RTA/FTA network in the APEC region, many important bilateral trade flows had not been covered by any RTA/FTA yet. In fact, certain high-income economies such as Australia and Korea had not implemented RTA/FTAs with many of their most important trade partners by then.

Figure 2.5: Top 20 Bilateral Trade Flows under RTA/FTAs in 2006 (USD Billions)

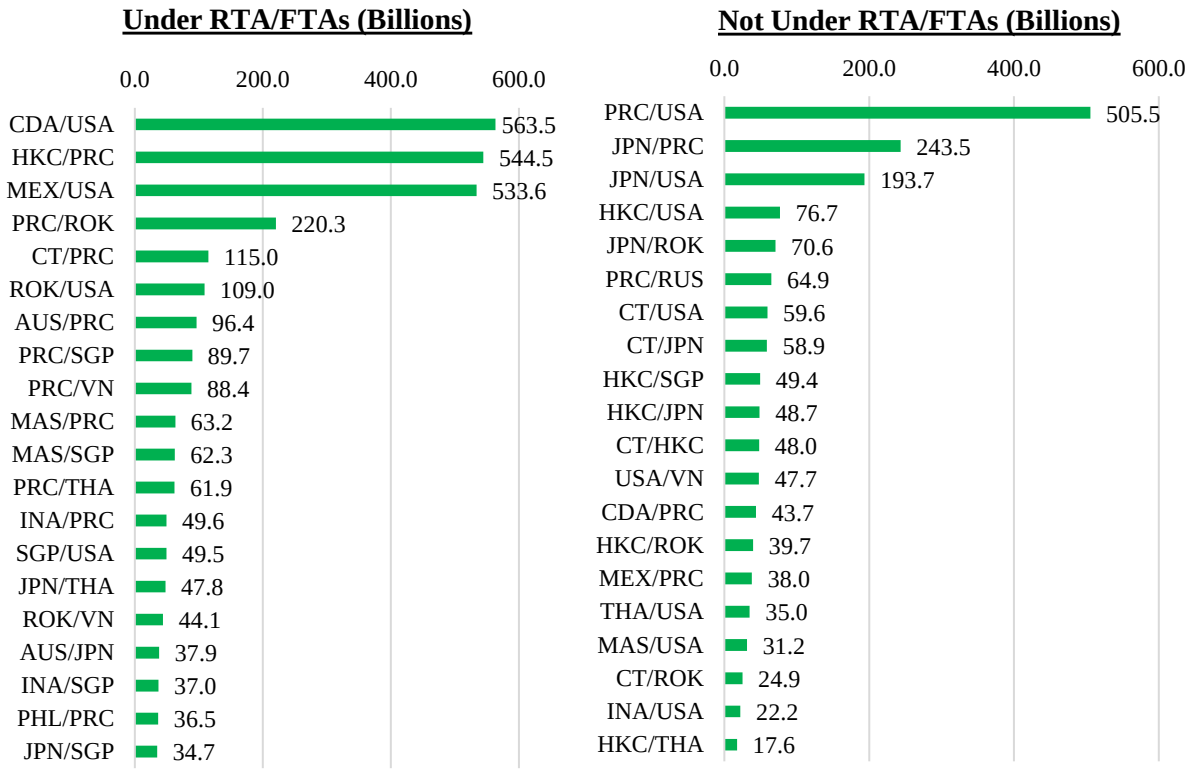


Source: International Monetary Fund - Direction of Trade Statistics. Chinese Taipei Ministry of Finance, External Trade Statistics – Export and Import Value by Country. APEC Secretariat, Policy Support Unit calculations

2016: More comprehensive intra-APEC RTA/FTA network

As shown in Table 2.1, nearly one-half of the trade pairings in APEC had already been covered by an RTA/FTA by 2016. In the last 10 years, there has been increasing interest to strengthen trade ties within the region and that has involved the realization of RTA/FTAs for individual APEC economies with some of their most important trade partners. For example, China implemented trade agreements with Korea and Chinese Taipei, Australia with China and Japan, and Korea with the United States.

Figure 2.6: Top 20 Bilateral Trade Flows under RTA/FTAs in 2016 (USD Billions)



Source: International Monetary Fund – Direction of Trade Statistics. Chinese Taipei's Ministry of Finance, External Trade Statistics. APEC Secretariat, Policy Support Unit calculations

Future Trade Developments in APEC

Despite the significant progress achieved in expanding the intra-APEC RTA/FTA network in recent years, several important bilateral trade flows are not yet subject to any RTA/FTA, such as those between China and United States; China and Japan; and Japan and United States, among others. Nevertheless, this may change in the future should TPP be implemented and RCEP be successfully negotiated and put in force. Should these agreements be implemented in the future, intra-APEC trade pairings would increase to 177 which would cover more than half (60.5%) of all possible intra-APEC trade pairings.

3. GENERAL STRUCTURE OF RTA/FTAS IN FORCE 2016

The structure of the RTA/FTAs implemented in 2016 corroborates the trend that recent agreements have covered not just disciplines related to trade in goods, but also services and investments as well (Table 3.1).

Table 3.1: Chapter Structure of RTA/FTAs

Chapters \ RTA/FTAs	FTA Put in Force in 2016			
	Japan-Mongolia	Korea-Colombia	Pacific Alliance Additional Protocol	Viet Nam - EAEU
Trade in Goods	■	■	■	■
Rules of Origin	■	■	■	■
Customs Administration /Trade Facilitation	■	■	■	■
Technical Barriers to Trade	■	■	■	■
Sanitary and Phytosanitary Measures	■	■	■	■
Trade Remedies	■	■		■
Cross Border Trade in Services	■	■	■	■
Financial Services			■	
Telecommunications		■	■	
Maritime Services			■	
Movement of Business People	■	■		■
Investment	■	■	■	■
Government Procurement	■	■	■	■
Intellectual Property Rights	■	■		■
Competition Policy	■	■		■
E-Commerce	■	■	■	■
Cooperation / Promotion	■	■		
Labor				■
Environment		■		■
Transparency		■	■	
Dispute Settlement	■	■	■	■

Source: APEC Secretariat, Policy Support Unit. Extracted from the legal texts of each of the agreements.

From the goods perspective, all four new trade agreements put in force in 2016 include traditional chapters on Trade in Goods (Market Access), Rules of Origin, Customs Procedures/Administration/Trade Facilitation, Technical Barriers to Trade and Sanitary and Phytosanitary Measures. The inclusion of a Trade Remedies chapter is present in all four agreements, except for the case of the Pacific Alliance FTA. The absence of a Trade Remedies chapter or provisions on anti-dumping, safeguards and countervailing duties in the Trade in Goods chapter, is a feature that is not very common within trade agreements. However, this does not mean Pacific Alliance members cannot defend themselves in special situations (e.g. cases of unfair trade between two members) because they are still allowed

to use trade remedies in accordance to WTO rules (e.g. those included in the Agreement on implementation of Article VI of the General Agreement on Tariffs and Trade 1994, commonly known as the Anti-dumping Agreement).

While all agreements include a chapter on Trade in Services covering cross-border trade, two of the agreements also include individual chapters for specific sectors, such as the case of Telecommunications in the Korea-Colombia and Pacific Alliance FTAs, and Financial Services and Maritime Services chapters in the Pacific Alliance FTA. Mobility of Business Persons has been included as a chapter in three agreements: the Japan-Mongolia; Korea-Colombia and Viet Nam-EAEU FTAs.

All four RTA/FTAs included in this report incorporate binding chapters on Investment with clauses on Investor-State Dispute Settlement (ISDS). Likewise, these agreements also contain chapters on Government Procurement, E-Commerce and Dispute Settlement. Co-operation is included as a chapter per se in only two agreements: Japan-Mongolia and Korea-Colombia FTAs. However, the Pacific Alliance and Viet Nam-EAEU FTAs include provisions on cooperation in a number of their chapters.

Regarding other topics, chapters on Intellectual Property Rights and Competition Policy are included in the Japan-Mongolia; Korea-Colombia and Viet Nam-EAEU FTAs. Transparency is addressed as a chapter in two agreements, the Korea-Colombia and Pacific Alliance FTA. The Korea-Colombia and Viet Nam-EAEU FTAs contain a chapter on Environment. Only the Viet Nam-EAEU FTA includes a chapter on Labor.

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

4.1 INVESTMENT

The four assessed RTA/FTAs include comprehensive chapters relating to investment issues. While the Japan–Mongolia; Korea–Colombia; and Pacific Alliance FTAs incorporate a specific Investment chapter, the Viet Nam–EAEU FTA contains a chapter called Trade in Services, Investment and Movement of Natural Persons, which is divided into several sections. Only the provisions in the sections on "horizontal provisions", "establishment, commercial presence and activities" and "investment" are applicable to investments.

The Viet Nam–EAEU FTA has distinctive features in relation to investment. In terms of the application of the investment-related provisions, they are only applicable to Viet Nam and one member of the EAEU (the Russian Federation). In addition, Viet Nam and the Russian Federation's investment commitments are not included in the text of the agreement, but in a separate protocol (Protocol No. 1), which has been incorporated as an integral part of this FTA.

The investment chapters in these agreements are WTO-plus as they include a broad range of disciplines beyond those appearing in the WTO Agreement on Trade-Related Investment Matters (TRIMS), which only includes issues affecting trade in goods, such as the need for parties not to discriminate against foreign products or implementing measures leading to quantitative restrictions[9].

This report does not include a comparative analysis of the content of the Investment chapters of recent RTA/FTAs signed by APEC economies vis-à-vis the APEC Model Measures for RTA/FTAs, endorsed in 2008, as this initiative did not include model measures for an Investment chapter.

a. Definition of Investment

The four RTA/FTAs put in force in 2016 include a comprehensive definition, in which any or every asset owned or controlled that is invested by an investor can be considered as an investment. Except for the Japan-Mongolia FTA, the definitions in the agreements state that these assets must have the characteristics of an investment. In the Korea-Colombia and Pacific Alliance FTAs, an asset is considered as investment if they meet at least one of these features: a) the commitment of capital or other resources; b) the expectation of gain or profit; or c) the assumption of risk. However, in the Viet Nam-EAEU FTA, all three features must be present in the asset for it to be considered an investment.

While the Japan-Mongolia; Korea-Colombia and Pacific Alliance FTAs stress that the investment could be direct (i.e. someone acquiring an asset) or indirect (i.e. a firm acquiring an asset on your behalf), the Viet Nam-EAEU FTA does not make any clarification on this matter.

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

All RTA/FTAs include a list of examples that may be considered investments, such as enterprises; shares and stocks; bonds, debentures, loans and other forms of debt; futures, options and other derivatives; rights under contracts; movable and immovable property; and intellectual property, among others. However, some agreements narrow down what could be considered as investments. For example, while public debt operations are explicitly excluded as investments in the Korea-Colombia and Pacific Alliance FTAs; claims to money that arise solely from commercial contracts for sale of goods and services or the extension of credit in connection with a commercial transaction are excluded from the Korea-Colombia and Viet Nam-EAEU FTAs. In addition, some agreements such as the Korea-Colombia and Pacific Alliance FTAs take a similar approach to TPP by clarifying that some forms of debt, namely long-term instruments, are more likely to have the characteristics of an investment than others

b. National Treatment

The national treatment clause seeks to provide investors from their FTA partners a treatment no less favorable than those given to local investors. All agreements evaluated include a national treatment clause, which also specifies that this treatment is given to investments in similar circumstances, and provides it for investments in the post-establishment phase (i.e. operation of an investment).

A difference found in the Viet Nam-EAEU FTA with respect to the others, is that this agreement is the only one that restricts the application of national treatment to the post-establishment phase. The other agreements, namely the Japan-Mongolia; Korea-Colombia; and Pacific Alliance FTA, extend this treatment to the pre-establishment phase (i.e. entry of investments into the territory of the parties).

All agreements include restrictions in the application of national treatment through a negative list, specifying sectors where it is not possible to implement this provision (i.e. non-conforming measures). The agreements also include a negative list of sectors, where the parties reserve the right to implement in the future, measures not complying with the national treatment clause.

c. Most Favored Nation Treatment (MFN)

All agreements offer a MFN clause, which states that investors of the other parties are given a treatment no less favorable than that given to investors of third parties in similar circumstances. For the Japan-Mongolia; Korea-Colombia; and Pacific Alliance FTAs, this treatment applies to both pre-establishment and post-establishment phases. For the Viet Nam-EAEU FTA, it is only applicable to post-establishment.

The Korea-Colombia; Pacific Alliance and Viet Nam-EAEU FTAs do not apply the MFN clause to investor-state dispute settlement mechanisms. Additionally, the Viet Nam-EAEU FTA includes exceptions to MFN treatment in the case that one of the parties offers now or in the future more favorable treatment to a third party through any other economic integration agreement (e.g. another FTA or BIT). The Viet Nam-EAEU FTA also does not apply the MFN clause to more favorable treatment offered to a third party through a taxation treaty.

d. General Treatment

The four agreements include a clause providing for "fair and equitable treatment" and "full protection and security". There are some variations regarding the standard of treatment, whereas the Japan-Mongolia; Korea-Colombia; and Pacific Alliance FTAs provide for minimum standard of treatment in accordance with international customary law, the Viet Nam-EAEU FTA provides for this treatment in accordance to the parties' own laws and regulations.

An additional difference in the Viet Nam-EAEU FTA with respect to the other three agreements is that the Viet Nam-EAEU FTA makes references to the national treatment and MFN clauses, by stating that parties are not required to provide "fair and equitable treatment" and "full protection and security" to investors of the other party in a more favorable way than their own party's investors and investors of any third party. Instead, the other agreements state that the treatment does not need to go beyond what it is required by customary international law. In this sense, while the "full protection and security" in the Viet Nam-EAEU FTA follows the domestic law, the Japan-Mongolia; Korea-Colombia; and Pacific Alliance FTA provide this treatment based on customary international law.

e. Performance Requirements & Senior Management and Board of Directors

The four RTA/FTAs analyzed in this report include an article preventing the use of performance requirements. All agreements include standard clauses preventing the parties from imposing a commitment or requirement on an investor. For instance, exporting a given level or a percentage of goods or services; purchasing goods produced in the territory of the party; relating in any way the volume or value of imports to those of exports; and supplying exclusively from the territory of the party to any market the goods and services produced there.

However, the scope of requirements that are not allowed differ among them. For instance, unlike the other agreements, the Viet Nam-EAEU FTA does not include prohibitions on imposing a local content requirement to achieve a given level or percentage of domestic content. Similarly, the Japan-Mongolia FTA specifies additional prohibitions, such as requiring the location of the investor's headquarters to be within the territory of the party and hiring a given number of local employees.

Some exceptions in the scope of prohibiting performance requirements are very common among the agreements. For example, the prohibition to implement requirements related to technology transfer, with the exceptions agreed with Articles 31 and 39 of the TRIPS Agreement[10] appears in the Korea-Colombia; Pacific Alliance and Viet Nam-EAEU FTAs. Similarly, the prohibition of certain performance requirements are not applied to government procurement in the Korea-Colombia and Pacific Alliance FTAs and to export promotion and foreign aid programs in the four agreements.

In terms of senior management, the clauses in all agreements state no nationality requirements for senior management positions. However, some differences appear with regards to the requirements to constitute the board of directors. In particular, the Korea-Colombia and Pacific Alliance FTAs establish that it is possible to require the majority of

[10] For more information of the TRIPS Agreement, please see https://www.wto.org/english/tratop_e/trips_e/trips_e.htm

the board of directors be of a specific nationality or resident in the territory of the parties as long as this requirement is not going to impair the ability of the investor to control its investment.

f. Expropriation and Compensation

Articles on expropriation and compensation are included in the four agreements, with the understanding that an expropriation could be direct (i.e. formal transfer or total confiscation of investment) or indirect (i.e. measures by the party have an equivalent effect of direct expropriation without any formal transfer or confiscation of the investment). All agreements highlight that a lawful expropriation can only take place if this is done for a public purpose, in a non-discriminatory manner, with a payment of a proper compensation, and in accordance with the due process of the law. While the Japan-Mongolia; Korea-Colombia; and Pacific Alliance FTA relates the due process with the customary international law, the Viet Nam-EAEU FTA does it in accordance to the laws and regulations of the party expropriating the assets.

The agreements provide some exceptions to the application of the expropriation and compensation clauses. For example, the Korea-Colombia; Pacific Alliance; and Viet Nam-EAEU FTAs establish that these clauses do not apply to the issuance of compulsory licenses granted in relation to intellectual property rights in accordance to the TRIPS agreement. Likewise, the Japan-Mongolia; Korea-Colombia; and Pacific Alliance FTAs specify that in particular circumstances, certain general regulatory measures to protect legitimate public welfare objectives do not constitute indirect expropriation.

All agreements establish that compensation has to be paid without delay, equivalent to the fair market value and based on a freely usable currency. In addition, the Korea-Colombia and Pacific Alliance FTAs specify how the payment should be converted in case it is done in a currency that is not freely usable.

g. Transfers

The Japan-Mongolia; Korea-Colombia; and Pacific Alliance FTAs include a standard clause to guarantee that parties will allow the free transfer of capital without delay. These agreements also mention that there could be exemptions to the application of this clause due to bankruptcy, issuance of securities, criminal offenses or the need to comply with orders in adjudicatory proceedings. Apart from the Pacific Alliance FTA, the other two agreements include a clause on temporary safeguard measures allowing parties to implement restrictive measures to capital transactions in cases of balance of payments difficulties.

The Viet Nam-EAEU FTA mentions that the free transfer of payments is guaranteed only after all tax and other obligations are met in accordance to domestic regulations. Similar to the Japan-Mongolia and Korea-Colombia agreement, it includes an exception to the transfer of payments obligation in case of balance of payments difficulties.

h. Treatment in Case of Armed Conflict or Civil Strife

All agreements include a provision to provide compensation to investors in the case of losses due to armed conflict or civil strife. In these cases, the treatment of foreign investments covered by the agreements need to be non-discriminatory with regards to local and foreign investments from other parties. The Korea-Colombia and Pacific Alliance FTAs have an additional provision which specifies that compensations do not apply to subsidies or grants that could be inconsistent to the article on national treatment, except for those listed in the provision on non-conforming measures.

i. Environmental Measures

The Japan-Mongolia and Pacific Alliance FTAs mention that it is inappropriate to relax environmental standards for the sake of attracting or keeping investments. Also, the Korea-Colombia and the Pacific Alliance FTAs point out that parties can adopt measures to ensure that investments are conducted in ways that environmental concerns are taken into account.

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

If a dispute arises between a party and an investor from an RTA/FTA signatory party, it is possible to resolve it through minimal action in domestic courts. When the agreements include clauses on investor-state dispute settlement (ISDS), the case can possibly be sent to international arbitration to find a solution.

All the agreements analyzed in this report include clauses on ISDS. However, each agreement's ISDS clauses have different characteristics. For example, while all agreements encourage the parties to resolve their discrepancies through consultations, if such consultations fail, the time period that needs to elapse for parties to submit the case to arbitration varies. The Pacific Alliance and Viet Nam-EAEU FTAs establishes a period of six months after the party has received the notification for consultations. The Japan-Mongolia FTA includes a shorter period of 120 days, while the Korea-Colombia FTA determines that the case can only be submitted for arbitration after eight months.

Another difference resides on the mechanisms used to settle dispute should consultation fail. The Korea-Colombia and Viet Nam-EAEU FTAs explicitly include the submission of a case to domestic courts of the home party besides the ICSID Convention, ICSID Additional Facility Rules, UNCITRAL Arbitration and other arbitration institution agreed by the parties[11].

The submission of claims in all agreements cannot be done if more than three years have passed after the claimant knew about the alleged breach. Nevertheless, in terms of the type of claims that could be submitted to the arbitral tribunal, the Korea-Colombia and Pacific Alliance FTAs include some restrictions. In particular, the investor can only make the submission of claims when there is an alleged breach by the home party of an obligation included in the Investment chapter and such breach caused a loss or damage to the investor of the other party.

[11] ICSID stands for International Centre for Settlement of Investment Disputes. UNCITRAL is the United Nations Commission on International Trade and Law.

With regards to the constitution of the arbitral tribunal, the Viet Nam-EAEU FTA does not specify any rules on the matter. The other three agreements specify that unless otherwise agreed, the tribunal should consist of three arbitrators. The Japan-Mongolia and Korea-Colombia FTAs point out a period of 60 days to choose the arbitrators. The Pacific Alliance FTA includes a 90-day period instead.

About the awards, in the case of the Japan-Mongolia, Korea-Colombia and Pacific Alliance FTAs, it is explicit that the tribunal can award pecuniary compensation (including interests) and restitution of property as appropriate. Only the Japan-Mongolia and Pacific Alliance FTAs stress that it is possible for the tribunal to award legal costs, such as attorney's fees. The Viet Nam-EAEU FTA only establishes that the arbitration award is binding for the parties to the dispute, which is also included in the other three agreements.

Regarding the execution of the award, two types of clauses have been found. In the case of the Korea-Colombia and Pacific Alliance FTAs, 120 days is allowed should the dispute follow ICSIDs Convention or 90 days if ICSIDs Additional Facilities Rules or UNCITRAL Arbitration Rules are followed. In the Japan-Mongolia and Viet Nam-EDAEU FTAs, no time period has been established. The agreements only state that the award has to be enforced according to the laws and regulations in the party where the award has to be implemented.

k. Transparency in ISDS Proceedings

The Pacific Alliance FTA is the only agreement analyzed in this report that requires specific documentation to be made available to the public, such as notice of dispute; notice of intent; pleadings, memorials, and briefs submitted to the tribunal by a disputing party; minutes or transcripts of hearings of the tribunal; and orders, awards, and decisions of the tribunal. Likewise, the Pacific Alliance FTA also mandates hearings to be open to the public. In both cases, necessary arrangements need to be made in order to ensure confidential information is protected.

The Japan-Mongolia FTA does not require the documentation related to the dispute be made available to the public. However, documents could be released by the disputing party, as long as these documents are redacted to protect any confidential business information or any other type of protected information.

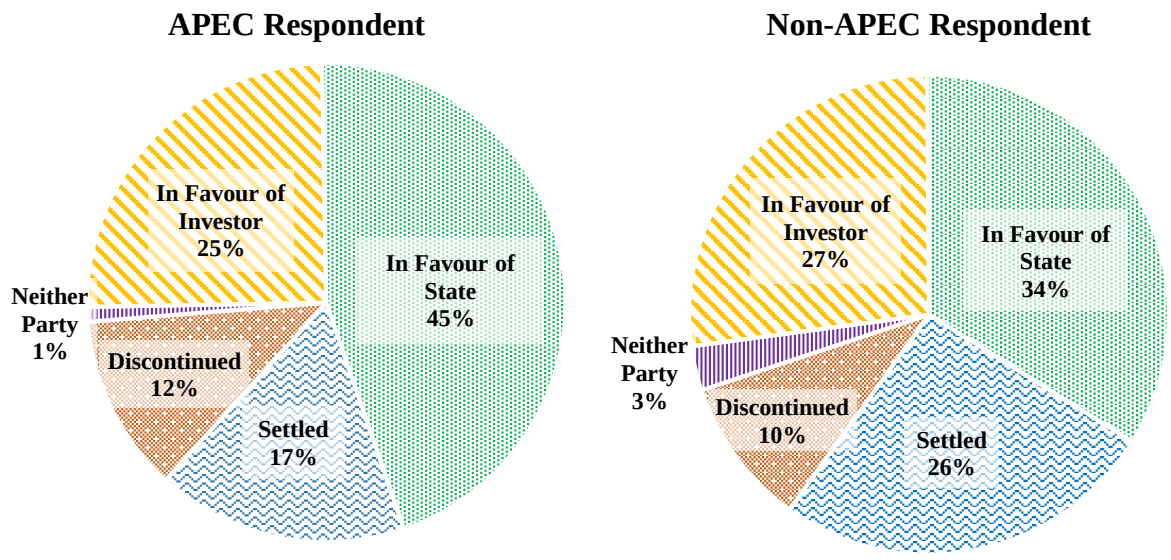
Box 1: Has ISDS Been Onerous for APEC Economies?

The inclusion of an ISDS provision in the Investment chapters of FTAs could help facilitate foreign direct investment (FDI) flows between signatory countries. Allowing access to international courts creates an objective forum for companies to resolve disputes, thereby incentivizing them to increase investment. An econometric study by Armstrong and Nottage (2016) found that ISDS provisions in Bilateral Investment Treaties (BIT) had a positive impact on attracting FDI inflows in the hosting economy. Additionally, ISDS provisions are also useful in assisting host economies with weak domestic legal institutions.

Some of the criticisms related to the inclusion of ISDS clauses mention that this is a costly process, as governments spend vast resources defending themselves and paying significant awards when cases are ruled in favour of the investors. The ISDS cases in the APEC region that were ruled in favour of the investor from 1987 to 2016, showed that the total amount claimed by investors from such cases was equivalent to USD 117 billion, while the total amount awarded by ISDS panels was USD 50.4 billion (43% of the total amount claimed).

Despite the seemingly high costs associated with these cases, 45% of the ISDS cases involving an APEC economy were resolved in favour of the State and 12% were discontinued. Only 25% of the cases were ruled in favour of the investor and 17% were settled. For the rest of the world, the results were slightly less favourable, as 34% of the concluded cases were in favour of the State while 27% of cases were ruled in favour of the investor.

Figure 4.1: Distribution of Concluded ISDS Cases by Outcome



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

On evaluation of the proportion of amount claimed that was awarded in favour of the investor, the actual costs associated with ISDS cases becomes less daunting, particularly for the APEC region. As shown in Table 4.1, more than half of the cases in the APEC region got awards equivalent to less than 25% of the amount claimed. In fact, only one case within APEC was awarded more than 75% of the total claim.

Table 4.1: Amounts Awarded to Investors as Percentage of Amounts Claimed

Proportion of Amount Claimed that was Awarded (%)	APEC Respondent		Non-APEC Respondent	
	No. Of Cases	Share (%)	No. Of Cases	Share (%)
Below 25	13	56.5	39	43.3
Between 25 to 50	7	30.4	26	28.9
Between 50 to 75	2	8.7	13	14.4
Between 75 to 100	1	4.3	12	13.3
Total	23	100	90	100

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

The total amount awarded in favour of investors within the APEC region is a reasonable cause for concern. The USD 50.4 billion awarded from 1994 to 2016 is significantly higher in comparison to the USD 13.4 billion awarded in cases against governments from the rest of the world. However, a closer look at the data shows that a large proportion of this amount is attributed to three outlier cases within the APEC region. These three cases (USD 1.8 billion, USD 8.2 billion and USD 40 billion) had awards significantly higher than all other cases and accounted for 99% of the total amount awarded in the APEC region to investors.

Table 4.2: Amounts Awarded to Investors by Range (USD)

Amount Awarded in Favour of Investor	APEC Respondent		Non-APEC Respondent	
	No. Of Cases	Share (%)	No. Of Cases	Share (%)
Between 0 mil and 10 mil	12	50.0	38	36.2
Between 10 mil and 20 mil	4	16.7	15	14.3
Between 20 mil and 50 mil	3	12.5	14	13.3
Between 50 mil and 100 mil	2	8.3	11	10.5
Between 100 mil and 1 bn	0	0.0	24	22.9
More than 1bn	3	12.5	3	2.9
Total	24	100	105	100

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

Aside from these outliers, the cost of paying ISDS awards for governments in the APEC region is relatively low. Table 4.2 shows that in 50% of the ISDS cases in favour of the investors awarded amounts below USD 10 million. In general, as the amount awarded to the investor increases, the share of cases decrease. While no case in the APEC region was awarded with amounts ranging between USD 100 million and USD 1 billion, 24 cases in the rest of the world (22.9% of total world cases awarded to investors) had been awarded with amounts within that range.

Excluding those outlier cases, the total amount awarded to investors for cases involving APEC economies decreased significantly to USD 345 million. As seen in Figure 4.2, the impact of the outliers on the statistical figures was significant. A further analysis also revealed that the awards in these outlier cases were set aside in their entirety after follow-

on proceedings in the district courts where the arbitration took place. While the initial awards of ISDS cases against APEC economies constituted 79% of the world's total amount awarded, the actual costs after follow-on proceedings shrank to 2.6% of that total, as shown in Figure 4.3. ISDS cases may have appeared costly at the onset for the APEC region. However, after examining carefully the ISDS awards data, this indicates that they have been as a whole not too onerous for APEC economies.

Figure 4.2: Outcomes of ISDS Cases in USD Billion – World

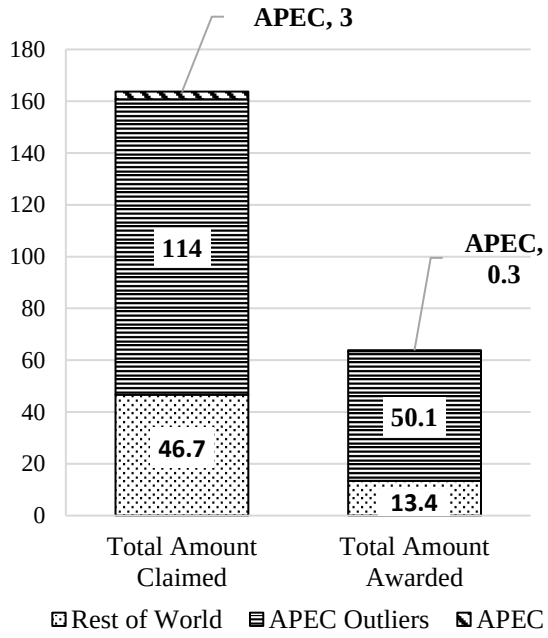
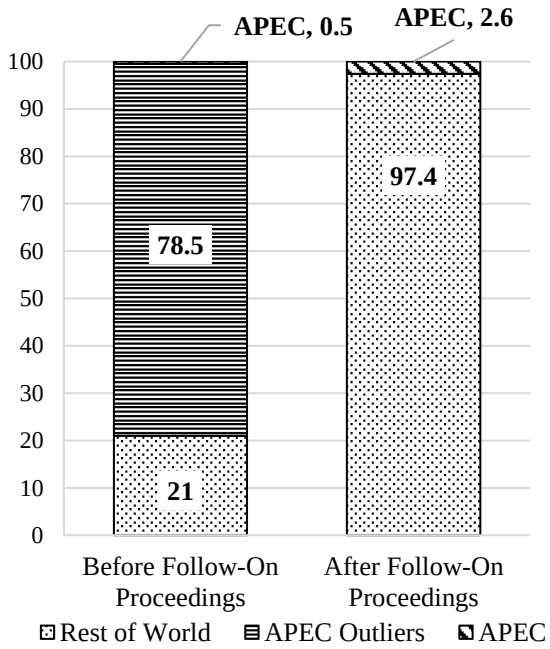


Figure 4.3: Amount Awarded by ISDS Tribunals – World (%)



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

Sources:

Armstrong, S. P., & Nottage, L. R. (2016). The Impact of Investment Treaties and ISDS Provisions on Foreign Direct Investment: A Baseline Econometric Analysis. *SSRN Electronic Journal*. doi:10.2139/ssrn.2824090

Blythe, S. E. (2013). The Advantages of Investor-State Arbitration as a Dispute Resolution Mechanism in Bilateral Investment Treaties. *The International Lawyer*, *47*(2), p. 273-290.

Peterson Institute for International Economics. (2015). What Do the Data Say about the Relationship between Investor-State Dispute Settlement Provisions and FDI? | PIIE. Retrieved from https://piie.com/blogs/trade-investment-policy-watch/what-do-data-say-about-relationship-between-investor-state

4.2 CUSTOMS ADMINISTRATION, PROCEDURES AND TRADE FACILITATION

Like the majority of RTA/FTAs, the four agreements analyzed in this report contain provisions on customs-related matters. All agreements include provisions seeking to establish clear rules with regards to customs procedures and facilitate trade. However, there are some differences among these agreements regarding the content structure of the customs-related chapters.

One of the main difference relates to the trade facilitation disciplines included in the chapters. Whilst the Japan-Mongolia FTA includes binding topics related to transparency, customs clearance and advance rulings. Other agreements such as the Korea-Colombia; Pacific Alliance; and Viet Nam-EAEU FTAs include a more comprehensive range of binding disciplines, including automation, release of goods, express consignments, risk management and review and appeal, among others.

In addition, the depth of the commitments to strengthen trade integration among RTA/FTAs could be significantly different in certain areas. For example, in terms of single windows, the Pacific Alliance FTA has taken a step forward by establishing a framework to achieve the interoperability of the single windows among the four signatory parties. The current single windows system facilitates the electronic issuance of documents -such as sanitary and phytosanitary records and certificates of origin- as well as their quick submission to the other parties.

Whilst the implementation of the WTO Trade Facilitation Agreement (TFA) has significantly closed the gap between the multilateral commitments in customs-related matters and those agreed in RTA/FTAs, the agreed chapters in RTA/FTAs are usually WTO-plus. For instance, many bilateral/regional trade agreements stipulate that the release of goods has to be done to the extent possible within 48 hours of arrival. However, the TFA does not include any time reference with respect to the release of goods. Likewise, as mentioned by the APEC Policy Support Unit, the requirement to provide advance rulings under the TFA is only mandatory regarding tariff classification and the origin of the goods planned to be imported. RTA/FTAs usually establish commitments on advance rulings in other areas (e.g. the application of customs value criteria)[12].

The Customs chapters analyzed in this report include provisions in most of the disciplines that appear in the APEC Model Measures for RTA/FTAs on Customs Administration and Trade Facilitation. In general, the agreements' provisions are similar to those in the Model Measures. However, in some specific cases, the level of ambition in the agreements is lower than those under the Model Measures.

a. General Principles, Objectives and Scope

The four RTA/FTAs analyzed in this report seek to facilitate trade by simplifying customs procedures and promoting mutual cooperation among customs authorities.

b. Transparency

All of the agreements include provisions regarding the publication of laws, regulations and procedures of customs-related issues. The depth of the commitment varies among agreements. For example, the commitment in the Japan-Mongolia FTA only specifies that information related to customs laws needs to be available to any interested person. The Viet Nam-EAEU FTA goes one step further by specifying that the information has to be published on the internet or any other appropriate media. The Korea-Colombia and Pacific Alliance FTA goes even deeper as they stipulate that the information has to be available on the internet as well, which has also been highlighted in the APEC Model Measures for RTA/FTAs.

[12] 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, p. 16.

The Pacific Alliance and the Viet Nam-EAEU FTAs also include provisions that encourages governments to publish laws and regulations that they are proposing to adopt, so interested parties can comment on proposals before they are implemented.

Also, the four agreements establish contact and/or enquiry points related to customs matters.

c. Customs Valuation

The Viet Nam-EAEU FTA includes a specific provision on this matter in the Customs chapter, establishing that the customs valuations should be conducted in accordance with GATT Article VII and the Customs Valuation Agreement. In the case of the Japan-Mongolia FTA, the Trade in Goods chapter includes a provision stating that the provisions in Part I on the Customs Valuation Agreement should apply for the purposes of determining the customs value of the goods traded between the parties. Similarly, the Pacific Alliance FTA includes a customs valuation provision in its Trade in Goods chapter, incorporating the Customs Valuation Agreement into the FTA.

The Korea-Colombia and Pacific Alliance FTAs also require parties to issue advance rulings, upon request, on the application of the customs valuation criteria in accordance with the provisions of the Customs Valuation Agreement. In the case of the Japan-Mongolia FTA, it was only agreed that the parties implement their best efforts in issuing advance rulings on customs valuation.

d. Paperless Trading and Automated Systems

All of the agreements include references to use information and communications technology for customs operations. The intention is to simplify and expedite operations through electronic means.

As mentioned previously, the Pacific Alliance FTA has included provisions looking to facilitate trade among their parties by making their single windows mutually inter-operational. The intention is to exchange information smoothly and verify the information related to any trade transaction.

e. Authorized Economic Operators (AEOs)

The Korea-Colombia and Pacific Alliance FTAs include provisions encouraging the parties to foster the implementation of AEO programs in accordance to the World Customs Organization's SAFE Framework of Standards. The Pacific Alliance FTA has established actions to allow its members to implement AEO programs. These actions include creating an AEO Technical Group; carrying out capacity-building activities and exploring cooperation opportunities with international organizations.

f. Risk Management

All of the agreements include provisions concerning this area. They stipulate that parties manage risk management system by focusing their resources on the inspection of high-risk goods and the simplification of procedures for low-risk goods. In the case of the Japan-Mongolia FTA, this was incorporated through the *Implementing Agreement between the*

Government of Japan and Government of Mongolia pursuant to Article 1.12 of the Agreement between Japan and Mongolia for an Economic Partnership.

The Korea-Colombia and Pacific Alliance FTAs include references on cooperation in this area. In the case of the Korea-Colombia FTA, the risk management clause indicates the importance in exchanging information regarding applied risk management techniques while safeguarding confidential information. The Pacific Alliance FTA emphasizes the adoption of cooperation programs to strengthen risk management systems based on best practices.

g. Release of Goods

All four agreements include clauses related to the release of goods, but with differing level of commitments. For example, the Japan-Mongolia FTA only states that parties have to use information and communications technology in the customs clearance process, as well as to simplify and harmonize procedures –when possible- with relevant standards.

The Korea-Colombia; Pacific Alliance and Viet Nam-EAEU FTAs stipulate that the release of goods has to be done to the extent possible within 48 hours of arrival. However, the Korea-Colombia and Pacific Alliance FTA specify deeper commitments as they allow the withdrawal of goods from customs before the determination of the applicable customs duties, as long as the importer provides a guarantee to cover the cost of these duties and other taxes and fees related to the imported goods.

Furthermore, the Korea-Colombia FTA states that information about the goods has to be sent electronically (as mentioned in the APEC Model Measures for RTA/FTA) and before their physical arrival to enable the release of goods on arrival. Also, it establishes that the goods have to be released at the point of arrival, without temporary transfer to warehouses or other facilities. This commitment is deeper than that in the Pacific Alliance FTA, which only states that the release at the point of arrival should be done to the extent possible.

h. Temporary Admission of Goods

When RTA/FTAs include clauses on temporary admission of goods, their purpose is usually to exempt products from the payment of customs duties provided they meet certain conditions, such as being imported for a specific use and re-exported after a specific period. Two agreements in these reports contain provisions on this topic, but only refer to best efforts to facilitate the temporary admission of goods.

The Japan-Mongolia FTA recommends parties to promote the use of the ATA carnets[13] to facilitate customs clearance of goods in transit. The Viet Nam-EAEU FTA only refers to best efforts to facilitate customs procedures for the temporary admission of goods, as well as the temporary exportation and importation of goods for inward or outward processing, based on international standards.

[13] ATA refers to "Admission Temporaire/Temporary Admission". The ATA Carnet is a customs document that allows duty free temporary export and import of goods for up to one year. For more information, please go to the International Chamber of Commerce website: https://iccwbo.org/resources-for-business/ata-carnet/

i. Express Shipments

Three agreements, the Japan-Mongolia; Korea-Colombia and Pacific Alliance FTAs, have incorporated provisions to adopt an expedited customs clearance for express consignments. The Korea-Colombia and Pacific Alliance FTAs also establish that those customs procedures have to be separate from those applicable to regular consignments, as specified in the APEC Model Measures for RTA/FTAs.

The Korea-Colombia and Pacific Alliance FTAs specify the features that the parties need to implement in their express consignment systems. For example, both agreements include the submission of documents before the shipments arrival for its posterior release and the clearance of goods with minimum documentation. The Korea-Colombia FTA also notes that the submission of documents has to be done in electronic format. At the same time, the Pacific Alliance FTA includes a time frame for express shipments, within six hours from the time of receipt of the documents. Both agreements indicate a waiver regarding the application of customs duties in cases of low-value express shipments[14].

j. Advance Rulings

The Korea-Colombia; Pacific Alliance and Viet Nam-EAEU FTAs contain provisions with regards to the issuance of advance rulings on a number of customs-related matters upon written request. The Japan-Mongolia FTA only includes best efforts to issue advance rulings in certain areas. While in the case of the Korea-Colombia and Pacific Alliance FTA, the request could come from an importer in its territory and an exporter or producer in the territory of the other party; the Viet Nam-EAEU FTA stipulates that the application should be from an applicant registered in the importing party.

Table 4.3: Issuance of Advance Rulings

Subject	Issuance			Best Efforts
	Korea-Colombia FTA	Pacific Alliance FTA	Viet Nam-EAEU FTA	Japan-Mongolia FTA
Tariff classification	X	X	X	X
Origin of goods	X	X	X	X
Application of customs valuation criteria	X	X		X
Others that parties may agree	X	X	X	

Source: FTAs texts. Prepared by APEC Secretariat, Policy Support Unit.

In terms of the procedures to issue the advance rulings, there is no single standard, as details may vary across agreements. For example, the Pacific Alliance FTA establishes a period not longer than 150 days to issue the advance rulings from the date the applicant submitted

[14] Some of the features in the FTAs regarding express shipments are below the depth included in the APEC Model Measures for RTA/FTAs, such as the clearance of express shipments within four hours after submission of the documents and the threshold for the waivers concerning the application of customs duties to low-value shipments.

all the required information. This is longer than the period established in the APEC Model Measures for RTA/FTAs (90 days). The Korea-Colombia FTA stipulates that the period cannot be longer than 90 days, same as the Viet Nam-EAEU FTA. However, the Viet Nam-EAEU FTA has also established that authorities can request for additional information within 30 days from the day of application, after which, an advance ruling has to be issued within 60 days from the day of receipt of the additional information.

Regarding the validity of the advance rulings, the Pacific Alliance and Viet Nam-EAEU FTAs mention that it has to be for at least 3 years assuming the facts or circumstances related to the issuance of the advance rulings have not changed. The Korea-Colombia FTA does not mention any time period on this matter, but it refers that this is subject to the period specified in domestic laws.

k. Cooperation

All the FTAs analyzed in this report include provisions on customs cooperation, particularly for the exchange of information. Nevertheless, the degree of cooperation varies across the agreements. For example, the Japan-Mongolia FTA makes a general statement on cooperating on customs procedures and it specifies two areas: 1) trafficking of prohibited goods; and 2) trade of goods suspected of infringing intellectual property rights.

The Viet Nam-EAEU FTA provisions on customs cooperation are more specific in terms of the procedures to initiate cooperation between customs authorities. In terms of the areas for cooperation, the agreement makes a general reference to "key customs issues", but emphasizes cooperation when one of the parties have a reasonable suspicion of unlawful activities.

The Korea-Colombia and Pacific Alliance FTAs include comprehensive sections about cooperation and mutual assistance. The intention of these two agreements is to cooperate to allow for the implementation and enforcement of the customs-related provisions in the agreements. In addition, the cooperation does not restrict to the exchange of information, but includes the provision of technical cooperation in a wide range of areas. Both agreements are also specific in terms of the procedures that need to be followed to request for assistance and to execute those requests, as well as in the cases where assistance may be refused (e.g. cases that may be detrimental to security, public order or other essential interests).

l. Confidentiality

All of the agreements include provisions on confidentiality. The Pacific Alliance FTA has adopted the APEC Model Measures for RTA/FTAs regarding customs confidentiality, which states that parties protect the confidentiality of information in cases where information is labelled confidential, and have the right to require written assurance that the information provided be only used for the purposes specified in the request. In addition, parties can deny the provision of information if the counterpart fails to act in conformity to these requirements.

The Korea-Colombia FTA and Japan-Mongolia FTAs contain provisions with a similar nature. However, the main difference of the Korea-Colombia FTA with respect to the Pacific Alliance FTA is that it considers all information between the parties as confidential or restricted. Similarly, the Viet Nam-EAEU FTA states that all information provided in

accordance to the Customs chapter is treated confidential, but it provides an exception for the case of statistics.

In the case of the Japan-Mongolia FTA, the main difference with the Pacific Alliance FTA is the location of the clauses on confidentiality applying to customs-related matters. The Japan-Mongolia FTA include in the General Provisions chapter a clause on the matter, which is applicable to the whole agreement. In addition, the *Implementing Agreement between the Government of Japan and Government of Mongolia pursuant to Article 1.12 of the Agreement between Japan and Mongolia for an Economic Partnership* includes provisions on exchange of information which stipulate the treatment of the information shared in confidence and the conditions on how this information can be used.

m. Review and Appeal

The four agreements in this report include provisions on review and appeal on customs matters. In the case of the Japan-Mongolia; Korea-Colombia and Pacific Alliance FTAs, any affected party has the right to have: 1) an administrative review, independent of the authority responsible for the decision under review; and 2) a judicial review of the decision. The Viet Nam-EAEU FTA only states that the review and appeal has to be done in accordance to domestic law.

The Korea-Colombia FTA is the only agreement which includes the APEC Model Measure of allowing exporters or producers of the other party to provide information directly to the party conducting the review and to request that party to treat it as confidential.

n. Penalties

Only the Pacific Alliance and Viet Nam-EAEU FTAs include a provision on penalties. While the sanctions in the Viet Nam-EAEU FTA only refer to administrative penalties for violations of customs laws and regulations; in the Pacific Alliance FTA, they refer to not only administrative or civil penalties, but also to criminal sanctions, in the same way as the APEC Model Measures for RTA/FTAs.

o. Committee on Customs Procedures

Three agreements establish the formation of a Committee or Sub-Committee to address customs-related issues. There are some differences regarding the scope of work. While the Japan-Mongolia FTA only includes a sub-committee looking at issues related to the implementation and operation of the Customs chapter, as well as areas related to this chapter; the Korea-Colombia and Pacific Alliance FTAs have created a Committee that deals with issues associated to the proper functioning of the chapters regarding Rules of Origin, Customs Administration and Trade Facilitation.

4.3 ELECTRONIC COMMERCE

Technological advancements have been introducing new ways to deal with trade transactions. The digital environment is revolutionizing how transactions are handled. For instance, things that were considered as goods in a traditional transaction could now be considered a service (e.g. a music album in a compact disc format bought in a shop vis-à-vis the same album purchased and downloaded online). These changes are bringing

challenges to trade policies and governments are becoming increasingly aware of the role e-commerce and digital platforms play in the economy.

RTA/FTAs are also adapting to this new environment such that most of the RTA/FTAs put in force in recent years have included chapters or sections on E-Commerce[15]. Wunsch-Vincent and Hold (2011) noted that since the incorporation of an E-Commerce chapter in the U.S.-Jordan FTA in 2000, this topic has increasingly been included in RTA/FTAs as a chapter in bilateral U.S. agreements and those signed by a number of Asian economies or a sub-chapter in those by the European Union[16].

APEC has also been working actively on e-commerce issues. In 1999, the E-Commerce Steering Group was created to "enable economies across all levels of development to be able to utilise Information and Communication Technologies (ICTs) to drive economic growth and social development (…)"[17] and "(…) perform a coordinating role for APEC e-commerce activities"[18]. Moreover, in 2007, the Committee on Trade and Investment endorsed the Electronic Commerce's APEC Model Measures, which included suggested provisions for RTA/FTAs on a wide range of issues such as electronic supply of services, customs duties, non-discriminatory treatment of digital products, electronic authentication, paperless trading, online consumer protection, online data protection and domestic regulation, among others[19].

The content of the E-Commerce chapters in RTA/FTAs can be considered WTO-plus in most cases as there is currently no multilateral or plurilateral agreement in WTO in this area. Most of the E-Commerce chapters include binding commitments such as those on not charging customs duties on electronic transmissions. This is similar to the current practice maintained by WTO members regarding the Work Program on Electronic Commerce[20].

With regards to the four RTA/FTAs included in this report, the Japan-Mongolia; Korea-Colombia; and Pacific Alliance FTAs contain binding commitments on the matter, in particular related to customs duties and consumer protection. While the Viet Nam-EAEU FTA acknowledges the importance of e-commerce on trade and economic growth and deals with this topic in a chapter entitled "Electronic Technologies in Trade", it only contains non-binding provisions on the matter.

The e-commerce provisions in the four RTA/FTAs includes and at times exceed the commitments suggested by the APEC Model Measures. However, as shown in this section,

[15] For example, the APEC Policy Support Unit found that the proportion of RTA/FTAs with an e-commerce chapter put in force by an APEC economy has increased in recent years. In 2014, 42.8% of the agreements implemented in that year had an e-commerce chapter. This proportion went up to 66.6% in 2015 and 100% in 2016.

[16] Wunsch-Vincent, Sacha and Arno Hold (2011), "Towards Coherent Rules for Digital Trade: Building on Efforts in Multilateral Versus Preferential Trade Negotiations", NCCR Trade Regulation, Swiss National Centre of Competence in Research, Working Paper No. 2011/64, July 2011, p. 17

[17] APEC Secretariat, E-Commerce Steering Group website, https://www.apec.org/Groups/Committee-on-Trade-and-Investment/Electronic-Commerce-Steering-Group

[18] Ibid

[19] APEC Committee on Trade and Investment (2008), "APEC Model Measures for RTA/FTAs", CTI Annual Report to Ministers 2008, Appendix 2, p. 75-77.

[20] This current practice was reaffirmed by Ministers in the WTO Nairobi Ministerial Conference in 2015 until the next meeting scheduled in 2017. See https://www.wto.org/english/tratop_e/ecom_e/ecom_e.htm

in certain occasions, they also contain provisions that lack the depth of the model measures or simply omit e-commerce disciplines that are part of the APEC Model Measures.

a. Affirmation of WTO Rules

Only the Korea-Colombia FTA explicitly describes the applicability of WTO rules to measures affecting e-commerce, as stated in the APEC Model Measures for RTA/FTAs. This indicates that Korea and Colombia acknowledge the necessity to describe that the General Agreement on Trade in Services (GATS) rules are applicable to electronic commerce transactions between them.

b. Objectives, Scope and Coverage

In general, all four agreements recognize the importance of e-commerce for economic growth and seek to promote their use and development. The Japan-Mongolia; Korea-Colombia and Pacific Alliance FTAs also recognize the importance of avoiding unnecessary barriers that may affect electronic commerce transactions.

In terms of the scope and coverage, the Pacific Alliance FTA specifies that the E-Commerce chapter applies to all goods and services electronic transactions, including digital products. The Viet Nam-EAEU FTA is more specific since it mentions that the chapter applies to trade with the use of electronic technologies and "the use of electronic documents in trade between the Parties by means of digital signatures and a trusted third party" (Article 13.1, paragraph 2 a).

c. Digital Products

Only the Japan-Mongolia and Pacific Alliance FTAs introduced a definition for digital products. In the case of the Japan-Mongolia FTA, it refers to "computer programs, text, video, images, sound recordings and other products, that are digitally encoded, regardless of whether they are fixed on a carrier medium or transmitted electronically" (Article 9.2, paragraph a). The Pacific Alliance FTA has a similar definition, but it does not make any reference to the carrier medium or the electronic transmission of the product.

In both cases, it can be inferred that the definitions do not establish any distinction between digital products delivered online or offline. According to Wunsch-Vincent and Hold (2011), this means that agreements "aim at the technologically-neutral treatment of both delivery forms"[21].

d. Customs Duties

The Japan-Mongolia, Korea-Colombia; and Pacific Alliance FTAs acknowledge the practice announced by WTO Ministers and recognized by the APEC Model Measures of not imposing customs duties on electronic transmissions. The Korea-Colombia and Pacific Alliance FTAs also add that this acknowledgement does not preclude the parties from imposing internal taxes or other internal charges on products delivered electronically.

[21] Wunsch-Vincent, Sacha and Arno Hold (2011), Op. cit., p. 17.

e. Non-Discriminatory Treatment of Digital Products

The Japan-Mongolia and Pacific Alliance FTAs include provisions on this matter. Similar to the APEC Model Measures, these agreements provide national treatment as well as most-favored nation (MFN) treatment to digital products of the other party. However, exceptions are included in specific cases (e.g. government procurement and subsidies).

In addition, the Japan-Mongolia FTA mentions that one of the parties can request to the other party how it determines the origin of a digital product in order to ensure that the above mentioned obligations are duly implemented.

f. Electronic Authentication and Digital Certificates

Only the Japan-Mongolia and Pacific Alliance FTAs contain binding provisions on this matter. For example, following the APEC Model Measures, both agreements state that with respect to an electronic transaction, parties cannot adopt or maintain legislation that prevents the parties from demonstrating in court that such transaction meets legal requirements.

The Japan-Mongolia FTA also includes a provision not to prohibit parties from mutually determining the appropriate electronic signature methods for electronic transactions. The Viet Nam-EAEU FTA contains a non-binding provision which encourages parties to work towards the mutual recognition of digital signatures in the exchange of electronic documents.

In terms of electronic/digital certificates, the Pacific Alliance FTA notes that parties will work on recognizing mechanisms and criteria which could allow the use of interoperable electronic authentication. This allows the recognition of digital certificates issued by certification services from any of the Pacific Alliance members. The Japan-Mongolia FTA also acknowledges that parties could require electronic certificates to be based on those issued by a supplier from the parties or meet certain performance standards.

g. Online Consumer Protection and Online Data Protection

In terms of consumer protection, the Japan-Mongolia; Korea-Colombia and Pacific Alliance FTAs include APEC Model Measures recognizing the importance of maintaining transparent and effective consumer protection for e-commerce as well as those conducive to generate trust among consumers. Moreover, they recognize the importance of cooperation among competent authorities. In the same way, the Viet Nam-EAEU FTA contains a provision promoting the adoption of measures to protect consumers from fraudulent and deceptive commercial practices in e-commerce.

Regarding online data protection, these agreements include a commitment to adopt or maintain measures to protect the personal data of e-commerce users. The Korea-Colombia and Pacific Alliance FTAs note the importance of taking into account international standards. The Japan-Mongolia FTA states that this has to be done in accordance to their respective laws and regulations. These positions are a step beyond the APEC Model Measures, which only includes best efforts in maintaining systems to protect private data, as stated in the Viet Nam-EAEU FTA.

Another step above the APEC Model Measures is the inclusion of provisions regarding the practice of spam. In this sense, the Pacific Alliance FTA also establishes that parties have to adopt or maintain measures to protect users from unsolicited commercial e-mails. The Japan-Mongolia FTA encourages best efforts from parties to take measures against these forms of e-mails.

h. Paperless Trade Administration

The Japan-Mongolia; Korea-Colombia; and Pacific Alliance FTAs contain similar provisions in this area. All these agreements incorporate best efforts in making all trade documents available in electronic form and accepting trade administration documents in electronic form as the legal equivalent of the paper form documents.

i. Transparency

Only the Pacific Alliance FTA includes a provision from the APEC Model Measure to make laws, regulations and other measures of general application related to e-commerce publicly available.

j. Domestic Regulatory Frameworks

Some agreements have adopted APEC Model Measures in this area. For example, the Japan-Mongolia and Pacific Alliance FTAs include provisions to prevent parties from adopting unnecessary or burdensome measures affecting e-commerce in order to achieve their policy objectives. Similarly, the Pacific Alliance; and Viet Nam-EAEU FTAs encourage the adoption of self-regulation by the private sector through codes of conduct, guidelines, model contracts and others to promote the use of e-commerce.

None of the four agreements included the APEC Model Measure which supports the endeavor to adopt a domestic legal framework for e-commerce based on the UNCITRAL Model Law on E-Commerce. However, the Viet Nam-EAU FTA includes a similar clause, but mentions that the framework should be in conformity with international practices in general, including decisions on e-commerce taken in WTO.

k. Location of Computing Facilities

Provisions on this matter are not very common in E-Commerce chapters. Besides TPP, the Japan-Mongolia and Pacific Alliance FTAs include an explicit provision within the E-Commerce chapter[22], which bans parties from implementing localization requirements on computing facilities as a condition to conduct any business in the area of the parties. Exceptions apply to cases in which parties maintain measures affecting the use or location of computing facilities when it is necessary to achieve a public policy objective in a way that it is not discriminatory nor a disguised barrier to trade.

l. Source Codes

Provisions on this matter are not very common in E-Commerce chapters. Besides TPP, only the Japan-Mongolia FTA includes an explicit provision within the E-Commerce chapter[23],

[22] WTO (2016), "Work Programme on Electronic Commerce: Non-Paper for the Discussions on Electronic Commerce/Digital Trade from Japan", JOB/GC/100, p. 5-8.
[23] Ibid.

which requires parties not to impose the transfer of or access to source codes of software as a condition to its import, distribute, sale or use. For clarity, the Japan-Mongolia FTA specifies that this is limited to mass-market software or products using that software, and excludes software used for critical infrastructure.

m. Cooperation

The four agreements contain articles on cooperation in their E-Commerce chapters. Their contents contain some common elements such as the exchange of information concerning laws and regulations relating to e-commerce, activities regarding the protection of private data and the improvement of consumer confidence.

Some agreements such as the Japan-Mongolia; Korea-Colombia; and Pacific Alliance FTAs list the support to SMEs to overcome obstacles related to the use of e-commerce as an area for cooperation.

4.4 GOVERNMENT PROCUREMENT

A WTO working paper by Anderson, et.al. (2014) found that recent RTA/FTAs have increasingly included specific chapters concerning government procurement[24]. The interest by RTA/FTA parties to include provisions on government procurement resides not only on the new market opportunities to sell goods and services and participate in construction projects, but also on the importance to establish rules to regulate the government procurement markets.

All four RTA/FTAs analyzed in this report include a chapter on government procurement. However, the chapters differ in terms of the elements included. For example, the Korea-Colombia and Pacific Alliance FTAs include detailed binding provisions in this area, and market access commitments. On the contrary, the Japan-Mongolia and Viet Nam-EAEU FTAs focus on a limited number of issues, particularly on cooperation, and do not include market access commitments. The latter two agreements do not have binding provisions, except for one clause within the Japan-Mongolia FTA requiring transparency regarding domestic laws and regulations related to government procurement.

Of all the APEC economies enforcing new RTA/FTAs in 2016, only Korea and Japan are parties to the plurilateral WTO Government Procurement Agreement (GPA). The market access commitments in the Korea-Colombia and Pacific Alliance FTA chapters on Government Procurement could be considered as GPA-plus, as their coverage includes at least one party not participating in the GPA. Many of the provisions included in these two agreements are based on those within the GPA. Similarly, these agreements incorporate many of the APEC Model Measures on RTA/FTAs in this area and sometimes include deeper commitments than those suggested as Model Measures.

[24] Anderson, Robert et.al. (2014), "The Relationship between Services Trade and Government Procurement Commitments: Insights from Relevant WTO Agreements and Recent RTAs", WTO Working Paper ERSD-2014-21, p. 13

a. Application of the Agreement and Exceptions

The Korea-Colombia and Pacific Alliance FTAs explain that the chapter can be applied to any measure relating to covered government procurement of goods and services. Both agreements list circumstances in which certain types of public procurement are not subject to the terms of the chapter, such as non-contractual agreements, assistance, procurement related to public indebtedness or public debt management, public employment contracts, purchases between government entities, purchases for foreign assistance and acquisition or rental of land, buildings or property.

Both agreements contain similar provisions in which parties cannot be restricted to implement or keep measures relating to national security, public interest (safety, morals and order), health, environmental and intellectual property issues, as well as to those related to goods and services of persons with disabilities, philanthropic institutions or prison labor. These measures cannot be applied in an arbitrary and unjustifiable discriminatory manner.

b. National Treatment and Non-Discrimination

The Korea-Colombia and Pacific Alliance FTA extend national treatment to goods and services as well as suppliers from the counterparts. In this way, the treatment should be equivalent to those offered to domestic goods, services and suppliers.

The agreements also specify that parties cannot discriminate suppliers based on their foreign affiliation or ownership, as well as on the basis of the goods or services offered that come from the other RTA/FTA partner.

c. Prohibition of Offsets

Offsets have been defined in WTO as "measures used to encourage local development or improve the balance-of-payments accounts by means of domestic content, licensing of technology, investment requirements, counter-trade or similar requirements"[25]. The Korea-Colombia and Pacific Alliance FTAs prohibit the use of this practice.

d. Procurement Methods

The Korea-Colombia and Pacific Alliance FTAs mention that public procurement could be carried out through either open, selective or limited tendering. These agreements explain the circumstances under which a selective or limited tendering is allowed.

In the case of selective tendering, both FTAs indicate that this process can take place in the situations that domestic laws of the parties allow it. The FTAs also include specific procedures that have to be followed, such as the need to publish a notice inviting suppliers to apply in advance to prepare for the process, and to allow all suppliers from any FTA partner to participate, as long as they meet the conditions for their participation, unless the tender stipulates a limitation on the number of suppliers allowed to tender and the criteria explaining this limitation.

[25] See footnote 7 of the WTO Agreement on Government Procurement. https://www.wto.org/english/docs_e/legal_e/gpr-94_02_e.htm#fnt-7

Both agreements allow the use of limited tendering as long as it is not used to avoid competition, protect domestic suppliers or discriminate against suppliers from other FTA partners. The circumstances in which limited tendering can be used are mostly similar to those listed in the GPA. For example: no tenders were initially submitted; no tender satisfied conditions for participation; goods purchased in the commodity markets; and goods and services can be only supplied by a specific provider because of intellectual property issues, work of art or absence of competition for technical reasons; among others.

Both agreements allow the use of limited tendering for the first purchase of a prototype that is developed at the request of the government as stated in the GPA. However, based on the Pacific Alliance FTA, subsequent purchases of the good and service developed have to be procured through open tendering. For the case of Korea-Colombia FTA, other procedures consistent with the Government Procurement chapter can be used.

Another difference is in the use of limited tendering for cases of extreme urgency caused by unforeseen events. Both agreements state that this could be used when goods or services cannot be obtained in time through open or selected tendering as stated in the GPA. However, the Pacific Alliance FTA adds that this can only be used if the use of the open or selected tendering could severely harm the public entity or impede its ability to perform its duties. The Pacific Alliance FTA also clarifies that lack of planning is not considered an unforeseen event.

e. Technical Specifications

The Korea-Colombia and Pacific Alliance FTAs include similar clauses to the GPA, clearly stating that procuring entities will not prepare, adopt, apply any technical specification or demand a conformity assessment procedure which would create unnecessary barriers to trade between the signatory parties. Similarly, both agreements mention that technical specifications, where appropriate, should be in terms of performance and functional requirements, rather than design or descriptive characteristics. In addition, those specifications should follow international standards where available.

f. Conditions for Participation

Both agreements state that the entities can only limit the conditions for participation in a tender to ensure that a supplier has the legal, technical and financial abilities to undertake the procurement. Performance requirements are also not allowed, such as requiring the supplier to possess prior work experience in the territory of the party to participate. Moreover, these two agreements establish that the assessment of the suppliers should take into account the suppliers' business activities inside and outside the territory of the parties. These agreements allow the exclusion of suppliers as a result of issues such as bankruptcy, false declarations and significant deficiencies in performance under prior or current contracts, among others.

The Pacific Alliance FTA includes features not available in the GPA. For example, public entities can establish lists of qualified suppliers to participate in the procurement process. These lists must be available on a permanent basis. In cases where an unqualified supplier requests to be included on the list, this supplier can immediately begin the process to qualify and participate in the procurement process as long as there is enough time to complete the formalities within the time period for tender submission.

g. Time Periods

The Korea-Colombia FTA establishes time periods for the submission of requests for participation in selective tendering and the submission of tenders for open and selective tenders. The time periods are similar to those included in the GPA. For selective tenders, the submissions of requests for participation has to be no less than 25 days from the date of publication of the notice of intended procurement. In cases of urgency, the time is reduced to no less than 10 days. For the submissions of tenders, the time period is no less than 40 days from the publication date of the notice of intended procurement (open tendering) or from the time the entity invites suppliers to participate (selective tendering).

The Pacific Alliance FTA establishes general time periods without differentiating for the type of tendering. The submission of tenders should take place no less than 30 days from the publication date of the notice of procurement. Shorter time periods no less than 10 days are allowed in certain situations, such as in cases of urgency duly justified that makes impracticable the time period of no less than 30 days.

Both agreements allow shortening time periods for the submission of tenders by five days in cases where electronic means are used for the notice of intended procurement, the availability of tender documentation and the submission of tenders. However, the time period for the submission of documents cannot be shorter than 10 days.

h. Treatment of Tenders and Awarding of Contracts

Both agreements ensure the fairness and impartiality of the procurement process and guarantee the confidentiality of the tenders until at least the opening of the tenders. The Korea-Colombia FTA also adds that procuring entities should not penalize participants should tenders be received after the deadline due to any mishandling of the tenders by the procuring entity. Moreover, it also establishes that if one of the participants is given the chance to correct unintentional errors of form, other participants should have the same opportunity.

As for the awarding of contracts, the Korea-Colombia and Pacific Alliance FTAs mention that contracts have to be awarded based on the requirements and evaluation criteria specified in the tendering process. The Korea-Colombia FTA includes additional provisions stated in the GPA, which allows parties to verify with the supplier its ability to deliver on its obligations when a tender is received at a much lower price than other tenders submitted. The Pacific Alliance FTA allows the parties not to award a contract in case they consider that the adjudication of the contract may be against public interest.

In terms of the post-award information, both agreements state that the procuring entity needs to promptly inform suppliers on contract award decisions. On request, the procuring entities have to provide unsuccessful bidders reasons their tenders were not selected, as well as the relative advantages of the selected supplier's tender. For the case of Korea-Colombia FTA, the award information must be published within 72 hours after the contract is awarded similar to what the GPA has established. On the other hand, the Pacific Alliance FTA only mentions that this information needs to be published promptly after the adjudication.

In addition, the Pacific Alliance FTA includes a clause in which it is possible for one party to request information from the other party to determine if an adjudication was conducted in a fair and impartial manner in accordance with the agreement.

i. Domestic Review Process

The Korea-Colombia and Pacific Alliance FTA provides the opportunity for suppliers to challenge procurement decisions through a domestic review process. Both agreements specify that the review procedure has to be timely, effective, transparent and non-discriminatory. While the details may differ in some cases, both agreements allow suppliers to present a challenge. The time to prepare a challenge cannot be less than 10 days from the day that the challenge became known or reasonably should have become known by the supplier.

In addition, both agreements stipulate that parties have at least one level of administrative or judiciary review and appeal which has to be independent of the procuring entity involved in the challenge.

j. Use of Electronic Means

None of the agreements has included provisions stating that procurement processes have to be conducted only through electronic means. Nonetheless, should electronic means be used, the time periods for the submission of tenders can be reduced by five days.

The agreements also includes specific clauses stating that any procurement by electronic means is to be conducted using IT systems and software that is generally available. These procurement processes also need to maintain security mechanisms to safeguard the integrity of the process.

The Pacific Alliance FTA includes provisions with best efforts to provide information through electronic means regarding intended public procurements, the availability of tendering documentation and the submission of tenders.

k. Transparency

The four RTA/FTAs analyzed in this report include clauses regarding the publication of their laws and regulations related to government procurement, with some differences among them. While the Korea-Colombia FTA establishes that the publication could be carried out electronically or by print; the Pacific Alliance FTA mentions that they have to be published in both printed and electronic format.

In the case of the Japan-Mongolia FTA, parties only need to ensure the transparency of the measures regarding government procurement according to their domestic laws and regulations.

With regards to the Viet Nam-EAEU FTA, the agreement stipulates that parties have to make publically available their laws and regulations on government procurement and to the extent possible, publish and make them available in electronic format. However, this clause is non-binding, as the Government Procurement chapter is not subject to dispute settlement, unlike the other three agreements.

l. Micro, Small and Medium Enterprises' Participation (MSMEs)

Both Korea-Colombia and Pacific Alliance agreements include provisions regarding MSME participation. Besides acknowledging the importance of MSMEs participating in government procurement and making best efforts to facilitate access to MSME in the public procurement market, the agreements allow set-asides for MSMEs in some cases with a view to guarantee that some government procurement contracts are reserved for these firms. In the Korea-Colombia FTA, both parties have included set-asides. Similarly, Colombia and Peru have included set asides for MSMEs in the Pacific Alliance FTA.

m. Coverage Commitments: Market Access Schedules

In terms of the entities covered, the Korea-Colombia and Pacific Alliance FTAs include institutions from the central government and sub-central governments, as well as other covered entities. However, the Pacific Alliance FTA does not include a schedule of commitments from Mexico at the sub-federal level yet. Mexico has to incorporate its commitments after consultations with its sub-federal governments no later than three years after the date of signature of the FTA.

It is possible to compare the market access scheduled by Korea in the Korea-Colombia FTA with that offered at the GPA. It is noticeable that the number of institutions covered at the sub-central level is lower in the FTA. Local governments within Seoul Metropolitan Government, Busan Metropolitan City and Incheon Metropolitan City are not included in the FTA as opposed to the GPA. Similarly, other entities in charge of city transportation issues in Seoul, Incheon, Busan, Daegu, Daejeon and Gwangju are not included.

With regards to the thresholds establishing the minimum value of the public purchases covered by the RTA/FTAs (i.e. the minimum amount of the purchase under which an FTA party allows suppliers from other FTA parties to participate in public procurement), the thresholds at the Korea-Colombia FTA vary depending the level of government (Table 4.4). However, the thresholds at the central government level are lower in this FTA for goods and services (70,000 SDR[26]) than those offered by Korea at the GPA (130,000 SDR), which makes it more flexible for Colombian suppliers to participate in public procurements in Korea at the central level of government and vice-versa.

Table 4.4: Government Procurement Thresholds in the Korea-Colombia FTA

(in SDR)	Central Level of Government	Sub-Central Level of Government	Other Covered Entities
Goods	70,000	200,000	400,000
Services	70,000	200,000	400,000
Construction Services	5,000,000	15,000,000	15,000,000

Source: Korea-Colombia FTA, Annex 14-A.

[26] SDR stands for Special Drawing Rights. According to the IMF, the SDR is an international reserve asset to supplement its member countries' official reserves. The value of the SDR is based on a basket of five major currencies—the US dollar, the euro, the Chinese renminbi (RMB), the Japanese yen, and the British pound sterling (please see http://www.imf.org/en/About/Factsheets/Sheets/2016/08/01/14/51/Special-Drawing-Right-SDR). As of 26 July 2017, 1 SDR is equal to 1.4 US dollars.

As opposed to the Korea-Colombia FTA in which the same threshold applies to both Korea and Colombia, the Pacific Alliance FTA members have included differentiated thresholds. Mexico's thresholds in the Pacific Alliance FTA are similar to those offered in NAFTA. Sometimes these thresholds include exemptions to other Pacific Alliance members based on reciprocity (Table 4.5).

Table 4.5: Government Procurement Thresholds in the Pacific Alliance FTA

	Chile			**Colombia**		
	Central	**Sub-Central**	**Others**	**Central**	**Sub-Central**	**Others**
Goods	SDR 50,000[1]	SDR 200,000	SDR 220,000[3]	SDR 50,000[1]	SDR 200,000	SDR 220,000[3]
Services	SDR 50,000	SDR 200,000	SDR 220,000	SDR 50,000	SDR 200,000	SDR 220,000
Construction Services	SDR 5,000,000[2]	SDR 5,000,000	SDR 5,000,000[4]	SDR 5,000,000[2]	SDR 5,000,000	SDR 5,000,000[4]
	Mexico			**Peru**		
	Central	**Sub-Central**	**Others**	**Central**	**Sub-Central**	**Others**
Goods	USD 79,507	N/A	USD 397,535	SDR 95,000	SDR 200,000	SDR 220,000
Services	USD 79,507	N/A	USD 397,535	SDR 95,000	SDR 200,000	SDR 220,000
Construction Services	USD 10,335,931	N/A	USD 12,721,740	SDR 5,000,000	SDR 5,000,000	SDR 5,000,000

[1] Except for Peru. Threshold for Peru is SDR 95,000
[2] Except for Mexico. Threshold for Mexico is USD 10,335,931
[3] Except for Mexico. Threshold for Mexico is USD 397,535
[4] Except for Mexico. Threshold for Mexico is USD 12,721,740
N/A: Not applicable
Source: Pacific Alliance FTA. Annex 8.2

In terms of which goods, services and construction services are included in the market access schedules, both the Korea-Colombia and Pacific Alliance FTAs use a negative list, which means that all goods and services are included with the exception of those listed. Many of the exceptions are related to national defense.

5. CONCLUDING REMARKS

APEC economies have continued their efforts to strengthen economic links through the realization of RTA/FTAs. Four new agreements that were put in force in 2016 had at least one APEC economy as a signatory party and the total number of RTA/FTAs in force by APEC economies stood at 156 as of December 2016.

The report also shows that the percentage of trade for APEC economies with FTA/RTA signatory parties increased significantly over the last two decades. From the export perspective, the share of exports with APEC RTA/FTA signatory parties increased from 23.1% to 43.4% of APEC's total exports between 1996 and 2016. Likewise, from the import side, the share with APEC RTA/FTA counterparts improved from 21.3% in 1996 to 46% in 2016.

The findings corroborate the fact that APEC economies are moving away from the traditional view of focusing on trade in goods. All the agreements that have been put in force in 2016 include chapters relating to services and investment. In addition, it is noticeable that a larger proportion of agreements are covering topics that are becoming more relevant to the current economic environment such as e-commerce, intellectual property rights, competition policy and mobility of business people, among others.

As for the Investment chapters analyzed in this report, all agreements show similarities in their liberalization commitments through the use of a negative list, provisions for national treatment and MFN at the post-establishment level, prohibition of the use of certain performance requirements, guarantees on the free transfer of capital without delay, consideration of environmental concerns to attract investments and the inclusion of clauses concerning the application of ISDS.

However, there are differences among the agreements. Some examples of this includes RTA/FTAs not providing for national treatment and MFN at the pre-establishment, not guaranteeing fair and equitable treatment and minimum standard of treatment in accordance to international customary law, but instead to domestic laws and regulations. Also, some RTA/FTAs do not include the prohibition of performance requirements to technology transfers and contain exceptions to free transfers of capital in cases of problems with balance of payments. ISDS provisions are included in the four agreements, but some features may differ among them, such as the time to submit the case to arbitration, mechanisms that can be used to resolve the dispute, constitution of arbitral tribunal and execution of the award, among others. In general, some of these contrasts may represent a challenge to APEC economies when pursuing new trade agreements, in particular when these involve a greater number of parties.

While the scope of the Customs Administration, Procedures and Trade Facilitation chapters differ among the four RTA/FTAs, there are similarities. These include the need to guarantee access to customs-related laws and regulations and the acknowledgement of the importance of using information technology systems to facilitate trade. In addition, issues such as the use of single windows, paperless trading, automated systems, risk management and submission of documents by electronic means have been frequently included in recent RTA/FTAs. Despite the WTO Trade Facilitation Agreement (TFA) is including many of the features appearing in past RTA/FTAs, recent RTA/FTAs still include WTO-plus

commitments (i.e. beyond those in the TFA) in issues such as release of goods and advance rulings, among others.

Among the main differences found in the Customs Administration, Procedures and Trade Facilitation chapters, one of them relates to the level of enforceability of the provisions. There are cases in which most agreements include similar binding provisions, whilst others agree on best efforts on similar provisions (e.g. issues on advance rulings), instead of including a transition period for parties not ready to implement certain provisions by the time the agreement is put in force.

Other differences are related to the requirements in submitting documentation, the time to complete certain procedures and the level of cooperation among RTA/FTA partners. Some agreements emphasize the need for cooperation to fight against crime, while others focus on capacity-building and technical issues to implement and enforce the agreements. The differences found within Customs chapters may not necessarily represent an obstacle in negotiating a regional agreement such as the Free Trade Area of the Asia Pacific (FTAAP), as the existing RTA/FTAs' Customs chapters generally share similar objectives.

With regards to the Electronic Commerce chapters, it is a good sign to find recent RTA/FTAs including provisions on this matter. In general, all agreements acknowledge the growing importance of e-commerce in achieving economic growth and including relatively similar clauses regarding consumer protection and paperless trade. Most agreements also recognize the importance of avoiding the implementation of unnecessary barriers affecting electronic commerce transactions. However, the agreements show divergences, which could be an issue of concern in the event APEC economies would like to negotiate a comprehensive regional trade agreement[27].

An area of divergence among Electronic Commerce chapters has been in defining digital products. The definition in some agreements provide a technologically-neutral treatment of the product (i.e. delivered fixed on a carrier medium or transmitted electronically) while others provide no definition and reference to a technology-neutral treatment. Likewise, in terms of the coverage, while some agreements mention that the Electronic Commerce chapter applies to any electronic transaction on goods and services, others include a narrower coverage by specifying their application to the use of electronic documents in trade.

Another relevant difference applies to the use of national treatment and MFN treatment to digital products from the other party. Most agreements do not include those treatments, as opposed to the APEC Model Measures, which suggest the inclusion of those treatments to digital products. Other differences found among agreements relate to the binding or non-binding nature of provisions on electronic authentication and digital certificates, as well as the inclusion of clauses preventing the imposition of conditions to transfer or access the source code of software as condition for the import, sale, distribution or use of such

[27] In fact, a recent study by Hamanaka (2017) comparing e-commerce clauses in the TPP with those in other past RTA/FTAs shows that many clauses in TPP were not able to achieve the same level of depth appearing in some bilateral RTA/FTAs. See http://www.ide.go.jp/library/Japanese/Publish/Download/PolicyBrief/Ajiken/pdf/098.pdf. This issue could be related to the diverging approaches that TPP negotiating parties had with respect to e-commerce, resulting into a lower common denominator agreed among the TPP negotiating parties.

software. Other clauses not included in all agreements relate to the prohibition on imposing localization requirements on computing facilities.

About the Government Procurement chapters, there are three types of chapters found in recent RTA/FTAs signed by APEC economies: 1) comprehensive with binding provisions; 2) chapters with non-binding provisions; 3) those with binding provisions only in transparency matters. Perhaps, the main difficulty of negotiating a Government Procurement chapter in an FTAAP process would be deciding if the agreement is to be comprehensive with binding provisions. In fact, when looking at those agreements with binding provisions in government procurement, they are mostly based on the WTO Government Procurement Agreement (GPA).

Among the many common features, the study has found similarities in the use of the non-discrimination treatment of suppliers, prohibition of offsets, rules concerning selected and limited tendering, technical specifications, treatment of tenders and awarding of contracts. All of them with similar characteristics to those of GPA. In addition, some of the agreements could include commitments that are deeper than those in the GPA (e.g. conditions for participation in tenders: use of lists of qualified suppliers).

One of the main differences among Government Procurement chapters with binding provisions relates to market access conditions. Thresholds establishing the minimum value of public purchases open to suppliers from RTA/FTA counterparts differ across agreements. In specific cases, RTA/FTAs could even differentiate thresholds by signatory parties. Furthermore, the number of public institutions covered by these chapters at the central, sub-central and other levels vary and reciprocal restrictions in market access are found in some agreements.

REFERENCES

Anderson, Robert et.al. (2014), "The Relationship between Services Trade and Government Procurement Commitments: Insights from Relevant WTO Agreements and Recent RTAs", WTO Working Paper ERSD-2014-21, p. 13
Retrieved from https://www.wto.org/english/res_e/reser_e/ersd201421_e.pdf

APEC (2014), "Meeting of the APEC Ministers Responsible for Trade – Qingdao Statement", 17-18 May,
Retrieved from https://www.apec.org/Meeting-Papers/Sectoral-Ministerial-Meetings/Trade/2014_trade

APEC Committee on Trade and Investment (2008), "APEC Model Measures for RTA/FTAs", CTI Annual Report to Ministers 2008, Appendix 2, p. 75-77.

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, p. 16.
Retrieved from http://publications.apec.org/publication-detail.php?pub_id=1660

APEC Policy Support Unit (2016), "Trends and Developments in Provisions and Outcomes of RTA/FTAs Implemented in 2015 by APEC Economies", APEC#215-SE-01.14, p. 6-7
Retrieved from http://publications.apec.org/publication-detail.php?pub_id=1757

APEC Secretariat. (2016). Asia-Pacific Economic Cooperation.
Retrieved from https://www.apec.org/Groups/Committee-on-Trade-and-Investment/Electronic-Commerce-Steering-Group\

Armstrong, S. P., & Nottage, L. R. (2016). The Impact of Investment Treaties and ISDS Provisions on Foreign Direct Investment: A Baseline Econometric Analysis. SSRN Electronic Journal. doi:10.2139/ssrn.2824090

Blythe, S. E. (2013). The Advantages of Investor-State Arbitration as a Dispute Resolution Mechanism in Bilateral Investment Treaties. *The International Lawyer*, *47*(2), p. 273-290.

Hamanaka, S. (2017). Critical Review of the Rulemaking Outcome of the Trans-Pacific Partnership: The Case of E-Commerce (Issue brief No. 98). IDE.JETRO.
Retrieved from
http://www.ide.go.jp/library/Japanese/Publish/Download/PolicyBrief/Ajiken/pdf/098.pdf

International Monetary Fund. (2017). Special Drawing Right SDR.
Retrieved from
http://www.imf.org/en/About/Factsheets/Sheets/2016/08/01/14/51/Special-Drawing-Right-SDR

Menon, J. (2008). Dealing with the Proliferation of Bilateral Free Trade Agreements. ERD Working Paper Series, 123rd ser., p. 10-12.
Retrieved from https://www.adb.org/sites/default/files/publication/28224/wp123.pdf.

Peterson Institute for International Economics. (2015). What Do the Data Say about the Relationship between Investor-State Dispute Settlement Provisions and FDI? | PIIE. Retrieved from https://piie.com/blogs/trade-investment-policy-watch/what-do-data-say-about-relationship-between-investor-state

World Trade Organization (2016), "Work Programme on Electronic Commerce: Non-Paper for the Discussions on Electronic Commerce/Digital Trade from Japan", JOB/GC/100, p. 5-8.

World Trade Organization. (2011). World Trade Report 2011: The WTO and preferential trade agreements (From co-existence to coherence). p 128-145.
Retrieved from
https://www.wto.org/english/res_e/booksp_e/anrep_e/world_trade_report11_e.pdf

World Trade Organization. (2016). WTO | 2016 News items - "Persistent" economic challenges continued to weigh on trade in 2016.
Retrieved from https://www.wto.org/english/news_e/news16_e/trdev_09dec16_e.htm

World Trade Organization. (n.d.). Agreement on Government Procurement. Footnote 7.
Retrieved from https://www.wto.org/english/docs_e/legal_e/gpr-94_02_e.htm#fnt-7

World Trade Organization. (n.d.). Agreement on Trade Related Investment Measures.
Retrieved from https://www.wto.org/english/tratop_e/invest_e/invest_info_e.htm

World Trade Organization. (n.d.). Electronic Commerce.
Retrieved from https://www.wto.org/english/tratop_e/ecom_e/ecom_e.htm

Wunsch-Vincent, Sacha and Arno Hold (2011), "Towards Coherent Rules for Digital Trade: Building on Efforts in Multilateral Versus Preferential Trade Negotiations", NCCR Trade Regulation, Swiss National Centre of Competence in Research, Working Paper No. 2011/64, July 2011, p. 17
Retrieved from http://nccr.stage.bnzk.ch/fileadmin/user_upload/nccr-trade.ch/wp3/3.8/wunsch_hold_WP_final_11-07-08.pdf