

HANDBOOK ON PROVISIONS AND OPTIONS FOR TRADE IN TIMES OF CRISIS AND PANDEMIC



United Nations



Handbook on Provisions and Options for Trade in Times of Crisis and Pandemic

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in collaboration with:



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FOREWORD

The COVID-19 pandemic has reminded us of the struggle to balance economic interests and other societal interests such as public health, which is crucial in achieving the Sustainable Development Goals (SDGs). Measures affecting trade have been inevitable to protect public health from the virus, but we must keep reflecting on how to minimize trade disruption during crises. Indeed, trade remains a key means of implementation of the SDGs and has also been critical for access to essential supplies during the pandemic.

Countries have massively relied on ad-hoc, unilateral measures in response to the COVID-19 pandemic. While some of these measures were trade restrictive and others trade facilitating, their overall effectiveness has been undermined by lack of coordination. This has been the case despite the existence of many regional trade agreements (RTAs) between the countries adopting those measures. In order to improve the effectiveness of RTAs in ensuring more resilient and predictable trade during future crises, the United Nations Economic and Social Commission for Asia and the Pacific (ESCAP), in collaboration with the United Nations Economic Commissions for Africa (ECA), Latin America and the Caribbean (ECLAC), West Asia (ESCWA) and Europe (UNECE), the United Nations Conference on Trade and Development (UNCTAD), and the World Trade Organization (WTO), launched the global Initiative on Model Provisions for Trade in Times of Crisis and Pandemic in Regional and Other Trade Agreements (IMP).

This Handbook on Provisions and Options for Trade in Times of Crisis and Pandemic is the main outcome of the Initiative – supported by a joint UN Development Account project coordinated by UNCTAD. It comprehensively covers all the major rules areas in RTAs, including Essential Goods and Services, Trade Facilitation, SPS and TBT Measures, Intellectual Property Rights, Digital Trade, Transparency, and Development. Focused on crisis mitigation, the Handbook provides a range of options for provisions which could be used in future trade agreements to provide guidance in times of pandemic and other crises.

We hope that this Handbook, also developed in collaboration with civil society, academics and private sector experts, can encourage and guide the development of RTAs that will foster more resilient and sustainable trade during future crises. We will continue working together towards this objective.



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EXECUTIVE SUMMARY

COVID-19 has brought significant disruption to international trade and has exacerbated global hunger, poverty, and unemployment. A number of countries have imposed *ad hoc* unilateral measures in response to the COVID-19 pandemic. This has highlighted gaps in the existing multilateral rules and regional trade agreements (RTAs) in terms of ensuring protection and resilience under crisis circumstances. The Handbook addresses these gaps in Chapters II-VIII, focused on key issues in international trade rules. For each key issue, this Handbook explores options for provisions that could be used in future RTAs to provide guidance for more coordinated and effective responses to future crises. The options are either derived from existing trade agreements or composed by the author or other experts based on existing provisions, categorised into “baseline”, “baseline+”, and “discretionary” options. *Baseline options* represent established rules that are widely agreed by the international community, which are often found in the WTO covered agreements or commonly appear in existing RTAs. *Baseline plus options* refer to rules going beyond the baseline, including those that provide more tailored and inclusive approaches in response to crises, maintain free trade obligations, and enhance cooperation. *Discretionary options* cover rules that allow for more policy space but may cause unnecessary trade barriers and come at the cost of trade partners.

Chapter II addresses the treatment of essential goods and services. Essential goods and services are critical for individual nations, and the world at large, to respond to a crisis in a timely and effective manner. During the COVID-19 pandemic, countries have employed measures to restrict exports and facilitate imports to ensure the supply of essential products. Most existing trade agreements include bans on export and import restrictions and provide general exceptions that could allow measures under certain circumstances, including the protection of public health (Baseline). However, they have proven to be insufficient to handle the COVID-19 crisis, particularly when multiple countries are dealing with a crisis at once. Among other gaps, existing trade agreements do not contain definitions or positive criteria for what goods and services might be deemed essential in times of crisis; they also lack tailored rules based on the identification of essential goods and services. This chapter provides options to define and identify essential goods and services, as well as tailored provisions that could be used to ensure the supply of essential goods and services while avoiding unnecessary restrictions to international trade.

Chapter III addresses key issues of trade facilitation. Trade facilitation focuses on simplifying processes and reducing cost of cross-border trade. Discussions on transparency are carved out from this chapter and covered in Chapter 7. The WTO Trade Facilitation Agreement (TFA) is the first and only multilateral agreement providing comprehensive rules for trade facilitation (Baseline). Besides substantive rules, the TFA adopts a mechanism that allows for progressive implementation: developing countries and least developed countries (LDCs) can choose to undertake implementation obligations in consideration of their capacity and needs. This mechanism can be and should be used in more RTAs. This chapter provides options that address 4 important aspects of trade facilitation (i) paperless trade; (ii) expedited shipments and release of essential goods; (iii) other measures expediting release of essential goods; and (iv) facilitation of border cooperation. Among others, paperless trade has been seen particularly important during the COVID-19 pandemic and is also pivotal to achieve sustainable development. Building upon the TFA and other innovations, RTAs can incorporate provisions that can enhance implementation, promote deeper cooperation, and ensure capacity building.

Chapter IV discusses sanitary and phytosanitary (SPS) measures and technical barriers to trade (TBT). SPS and TBT measures are technical non-tariff measures (NTMs) commonly adopted by governments to achieve specific public policy objectives. SPS measures are applied to protect human, animal, or plant life or health. TBT measures, including technical regulations, standards, and conformity assessment procedures, are applied to ensure a certain level of quality of products. The WTO Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement) and Agreement on Technical Barriers to Trade (TBT Agreement) are the principal multilateral instruments governing the development, adoption, and implementation of SPS and TBT measures (Baseline). During the COVID-19 pandemic, stricter SPS and TBT measures have been imposed to secure safety, while relaxation and even waiver of SPS and TBT measures have also been applied to increase the importation of essential goods. This chapter provides options to pursue the balance between legitimate policy objectives and free trade by ensuring the proportionality and compatibility of SPS and TBT measures. Among others, risk assessment procedures, mutual recognition, and harmonization are crucial and thus should be the focus of improving RTA provisions.

Chapter V talks about intellectual property rights (IPRs). IPRs drive innovation-based economic development and also have a public interest dimension. For instance, IPRs have an impact on the accessibility of medicines and vaccines, which has been particularly important during the COVID-19 pandemic. The protection of IPRs can encourage innovation, whereas excessive protection can prevent the poor from accessing essential goods such as vaccines. Thus, through IPR policies, the crucial balance between innovators' rights and public access to innovation products can be improved. The WTO Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS Agreement) sets out minimum standards for protection of covered IPRs (Baseline). TRIPS plus provisions that are most relevant to pharmaceuticals, which appear in some RTAs, are also covered in this chapter, including patent linkage, patent term extension, expanded definitions of patentability, and protection for undisclosed test data and biologics. When maintaining or raising the standards of IPR protection, RTAs need also to incorporate compulsory licensing or alternative incentives such IPR pooling to ensure access to essential products.

Chapter VI addresses key issues in digital trade. The digitalization of trade experienced an unprecedented boost during the COVID-19 pandemic, and digital trade was able to provide consumers with access to essential and non-essential goods and services when physical trade channels were not available. The process of digitalization will only continue. It has become ever more imperative to ensure that international trading rules are designed to foster digital trade. Although there is no single definition of e-commerce or digital trade, nor do multilateral rules governing digital trade exist, countries have been putting in place policies and laws in the digital realm, as well as including digital trade provisions in RTAs. As observed in existing domestic laws, international guidelines, and RTAs, there are several priority areas for digital trade rules. This chapter provides options for priority areas particularly in the context of crisis: governance of data (data privacy, cross-border flows, and data localization); consumer protection; electronic signatures and authentication; electronic payments; and bridging digital divide. The chapter also covers the crucial area of addressing the digital divide.

Chapter VII is focused on transparency. In the realm of international trade rules, transparency refers to the degree to which trade policies and practices, and the processes by which they are established, are open and predictable. Transparency has been particularly important since the start of the COVID-19 pandemic because many countries have acted unilaterally, and often on an *ad hoc* basis, to enact measures aimed at curbing the spread of COVID-19. Stakeholders have often been caught unaware of

the latest policy developments, which in some cases has caused further disruptions in international trade due to challenges with compliance. Further, during times of crisis, governments are also more likely to bypass review and accountability procedures, which can cause widespread discrimination, arbitrary decision making, and even corruption. Existing trade agreements always contain transparency provisions, and the WTO agreements stipulate a range of obligations, including publication and notification of measures affecting trade (Baseline). This chapter provides options to develop transparency provisions tailored to times of crisis.

Chapter VIII highlights development. In the context of international trade rules, development has both economic and non-economic aspects, *inter alia*, development in economic advancement, social security, and sustainability. To ensure that developing countries and LDCs gain from international trade and to foster their development, special and differential treatment (S&DT) is commonly employed. Notably, WTO Members are given the latitude to self-identify as a developing country, whereas LDCs are designated based on UN criteria. S&DT provisions are embedded in many of the WTO covered agreements (Baseline) and a number of RTAs, which allow deviation from the fundamental principles such as the most-favoured-nation (MFN) and national treatment as well as the principle of reciprocity . Options for RTAs include more comprehensive standards for differentiation among countries based on their particular needs; development of mechanisms for technical assistance and capacity building; and inclusion of broader development concerns, especially sustainable development in line with the UN Sustainable Development Goals (SDGs).

Chapter IX provides possibilities of building forward better. This chapter covers five areas that are not covered in detail in this Handbook, as suggestions for further study and focus. These five areas are: investment, labour regulation, environmental protection, small- and medium-sized enterprises (SMEs), and gender. Issues in these areas are generally regarded as WTO extra or WTO-x in the sense that these disciplines have largely evolved outside the ambit of the WTO, with RTAs as a key driver in law-making in these areas. As a first step towards a detailed study of crisis-proof RTA options in these areas that could be covered more fully in future iterations of this work, this chapter provides an overview on how and to what extent these issues are incorporated in existing RTAs – often through non-binding language – with a reference to the UN SDGs.

LIST OF ABBREVIATIONS & ACRONYMS

ACCTS	Agreement on Climate Change, Trade and Sustainability
AEOs	Authorized Economic Operators
AfCFTA	African Continental Free Trade Area
APEC	Asia-Pacific Economic Cooperation
API	Application Programming Interface
ASEAN	Association of Southeast Asian Nations
ATIGA	ASEAN Trade in Goods Agreement
BITs	Bilateral Investment Treaties
BSA	Business Software Alliance
CARICOM	Caribbean Community
CARIFORUM	Caribbean Forum
CEPA	Comprehensive Economic Partnership Agreement
CETA	Comprehensive Economic and Trade Agreement
COVID-19	Coronavirus Disease 2019
CPTPP	Comprehensive and Progressive Agreement for Trans-Pacific Partnership
CUTS	Consumer Unity and Trust Society
DEA	Digital Economy Agreement
DEPA	Digital Economy Partnership Agreement
DESTA	Design of Trade Agreements
ECA	Economic Commission for Africa
ECC	Electronic Communications Convention
ECLAC	Economic Commission for Latin America and the Caribbean
ECOWAS	Economic Community of West African States
EFTA	European Free Trade Area
EU	European Union
EUAs	Emergency Use Authorizations
FDA	Food and Drug Administration

FDI	Foreign Direct Investment
FTA	Free Trade Agreement
G7	Canada, France, Germany, Italy, Japan, the United Kingdom and the United States
G20	Argentina, Australia, Brazil, Canada, China, France, Germany, India, Indonesia, Italy, Japan, Republic of Korea, Mexico, Russian Federation, Saudi Arabia, South Africa, Turkey, the United Kingdom, the United States, and the European Union.
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
GDP	Gross Domestic Product
GDPR	General Data Protection Regulation
GSP	Generalized System of Preferences
GSTP	Global System of Trade Preferences
HIPAA	Health Insurance Portability and Accountability Act
HS	Harmonized System
IBM	International Business Machines
ICT	Information and Communication Technology
IEC	International Electrotechnical Commission
IEL	International Economic Law
ILO	International Labour Organization
IMP	Initiative on Model Provisions
ISDS	Investor-State Dispute Settlement
ISO	International Organization for Standardization
ITA-1	Information Technology Agreement-1
ITA-2	Information Technology Agreement-2
KORUS	United States-Republic of Korea Free Trade Agreement
LDCs	Least Developed Countries
MEAs	Multilateral Environmental Agreements
MAST	Multi-Agency Support Team
MERCOSUR	Southern Common Market Agreement
MFN	Most-Favoured-Nation

MLEC	Model Law on Electronic Commerce
MLES	Model Law on Electronic Signatures
MLETR	Model Law on Electronic Transferable Records
MRAs	Mutual Recognition Agreements
NAAEC	North American Agreement on Environmental Cooperation
NAFTA	North American Free Trade Agreement
NTFCs	National Trade Facilitation Committees
NTMs	Non-tariff measures
OECD	Organization for Economic Co-operation and Development
PACER Plus	Pacific Agreement on Closer Economic Relations Plus
PPE	Personal Protection Equipment
RCEP	Regional Comprehensive Economic Partnership Agreement
RGLs	Reciprocal Green Lanes
ROO	Rules of Origin
RTA	Regional Trade Agreement
SADC	Southern African Development Community
SADEA	Australia-Singapore Digital Economy Agreement
S&DT	Special and Differential Treatment
SCM	Subsidies and Countervailing Measures
SDGs	Sustainable Development Goals
SDG 2	Zero Hunger
SDG 3	Good Health and Well-Being
SDG 5	Achieve Gender Equality and Empower All Women
SDG 6	Clean Water and Sanitation
SDG 8	Decent Work and Economic Growth
SDG 9	Industry, Infrastructure and Innovation
SDG 12	Responsible Consumption and Production
SDG 13	Climate Action
SDG 14	Life below Water

SDG 15	Life on Land
SDG 16	Peace, Justice, and Strong Institutions
SDG 17	Partnership for the Goals
S&DT	Special and Differential Treatment
SMEs	Small and Medium-Sized Enterprises
SPS	Sanitary and Phytosanitary Measures
TBT	Technical Barriers to Trade
TCA	Trade and Cooperation Agreement
TFA	Trade Facilitation Agreement
TRIMS	Trade-Related Investment Measures
TRIPS	Trade-Related Aspects of Intellectual Property Rights
UK	United Kingdom
UN	United Nations
UNCITRAL	United Nations Commission on International Trade Law
UNCTAD	United Nations Conference on Trade and Development
UNDP	United Nations Development Programme
UN ECA	United Nations Economic Commission for Africa
UN ECE	United Nations Economic Commission for Europe
UN ESCAP	United Nations Economic and Social Commission for Asia and the Pacific
UN ESCWA	United National Economic and Social Commission for West Asia
URL	Uniform Resource Locator
US	United States
USMCA	United States-Mexico-Canada Agreement
WCO	World Customs Organization
WTO	World Trade Organization

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INTRODUCTION TO THE INITIATIVE AND HANDBOOK

The global community today finds itself facing unprecedented circumstances and challenges that will undoubtedly reshape international trade in the months and years to come. The COVID-19 pandemic wreaked havoc on global supply chains and spurred the rise of unilateral national and regional measures, at the same time as the main international institution responsible for trade, the WTO, faces significant reform due to widening systemic inequalities, increasing economic diversity in membership, and massive changes propelled by technological advancement.¹ Concomitantly, RTAs, bilateral trade agreements, and free trade agreements (FTAs), have proliferated,² both in the Asia-Pacific region and globally, creating an avenue for change while also complicating the increasingly intricate and sometimes inadequate global rulebook.

Although the WTO has become more critical as an institution than ever, as WTO Member States contemplate broader reform, RTAs appear to be the most likely if not the most practical vehicle through which the contours of international economic law can be reshaped. Based on the latest figures from the WTO, a total of 350 RTAs are in force across the world today, with a near four-fold increase since the turn of the century.³ A number of these newer RTAs push for deeper economic integration than has been possible through multilateral negotiations. In some cases, they include stricter or “WTO plus” commitments on mainstream trade topics covered under the WTO, such as IPR commitments that go beyond the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement, or TRIPS plus commitments.⁴ RTAs can also broaden the trade agenda by establishing rules on issues that have yet to be addressed by the WTO, including environmental protection, competition policy, digital trade, gender, and labour standards (these are often referred to as “WTO beyond”, “WTO extra”, or “WTO-x” issues and agreements).⁵

¹ See generally, Sebastian Dullien, *Shifting Views on Trade Liberalisation: Beyond Indiscriminate Applause*, 53 *INTERECONOMICS* 119 (2018), <https://www.intereconomics.eu/pdf-download/year/2018/number/3/article/shifting-views-on-trade-liberalisation-beyond-indiscriminate-applause.html>.

² The term RTAs is used in this Handbook to encompass a range of agreement models between nations, including Free Trade Agreements (FTAs), Free Trade Areas, Customs Unions, Trade and Development Agreements, and other related agreement models. Preferential Trade Agreements, also referred to as trade preference programs, are not covered as extensively due to their unilateral nature but may be referenced as appropriate.

³ In 2000, the World Trade Organization (WTO) counted only 82 Regional Trade Agreement (RTAs) in force. See *Regional Trade Agreements Database*, WTO, <http://rtais.wto.org/UI/PublicMaintainRTAHome.aspx> (last updated June 28, 2021).

⁴ Iza Lejárraga, *Deep Provisions in Regional Trade Agreements: How Multilateral Friendly?*, ORGANIZATION FOR ECONOMIC AND COOPERATION DEVELOPMENT (OECD) TRADE POLICY PAPER NO 168, 15 (2014), <https://www.oecd-ilibrary.org/docserver/5jxvgn4bjf0-en.pdf?expires=1604451869&id=id&accname=guest&checksum=4B04A3B6F4908DF93CFF9984684F7331>.

⁵ See Kimberly Ann Elliott, *The WTO and Regional/Bilateral Trade Agreements*, in *HANDBOOK OF INTERNATIONAL TRADE AGREEMENTS: COUNTRY, REGIONAL AND GLOBAL APPROACHES* 17, 25 (Robert E. Looney ed., 2018). See also Chad P. Bown, *Mega-Regional Trade Agreements and the Future of the WTO*, 4 (2016), <https://www.globalpolicyjournal.com/articles/world-economy-trade-and-finance/mega-regional-trade-agreements-and-future-wto>, which discusses WTO-plus and WTO-extra provisions; and generally, Katrin Kuhlmann, Tara Francis, Indulekha Thomas, Malou Le Graet, Mushfiqur Rahman, Fabiola Madrigal, Maya Cohen, Ata Nalbantoglu, *Re-conceptualizing Free Trade Agreements Through a Sustainable Development Lens*, 22 (July 27, 2020) (A Contribution to the Policy Hackathon on Model Provisions for Trade in Times of Crisis and Pandemic in Regional and Other Trade Agreements), <https://www.unescap.org/sites/default/files/145%20Final-Team%20Katrin%20Kuhlmann-USA.pdf>, which

Examples of WTO-x next-generation RTAs include “deep” trade agreements,⁶ such as the United States-Mexico-Canada Agreement (USMCA),⁷ the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP),⁸ and comprehensive European Union (EU) agreements with trading partners such as Canada and Singapore. The Agreement Establishing the African Continental Free Trade Area (AfCFTA),⁹ which will create a considerable trade bloc that connects more than 1.2 billion people in a market worth several trillion,¹⁰ is another new model that both draws upon WTO norms in key areas such as trade facilitation, sanitary and phytosanitary measures, and dispute settlement and also seems poised to go beyond the WTO by integrating issues like sustainable development more firmly into the trade agenda.¹¹ The Agreement on Climate Change, Trade and Sustainability (ACCTS) between Costa Rica, Fiji, Iceland, New Zealand, Norway, and Switzerland, which is currently under negotiation, is another example of a new model RTA that seeks to reframe the rules of trade to address WTO-x issues such as climate change and sustainability.¹²

Other RTAs are notable as well. Among these is the largest RTA yet, the Regional Comprehensive Economic Partnership Agreement (RCEP) among fifteen nations in the Asia-Pacific region,¹³ which encompasses nearly one-third of the global gross domestic product (GDP) and adds to the mega-regional agreements that are shaping the contours of international economic law beyond the purview of the WTO.¹⁴ Additionally, the Digital Economy Partnership Agreement (DEPA) among Chile, New Zealand, and Singapore (which Republic of Korea is preparing to join as well) goes beyond multilateral

highlights numerous RTAs that have broadened the trade agenda beyond WTO disciplines [hereinafter Kuhlmann et al. Hackathon 2020].

⁶ *Deep Trade Agreements: Data, Tools and Analysis*, WORLD BANK, <https://datatopics.worldbank.org/dta/about-the-project.html>.

⁷ United States–Mexico–Canada Agreement, November 30, 2018, <https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement> [hereinafter USMCA].

⁸ Comprehensive and Progressive Agreement for Trans-Pacific Partnership, March 8, 2018, <https://www.dfat.gov.au/trade/agreements/in-force/cptpp/official-documents/Pages/official-documents> [hereinafter CPTPP].

⁹ Agreement Establishing the African Continental Free Trade Area, Article 31, March 21, 2018, https://au.int/sites/default/files/treaties/36437-treaty-consolidated_text_on_cfta_-_en.pdf [hereinafter AfCFTA].

¹⁰ David Luke, “Making the Case for the AfCFTA,” *Afronomicslaw*, January 15, 2019, available at <https://www.afronomicslaw.org/2019/01/12/making-the-case-for-the-african-continental-free-trade-area-2/>. See also, Gerald Chirinda, *Africa is Creating One of the World’s Largest Single Markets. What Does This Mean for Entrepreneurs?*, WORLD ECON. FORUM (May 2, 2019), <https://www.weforum.org/agenda/2019/05/AfCFTA-africa-continental-free-trade-area-entrepreneur/> and Landry Signé, *Africa’s Big New Free Trade Agreement, Explained*, WASH. POST (Mar. 29, 2018), https://www.washingtonpost.com/news/monkey-cage/wp/2018/03/29/the-countdown-to-the-africancontinental-free-trade-area-starts-now/?utm_term=.7ef4d48b47cc.

¹¹ See Katrin Kuhlmann & Akinyi Lisa Agutu, *The African Continental Free Trade Area: Toward A New Legal Model for Trade and Development*, 51 GEO. J. INT’L L. 4 (2020) [hereinafter Kuhlmann & Agutu 2020].

¹² See, *Agreement on Climate Change, Trade and Sustainability (ACCTS) Negotiations*, N.Z. MINISTRY FOREIGN AFF. & TRADE, <https://www.mfat.govt.nz/en/trade/free-trade-agreements/climate/agreement-on-climate-change-trade-and-sustainability-accts-negotiations/> (last visited March 16, 2020). [hereinafter New Zealand MoFT 2020]

¹³ Regional Comprehensive Economic Partnership, November 15, 2020, <https://www.dfat.gov.au/trade/agreements/not-yet-in-force/rcep/rcep-text-and-associated-documents> [hereinafter RCEP].

¹⁴ Philip Heinmans, Michelle Jamrisko, & Bryce Baschuk, *China and 14 Asian Nations to Sign World’s Biggest Free Trade Deal*, BLOOMBERG (Nov. 12, 2020), <https://www.bloomberg.com/news/articles/2020-11-12/deal-near-for-world-s-biggest-free-trade-zone-anchored-by-china?sref=0klsF1YE>.

frameworks to establish regional rules for the digital economy and incorporates social considerations, such as digital inclusion.¹⁵

While international trade rules can provide guidance in times of crisis, in many ways these rules are simply not tailored to the current set of challenges, which calls for a fresh evaluation of the degree to which trade rules might be made more resilient in order to deal with the crises of the 21st century. This Handbook was developed with this challenge in mind and presents options for trade negotiators, policymakers, and other stakeholders alike in considering RTAs that are designed to encourage collaboration, cooperation, and resilience in times of crisis. While the Handbook often builds upon, rather than completely refashions, trade rules in a number of key areas, the options presented in the chapters that follow attempt to better accommodate diverse national interests, maintain fundamental trade principles, and adequately balance the needs of countries that have the capacity to produce essential goods with those that must rely on their importation.¹⁶

The Handbook is part of the IMP launched by the United Nations (UN) and ESCAP with joint implementation by the United Nations Conference on Trade and Development (UNCTAD) and the five UN Regional Commissions (Economic Commission for Africa (ECA), Economic Commission for Latin America and the Caribbean, ESCAP, Economic and Social Commission for Western Asia (ESCWA), and Economic Commission for Europe) in cooperation with the WTO, Consumer Unity and Trust Society (CUTS) International, civil society organizations, academia, and the private sector, including a Core Expert Group.¹⁷ The Handbook is a continuation of the UN ESCAP Policy Hackathon organized in June 2020, which has allowed for inputs and ideas to be gathered from a wide range of stakeholders, including, inter alia, government experts, academics, trade negotiators, international organizations, and civil society groups.¹⁸ The Handbook is meant to be a living document, serving as a knowledge repository for trade policymakers and negotiators seeking to incorporate tailored provisions within RTAs to encourage resilience and respond to future crises and pandemics.

The chapters of the Handbook, outlined briefly below, provide possible approaches in different issue areas, with options for tailored RTA provisions included to assist countries and stakeholders in considering how to build resilience into RTAs more broadly. Each chapter provides a range of RTA

¹⁵ *Digital Economy Partnership Agreement*, MINISTRY TRADE & INDUSTRY SING., <https://www.mti.gov.sg/Improving-Trade/Digital-Economy-Agreements/The-Digital-Economy-Partnership-Agreement> (last updated Nov. 10, 2020) [hereinafter DEPA]. The draft negotiated agreement text for the Partnership Agreement between the EU and Members of the Organisation of African, Caribbean, and Pacific States also includes provisions on the digital divide. See *Negotiated Agreement Text for the Partnership Agreement between the European Union/The European Union and its Member States, of the One Part, and Members of the Organisation of African, Caribbean and Pacific States, of the Other Part* (April 15, 2021) https://ec.europa.eu/international-partnerships/system/files/negotiated-agreement-text-initialled-by-eu-oacps-chief-negotiators-20210415_en.pdf.

¹⁶ For example, the UN Economic Commission for Africa (UNECA) estimates that African nations import 94 per cent of their pharmaceutical and medicinal needs from outside the continent. See *Call for Expression of Interest: Africa Making Moves to Manufacture its Own Medicines*, UNECA (June 24, 2020) <https://www.uneca.org/archive/stories/call-expression-interest-africa-making-moves-manufacture-its-own-medicines>.

¹⁷ See generally, *Initiative on Model Provisions for Trade in Times of Crisis and Pandemic in Regional and Other Trade Agreements*, U.N. ECON. & SOC. COMMISSION ASIA & PACIFIC (UN ESCAP) (May 13, 2020), <https://www.unescap.org/resources/initiative-model-provisions-trade-times-crisis-and-pandemic-regional-and-other-trade#>.

¹⁸ An online repository of the contributions to the UN ESCAP Policy Hackathon can be found here: <https://www.unescap.org/resources/online-repository-contributions-policy-hackathon-model-provisions-trade-times-crisis-and>.

options, starting with provisions that follow a more established or minimum baseline that could be better leveraged in times of crisis and including other options that build upon these provisions to enhance rules or allow for additional policy space while still taking into account the needs of local stakeholders and global trading partners. Many of the options provided are derived from existing WTO or RTA provisions, modified to include sample crisis-specific language as necessary.

In most cases, for each specific trade topic, a baseline option is presented that provides a minimum standard for the commitment (in a number of cases, these track with WTO rules); examples are used to explain these baseline standards, but they are meant to be illustrative and not dispositive. Baseline options are sometimes based on WTO norms, which is a helpful way of ensuring that multilateral approaches continue to underpin trade even as heterogeneous RTAs proliferate. In other cases, the baseline option represents the most common RTA approach across regions. The Handbook also highlights ‘baseline plus’ options that go beyond a minimum standard to establish disciplines that are particularly tailored to responding to crises within a particular issue area, building upon rather than undermining global norms. In some instances, the Handbook also highlights a range of discretionary options, which may subject States to less stringent obligations, thereby increasing their policy space. However, policymakers should note that such an increase in discretion may come at the cost of reduced rights for third party stakeholders. In other cases, where a baseline does not yet exist, such as digital trade, the Handbook provides a range of example options. Finally, in order to address gaps in current RTAs related to trade in times of crisis, sample model RTA provisions are included in some cases for future consideration.

The Handbook’s overall aim is to reduce the incentives for countries to resort to unilateral action and trade disruption, instead facilitating a return to collective action to solve global problems. While the options included in the Handbook are presented in the hope that they can encourage RTAs to be better tailored to deal with future crisis, it is important to acknowledge that some emergencies may be so severe that they would overwhelm any trade agreement, even if well-tailored. With this in mind, strong global leadership and effective domestic action by States may well be the best option to weather periods of disruption.

Notably, the options presented are intended to address social and economic development considerations,¹⁹ and, in this regard, the Handbook recognizes the importance of the UN SDGs in promoting inclusive trade and includes RTA options that could help achieve specific SDGs. While specific examples are contained in the various chapters, the options included throughout the Handbook support SDG 17 (Peace, Justice, and Strong Institutions) and its targets, balancing in particular between a “rules-based, open, non-discriminatory and equitable multilateral trading system” as set out in target 17.10, due to the incorporation of WTO rules into many of the provisions, while preserving countries’ “policy space and leadership to establish and implement policies for poverty eradication and sustainable development,” in line with target 17.15.²⁰

Achieving broader development goals will also require effective implementation, and this is an important consideration for all trade agreements and the rules they contain. While this Handbook notes

¹⁹ For a more comprehensive discussion of options that address social and economic development, presented in the context of a broader methodology that includes flexibility, equity, inclusiveness, and other factors covered in this Handbook, see Katrin Kuhlmann, *Mapping Inclusive Trade and Development: A Comparative Agenda for Addressing Inequality and Vulnerability Through International and National Law*, 2 AF. J. INT’L L. (forthcoming, 2021) [hereinafter Kuhlmann 2021].

²⁰ *Goal 17: Strengthen the Means of Implementation and Revitalize the Global Partnership for Sustainable Development*, UNITED NATIONS, DEPARTMENT OF ECONOMIC AND SOCIAL AFFAIRS (UN DESA), <https://sdgs.un.org/goals/goal17>.

implementation issues to the extent possible, a full assessment of the implementation implications of the options discussed is beyond the scope of this current version of the Handbook and could be the focus of future efforts.

A number of the options presented in this Handbook are drawn from contributions to the Policy Hackathon on Model Provisions for Trade in Times of Crisis and Pandemic in Regional and Other Trade Agreements, as referenced throughout the Handbook. These include the work of Henry Gao, Dhiraj G. Chinani, Chew Siu Farn, Claudia Dalmau Gomez, Dou Han, Guo Ziyong, Jamie Loh, Kueh Jinyan Justin, and Tay Yan Chong, Leslie on Singapore’s experience during the pandemic; the work of Tracey Epps, Denae Wheeler, and Georgia Whelan on trade in essential goods; the work of Divya Prabhakar, Seul Lee, Mingcong Li and Chi-Le Ngo on regulatory cooperation for medical supplies in emergencies; the work of Sara Ashour on rules of origin; the work of Jiangyuan Fu, Joseph A. McMahon and Huidan Xue on facilitation of personal protection equipment (PPEs); and the work of Chiedza L. Muchopa on Africa’s crisis response in context of trade in good.²¹

Other options presented in the Handbook are drawn from a broader research project underway by the lead author and New Markets Lab, and they integrate work on regulatory diversity, equity, flexibility, and other factors observed in RTAs and international economic law (IEL) that can address economic and social development considerations.²² For the avoidance of doubt, flexibility is referred to in the Handbook as a way to tailor the rules in RTAs to the needs of different stakeholders, particularly within

²¹ Henry Gao, Dhiraj G. Chainani, Chew Siu Farn, Claudia Dalmau Gomez, Dou Han, Guo Ziyong, Jamie Loh, Kueh Jinyan Justin, Tay Yan Chong, Leslie, COVID-19 and the Little Red Dot: Important Lessons for Trade in Times of Global Pandemics Based on Singapore’s Experience 25-32 (July 27, 2020) (A Contribution to the Policy Hackathon on Model Provisions for Trade in Times of Crisis and Pandemic in Regional and Other Trade Agreements), <https://www.unescap.org/sites/default/files/175%20Final-Team%20Henry%20Gao-SMU.pdf> [hereinafter Gao et al. Hackathon 2020]; Tracey Epps, Denae Wheeler & Georgia Whelan, Facilitating a Coordinated International Response in Times of Crisis (July 27, 2020) (A Contribution to the Policy Hackathon on Model Provisions for Trade in Times of Crisis and Pandemic in Regional and Other Trade Agreements), <https://www.unescap.org/sites/default/files/103%20Final-Team%20Tracey%20Epps-New%20Zealand.pdf> [hereinafter Epps et al. Hackathon 2020]; Kuhlmann et al. Hackathon 2020, *supra* note 5; Divya Prabhakar, Seul Lee, Mingcong Li, Chi-Le Ngo, Strengthening International Regulatory Cooperation for Medical Supplies in Times of Medical Emergencies, (July 27, 2020) (A Contribution to the Policy Hackathon on Model Provisions for Trade in Times of Crisis and Pandemic in Regional and Other Trade Agreements), https://www.unescap.org/sites/default/d8files/142%20Final-Team%20Divya%20Prabhakar-Switzerland_0.pdf [hereinafter Prabhakar et al. Hackathon 2020], Sara Ashour, Lessons learned from Covid-19 Stress test: Filling the Gaps in Rules of Origin Provisions, (July 27, 2020) (A Contribution to the Policy Hackathon on Model Provisions for Trade in Times of Crisis and Pandemic in Regional and Other Trade Agreements), <https://www.unescap.org/sites/default/files/49%20Final-Sara%20Ashour-Egypt.pdf> [hereinafter Ashour Hackathon 2020]; Jiangyuan Fu, Joseph A. McMahon, Huidan Xue, More Restrictions or Facilitation on PPE Amid COVID-19: Limitations and Options of International Trade Law §II(c) (July 27, 2020) (A Contribution to the Policy Hackathon on Model Provisions for Trade in Times of Crisis and Pandemic in Regional and Other Trade Agreements), https://www.unescap.org/sites/default/files/46%20Final%20Team%20Jiangyuan%20Fu-Hong%20Kong_0.pdf [hereinafter Fu et al. Hackathon 2020]; and Chiedza L. Muchopa, Improving Africa’s Crisis and Pandemic Responses Through Regional Trade Agreement – Does a “Crisis/Pandemic Lens” Matter for Trade in Food?, (July 27, 2020) (A Contribution to the Policy Hackathon on Model Provisions for Trade in Times of Crisis and Pandemic in Regional and Other Trade Agreements), <https://www.unescap.org/sites/default/files/30%20Final-LC%20Muchopa-South%20Africa.pdf> [hereafter Muchopa Hackathon 2020].

²² See Kuhlmann 2021, *supra* note 19; Katrin Kuhlmann, *Flexibility and Innovation in International Economic Law: Enhancing Rule of Law, Inclusivity, and Resilience in the Time of COVID-19*, AFRONOMICSLAW BLOG (AFRICAN INT’L ECON. L. NETWORK) (August 27, 2020) [hereinafter, Kuhlmann Afronomicslaw 2020], <https://www.afronomicslaw.org/2020/08/27/flexibility-and-innovation-in-international-economic-law-enhancing-rule-of-law-inclusivity-and-resilience-in-the-time-of-covid-19/>. See also, Katrin Kuhlmann and Bhramar Dey, “Using Regulatory Flexibility to Address Market Informality in Seed Systems: A Global Study,” *Agronomy* 2021, 11, 377.

developing economies, and is intended to highlight how rules could be better designed to respond to development challenges rather than a “suspension” of or departure from the rules, as is often implied by application of “flexibilities”.²³ While the principle of special and differential treatment (S&DT) that shapes both multilateral and regional trade agreements, which will be discussed in a latter chapter of the Handbook, can sometimes suspend, albeit temporarily, trade commitments,²⁴ this will not be the focus of many of the flexible options presented throughout the Handbook. Rather, an inquiry of flexibilities in RTAs will focus on the specific positive rules and norms that are adaptable to changing circumstances, especially during times of crisis like the current pandemic, thereby enabling global trade to continue flowing with minimal disruption.²⁵ In particular, the chapters incorporate provisions that have the potential to allow countries to balance appropriate flexibility and fit-for-purpose design while still preserving a collective rules-based approach.²⁶

As the chapters that follow highlight, the trade impacts of the COVID-19 pandemic illustrate that the trade rules created by RTAs, along with better implementation of agreements overall, can contribute to helping “build forward better”. In some cases, innovations in RTAs could also help guide developments at the multilateral level. For example, during the early phases of the WTO e-commerce negotiations, a number of RTAs (like the CPTPP) were examined to help guide the multilateral dialogue.²⁷ This interplay between RTAs and multilateral trade rules may become more important as the WTO enters a phase of possible reform under new leadership.

The Handbook consists of the following chapters focused on central aspects of RTAs that have been, or could be, leveraged to respond to crises:

Chapter I discusses the impact of the COVID-19 pandemic on cross-border trade and identifies key vulnerabilities in global trading rules that will form the basis for the RTA options presented throughout the Handbook.

Chapter II focuses on the efficient cross-border movement of ‘essential goods and services’ that is vital in states’ crisis response and management. The chapter addresses three aspects of treatment of essential goods, namely approaches to essential goods, export restrictions, and rules of origin, with possible RTA options presented. With regard to essential services, Chapter II also addresses procedural liberalizations for cross-border movement of natural persons, mutual recognition of qualifications, and crisis-specific responses.

Chapter III covers trade facilitation and includes a range of RTA options to streamline cross-border trade during times of crisis, including provisions to expedite, simplify, and digitalize border processes and ensure greater transparency in customs administration. This chapter also covers electronic payments, although digital trade and e-commerce are covered in greater detail in Chapter VI as noted below.

²³ See, e.g., Simon J. Evenett & Richard Baldwin, *Revitalizing Multilateral Trade Cooperation: Why? Why Now? And How?*, in REVITALISING MULTILATERALISM: PRAGMATIC IDEAS FOR THE NEW WTO DIRECTOR-GENERAL 9 (Simon J. Evenett & Richard Baldwin eds., 2020), <https://voxeu.org/content/revitalising-multilateralism-pragmatic-ideas-new-wto-director-general> [hereinafter Evenett & Baldwin 2020].

²⁴ Simon J. Evenett & Johannes Fritz, *Why Transparency is Needed During Systemic Crises*, COLLATERAL DAMAGE CROSS-BORDER FALLOUT FROM PANDEMIC POLICY OVERDRIVE, THE 26TH GLOBAL TRADE ALERT REPORT, 5 (2020) [hereinafter Evenett & Fritz], <https://www.globaltradealert.org/reports/60>.

²⁵ See Kuhlmann 2021, *supra* note 19.

²⁶ See Kuhlmann et al. Hackathon 2020, *supra* note 5.

²⁷ *DDG Wolff Outlines Possible Responses to Calls for WTO Reform*, WTO, (January 13, 2021), https://www.wto.org/english/news_e/news21_e/ddgaw_13jan21_e.htm [hereinafter WTO Reform 2021].

Chapter IV examines SPS and TBT, which are among the most significant non-tariff measures affecting international trade, and highlights RTA options for greater simplification, harmonization, mutual recognition, and adherence to risk-based principles.

Chapter V covers intellectual property considerations, including those that are particularly central to responding to health crises like the current COVID-19 pandemic. It showcases options that balance innovation with just and equitable access, linking with the essential goods and services focus of Chapter II.

Chapter VI focuses on digital trade and e-commerce, which is one of the most important emerging areas of rules in RTAs, examining options related to key issues such as data privacy, cross-border data flows, data localization, and digital inclusion in cross-border e-commerce. Because a global approach to digital trade rules has not yet been developed, Chapter VI presents example options rather than baseline and baseline plus options. In addition, although all of these issues have implications well beyond crisis situations, they are included in this Handbook due to the central role that digital trade has played in the pandemic, which is certain to continue well beyond the current crisis.

Chapter VII covers transparency measures, which are particularly important during times of crisis, focusing on RTA options to ensure prompt publication of measures, accountability, and information sharing, while improving the access of third parties and the general public to decision-making procedures as rules change and develop.

Chapter VIII is focused on development, particularly in the form of S&DT, based on the recognition that many states will have particular circumstances and development needs when dealing with crises and its aftermath. It also touches upon sustainable development in RTAs, linking with some of the issues covered in Chapter IX on ‘Building Forward Better’. While a full assessment of sustainable development provisions in RTAs is beyond the scope of this first volume of the Handbook, due to its importance, sustainable development will likely be added to the Handbook going forward.

Chapter IX looks to the future and focuses on the theme of ‘building forward better’ through focus on environmental sustainability and other key issues, such as gender, SMEs, investment, and labour. All of these issues will be particularly relevant in ensuring that trade agreements serve as a way to facilitate the achievement of global development objectives as crystallized in the SDGs and move beyond the pandemic and global economic crisis. In addition to sustainable development, as noted above, these additional issues could be the basis of additional chapters in a subsequent version of the Handbook.

CHAPTER I - THE COVID-19 PANDEMIC AND COUNTRIES' RESPONSES

COVID-19 and the resulting pandemic have had a significant impact on international trade. The first ten months of 2020 alone saw G20 members undertake 1,371 policy interventions in response to the pandemic, out of which 1,067 were harmful for their trading partners.²⁸ This is evidence to the reality that protectionist approaches tend to become more prevalent in times of crisis, and existing multilateral and regional trade disciplines, while necessary to deal with crisis and emergency, have not been sufficient in preventing major diversions in trade along global value chains. Throughout the pandemic, interruptions have arisen in the flow of food, medicines, and PPE, all of which are necessities in crisis response. Nations grappled with the difficult tension of how to keep trade open while taking care of their own health and economic challenges. These dynamics also underscore that the world is more interconnected than ever before, and policy changes in one country can cause a domino effect in times of crisis. This means that in charting out a course for economic recovery and dealing with future challenges, a systemic approach has to be applied in order to build resilience and sustainability both within and among economies.²⁹

Not all trade measures taken during the pandemic have been disruptive, however, and some have helped to facilitate trade, such as the simplification of border controls for essential supplies and increased digitalization of border processes. Regional and multilateral entities like the Organization for Economic Co-operation and Development (OECD),³⁰ the WTO, and the G20,³¹ among others, have rallied to promote and adopt cooperative solutions, including the pooling of information on trade measures and commitments to waive export restrictions and tariffs on essential commodities. Further, many countries in the Arab region, including Jordan, Lebanon, Qatar, Oman, Mauritania, and Yemen, adopted specific measures to facilitate trade during the pandemic.³² These measures included offering low-cost licenses to exporters, exempting certain basic commodities from import taxes and customs duties, accepting customs documents in electronic format, and adopting other fiscal measures to mitigate the losses from the pandemic.³³

These measures must also be viewed in light of the economic crisis, which the United Nations declared “the worst collapse of economic activity since the Great Depression of the 1930s.”³⁴ Countries have faced lost labour income, grave impact on the informal economy, precautionary saving by consumers and low investment rates, shrinking of fiscal space and strained public services, decreased tourism

²⁸ See Evenett & Fritz, *supra* note 24.

²⁹ Katrin Kuhlmann, Chantal Line Carpentier, Tara Francis & Malou Le Graet, *Trade Policy for Resilient, Inclusive, and Sustainable Development in a New International Economic Order* (2020), https://cb4fec8a-9641-471c-9042-2712ac32ce3e.filesusr.com/ugd/095963_4460da2de0e746dd81ad32e003cd0bce.pdf.

³⁰ *COVID 19 and International Trade: Issue and Actions: OECD Policy Responses To COVID-19*, OECD, (June 12, 2020), <https://www.oecd.org/coronavirus/policy-responses/covid-19-and-international-trade-issues-and-actions-494da2fa/>.

³¹ *Report on G20 Trade Measures (Mid-May 2020 to Mid-October 2020)*, WTO, (November 18, 2020), https://www.wto.org/english/news_e/news20_e/report_trdev_nov20_e.pdf.

³² *COVID-19: Trade and Trade Facilitation Responses in the Arab Region*, UNITED NATIONAL ECONOMIC AND SOCIAL COMMISSION FOR WEST ASIA (ESCWA), 18-21 (2020), <https://www.unescwa.org/sites/default/files/pubs/pdf/covid-19-trade-facilitation-responses-arab-region-english.pdf>.

³³ *Id.*

³⁴ *COVID-19 and the Least Developed Countries, Policy Brief No. 66*, UN DESA, (May 1, 2020), <https://www.un.org/development/desa/dpad/publication/un-desa-policy-brief-66-covid-19-and-the-least-developed-countries/> [hereinafter UNDESA 2020].

revenue and commodity exports, and an increase in public sector debt ratios.³⁵ Due to the COVID-19 crisis and resulting measures, it is estimated that the total number of people living in extreme poverty could rise up to one hundred and fifty million.³⁶ Statistics released by the WTO in January 2021 showed an approximate 20 per cent year-on-year contraction for global trade in goods in the second quarter of 2020, with some recovery in the third quarter where a 5 per cent year-on-year contraction was observed.³⁷ Global trade in services had contracted by 30 per cent by the second quarter of 2020 alone, reflecting a more significant drop than that experienced in the aftermath of the Global Financial Crisis of 2007-2008.³⁸ UNCTAD data also show that global foreign direct investment fell by 42 per cent in 2020, with a hesitant recovery forecasted in 2021 due to continuing economic uncertainties caused by the COVID-19 pandemic.³⁹

A. The Global Health Crisis and the Global Trading System

The global health crisis caused by the COVID-19 pandemic has triggered related crises of hunger and poverty, climate change, gender and diversity, and unemployment, amongst others.⁴⁰ In an ideal scenario, the multilateral trade framework, as well as bilateral and regional frameworks, would have adequate legal tools to address these challenges and facilitate trade during the pandemic. However, the existing rules do not provide sufficient protection and flexibility under the current circumstances.⁴¹ In a number of cases, countries have resorted to emergency measures (mainly claimed under “general and security exceptions”)⁴² considered to be pertinent to health and economic security, with legal and economic consequences to be considered later. While some of these measures may fall within exceptions, it is fair to say that their imposition has called into question other provisions (especially fundamental norms relating to non-discrimination and avoidance of arbitrary, trade-distortive measures) in multilateral agreements and RTAs. Not only have these measures challenged global trade

³⁵ *Recover Better: Economic and Social Challenges and Opportunities*, U.N. HIGH-LEVEL ADVISORY BOARD ON ECON. & SOC. AFF., (2020), https://www.un.org/development/desa/en/wp-content/uploads/2020/07/RECOVER_BETTER_0722-1.pdf. See also *COVID-19 Crisis and The Informal Economy: Immediate Responses and Policy Challenges*, INT'L LAB. ORG. (ILO), (2020), https://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---travail/documents/briefingnote/wcms_743623.pdf [hereinafter ILO Informal Economy 2020].

³⁶ *Poverty and Shared Prosperity Report, 2020: Reversals of Fortune*, WORLD BANK GROUP 7 (2020), [HTTPS://OPENKNOWLEDGE.WORLDBANK.ORG/BITSTREAM/HANDLE/10986/34496/2116020V.PDF](https://openknowledge.worldbank.org/bitstream/handle/10986/34496/2116020v.pdf).

³⁷ *Services Trade Recovery Not Yet in Sight*, WTO, (Jan. 26, 2021), https://www.wto.org/english/news_e/news21_e/serv_26jan21_e.htm?utm_source=dlvr.it&utm_medium=twitter.

³⁸ See *Second Quarter 2020 Trade in Services*, WTO, (Oct. 23, 2020), https://www.wto.org/english/res_e/statist_e/daily_update_e/serv_latest.pdf. See also *Services Trade Recovery Not Yet in Sight*, WTO, (Jan. 26, 2021), https://www.wto.org/english/news_e/news21_e/serv_26jan21_e.htm?utm_source=dlvr.it&utm_medium=twitter.

³⁹ *Global Foreign Direct Investment Fell by 42% in 2020, Outlook Remains Weak*, U.N. CONFERENCE ON TRADE & DEV. (UNCTAD) (Jan. 24, 2021), <https://unctad.org/news/global-foreign-direct-investment-fell-42-2020-outlook-remains-weak>.

⁴⁰ Emma Charlton, *5 Crises That Could Worsen Under COVID-19*, WORLD ECON. FORUM (WEF) (May 14, 2020), <https://www.weforum.org/agenda/2020/05/crises-coronavirus-could-worsen/>.

⁴¹ See Kuhlmann 2021, *supra* note 19.

⁴² The general exceptions clause set out in Article XX of General Agreement on Tariffs and Trade 1994 allows for countries to deviate from their trade obligations in the interest of certain non-economic consideration, including the protection of human health, provided that such deviation is neither arbitrary nor discriminatory. The security exception set out in Article XXI of GATT 1994 allows countries to take necessary action during times of national or international emergencies in a non-arbitrary/non-discriminatory manner (See GATT1994, Article XI.1, April 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 187, 33 I.L.M. 1153 (1994)) [hereinafter GATT 1994].

rules and norms, they have also threatened progress on many of the global economic and social development goals (including the SDGs).

As the world grappled with the pandemic, international trade institutions were also in a state of transition. In the twenty-five years since its inception, the WTO has become the backbone of international trade rules, with nearly universal global membership and extensive reach of its covered agreements and dispute settlement mechanism.⁴³ WTO rules serve to increase predictability in trading relations by binding tariff rates, eliminating quantitative restrictions (except in specified circumstances), and upholding the principle of non-discrimination.⁴⁴ They also allow for some recognition of the differing economic circumstances among members, through exceptions,⁴⁵ along with S&DT, although the development function of the WTO is currently in need of a refresh.⁴⁶ At present, however, both the negotiation and adjudication functions of the WTO are highly strained, although new leadership and calls for reform hold some promise.

Trade rules are also increasingly being defined by RTAs. Many argue that trade liberalization can be achieved faster if pursued through regional blocs,⁴⁷ with RTAs providing a platform for deeper commitments on issues that have deadlocked at the multilateral level. RTAs cover a wide spectrum, ranging from bilateral trade agreements to mega RTAs such as the AfCFTA and RCEP.⁴⁸ As noted in the Introduction, the number of RTAs has increased steadily over the past twenty years, and, in many respects, RTAs have gone beyond WTO disciplines in pursuit of deeper integration.⁴⁹ RTAs are often “WTO plus”, establishing more comprehensive rules in areas like intellectual property, for instance.⁵⁰ Newer RTAs are pushing the envelope to further integrate sustainability and development by addressing “WTO-x” issues, linking to other legal and policy instruments and setting a foundation of rules which will allow countries to, inter alia, address labour standards, combat climate change, and eliminate fossil fuel subsidies.⁵¹ If carefully crafted and implemented, RTAs could be a more useful tool during times of crises. Adjustments could include incorporating provisions tailored to crises, such as the options contained in this Handbook, or integrating crisis-specific chapters.⁵² In order to do so, however, it will be important to understand how specific RTA provisions have been used (or could

⁴³ See generally, Evenett & Baldwin 2020, *supra* note 23.

⁴⁴ JOOST H.B. PAUWELYN, ANDREW GUZMAN & JENNIFER A. HILLMAN, *INTERNATIONAL TRADE LAW* (3d ed., 2016).

⁴⁵ Bernard Hoekman, *COVID-19 Trade Policy Measures, G20 Declarations and WTO Reform*, in Evenett & Baldwin 2020, *supra* note 23.

⁴⁶ James Bacchus & Inu Manak, *The Development Dimension: What to Do About Differential Treatment in Trade*, *Policy Analysis No. 887*, CATO Inst. (2020), <https://www.cato.org/sites/cato.org/files/2020-04/PA-887-update.pdf> [hereinafter Bacchus & Manak].

⁴⁷ PETER VAN DEN BOSSCHE, *THE LAW AND POLICY OF THE WORLD TRADE ORGANIZATION: TEXTS, CASES AND MATERIALS* 696 (2d ed., 2008).

⁴⁸ Other agreements, such as the Greater Arab FTA with 17 Arab countries as members, should also be used to facilitate trade in emergency situations. The implementation of the Arab Customs Union will also help reduce border costs, address inefficiencies, and help facilitate regional trade. (See *Assessing Arab Economic Integration Toward the Arab Customs Union – Summary*, UNITED NATIONS, 6 (2015) <https://digitallibrary.un.org/record/1309431?ln=en>)

⁴⁹ *Regional Trade Agreements Are Evolving – Why Does It Matter?*, OECD, <https://www.oecd.org/trade/topics/regional-trade-agreements/> (last visited March 16, 2021).

⁵⁰ *Id.*

⁵¹ For example, the Agreement on Climate Change, Trade and Sustainability currently being negotiated between Costa Rica, Fiji, Iceland, New Zealand, Norway, and Switzerland is expected to establish rules on these areas. See New Zealand MoFT 2020, *supra* note 12.

⁵² See Epps et al. Hackathon 2020, *supra* note 21.

have been used) during the crisis as well as where new disciplines could be incorporated to better handle future crisis situations.⁵³

B. COVID-19 and Resulting Challenges

The COVID-19 pandemic was an exogenous shock of massive proportions, which has had dire public health, economic, and social consequences. The rapid spread of the virus quickly overwhelmed the health infrastructure of both developing and developed economies, causing widespread loss of life⁵⁴ and exacerbating existing disparities in access to healthcare. The economically vulnerable, elderly, and sick were (and continue to be) the worst affected, due to heightened risk of infection and greater chance of exposure in unsanitary and overcrowded living conditions.⁵⁵ Because no country was prepared to meet a health challenge of this magnitude, governments faced acute shortages in medical equipment and technology required for the treatment of the disease, as well as other goods essential during the pandemic.

A number of countries reacted quickly and instinctively to protect their populations and bolster their flailing public health systems. Common actions included domestic measures such as bans on public events, enforcement of lockdowns, and the imposition of quarantines,⁵⁶ as well as international measures such as border closures and export restrictions on essential goods. In addition, countries have attempted to curb the spread of the virus by declaring travel restrictions, banning non-residents and non-citizens from entering a country, and imposing quarantine requirements upon entry.⁵⁷

Border closures and travel restrictions have affected trade in both goods and services.⁵⁸ Inability of service providers and consumers to move across borders has disrupted services provided through mode two (consumption abroad), mode three (commercial presence), and mode four (movement of natural persons). The most affected services sector has been tourism, where trade levels could fall back to 1950s levels.⁵⁹ Significantly, developing and least developed economies are particularly dependent on revenue from tourism and are, therefore, disproportionately affected by the decline in tourism services.⁶⁰ Educational services have also been similarly, if not as severely, affected, due to school closures and travel restrictions affecting the movement of international students and faculty members.⁶¹ The transport sector has also been hard hit due to reduced mobility, quarantine

⁵³ See Gao et al. Hackathon 2020, *supra* note 21.

⁵⁴ See UNDESA 2020, *supra* note 34. See also *Recover Better: Economic and Social Challenges and Opportunities*, U.N. HIGH-LEVEL ADVISORY BOARD ON ECON. & SOC. AFF. (2020), https://www.un.org/development/desa/en/wp-content/uploads/2020/07/RECOVER_BETTER_0722-1.pdf; ILO Informal Economy 2020, *supra* note 35; and *Tracking Universal Health Coverage: 2017 Global Monitoring Report*, WORLD HEALTH ORG. (WHO), (2017), https://www.who.int/healthinfo/universal_health_coverage/report/2017/en/.

⁵⁵ Sanni Yaya, Akaninyene Otu & Ronald Labonté, *Globalization in the Time of COVID-19: Repositioning Africa to Meet the Immediate and Remote Challenges*, 16 GLOBALIZATION & HEALTH 51 (2020), <https://globalizationandhealth.biomedcentral.com/articles/10.1186/s12992-020-00581-4>; and INT'L LAB. ORG., *supra* note 54.

⁵⁶ See Yaya, Otu & Labonté, *supra* note 55 at 51.

⁵⁷ See *Cross Border Mobility, Covid-19 and Global Trade, Information Note*, WORLD TRADE ORG. (WTO), (2020) [hereinafter WTO Cross-Border Mobility 2020], https://www.wto.org/english/tratop_e/covid19_e/mobility_report_e.pdf.

⁵⁸ Bengt Söderlund, *The Impact of Travel Restrictions on Trade During the COVID-19 Pandemic*, VOXEU CEPR (Nov. 4, 2020), <https://voxeu.org/article/impact-travel-restrictions-trade-during-covid-19>.

⁵⁹ See WTO Cross-Border Mobility 2020, *supra* note 57.

⁶⁰ L. Alan Winters, *The Temporary Movement of Natural Persons (Mode 4): The Need for a Long View*, [hereinafter Winters Mode 4 2020] in Evenett & Baldwin, *supra* note 23 .

⁶¹ See Winters, *supra* note 60; and WTO Cross-Border Mobility 2020, *supra* note 57.

requirements for staff, travel bans, and the lack of demand for passenger transport.⁶² Other services which often require the presence of foreign investment and skilled professionals at the final stage in the supply chain, such as engineering, accounting and legal services, among others, have also suffered due to restrictions on international mobility.⁶³

Border closures and transport restrictions have also disrupted trade in goods.⁶⁴ For instance, the supply of essential goods including food in LDCs has been severely affected due to long border delays.⁶⁵ The unavailability of staff to perform border checks has also contributed to these delays.⁶⁶ Such restrictions in mobility and the reduced scale of transport operations have particularly affected agriculture exports, with seasonal produce bearing the brunt of the losses.⁶⁷ Internal travel restrictions have also caused value chain disruptions due to lockdowns and factory closures.⁶⁸ The global nature of the pandemic has affected manufacturing hubs all around the world, increasing input costs.⁶⁹ These costs to the manufacturing sector have also been compounded as a result of global demand shocks due to the economic downturn.⁷⁰

In response to the crisis, the global demand for essential goods, including PPE, pharmaceuticals, and cleaning products, rose exponentially. In order to safeguard local interests, several WTO members notified export restrictions on essential goods in the early stages of the pandemic, despite the general prohibition on quantitative restrictions.⁷¹ For instance, Algeria, Azerbaijan, Bahrain, Bulgaria, Cambodia, Colombia, Ecuador, Egypt, El Salvador, Georgia, Honduras, Hungary, and India imposed temporary export bans on goods such as PPE, cleaning supplies, pharmaceutical products, and food.⁷² Countries such as Argentina, Brazil, and Costa Rica imposed export licensing requirements for goods required to fight COVID-19.⁷³ Such measures contributed to shortages in other countries that did not have sufficient local production capacity. More recently, disruptions in the export of COVID-19 vaccinations due to bans and other protectionist measures (termed “vaccine nationalism”) have drawn criticism from various governments and multilateral institutions, including a sharp rebuke from United Nations Secretary-General António Guterres.⁷⁴ Despite their adverse effects, countries would often

⁶² See WTO Cross-Border Mobility 2020, *supra* note 57.

⁶³ *Id.*

⁶⁴ See Winters Mode 4 2020, *supra* note 60.

⁶⁵ *Impact of the COVID-19 Pandemic on Trade and Development: Transitioning to a New Normal*, UNCTAD, (2020), https://unctad.org/system/files/official-document/osg2020d1_en.pdf.

⁶⁶ Erik Nora, Satya Prasad Sahu & Ivan Peterson, COVID-19 Highlights Need for Digitizing and Automating Trade in South Asia, WORLD BANK BLOGS (Aug. 14, 2020), <https://blogs.worldbank.org/endpovertyinsouthasia/covid-19-highlights-need-digitizing-and-automating-trade-south-asia>.

⁶⁷ See WTO Cross-Border Mobility 2020, *supra* note 57.

⁶⁸ Richard Baldwin & Rebecca Freeman, *Supply Chain Contagion Waves: Thinking Ahead on Manufacturing ‘Contagion and Reinfection’ from the COVID Concussion*, VOXEU–CEPR (April 1, 2020) [hereinafter Baldwin & Freeman 2020], <https://voxeu.org/article/covid-concussion-and-supply-chain-contagion-waves>.

⁶⁹ Baker McKenzie & Oxford Economics, *Beyond COVID-19: Supply Chain Resilience Holds Key to Recovery* <https://www.bakermckenzie.com/-/media/files/insight/publications/2020/04/covid19-global-economy.pdf>.

⁷⁰ See Baldwin & Freeman 2020, *supra* note 68.

⁷¹ *Export Prohibitions and Restrictions, Information Note*, WTO, (2020) [hereinafter WTO Export Prohibitions 2020], https://www.wto.org/english/tratop_e/covid19_e/export_prohibitions_report_e.pdf.

⁷² *COVID-19: Measures Affecting Trade in Goods*, WTO, https://www.wto.org/english/tratop_e/covid19_e/trade_related_goods_measure_e.htm (last updated October 7, 2020) [hereinafter WTO Goods 2020].

⁷³ *Id.*

⁷⁴ See Rick Noack, Quentin Ariès & Loveday Morris, *EU Denies Vaccine Nationalism Charge, Accuses US and UK of Not Sharing*, WASH. POST (March 10, 2021), <https://www.washingtonpost.com/world/europe/covid-vaccine-exports-eu-uk->

justify these measures under the exceptions provided in the multilateral and regional trading rules, which provide some room for a temporary departure from trade obligations in light of non-economic considerations such as health emergencies or critical food shortages.⁷⁵

Trade measures have also exacerbated the economic crisis: supply chain disruptions and export bans have caused acute shortages of essential medical goods, particularly for countries that lack adequate local productive capacity, while border closures and controls have sown the seeds of looming food insecurity. Vulnerable sections of society, including the global poor, women, and small businesses, are bearing the brunt of both the pandemic and its responses. For example, the UN reports that the pandemic left women in Arab countries more vulnerable to domestic violence, since isolation measures made it more challenging to receive help and protection.⁷⁶

C. The Role of RTAs During the COVID-19 Pandemic

RTAs currently in place were not negotiated with a global pandemic and resulting systemic economic crisis in mind. One important gap is that many provisions are not designed to adapt to changed circumstances. As an example, border closures and reduced border staffing have impeded the efficient application of border regulatory measures, including the implementation of technical regulations, standards, and SPS measures. However, provisions in RTAs often do not foresee such circumstances, leading many countries to adopt ad hoc approaches.

Measures taken in response to the pandemic have also included the relaxation of technical regulations and standards, harmonization or mutual recognition of standards, and the adoption of online certification.⁷⁷ For instance, Brazil is accepting information, certifications, and authorizations by other regulators participating in the Pharmaceutical Inspection Co-operation Scheme, the Medical Device Single Audit Program, and the International Medical Device Regulators Forum.⁷⁸ Canada is recognizing authorizations by third country regulators who follow similar regulatory frameworks.⁷⁹ With regard to relaxation in technical regulations and standards, Switzerland has temporarily relaxed food labelling requirements to deal with food shortages,⁸⁰ as well as certification requirements for medical devices and PPE to increase their availability.⁸¹ Canada passed an interim order to ease its bilingual labelling requirements for certain categories of essential goods such as hand sanitizers and

[us/2021/03/10/1899556c-81a0-11eb-be22-32d331d87530_story.html](https://www.nytimes.com/2021/03/10/1899556c-81a0-11eb-be22-32d331d87530_story.html). See also *UN Chief Blasts Vaccine Nationalism, Hoarding, Side Deals*, ASSOCIATED PRESS (March 11, 2021), <https://news.yahoo.com/un-chief-blasts-vaccine-nationalism-012351419.html?guccounter=1>.

⁷⁵ GATT 1994 Art. XI and Art. XX, *supra* note 42.

⁷⁶ The UN reports that about 37 per cent of women in Arab countries experience domestic violence, which has been exacerbated during COVID-19. (*Regional Emergency Response to Mitigate the Impact of COVID-19*, UNITED NATIONAL ECONOMIC AND SOCIAL COMMISSION FOR WEST ASIA (2020), https://afsd-2021.unescwa.org/sdgs/pdf/covid-19/en/1-20-00116_rer_mitigatingimpact_covid-19_eng_april8.pdf)

⁷⁷ Seul Lee & Divya Prabhakar, *COVID-19 Non-Tariff Measures: The Good and the Bad, Through a Sustainable Development Lens*, (2021), UNCTAD RESEARCH PAPER NO. 60 [hereinafter, Lee & Prabhakar 2021], UNCTAD/SER.RP/2021/3, https://unctad.org/system/files/official-document/ser-rp-2021d3_en.pdf.

⁷⁸ See Prabhakar et al. Hackathon 2020, *supra* note 21.

⁷⁹ *Standards, Regulations and COVID-19: What Actions Taken By WTO Member?*, Information Note, WTO, (2020) [hereinafter, WTO Standards 2020], https://www.wto.org/english/tratop_e/covid19_e/standards_report_e.pdf.

⁸⁰ *Revision of the Ordinance on Foodstuffs and Utility Articles - Derogations Due to COVID-19*, FEDERAL FOOD SAFETY AND VETERINARY OFFICE, SWITZERLAND, (April 27, 2020), https://chemycal.com/news/b09062fb-e0c8-43b7-b06fc7ba39c3ce57/Switzerland_Revision_of_the_Ordinance_on_Foodstuffs_and_UTILITY_Articles_derogations_due_to_COVID-19.

⁸¹ See WTO Standards 2020, *supra* note 79.

disinfectants.⁸² Countries have also shown increased acceptance of online certifications, for example, Argentina, Australia, Chile, Costa Rica, Indonesia, Japan, Mexico, the Philippines, the Russian Federation, South Africa, and the EU temporarily accepting electronic SPS certificates.⁸³ This could lead to more widespread use of electronic certification and the adoption of measures like the International Plant Protection Convention (IPPC) e-Phyto certificate.⁸⁴

Transparency provisions, while common in RTAs and the multilateral trading framework, have also proven to be insufficient to deal with policy changes during a crisis. When country responses change rapidly and often unpredictably, traders and businesses are plunged into uncertainty.⁸⁵ As the pandemic has highlighted, one of the most important issues tends to be the lack of timely and updated information. For instance, while countries enacted a host of export restrictions in the initial stages of the pandemic, only a relative few were notified as of March 2020.⁸⁶ In response to weak compliance with notification requirements, information pooling and dissemination mechanisms were created both at the multilateral level by institutions including the WTO⁸⁷ and the United Nations Economic Commission for Europe⁸⁸ and at the national level by countries including Russian Federation and Japan⁸⁹ to allow access to updated information across strategic sectors.⁹⁰

D. Options for Future Reform

Policy responses to the pandemic to date have involved both trade facilitating and trade restrictive measures, which serve to clearly illustrate gaps in existing trade frameworks. Going forward, RTAs could incorporate some of the more trade facilitating measures, while mitigating the effects of trade restrictive measures such as export bans. One common element that could be addressed in future RTAs is an approach to essential goods and services that would get priority treatment during times of crises, when institutional frameworks for cross-border trade are under stress.

For essential goods, while developing an exhaustive list of essential goods would be a challenge, it is important that RTAs nevertheless address the issue and specify the criteria for identifying essential goods in times of crisis.⁹¹ This delineation will be vital for crisis-proofing RTAs, since many crisis-specific emergency provisions need to cut across multiple RTA chapters.⁹² Further, while current global trading rules generally discourage export restrictions, allowing for their use under certain

⁸² *Public Advisory - Expedited Access to Cleaning Products Used in the Workplace to Help Fight COVID-19*, CISION, (April 27, 2020), <https://www.newswire.ca/news-releases/public-advisory-expedited-access-to-cleaning-products-used-in-the-workplace-to-help-fight-covid-19-865165693.html>.

⁸³ See WTO Standards 2020, *supra* note 79.

⁸⁴ See Kuhlmann et al. Hackathon 2020, *supra* note 21.

⁸⁵ See WTO Export Prohibitions 2020, *supra* note 71.

⁸⁶ *Id.*

⁸⁷ See WTO Goods 2020, *supra* note 72.

⁸⁸ *Observatory on Border Crossings Status Due to COVID-19*, U.N. ECON. COMMISSION EUROPE (UNECE) <https://wiki.unece.org/display/CTRBSBC/Observatory+on+Border+Crossings+Status+due+to+COVID-19+Home> (last updated November 13, 2020).

⁸⁹ Yann Duval, *Lessons from The Pandemic for Trade Facilitation and the WTO*, 129, 133 [hereinafter Duval] in Evenett & Baldwin 2020, *supra* note 23.

⁹⁰ See WTO Goods 2020, *supra* note 72.

⁹¹ *Declaration on Facilitating the Movement of Essential Goods by the APEC Ministers Responsible for Trade*, ASIA-PACIFIC ECONOMIC COOPERATION (APEC), July 25, 2020, https://www.apec.org/Meeting-Papers/Sectoral-Ministerial-Meetings/Trade/2020_MRT/Annex-A [hereinafter APEC MRT 2020].

⁹² *Id.*

circumstances, including temporary measures to address critical food and other supply shortages,⁹³ RTAs could nevertheless include additional disciplines on export measures, including temporary waivers under certain circumstances, commitments to restrict the scope of export restrictions, limitations on term and applicability, mechanisms to review necessity, and enhanced transparency requirements. RTAs could also be adapted to better facilitate faster movement of essential goods. One approach would be to expedite cross border movement through streamlined rules of origin provisions. In this context, RTAs could include provisions for harmonized e-certification, simplified certification requirements for essential goods, and cooperation between regional trading partners.⁹⁴

For essential services, greater focus should be placed on Mode 4 (temporary movement of natural persons),⁹⁵ including through mechanisms such as fast track entry channels for service providers, mutual recognition of qualifications of high skilled essential service providers, and review mechanisms to ensure that any ad hoc regulations adopted are necessary, non-discriminatory, and proportionate.⁹⁶

In addition, while trade facilitation provisions are extensive in newer RTAs and include measures on customs cooperation, automation, expedited clearance, and transparency, these measures do not fully address the complexities of a crisis of indefinite duration. Some trade facilitation provisions are also couched in terms of soft, 'best-endeavour' language, which can impede their reliability and practical effectiveness.⁹⁷ Another issue is the lack of capacity to properly implement trade facilitation obligations, such as the lack of infrastructure, technological capability, or know-how. RTAs could, therefore, be a useful tool for strengthening trade facilitation obligations, particularly through hard commitments. Reforms might include, inter alia, further simplification of customs procedures, improved accessibility of trade related information, and cooperation and dialogue between border agencies,⁹⁸ which would also track with the WTO Agreement on Trade Facilitation (TFA). RTA provisions on expedited clearance for express shipments and perishable goods could also be broadened to include a wider, non-exhaustive category of essential goods.

Technical regulations, standards, and SPS measures are also particularly relevant during periods of crisis.⁹⁹ Notably, the majority of trade facilitating measures adopted during the pandemic have been

⁹³ GATT, Article XI, *supra* note 42.

⁹⁴ See Ashour Hackathon 2020, *supra* note 21.

⁹⁵ See General Agreement on Trade in Services, Article I.2(d), Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, 1869 U.N.T.S. 183, 33 I.L.M. 1167 (1994) [hereinafter GATS].

⁹⁶ See Winters Mode 4 2020, *supra* note 60 in Evenett & Baldwin Revitalizing Multilateralism, *supra* note 23. ; *A Quick Guide to the GATS and Mode 4*, OECD, WORLD BANK & INT'L ORG. MIGRATION SEMINAR ON TRADE AND MIGRATION, 15 (2003), https://www.iom.int/jahia/webdav/site/myjahiasite/shared/shared/mainsite/microsites/IDM/workshops/Trade_2004_0405_1004/related%20docs/quick_guide.pdf.

⁹⁷ Yann Duval, Nora Neufeld & Chorthip Utoktham, *Do Trade Facilitation Provisions in Regional Trade Agreements Matter? Impact on Trade Costs and Multilateral Spillovers*, ASIA-PACIFIC RESEARCH AND TRAINING NETWORK ON TRADE (ARTNET) WORKING PAPER NO. 164, 10 (2016) ("Trade facilitation measures in RTAs are also mostly specified in "best endeavor" terms, with often little or no details provided on how they are to be implemented."). See also Lejárraga, *supra* note 4, at 13 (2014), arguing that best-endeavor clauses are less likely to lead to tangible reforms within countries that have implemented the RTA in question; and *Trade Facilitation in Regional Trade Agreements*, UNCTAD, 7, 15 (2011), noting the usage of best-endeavor language for trade facilitation provisions in some of the RTAs sampled.

⁹⁸ See, e.g., Agreement Between New Zealand and Singapore on a Closer Economic Partnership, N.Z.–Sing., Ch. 4, May 17, 2019, <https://www.mfat.govt.nz/assets/Trade-agreements/Singapore-NZ-CEP/CEP-Upgrade-Protocol-all-chapters-and-annexes/P04-Ch4-Customs-Procedures-and-Trade-Facilitation.pdf>; and DEPA, Module 2 [New Zealand Singapore CEPA].

⁹⁹ See WTO Standards 2020, *supra* note 79.

focused on streamlining these measures.¹⁰⁰ RTAs could incorporate these trends to enhance easy movement of essential goods, including, for example, commitments for mutual recognition of standards, capacity building mechanisms, and simplified procedures for essential goods. Further, considering these measures in a crisis context also underscores the importance of bilateral and regional efforts focused on harmonization, digitalization, and simplification, particularly when coupled with adequate technical support for low income contracting parties.

The pandemic has also highlighted the importance of reassessing flexibilities for intellectual property rights, including those for essential medicines, vaccines, and medical equipment. RTA parties could consider, for example, provisions that expressly give full effect to the compulsory licensing provisions set out at the multilateral level or those that establish alternative incentive models such as prizes or grants for innovation.¹⁰¹ Further, while heightened IP protections found in some RTAs are viewed by some stakeholders as encouraging innovation,¹⁰² States should keep in mind any possible adverse effects to public health and access to essential technology.

Crises like the pandemic also shine light on the need to develop trade disciplines that can adapt to the new realities of international trade. During the ongoing pandemic, digital trade and electronic commerce (e-commerce) witnessed an unprecedented rise, due in part to government orders limiting physical business operations, and provided consumers with access to essential and non-essential goods and services.¹⁰³ Although digital trade transactions often occur within the borders of a State, an increasing number of consumers are engaging in cross-border e-commerce,¹⁰⁴ and suppliers often import their goods, making cross-border trade even more vital to e-commerce. International trade rules do not yet cover digital trade and e-commerce at the multilateral level, however, although RTAs are increasingly incorporating e-commerce and digital trade provisions that include aspects such as cross-border data flows, data privacy, electronic transactions, and consumer protection. Some RTAs even incorporate provisions on digital inclusion, which is particularly important during periods of crisis. While relatively few RTAs contain specific rules on digital commerce, this is a growing trend that could also inform future rules at the multilateral level and help make trade more resilient in a range of circumstances.

¹⁰⁰ See Lee & Prabhakar, *supra* note 77.

¹⁰¹ Simon Lester & Bryan Christopher Mercurio, *We Need a Coronavirus Vaccine. Patents Might Slow the Process*, CATO INST. (April 8, 2020), <https://www.cato.org/publications/commentary/we-need-coronavirus-vaccinepatents-might-slow-process> [hereinafter Lester & Mercurio].

¹⁰² Tom Wilbur, *The Latest: What They are Saying: Intellectual Property Protections Vital to Incentivize Ongoing COVID-19 Research and Development*, PHARMA (October 2020), <https://catalyst.pharma.org/the-latest-what-they-are-saying-intellectual-property-protections-vital-to-incentivize-ongoing-covid-19-research-and-development-2>.

¹⁰³ Dylan Loh, *Coronavirus Pandemic Fuels Asia E-commerce Commerce Boom*, NIKKEI ASIA (May 31, 2020), <https://asia.nikkei.com/Business/Retail/Coronavirus-pandemic-fuels-Asia-e-commerce-boom>; Kok Xinghui, *Coronavirus: E-commerce In Southeast Asia Rides High On Pandemic Boom*, SOUTH CHINA MORNING POST (August 1, 2020), <https://www.scmp.com/week-asia/economics/article/3095585/coronavirus-e-commerce-southeast-asia-rides-high-pandemic-boom>; Ananya Bhattacharya, *Indians Are Now Spending More On E-commerce Than They Did In 2019*, QUARTZ INDIA (August 19, 2020), <https://qz.com/india/1892653/despite-covid-19-slump-indians-are-spending-more-on-e-commerce/>; Sarah Perez, *COVID-19 Pandemic Accelerated Shift To E-Commerce By 5 Years, New Report Says*, TECH CRUNCH (August 24, 2020), <https://techcrunch.com/2020/08/24/covid-19-pandemic-accelerated-shift-to-e-commerce-by-5-years-new-report-says/>.

¹⁰⁴ Evelyn Cheng, *Chinese Companies Look to Ride A New Cross-Border E-Commerce Wave Driven By The Coronavirus*, CONSUMER NEWS AND BUSINESS CHANNEL (CNBC) (July 28, 2020), <https://www.cnbc.com/2020/07/29/chinese-companies-look-to-ride-a-new-cross-border-e-commerce-wave.html>.

Disciplines on transparency, dispute settlement, and development are also not equipped to deal with crises. For example, RTAs could tailor obligations requiring countries to promptly notify the implementation of any trade-restrictive barriers in order to help traders and businesses cope with changing rules,¹⁰⁵ and the role of trade committees established under the WTO and various RTAs could be strengthened. Re-calibration of timelines involved in dispute settlement could also be critical to addressing crises and promoting accountability, particularly when the dispute involves essential and perishable goods.¹⁰⁶ RTAs should also foster cooperation among parties by creating mechanisms for the collection and dissemination of information at the regional level and allowing for the coordination of technical assistance to respond to the needs of low-income countries.

It is clear that many of the RTA options highlighted in this Handbook would require capacity building and technical assistance for low income contracting parties. Support may also be required to mitigate severe trade losses caused by crises. RTAs could prove a useful mechanism to coordinate support for developing country parties during times of crisis, and discussions on improving resilience should include thoughtful consideration of S&DT provisions. Traditionally, S&DT has focused on preferential access, non-reciprocity, technical assistance, and flexibilities in implementation,¹⁰⁷ but the current climate calls for a departure from the one-size-fits-all mechanism, with differential treatment better tailored to the specific needs of developing countries.¹⁰⁸ Future RTAs might consider the example of newer agreements such as the AfCFTA in integrating differentiated S&DT provisions that specifically cater to the needs of a diverse group of member countries.¹⁰⁹

In addition to important disciplines related to export restrictions, rules of origin, trade facilitation, technical measures and standards, intellectual property rights, digital trade, and development, a broader reform strategy for 'building forward better' is also considered in Chapter IX. While a full assessment is beyond the scope of the initial version of this Handbook, further work is warranted on how RTAs could address issues like labour, environment, gender, treatment of SMEs, and investment in order to be effective tools to address challenges in time of crisis and meet global development goals more broadly.¹¹⁰ Here, once again, the SDGs provide a useful benchmark to ensure a more equitable distribution of the gains from global trade.

Altogether, the options highlighted in this Handbook are intended to provide policymakers and stakeholders with options that could make future RTAs more responsive to global crises and mitigate the trade costs associated with such crises. The crisis-proofing measures explored in the chapters that follow would help make trade more sustainable and resilient to future shocks, thereby enhancing the benefits of trade agreements for a broader group of countries and stakeholders.

¹⁰⁵ See WTO Export Prohibitions 2020, *supra* note 71.

¹⁰⁶ Joost Pauwelyn, *The Real Rot in the System: Delays Are Making WTO Dispute Settlement Irrelevant, Especially During a Pandemic*, INTERNATIONAL ECONOMIC LAW AND POLICY BLOG (March 27, 2020), <https://ielp.worldtradelaw.net/2020/03/the-real-rot-in-the-system-delays-are-making-wto-dispute-settlement-irrelevant-especially-during-a-p.html?cid=6a00d8341c90a753ef0240a4f688bf200d>.

¹⁰⁷ See Kuhlmann & Agutu, *supra* note 11.

¹⁰⁸ Bacchus & Manak, *supra* note 46.

¹⁰⁹ See Kuhlmann & Agutu, *supra* note 11.

¹¹⁰ See Kuhlmann et al. Hackathon 2020, *supra* note 5.

CHAPTER II - TREATMENT OF ESSENTIAL GOODS AND SERVICES

Essential goods and services are critical in emergency situations because they impact the ability of individual nations, and the world at large, to respond to a crisis in a timely and effective manner. During the COVID-19 pandemic, key essential goods have included PPE, medicines, vaccines, and cleaning supplies. Due to the nature of globally dispersed value chains, few, if any, nations produce all goods that may be essential during a crisis, and replicating all links in a value chain domestically is difficult for most, if not all, countries.¹¹¹ Further, concentrating production of goods domestically can also expose a nation to locally concentrated shocks.¹¹² Collaboration among trading partners, diversified supply chains, and improved access to essential goods can all help nations ensure that the channels of trade remain open during times of crisis.

Existing multilateral and regional trade agreements do not contain definitions or positive criteria for what goods might be deemed essential in times of crisis. However, as observed during the COVID-19 pandemic, most trade measures taken by countries targeted the cross-border movement of essential goods. While some countries took measures to facilitate trade and improve the inflow of essential goods (including tariff waivers, tailored approaches to technical regulations, creation of fast-track channels for cross-border movement of goods, and other import liberalizing commitments), trade restrictive measures, including export bans and restrictions, proliferated during the pandemic, not only disrupting trade but also resulting in higher prices for essential goods and increased food insecurity.¹¹³

Since many essential goods such as medical products and PPE are supplied by a handful of producers,¹¹⁴ these measures can exacerbate the challenges faced by many countries, particularly less developed countries that depend on imported supplies to meet local demand.¹¹⁵ Ten exporting countries reportedly account for 3/4 of the world's exports of medical goods and 2/3 of the world's exports of protective gear.¹¹⁶ In the early stages of the crisis (as of April 3, 2020), 69 countries (including the EU) had banned or limited export of face masks, PPEs, and medical goods.¹¹⁷ In 2020, more than 10 per cent of exports from 43 countries were subjected to worse market access conditions than had previously been the case, and exports from over 170 countries faced "impaired access to foreign markets." Initially, China had been responsible for supplying around 40 per cent of PPE; however, to meet the demand of the country's own 1.4 billion people, highly disruptive and ad hoc measures, including export restrictions, were adopted.¹¹⁸ Further, many of the export restrictions

¹¹¹ See WTO Reform 2021, *supra* note 27.

¹¹² *Id.*

¹¹³ See Anabel Gonzalez, *The G20 Should Expand Trade to Help Developing Countries Overcome COVID-19*, PETERSON INSTITUTE FOR INTERNATIONAL ECONOMICS, (April 7, 2020) [hereinafter Gonzalez 2020], <https://www.piie.com/blogs/trade-and-investment-policy-watch/g20-should-expand-trade-help-developing-countries-overcome>.

¹¹⁴ *Trade in Medical Goods in The Context of Tackling COVID-19*, WTO (April 3, 2020), https://www.wto.org/english/news_e/news20_e/rese_03apr20_e.pdf [hereinafter WTO Medical Goods 2020].

¹¹⁵ *Id.*

¹¹⁶ Namely United States, Germany, China, Belgium, Netherlands, Japan, United Kingdom, France, Italy and Switzerland (See WTO Medical Goods 2020 *supra* note 114)

¹¹⁷ See Gonzalez 2020, *supra* note 113.

¹¹⁸ See Chad Bown, *COVID-19: Demand Spike, Export Restriction and Quality Concern Imperil Poor Country Access to Medical Supplies* [hereinafter Bown 2020], in COVID-19 AND TRADE POLICY: WHY TURNING INWARD WON'T WORK 32

(about 110) remained in force until the end of 2020, with no phase out period identified for 68 of the measures. These practices can indeed have long term effects on the international trading system.¹¹⁹

Within the first few months of the pandemic, multilateral and regional bodies, recognizing the adverse effects of export restrictions on such a large scale, came together to commit to curbing the imposition of these restrictions. WTO Members, for example, set forth a Joint Ministerial Statement emphasizing the need for emergency measures to be “targeted, proportional, transparent, and temporary” and pledged to lift measures that cause unnecessary barriers or disruptions to trade, keeping in line with existing WTO disciplines. In the same statement, WTO Members committed to refrain from imposing export restrictions on agricultural and food products in response to COVID-19. While laudable, only 42 out of 159 WTO Members signed onto this statement.¹²⁰ Some economies like France, Germany, the Czech Republic, and Poland imposed unilateral export restrictions on both European Union (EU) member countries and third countries to ensure access to PPE, which led to criticism from EU leaders who emphasized interdependence, highlighting that countries need each other to meet their growing demands for medical equipment during the COVID-19 pandemic.¹²¹

A wide range of services were deemed vital during the pandemic as well, ranging from healthcare services to retail services. With respect to the cross-border provision of services, hurdles to the international movement of service-providers were considerable during the pandemic, highlighting the importance of addressing this issue. Border closures and restrictions on entry of non-citizens and non-residents,¹²² coupled with closure of embassies, grounding of flights, and limited consular services, brought international mobility to a near halt in the early stages of the pandemic.¹²³ These measures were deemed necessary to combat the spread of disease, but they nevertheless had a huge impact on trade in both goods and services. Winters classifies COVID-19 related measures on movement of people based on the following three categories: (i) measures facilitating the movement of medical professionals across borders; for instance, relaxation of geographical restrictions on foreign doctors in the United States and visa extensions for medical professionals in the United Kingdom; (ii) limited measures facilitating the movement of other workers in key sectors; for instance, the US and Canada increased the allowed employment duration for workers in some low wage sectors; and (iii) general

(Richard Baldwin & Simon J. Evenett eds., 2020), <https://voxeu.org/content/covid-19-and-trade-policy-why-turning-inward-won-t-work> [hereinafter Baldwin & Evenett 2020].

¹¹⁹ See Evenett & Fritz, *supra* note 24.

¹²⁰ Statement on COVID-19 and the Multilateral Trading System by Ministers Responsible for the WTO from Afghanistan; Australia; Barbados; Benin; Cambodia; Canada; Chile; Colombia; Costa Rica; Ecuador; El Salvador; Guatemala; Guyana; Hong Kong, China; Iceland; Israel; Jamaica; Japan; Kenya; Republic of Korea; the State of Kuwait; Liechtenstein; Madagascar; Mauritius; Mexico; Republic of Moldova; Montenegro; Nepal; New Zealand; Nigeria; North Macedonia; Norway; Peru; Saint Lucia; Kingdom of Saudi Arabia; Singapore; Solomon Islands; Switzerland; Ukraine; United Arab Emirates; United Kingdom and Uruguay, WTO, (May 2020), https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=263576&CurrentCatalogueIdIndex=0&FullTextHash=371857150&HasEnglishRecord=True&HasFrenchRecord=False&HasSpanishRecord=False#.

¹²¹ Caroline Glöckle, *Export Restrictions Under Scrutiny – The Legal Dimensions of Export Restriction on Personal Protective Equipment*, EJIL TALK, (April 7, 2020), <https://www.ejiltalk.org/export-restrictions-under-scrutiny-the-legal-dimensions-of-export-restrictions-on-personal-protective-equipment/>.

¹²² See WTO Cross-Border Mobility, *supra* note 57; Sebastian Benz, Frédéric Gonzales & Annabelle Mourougane, *The Impact Of COVID-19 International Travel Restrictions on Services-Trade Costs*, OECD TRADE POLICY PAPERS NO. 237 [hereinafter Benz et al.], 5 (2020), <https://www.oecd-ilibrary.org/docserver/e443fc6b-en.pdf?expires=1605681335&id=id&accname=guest&checksum=BDFEBDA4F804F6BE85067D068D9ECCB9>.

¹²³ See WTO Cross-Border Mobility, *supra* note 57 in Evenett & Baldwin 2020, *supra* note 23.; Winters Mode 4 2020, *supra* note 60.; and Benz et al. , *supra* note 122.

restrictions on international mobility across all sectors.¹²⁴ Such measures were adopted by nearly all countries across the world in the initial stages of the pandemic,¹²⁵ and they are a sign of which to expect in future circumstances. Experts estimated that the set of largely trade restrictive measures witnessed during the pandemic are set to increase the cost of international services trade by 12 per cent of its value.¹²⁶

Although the subject of this chapter, essential goods and services are cross-cutting themes of the Handbook, and many chapters include related provisions that will help facilitate trade in times of crisis. This chapter focuses in particular on several disciplines related to the movement of essential goods including: (1) categorization of essential goods, (2) tariff waivers, (3) export restrictions, and (4) rules of origin. The functional elements of these disciplines are examined below, with a range of potential options for RTAs presented in order to enhance resilience to future crises. Further, this chapter also looks at RTA provisions affecting the cross-border movement of people, which is necessary in the provision of services under mode four. With regard to services trade, this chapter looks at (1) procedural liberalizations for cross-border movement of natural persons, (2) mutual recognition of qualifications, and (3) crisis-specific responses.

Going forward, RTAs could be designed to curb disruptions in the movement of essential goods and services during future crises. For instance, RTAs could better define essential goods and provide relevant preferential treatment (including tariff liberalization, which could also be done through a plurilateral approach). RTAs could also obligate importers to retain any reforms related to essential goods (e.g., medicines) undertaken during the pandemic to avoid shocks and disruptions to global supply chains.¹²⁷ Further, RTAs could clarify limitations on export restrictions, including through increased accountability and transparency requirements for ad hoc measures. Rules of origin flexibilities could also be crafted to allow for the effective functioning of supply chains during emergencies and promotion of the unhampered cross-border movement of essential goods. Finally, RTAs could include provisions on procedural aspects of issuance of visas, mutual recognition of qualifications, and emergency responses, such as the creation of fast-track corridors and entry channels to minimize disruptions to provision of essential services during crises.

A. Legal Aspects of Trade in Essential Goods and Services

Although the WTO rules do not define essential goods or services or, for the most part, distinguish between essential and non-essential goods and services, some insight can be drawn using other WTO rules as a baseline, including disciplines on import and export restrictions, exceptions, and rules of origin in the WTO covered agreements.

The General Agreement on Tariffs and Trade 1994 (GATT 1994) contains a general prohibition on imposition of quantitative restrictions along with obligations of notification, publication, and non-discrimination. According to GATT Article XI.1, quantitative restrictions refer to “prohibitions or restrictions *other than duties, taxes or other charges* made effective through quotas, import or export licenses or *other measures*... maintained by contracting party on the... *importation of any product* of the territory of any other contracting party or *exportation or sale for export of any product* destined

¹²⁴ See Winters Mode 4 2020, *supra* note 60.

¹²⁵ *Id.*

¹²⁶ See Benz et al., *supra* note 122.

¹²⁷ See generally, Evenett & Baldwin 2020, *supra* note 23.

for territory of another contracting party.”¹²⁸ The agreement does not provide an exhaustive list of what constitutes a quantitative restriction; however, the provision is drafted in a broad enough manner to include a range of NTMs, such as those imposed during the pandemic.¹²⁹ Export restrictions, which were prevalent during the early phases of the pandemic, have been defined under WTO jurisprudence as “a border measure that takes the form of a government law or regulation which expressly limits the quantity of exports or places explicit conditions on the circumstances under which exports are permitted, or that takes the form of a government-imposed fee or tax on exports of the product calculated to limit the quantity of exports”;¹³⁰ this includes export bans and quotas, along with export licenses and other measures.

GATT 1994 does allow for application of export restrictions in certain limited and temporary circumstances, including, inter alia, to “*prevent or relieve critical shortages* of foodstuffs or other products *essential* to the exporting [WTO Member]” (emphasis added).¹³¹ GATT Article XX (General Exceptions) and XXI (Security Exceptions) further provide for instances in which such measures may be justified. Of particular note is GATT Article XX (b) that creates an exception for measures that protect human life or health,¹³² and GATT Article XX (j) extends to measures “essential to the acquisition or distribution of products in general or local short supply”,¹³³ in both cases subject to the Chapeau of Article XX which requires that such measures not “constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a “disguised restriction on international trade.” The security exception set out in GATT Article XXI may also apply, as they allow WTO Members to take measures necessary to protect “essential security interests” including those taken “in time of war or other emergency in international relations”.¹³⁴ However, GATT Article XXI has only been applied relatively recently, and little jurisprudence or guidance exists with respect to its scope. Notably, most of the export restrictions taken to date have been notified under health or critical shortage exceptions and not national security.¹³⁵

Consistent with MFN, export restrictions must be non-discriminatory and WTO Members are applied in a “*uniform, impartial, and reasonable manner.*”¹³⁶ WTO Members are also obliged to undertake consultations with other members or provide additional information on request.¹³⁷ In 2012, the WTO Council for Trade in Goods adopted the “Decision on Notification Procedures for Quantitative Restrictions”¹³⁸ whereby WTO Members were obligated to adopt “complete notification”

¹²⁸ See GATT 1994, *supra* note 42.

¹²⁹ See Joost Pauwelyn, *Export Restrictions in Time of Pandemic: Options and Limits under International Trade Agreements*, in Baldwin & Evenett 2020, *supra* note 118 [hereinafter Pauwelyn Export Restrictions 2020].

¹³⁰ Panel Report, *United States – Measures Treating Export Restraints as Subsidies*, ¶ 8.17, WTO Doc. WT/DS194/R (adopted August 23, 2001). For a detailed discussion on how export restrictions have been dealt with by WTO’s Dispute Settlement Body, see, e.g., Fu et al. Hackathon 2020, *supra* note 21.

¹³¹ See GATT 1994, Article XI.2(a), *supra* note 42; The Agreement on Agriculture, Article 12, April 15, 1994, Marrakesh Agreement Establishing the WTO, Annex 1A, 1867 U.N.T.S. 410, requires an application of Article XI.2(a) to be notified to other Members and imposes an obligation on the exporting Member to act considerately towards importing Members.

¹³² See GATT 1994, Article XX (b), *supra* note 42.

¹³³ See GATT 1994, Article XX (j), *supra* note 42.

¹³⁴ GATT 1994, Article XXI (b)(iii). See Pauwelyn Export Restrictions 2020, *supra* note 129 in Baldwin & Evenett 2020. See also, Glöckle, *supra* note 121 (Based on the *China-Raw Materials* case, when GATT Article XI requirements are met, Article XX would not be invoked; this reasoning would likely apply to Article XXI as well).

¹³⁵ See Pauwelyn Export Restrictions 2020, *supra* note 129 in Baldwin & Evenett 2020, *supra* note 118.

¹³⁶ *Id.*

¹³⁷ See WTO Export Prohibitions, *supra* note 71.

¹³⁸ *Decision on Notification Procedures for Quantitative Restrictions*, WTO, (June 2012).

requirements for quantitative restrictions as soon as possible but no later than six months from their entry into force. With respect to foodstuffs, if a WTO Member chooses to justify a measure as a temporary export restriction, citing the critical shortage exception, such Member is obliged, under Article 12 of the Agreement on Agriculture, to consider the effect of the measure on the food security of importing members and give prior notice to the Committee on Agriculture about the nature and duration of the measure.¹³⁹

Rules of origin are also relevant to trade in essential goods, although the relevant WTO disciplines do not set out specific rules applicable to essential goods, however defined. While the harmonization of rules of origin as envisioned under the Agreement on Rules of Origin is yet to be completed,¹⁴⁰ WTO Members are required to ensure that their respective rules of origin are, inter alia, transparent and do not restrict, distort, or disrupt international trade.¹⁴¹ This means that countries have some latitude in determining appropriate rules of origin, although WTO rules do not provide sufficient guidance on how rules of origin could be adapted to times of crisis to further enable the flow of essential goods.

Multilaterally, the General Agreement on Trade in Services governs international trade in services.¹⁴² GATS recognizes four modes for the provision of services, namely cross-border supply (mode 1), consumption abroad (mode 2), commercial presence (mode 3), and temporary movement of natural persons (mode 4).¹⁴³ WTO Member States have made the most shallow commitments under mode 4,¹⁴⁴ which is notable in the crisis context, since cross-border movement of persons was particularly affected by the pandemic.

Like the WTO covered agreements, RTAs generally do not differentiate between non-essential and essential goods and services. However, similar to the WTO covered agreements, RTAs tend to contain provisions on export restrictions, exceptions, and disciplines on rules of origin, which will inevitably affect the movement of essential goods.

Provisions on export restrictions are prevalent in RTAs.¹⁴⁵ Many RTAs incorporate the language set out in GATT Article XI, without great variation, while others incorporate WTO plus obligations.¹⁴⁶ Following the structure of GATT 1994, most RTAs impose a general prohibition on export restrictions, along with obligations of prior information, consultation, and notification.¹⁴⁷ The Comprehensive Economic and Trade Agreement (CETA) between the EU and Canada, for example, incorporates

¹³⁹ See WTO Export Prohibitions, *supra* note 71.

¹⁴⁰ Agreement on Rules of Origin, Part IV, April 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1868 U.N.T.S. 397 [hereinafter Agreement on Rules of Origin]. [Not reproduced in I.L.M.]

¹⁴¹ See Agreement on Rules of Origin, Article 2(c), *supra* note 140.

¹⁴² *Trade in Services*, WTO (2015), https://www.wto.org/english/thewto_e/20y_e/services_brochure2015_e.pdf.

¹⁴³ *GATS: Objectives, Coverage and Disciplines*, WTO, https://www.wto.org/english/tratop_e/serv_e/gatsqa_e.htm.

¹⁴⁴ WTO Trade in Services 2015, *supra* note 142.

¹⁴⁵ For an analysis of RTA disciplines on export restrictions, see Mark Wu, *Chapter 3: Export Restrictions* [hereinafter Wu Export Restrictions 2020], in HANDBOOK OF DEEP TRADE AGREEMENTS, (Aaditya Mattoo, Nadia Rocha & Michele Ruta eds., World Bank, 2020) [hereinafter Handbook of Deep Trade Agreements 2020].

¹⁴⁶ See Wu Export Restrictions 2020, *supra* note 145 in Handbook of Deep Trade Agreements 2020, *supra* note 45.

¹⁴⁷ Interestingly, the European Union-Eastern and Southern Africa Interim Economic Partnership Agreement narrows the scope of GATT Article XI by removing the exception which allows export restrictions to be placed to temporarily relieve critical shortages of foodstuffs or other products essential to the exporting state. See European Union-Eastern and Southern Africa Interim Economic Partnership Agreement, Article 17, July 13, 2009, L/111/1 (24.4.2012), <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:L:2012:111:FULL&from=EN>. However, Articles 56(a) and (b) of the same agreement allow a state to impose measures necessary, inter alia, to maintain public order and protect human life and health, which might render the narrowed scope of the exception nugatory in certain circumstances.

GATT Article XI,¹⁴⁸ as does the USMCA. Chapter 3 on Agriculture in the USMCA also incorporates GATT Article XI and contains a provision on temporary application of export restrictions in foodstuffs to address concerns about food security, including provisions on prior notification, consultation, detailed explanation, time limits, and a prohibition on export restrictions on foodstuff for non-commercial or humanitarian purpose.¹⁴⁹

RTAs also tend to incorporate the language of GATT Article XX on general exceptions. CETA, for example, incorporates Article XX of GATT 1994,¹⁵⁰ as does the USMCA, *mutatis mutandis*.¹⁵¹ Both include national security exceptions as well.

Several additional RTA examples are worth highlighting as well. The EU-Viet Nam RTA obligates contracting parties to maintain full transparency when adopting or maintaining an import or export prohibition (however, the agreement does not clearly establish the meaning of “full transparency”).¹⁵² Another example is the EU-Singapore RTA, which sets out enhanced transparency obligations, namely, the obligation to provide information and deliberation in specific circumstances, including when an export prohibition or restriction is temporarily applied to prevent a critical shortage of foodstuffs or other essential products (incorporating Article XI.2(a) of GATT 1994).¹⁵³ The RTA also sets out transparency obligations for “exceptional and critical” circumstances, allowing a contracting party to take “precautionary measures necessary to deal with the situation” while also imposing an obligation to “inform the other [p]arty immediately thereof”.¹⁵⁴

Preferential rules of origin (ROO) are also related to essential goods,¹⁵⁵ since they determine how the benefits afforded by RTAs may apply.¹⁵⁶ While subject to extensive RTA-specific negotiations, preferential rules of origin chapters retain some similarity in substance and procedural requirements.¹⁵⁷ Strict ROO provisions can impede supply chains and possibly even encourage onshoring. However, most RTAs incorporate flexibilities that promote movement within the RTA territory. The mechanics of these flexibilities are, however, sometimes unclear in practice due to the complexities in the applicable rules.¹⁵⁸ Traders are also subject to procedural requirements to establish origin, including certification of origin, which may prove burdensome during crises and pose hurdles at the border, where lockdowns and staff shortages have prevented the timely issuance of certificates and declarations of origin.¹⁵⁹

¹⁴⁸ See Pauwelyn Export Restrictions 2020, *supra* note 129.

¹⁴⁹ See USMCA, Article 3.5, *supra* note 7.

¹⁵⁰ See *e.g.*, Comprehensive Economic and Trade Agreement, Article 28.3, Oct. 30, 2016, O.J. L 11/23, 14.1.2017, http://trade.ec.europa.eu/doclib/docs/2014/september/tradoc_152806.pdf [hereinafter CETA].

¹⁵¹ See USMCA, Article 32.1, *supra* note 7.

¹⁵² FTA Between European Union and Viet Nam, Article 2.14, June 8, 2020, <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1437> [hereinafter EU-Viet Nam FTA].

¹⁵³ FTA Between European Union and Singapore, Article 2.9, February 13, 2019, <https://trade.ec.europa.eu/doclib/press/index.cfm?id=961> [hereinafter EU-Singapore FTA].

¹⁵⁴ *Id.*

¹⁵⁵ See Ashour Hackathon 2020, *supra* note 21.

¹⁵⁶ *Rules of Origin Handbook*, WORLD CUSTOMS ORG. (WCO), <http://www.wcoomd.org/~media/wco/public/global/pdf/topics/origin/overview/origin-handbook/rules-of-origin-handbook.pdf>.

¹⁵⁷ See *Rules of Origin Facilitator*, <https://findrulesoforigin.org/> (last visited on January 23, 2021).

¹⁵⁸ See Ashour Hackathon 2020, *supra* note 21.

¹⁵⁹ See *e.g.*, Kirtika Suneja, *COVID-19: India Asks FTA Partners to Temporarily Allow Imports Without Certificate of Origin*, THE ECONOMIC TIMES (March 30, 2020), <https://economictimes.indiatimes.com/news/economy/foreign->

Many RTAs also include specific provisions on visas and asylum, although the scope of such provisions tends to be limited to the temporary movement of workers, focusing on promoting and regulating the movement of high-skilled labour in key services sectors.¹⁶⁰ According to the World Bank Deep Trade Agreements Database, 100 out of 279 RTAs, predominantly North-North RTAs, include visa and asylum provisions.¹⁶¹ Such RTA provisions liberalize international mobility through the streamlining of procedural requirements through, for instance, greater clarity on immigration proceedings, mutual recognition of qualifications, and limitations on fees.¹⁶² Visa and asylum provisions are largely enforceable and are often subject to state-to-state dispute settlement with safeguards such as requirements for the establishment of a pattern of practice (single instances of non-compliance cannot be subject to dispute settlement) and exhaustion of administrative remedies.¹⁶³

B. RTA Options for Facilitating the Movement of Essential Goods

The RTA options below address three critical areas with respect to trade in essential goods: (1) approaches to recognize essential goods; (2) disciplines on export restrictions; and (3) rules of origin. Within each of these three categories, different options are presented (baseline options and additional baseline+ policy-space enhancing options), with references to WTO rules and existing RTA provisions noted as applicable.

1. Approaches to Recognize Essential Goods

Even though food and medical goods are generally recognized as essential goods, at present, there is no formally established way of differentiating between essential goods and non-essential goods. This could be done through a trade provision to define essential goods, creation of a positive list of essential goods (based on HS Codes), or both.

The Baseline Option below, drawn from the contribution of Tracey Epps, Danae Wheeler, and Georgia Whelan to the 2020 Hackathon, provides a definition of essential goods, which could be accompanied by an illustrative list under the Baseline+ Option. This approach would clarify what is meant by essential goods, while preserving some flexibility for the parties to make crisis-specific determinations of what constitutes an essential good.

The Baseline+ Option below expands upon a definition of essential goods to establish a list of essential goods. If such an option were exercised, while the concessions available under an RTA would apply to the products covered in the list, an RTA could prescribe mechanisms to modify coverage as circumstances change. The Baseline+ Option would also require countries to create a list of covered products for implementing the tariff concessions in the parties' respective domestic tariff schedules. While such an approach is not contained in an existing RTA, it can be drawn from official statements released during the pandemic. For example, in March 2020 New Zealand and Singapore jointly issued a ministerial statement outlining their commitment to “maintaining open and connected supply chains ... to facilitate the flow of goods including essential supplies,” yet the parties stopped short of defining

[trade/coronavirus-india-urges-fta-partners-to-temporarily-allow-imports-without-certificate-of-origin/articleshow/74873794.cms](https://www.wto.org/trade/coronavirus-india-urges-fta-partners-to-temporarily-allow-imports-without-certificate-of-origin/articleshow/74873794.cms).

¹⁶⁰ Joost Pauwelyn, Trung Nguyen, and Khalid Kamal, *Visas and Asylum*, in HANDBOOK OF DEEP TRADE AGREEMENTS, 2020, *supra* note 145.

¹⁶¹ *Id.* Of the 100, 63 per cent are North-North RTAs, 34 per cent are North-South RTAs and only 3 per cent are South-South RTAs.

¹⁶² *Id.*

¹⁶³ *Id.*

what was meant by “essential supplies”.¹⁶⁴ This joint ministerial statement was followed by a declaration, which included a positive list of essential goods specific to the challenges posed by the COVID-19 pandemic.¹⁶⁵

Example Provisions on Essential Goods

Baseline Option: Broad Definition with Illustrative Example

“Essential goods and services mean goods and services that are necessary to sustain or support life, health, critical infrastructure or public utilities. These include, but are not limited to, food, water, medical supplies, building materials, modes of transport, suppliers of goods and services essential to national security and provision of health and other public utility services such as distribution of electricity and telecommunications.”

Source: Tracey Epps, Danae Wheeler and Georgia Whelan, *Facilitating a Coordinated International Response in Times of Crisis* (2020)¹⁶⁶

Baseline + Option: Specific List of Essential Goods

“Each Participant will eliminate all customs duties and all other duties and charges of any kind, within the meaning of Article II:1(b) of GATT 1994, with respect to all products listed in Annex I.”

“Participants will review periodically, and at least one year prior to regular amendments to the Harmonized System nomenclature by the World Customs Organization, and no later than 15 April 2021 for the first review, the paragraphs of this Declaration and the product coverage specified in Annex I and Annex II and consider whether, in the light of the COVID-19 pandemic, or changes to the HS nomenclature, the paragraphs of this Declaration should be amended or Annex I and Annex II should be updated to incorporate additional products.”

Source: Singapore-New Zealand Declaration on Trade in Essential Goods, Article 1 and Article 13¹⁶⁷

¹⁶⁴ See *Joint Ministerial Statement by Singapore and New Zealand Affirming Commitment to Ensuring Supply Chain Connectivity Amidst the COVID-19 Situation*, WTO, (March 20, 2020), <https://www.mti.gov.sg/-/media/MTI/Newsroom/Press-Releases/2020/03/Joint-Ministerial-Statement-by-SG-and-NZ-Affirming-Commitment-to-Ensuring-Supply-Chain-Connectivity.pdf>. This was later joined by the governments of Australia, Brunei Darussalam, Canada, Chile and Myanmar (see *Joint Ministerial Statement by Australia, Brunei Darussalam, Canada, Chile, Myanmar, New Zealand and Singapore Affirming Commitment to Ensuring Supply Chain Connectivity Amidst the Covid-19 Situation*, WTO, (April 6, 2020), <https://www.mfa.gov.sg/Overseas-Mission/Geneva/Mission-Updates/2020/04/JOINT-MINISTERIAL-STATEMENT-SUPPLY-CHAIN-CONNECTIVITY--COVID-19-SITUATION>). See also APEC MRT 2020, *supra* note 91.

¹⁶⁵ See *Declaration on Trade in Essential Goods for Combating the COVID-19 Pandemic*, April 15, 2020, GOVERNMENT OF NEW ZEALAND, <https://www.beehive.govt.nz/sites/default/files/2020-04/FINAL%20TEXT%20Declaration%20on%20Trade%20in%20Essential%20Goods.pdf> [hereinafter *New Zealand 2020*].

¹⁶⁶ See Epps et al. Hackathon 2020, *supra* note 21.

¹⁶⁷ See *New Zealand 2020*, *supra* note 165.

Tariffs for essential goods could be addressed through temporary or conditional bindings,¹⁶⁸ even if more permanent bindings may be pursued on a most favoured nation (MFN) basis under the WTO. This could be done on a preferential basis through an RTA, on a plurilateral basis, or multilaterally. Under any scenario, tariff concessions for essential goods could be temporary or permanent. For eliminating bound duties, the WTO Agreement requires that a Member submit a request for rectification of schedules under the 1980 Procedures for Modification and Rectification of Schedules of Tariff Concessions.¹⁶⁹ Once the request for rectification has been reviewed and certified by the WTO Membership, the particular Member cannot impose duties.¹⁷⁰

An analogous approach was adopted for the Information Technology Agreement (ITA-1), a plurilateral agreement under which parties eliminated duties on Information and Communication Technology (ICT) products by binding them at duty-free levels in their schedules of concessions.¹⁷¹ The products in ITA-1 are specified in two attachments: Attachment A lists the products based on the HS Code and Attachment B provides a list of product descriptions that should be liberalized “wherever they are classified”.¹⁷²

Building upon GATT Article XI, RTAs could further address export restrictions in times of crisis and also effectively manage them more broadly. Provisions could be included in RTAs that make the imposition of export restrictions a more deliberative process causing minimum disruptions to global value chains, especially in relation to essential goods. As such, the sections below highlight elements that could be considered, with example provisions from existing RTAs noted where relevant and new, sample model language highlighted that could be included in future RTAs.

a. Addressing Export Restrictions for Essential Goods

Ideally, unilateral and ad hoc export restrictions should be avoided, particularly during a crisis, as they can trigger high prices and scarcity. However, in some situations, export restrictions may be justified as Article XI also envisions, although legal standards that will hold countries accountable in the event, they act in an arbitrary manner are particularly important during a crisis. This section of the Handbook presents a few options related to export restrictions in crisis situations. The Baseline Option noted below is drawn from GATT Article XI, which prohibits the imposition of export restrictions except under certain circumstances, such as when imposed “temporarily” to prevent or relieve “critical shortages” of products essential to the exporting parties.

As noted, during the COVID-19 pandemic, states have committed to taking coordinated action to mitigate any losses that might arise from the crisis. With respect to export restrictions, the Trade and Investment Ministers of the G20 and guest countries committed to only impose export restrictions deemed necessary and to do so only in a targeted, proportionate, transparent, and temporary manner in order to not create unnecessary barriers to trade.¹⁷³ Baseline+ Option A below sets forth sample

¹⁶⁸ Alvaro Espitia, Nadia Rocha and Michele Ruta, A Pandemic Trade Deal: Trade and Policy Cooperation on Medical Goods [hereinafter Espitia et al.], in Evenett & Baldwin Revitalizing Multilateralism, *supra* note 23.

¹⁶⁹ Decision of 26 March 1980, Procedure for Modification and Rectification of Schedules of Tariff Concessions, GATT document L/4962, BISD S27/25.

¹⁷⁰ When imposing duties, GATT Article XXVIII requires the Member to renegotiate with other Members affected by the removal of the tariff concession.

¹⁷¹ *Ministerial Declaration on Trade in Information Technology Products*, WTO Doc. WT/MIN(96)/16, WTO.

¹⁷² *Id.*

¹⁷³ *G20 Trade and Investment Ministerial Meeting: Ministerial Statement*, G20 RESEARCH GROUP, (May 14, 2020), <http://www.g20.utoronto.ca/2020/2020-g20-trade-0514.html>.

language drawn from this commitment. Such an option could also be modified to include a time limit on export restrictions, e.g., three months, or limitation on the degree to which exports could be impacted.¹⁷⁴

In some cases, certain essential goods could be considered to be outside of the purview of export restrictions altogether, considering their critical role in preventing humanitarian crises. Baseline Option+ B below, drawn from the USMCA, reflects such a provision obligating the parties to not apply export restrictions to foodstuffs purchased for non-commercial and humanitarian purposes.

Baseline+ Option C requires the parties to consider the impact of export restricting measures on the importing country's domestic supplies. The Agreement on Agriculture exemplifies this option with respect to foodstuffs, which could be adapted to essential goods during crises. Some have proposed equivalent options at the multilateral level for essential goods in order to ensure that States are cognizant of the impact of their measures on their trading partners.¹⁷⁵

Example Provisions on Export Restrictions

Baseline Option: Limiting Imposition of Export Restrictions on Essential Goods

“1. No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licenses or other measures, shall be instituted or maintained by any Parties on the importation of any product of the territory of any other Parties or on the exportation or sale for export of any product destined for the territory of any other Parties.

2. The provisions of paragraph 1 of this Article shall not extend to the following:

(a) Export prohibitions or restrictions temporarily applied to prevent or relieve critical shortages of foodstuffs or other products essential to the exporting Parties...”

Source: GATT 1994, Article XI: General Elimination of Quantitative Restrictions

Baseline + Option A: Limiting Export Restrictions in Emergency Situations

“1. In times of emergency, Parties shall ensure that any trade measure taken to address the emergency, including export restrictions on essential goods, if deemed necessary, are targeted, proportionate, transparent, and temporary and do not create unnecessary barriers to trade or disrupt global supply chains.”

Source: G20 Trade and Investment Ministerial Meeting: Ministerial Statement, May 14, 2020¹⁷⁶

Baseline + Option B: Prohibiting Exporting Restriction on Certain Essential Goods

“No Party shall apply an export restriction on essential goods purchased for non-commercial, humanitarian purposes.”

Source: USMCA, Article 3.5 (10)

¹⁷⁴ Espisitia et al., *supra* note 168.

¹⁷⁵ *Id.*

¹⁷⁶ *See* G20 RESEARCH GROUP, *supra* note 173.

Baseline+ Option C: Considering the Effects on the Importing Party

“Where any *Contracting Party* institutes any new export prohibition or restriction on *essential goods* in accordance with paragraph 2(a) of Article XI of GATT 1994, the *Contracting Party* shall observe the following provisions:

- (a) The *Contracting Party* instituting the export prohibition or restriction shall give due consideration to the effects of such prohibition or restriction on importing *Contracting Party’s domestic supply of essential goods*;
- (b) before any *Contracting Party* institutes an export prohibition or restriction, it shall give notice in writing, as far in advance as practicable, to the other *Contracting Parties* comprising such information as the nature and the duration of such measure, and shall consult, upon request, with any other *Contracting Party* having a substantial interest as an importer with respect to any matter related to the measure in question. The *Contracting Party* instituting such export prohibition or restriction shall provide, upon request, such a *Contracting Party* with necessary information.”

Source: Adapted from the Agreement on Agriculture, Article 12, with additional sample draft language added in italics.

*b. Increasing Transparency in the Imposition of Export Restrictions*¹⁷⁷

The negative effects of export restrictions on international trade can be mitigated to a degree by exercising transparency, as this helps stakeholders anticipate any potential market disruptions and also helps create awareness of the policy changes adopted by countries. Transparency with respect to export restrictions placed on essential goods is especially important because, as noted, production of many essential goods tends to be concentrated in a few countries, particularly in an initial stage of a pandemic or other crisis when circumstances abruptly change. However, the transparency requirements surrounding export restrictions are often insufficient,¹⁷⁸ and RTAs could potentially address this gap.

The OECD has published a transparency checklist for export measures that has application in the RTA context: (i) providing information about the draft and final measure before it is implemented so that stakeholders can anticipate the risks arising from the measure before it is applied; (ii) engaging in stakeholder consultations before the implementation of the measure; (iii) making sure the measure is administered in a consistent, impartial, and reasonable manner; (iv) allowing for an avenue to review the measure; and (v) making sure information is made available in an easily accessible manner.¹⁷⁹ RTAs could incorporate all five of these elements, and some RTAs have already incorporated some or all, including consultation and notification.

RTA provisions could require that information is shared with interested stakeholders and that feedback on a measure and its implications is taken into account. Parties could commit to share information publicly or in a confidential manner based on the nature of the measure. During a crisis, this might have to be done in an expedited manner; therefore, a mechanism created by an RTA could be well-

¹⁷⁷ For a detailed analysis of transparency provisions in RTAs, please refer to Chapter [X]: Transparency.

¹⁷⁸ See WTO Export Prohibitions, *supra* note 71.

¹⁷⁹ Barbara Fliess, *Transparency of Export Restrictions: A Checklist for Promoting Goods Practice*, OECD Trade Policy Papers No. 164 (2014), <https://ideas.repec.org/p/oec/traaab/164-en.html>.

suited. In the event that parties are unable to engage in a consultative process before enforcement of a measure, they should at least notify the measure, ideally before it is enforced, or at least immediately thereafter. The format in which information is shared through notification is equally important, and all details of the export measures must be made public to affected parties. Further, considering the damage that export measures could cause if applied in an ad hoc manner, it is important that they are subject to a review process. RTAs could also be used as a tool for establishing a review mechanism and additional disciplines to review the export measures; this is addressed Chapter VII of this Handbook. The Sample Model Provision below, adapted from Article 3.5 of the USMCA, encompasses all of these elements, with the exception of the review mechanism, and could be incorporated into future RTAs.

Sample Model Provision on Deliberation and Information Sharing Before Enforcement of Export Measures on Essential Goods

1. In times of emergency and, in the event any Party is considering imposing export restrictions on any goods determined to be essential, said Party shall take best efforts to consult with the other Parties before enforcing such a restriction with a view to avoiding undue disruptions in the flow of these goods between the Parties.
2. In the event, either due to the nature of the crisis or some other justifiable reason, the Party is unable to engage in consultations with the other Party (s), such Party shall notify the measure to the other Party (s) at least [X] days prior to the date the measures take effect. If said Party is unable to notify the other Party/Parties, that Party shall notify the other immediately after the measures enters into effect.
3. A notification made pursuant paragraphs (1) and (2) of this Article must include, the general description of the notification, type of restriction, tariff code/s, detailed description of the product, justification, national legal basis, and details for administering the restriction, including costs.

Source: Sample Draft Language

While export restrictions have been a focus during the pandemic, import measures are important as well, and some countries have liberalized measures, motivated by same underlying objective of increasing the domestic supply of essential goods.¹⁸⁰ These have resulted in an increase in market access to essential goods on a temporary basis. Exporting countries have a vital interest in ensuring that such enhanced market access does not disappear after the pandemic.¹⁸¹ In order to strike a more lasting balance, Alvaro Espitia, Nadia Rocha, and Michele Ruta have recommended that importing countries could commit, multilaterally or regionally, to continue their crisis-specific import

¹⁸⁰ See Espitia et al., *supra* note 168.

¹⁸¹ *Id.*

liberalization measures and exporting countries could concede some policy space to impose export restrictions during times of crisis in exchange for improved access to the importers' markets.¹⁸²

2. Flexibility in Rules of Origin

Flexibilities in rules of origin provisions can help expedite the movement of essential goods during crises. For instance, waivers of certification of origin or their retroactive issuance could provide for limited operating capacity during emergencies, while relaxation of the format required for certification or the acceptance of e-certification could allow for faster and more efficient border crossing. Other flexibilities in rules of origin, such as broad cumulation provisions discussed below, could help strengthen supply chains within RTA territories. Future RTAs could incorporate these options to provide for greater adaptability during crises, which could be tailored to the nature of the emergency.

a. Cumulation

Cumulation provisions in rules of origin allow for material originating in one contracting party, which is processed or used by another contracting party in the production of a different material, to be considered as originating in the second contracting party. In implementing cumulation provisions, parties have a range of options.

The most common option found in most RTAs (Baseline Option), is bilateral cumulation, which allows for material originating in a contracting party and processed in the other contracting party to retain its originating status.¹⁸³ The Baseline Option also includes regional cumulation, which is found in larger RTAs (those with more than two parties) and allows for cumulation among all contracting parties of the RTA.¹⁸⁴ Regional cumulation provisions are found in the USMCA¹⁸⁵ and the CPTPP.¹⁸⁶ Most recently, the regional cumulation provision in the RCEP¹⁸⁷ was hailed for having the potential to reduce transaction costs and ease supply chain management among the fifteen RCEP signatories.¹⁸⁸

Baseline+ Option A below encompasses what is known as diagonal cumulation, which allows policymakers to go a step further and provide that material from third parties to the RTAs can be considered as originating goods within the scope of the RTA. This option is most common in EU RTAs but is also found to a lesser extent in other RTAs.¹⁸⁹

Baseline Option+ B below provides for full cumulation, allowing cumulation to apply in the case of non-originating goods processed in an RTA Contracting Party.¹⁹⁰ Full cumulation is seen in EU RTAs

¹⁸² Anabel González, *Role of trade ministers at the WTO during crises: Activating global cooperation to overcome COVID-19* in Evenett & Baldwin 2020, *supra* note 23. See Espitia et al., *supra* note 168.

¹⁸³ Maria Donner Abreu, *Preferential Rules of Origin in Regional Trade Agreements*, WTO STAFF WORKING PAPER ERSD-2013-05 (2013), https://www.wto.org/English/res_e/reser_e/ersd201305_e.pdf [hereinafter Abreu 2013].

¹⁸⁴ *Accumulation/Cumulation, RULES OF ORIGIN FACILITATOR*, <https://findrulesoforigin.org/en/glossary?uid=accum&returnto=gloscen#:~:text=Rules%20of%20Origin%20Facilitator&text=Also%20known%20as%20accumulation..sharing%20within%20the%20FTA%20territory> (last visited on January 23, 2021) [hereinafter RULES OF ORIGIN FACILITATOR].

¹⁸⁵ See USMCA, Article 4.11, *supra* note 7.

¹⁸⁶ See CPTPP, Article 3.10, *supra* note 8.

¹⁸⁷ See RCEP, Article 3.4(1), *supra* note 13.

¹⁸⁸ *RCEP: Common rule of origin could boost regional trade by around USD90bn annually*, EULER HERMES GLOBAL (November 17, 2020), https://www.eulerhermes.com/en_global/news-insights/economic-insights/RCEP-common-rule-of-origin-could-boost-regional-trade-by-around-USD90bn-annually.html.

¹⁸⁹ For a discussion of the types of cumulation provisions and their use in RTAs, see Abreu, *supra* note 183.

¹⁹⁰ RULES OF ORIGIN FACILITATOR, *supra* note 184.

with Algeria, Tunisia, and Morocco, as well as the Southern Common Market Agreement (MERCOSUR).¹⁹¹

Further, any of these three options could be used for a specific category of goods, such as essential goods. For instance, some RTAs provide for extended cumulation in a limited fashion for certain categories of products, which allows the use of inputs from specified jurisdictions not part of the relevant RTA in originating products.¹⁹²

Applied in the case of essential goods, broad cumulation provisions can allow for the creation of regional manufacturing hubs for essential goods and the cost-effective movement of inputs for such goods throughout the RTA territory. As the pandemic revealed, no country is self-sufficient in the production of crisis essentials, and provisions that allow for supply chains to flourish can be vital in ensuring the affordable and uninterrupted supply of essential goods during crises. RTAs could provide for extended cumulation rules for essential goods in order to alleviate shortages in supply during crises.

Example Provisions on Cumulation

Baseline Option: Regional Cumulation

“Unless otherwise provided in this Agreement, goods and materials which comply with the origin requirements provided in Article 3.2 (Originating Goods), and which are used in another Party as materials in the production of another good or material, shall be considered as originating in the Party where working or processing of the finished good or material has taken place.”

Source: RCEP, Article 3.4(1)

Baseline + Option A: Diagonal Cumulation

“Subject to paragraph [3], if each Party has a free trade agreement that establishes or leads to the establishment of a free trade area with the same non-Party, the territory of that non-Party shall be deemed to form part of the territory of the free trade area established by this Agreement for the purposes of determining whether a good is originating under this Agreement.”

Source: Canada – Israel FTA, Art. 3.2(2)¹⁹³

“The Parties shall explore the application of the concept of diagonal accumulation between the Parties and third parties should there be a free trade agreement between each of the Parties and the third party in question.”

Source: Jordan – Singapore FTA, Article 3.6(3)¹⁹⁴

¹⁹¹ See Abreu 2013, *supra* note 183.

¹⁹² See RULES OF ORIGIN FACILITATOR, *supra* note 190.

¹⁹³ Canada-Israel FTA, Article 3.2(2), July 31, 1996, https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/israel/fta-ale/text-texte/toc-tdm.aspx?lang=eng&_ga=2.56681578.1125609168.1568312262-1394131750.1568312262.

¹⁹⁴ Jordan – Singapore FTA, Article 3.6(3), May 16, 2004, <http://rtais.wto.org/UI/PublicShowRTAIDCard.aspx?rtaid=23>.

Baseline + Option B: Full Cumulation

- a. For the purpose of implementing Article [2(1)(b)], working or processing carried out in Algeria, or, when the conditions required by Article [4(3)] and [(4)] are fulfilled, in Morocco or in Tunisia shall be considered as having been carried out in the Community when the products obtained undergo subsequent working or processing in the Community.
- b. For the purpose, of implementing Article [2(2)(b)], working or processing carried out in the Community or, when the conditions required by Article [4(3)] and [(4)] are fulfilled, in Morocco or in Tunisia shall be considered as having been carried out in Algeria when the products obtained undergo subsequent working or processing in Algeria.

Source: EU – Algeria FTA, Articles 5.1 & 2¹⁹⁵

b. Waiver of Certification of Origin for Essential Goods

Some RTAs allow for the waiver of the requirement for certification or declaration of origin in certain cases. Waivers or exemptions are usually provided for goods whose value does not exceed a prescribed *de minimis* amount. However, waiver provisions can be useful during crises to allow for the speedy movement of essential goods.

Such waiver provisions can take two forms. The Baseline Option included in the box below allows RTA contracting parties to waive the requirement for certification or declaration of origin for any goods identified by the Parties. Contracting parties can use such waiver provisions to exempt goods deemed necessary by the Parties during future emergencies.

The Sample Model Provision (Baseline+ Option) below incorporates waivers or exemptions. These are also seen in New Zealand’s RTAs with Malaysia, China, and Hong Kong, China¹⁹⁶ the USMCA,¹⁹⁷ the Chile-Hong Kong, China Free Trade Agreement,¹⁹⁸ and the Peru-Australia Free Trade Agreement.¹⁹⁹ This option preserves some discretion in deciding which goods are essential in times of crisis. In future RTAs that specifically include a list of essential goods or prescribe strict criteria for identifying essential goods, the Baseline+ Option below allows parties to exempt these goods during the term of the RTA in a defined ‘crisis situation’. Under such provisions, essential goods covered by the agreement would automatically be subject to certification or declaration of origin waivers when the conditions for a ‘crisis situation’ are met.

¹⁹⁵ Euro – Mediterranean Agreement establishing an Association between the European Community and its Member States, of the one part, and the People’s Democratic Republic of Algeria, of the other part, Article 5.1 & 5.2, April 22, 2002, [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:22005A1010\(01\)&from=EN](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:22005A1010(01)&from=EN).

¹⁹⁶ Guidelines on Certification of Origin, World Customs Organization (2014), <http://www.wcoomd.org/-/media/wco/public/global/pdf/topics/key-issues/revenue-package/guidelines-on-certification.pdf?la=en>.

¹⁹⁷ See USMCA, Article 5.5, *supra* note 7.

¹⁹⁸ FTA between Hong Kong, China and Chile, Article 4.16, September 7, 2012, https://www.tid.gov.hk/english/trade_relations/hkclfta/files/Chapter4.pdf.

¹⁹⁹ Peru-Australia Free Trade Agreement, Article 3.20, February 18, 2018, <https://www.dfat.gov.au/trade/agreements/in-force/pafta/full-text/Pages/fta-text-and-associated-documents>.

Example Provisions on Waiver of Certification of Origin

Baseline Option: Waiver at Party Discretion

“Notwithstanding Article [3.18], an origin declaration shall not be required for:

(a) an importation of a good whose customs value does not exceed 1,000 US dollars or its equivalent amount in the importing Party's currency, or such higher amount as the importing Party may establish; or

(b) an importation of a good into the territory of the importing Party for which the importing Party has waived the requirement for an origin declaration,

provided that the importation does not form part of a series of importations that may reasonably be considered to have been undertaken or arranged for the purposes of avoiding the origin declaration requirements of Articles [3.18] and [3.19].”

Source: New Zealand-Republic of Korea Free Trade Agreement Article 3.20²⁰⁰

Sample Model Provision (Baseline+): Specific Exemption for Essential Goods

“An origin declaration shall not be required:

(x) During a crisis situation as defined under this agreement, for the importation of essential goods into the territory of the importing Party, or goods which have, by agreement of the Parties, been deemed essential to address such crisis.”

Source: Sample Draft Language

c. Electronic Certification of Origin

In times of crisis, such as the COVID-19 pandemic, many countries have noted difficulty in following the procedural requirements surrounding rules of origin. RTAs generally require that shipments of goods be accompanied by a certification of origin when preferential tariff treatment is claimed. With attempts to contain the pandemic leading to the closure of many offices, including within governments, and shift to remote work arrangements, it proved challenging for exporters to comply with all formalities relating to certification of origin. For example, the Indian government appealed to its trading partners to allow for importation of goods without a certification of origin due to the temporary closure of government offices which made it impossible to issues such certifications.²⁰¹ Similarly, the

²⁰⁰ FTA between New Zealand and the Republic of Korea, March 23, 2015, <https://www.mfat.govt.nz/assets/Trade-agreements/Korea-NZ-FTA/NZ-Korea-FTA-consolidated-text.pdf> [hereinafter New Zealand-Korea FTA].

²⁰¹ Kirtika Suneja, *COVID-19: India Asks FTA Partners to Temporarily Allow Imports Without Certificate of Origin*, THE ECONOMIC TIMES (March 30, 2020), <https://economictimes.indiatimes.com/news/economy/foreign-trade/coronavirus-india-urges-fta-partners-to-temporarily-allow-imports-without-certificate-of-origin/articleshow/74873794.cms>.

Australian government attempted to persuade its RTA partners to accept electronic versions, including scanned copies, of the certification of origin.²⁰²

RTA disciplines surrounding rules of origin could accommodate circumstances wherein the submission of a hard copy certification of origin may be difficult or even impossible. This is especially relevant to ensure that trade in essential goods can continue flowing during times of crisis, since the declaration of origin is a prerequisite for preferential tariff treatment. In such a scenario, RTAs could facilitate trade in essential goods by explicitly authorizing the acceptance of electronic documents in lieu of a hard copy certification of origin.

Example Provisions on Electronic Certification of Origin

Baseline Option: Best-Endeavour Language for the Acceptance of Electronic Certification of Origin

“The Parties, to the extent possible, should implement an electronic system of certification of origin. The Parties also recognize the validity of the digital signature.”

Source: Chile-Indonesia Comprehensive Economic Partnership Agreement Chapter 4, Rule 1 (x)²⁰³

Baseline + Option: Obligatory Language for the Acceptance of Electronic Certification of Origin

“Each Party shall allow a certification of origin to be completed and submitted electronically and shall accept the certification of origin with an electronic or digital signature.”

Source: USMCA, Article 5.2.6

The Baseline Option above, taken from the Chile-Indonesia Comprehensive Economic Partnership Agreement, couches the obligation to implement an electronic certification of origin in best-endeavour terms. Given the non-binding nature of the language used (“to the extent possible”), this form of drafting could be relied upon by parties that may not have the necessary institutional and technical capacity to implement electronic certification, but it is a step in the right direction towards encouraging its adoption. The European Union, in an information note from March 2020, also relaxed its requirements surrounding certifications of origin in favour of electronic versions after noting that its RTAs do not prescribe a specific form in which the certifications are to be issued.²⁰⁴

The Baseline+ Option above, taken from the USMCA, incorporates obligatory language requiring the parties to the RTA to accept electronic certifications of origin (“shall allow”). Similar provisions are

²⁰² AANZFTA Certificate of Origin (Form AANZ) Temporary COVID-19 Measures, DEPT. FOREIGN AFF. & TRADE, AUST. GOV'T, <https://www.dfat.gov.au/trade/agreements/in-force/aanzfta/for-business/aanzfta-certificate-origin-form-aanz-temporary-covid-19-measures> (last visited January 21, 2021) [hereinafter DEPT. FOREIGN AFF. & TRADE].

²⁰³ Comprehensive Economic Partnership Agreement Between the Government of the Republic of Indonesia and the Government of the Republic of Chile, Dec. 14, 2017, http://ditjenppi.kemendag.go.id/assets/files/publikasi/doc_20190319_perjanjian-kemitraan-ekonomi-komprehensif-indonesia-chile-indonesia-chile-cepaa.pdf [hereinafter Indonesia-Chile CEPA].

²⁰⁴ Information Note No. 1: Submission of Proofs of Preferential Origin During the COVID-19 Crisis, European Commission 1–2, March 31, 2020, TAXUD/E4/E5, https://ec.europa.eu/taxation_customs/sites/taxation/files/200331-information_note_certificates_en_and_fr.pdf.

found in the CPTPP²⁰⁵ and the China-Republic of Korea Free Trade Agreement.²⁰⁶ This option explicitly requires parties to accept a certification of origin bearing an electronic or digital signature, which would be especially useful during a time of crisis like the current pandemic when it may be difficult to obtain the required physical signatures due to movement restrictions and remote work arrangements. This language is also important in ensuring that trading partners give the same recognition to electronic certification that they would hard copy certifications and may help avoid situations such as those in Brunei, Malaysia, and the Philippines, where, despite acceptability of an electronic certification of origin for customs clearance during the COVID-19 pandemic, hard copy certification was still required within a specified time period.²⁰⁷

d. Retrospective Certification of Origin

RTAs can also include provisions that allow for certifications of origin to be issued retrospectively, especially during exceptional circumstances like the COVID-19 pandemic, which could be an additional way to allow essential goods to continue enjoying preferential tariff treatment despite not being accompanied by a certification of origin at the time of shipment.

Example Provisions on Retrospective Certification of Origin

Baseline Option: Retroactive Certification with Defined Validity

“A Certificate of Origin may be issued retrospectively within 1 year from the date of shipment, bearing the words “ISSUED RETROSPECTIVELY” and remains valid for 1 year from the date of shipment, if it is not issued before or at the time of shipment due to force majeure, involuntary errors, omissions or other valid causes.”

Source: China-Mauritius Free Trade Agreement Article 3.14.5²⁰⁸

Baseline+ Option: Retroactive Certification with Validity for the Period of Emergency or Crisis and Broader Scope of Application

“A Certificate of Origin may be issued retrospectively *during the period of time that an emergency or crisis declaration is in place*, bearing the words “ISSUED RETROSPECTIVELY” and remains valid for *the duration of the emergency or crisis*, if it is not issued before or at the time of shipment due to the *emergency, crisis*, force majeure, involuntary errors, omissions, or other valid causes.”

Source: Adapted from the China-Mauritius Free Trade Agreement, Article 3.14.5, with additional sample draft language added in italics.

²⁰⁵ See CPTPP, Article 3.20.3, *supra* note 8.

²⁰⁶ The China- Republic of Korea FTA envisions the establishment of an Electronic Origin Data Exchange System (officially launched on December 28, 2016) which allows the customs authorities of both parties to accept and verify electronic certificates of origin. See Free Trade Agreement Between the Government of the People’s Republic of China and the Government of the Republic of Korea, Article 3.27, June 2, 2015, http://fta.mofcom.gov.cn/korea/annex/xdzw_en.pdf [hereinafter China-Republic of Korea FTA]. See also *Promoting Cross-Border E-Trade Under the Framework of RTAs / FTAs: Best Practices in the APEC Region*, APEC ELECTRONIC COMMERCE STEERING GROUP, 55 (2017).

²⁰⁷ See DEPT. FOREIGN AFF. & TRADE, *supra* note 202.

²⁰⁸ FTA Between the Government of the People’s Republic of China and the Government of the Republic of Mauritius, October 18, 2019, http://fta.mofcom.gov.cn/mauritius/annex/mlqs_xdzw_en.pdf [hereinafter China-Mauritius FTA].

The Baseline Option above gives parties to the RTA some flexibility in issuing certifications of origin retrospectively in instances where they could not be issued before or at the time of shipment due to force majeure or other valid causes. Similar provisions are found in the China-Republic of Korea Free Trade Agreement²⁰⁹ and the Association of Southeast Asian Nations (ASEAN)-China Free Trade Agreement.²¹⁰ Allowing for certifications of origin to be issued retrospectively ensures that trade in essential goods will not be hampered due to the certification of origin requirement.

The Baseline+ Option above modifies the language further to provide greater discretion to policymakers with respect to retroactive certification. Since it is not time-limited like the Baseline Option, drafting a provision similar to the Baseline+ Option could ensure that retroactive certificates can be issued for the duration of the emergency or crisis in question. Such flexibility could be especially helpful in times of crisis like the current COVID-19 pandemic, where crisis circumstances have lasted for over one year as of the time of writing. The Baseline+ Option also expands the definition of “other valid causes” to include “emergency” and “crisis”. This is consistent with how countries have been interpreting analogous provisions; for example, in a March 2020 information note, the European Union determined that the COVID-19 pandemic was a sufficiently “special circumstance” which justified retrospective certification of origin.²¹¹

In addition to these four issues related to rules of origin, other aspects of rules of origin may be relevant in a crisis context. For example, fluctuating rules of origin related to food inputs can complicate food value chains and food processing, inhibiting access during crisis periods.

3. Treatment of Essential Services

The COVID-19 pandemic has also highlighted the importance of disciplines on essential services. While the movement of people in the services context is critical, especially during times of crisis, it is likely that any future rules would have a narrow ambit, as domestic considerations continue to govern long-term migration flows. However, there is still much scope for streamlining and liberalizing the international movement of skilled workers. For instance, future RTAs could continue the trend of procedural liberalization to help facilitate business travel. RTAs could also include crisis-specific provisions. This may be particularly relevant, since movement of service providers and business travellers was significantly disrupted during the COVID-19 pandemic, a herald of future disruptions during health and other crises. Crisis specific provisions could include the implementation of fast-track entry channels and corridors for movement of service providers during crises. For example, such channels were implemented between China and the Republic of Korea and between Singapore and China during the COVID-19 pandemic.²¹²

²⁰⁹ See China- Republic of Korea FTA, Article 3.15.4, *supra* note 206.

²¹⁰ See Rules of Origin for the ASEAN-China Free Trade Area, Attachment A, Rule 10(b); Agreement on Trade in Goods of the Framework Agreement on Comprehensive Economic Cooperation Between the ASEAN and the People’s Republic of China, November 29, 2004, <https://www.asean.org/wp-content/uploads/images/2013/economic/afta/ACFTA/3-%20ACFTA%20TIG%20Annex%203.pdf>.

²¹¹ Information Note No. 1: Submission of Proofs of Preferential Origin During the COVID-19 Crisis, EUROPEAN COMMISSION 2–3, March 31, 2020, TAXUD/E4/E5, https://ec.europa.eu/taxation_customs/sites/taxation/files/200331-information_note_certificates_en_and_fr.pdf.

²¹² See WTO Cross-Border Mobility 2020, *supra* note 57.

a. Procedural Liberalizations

RTAs could contain provisions on procedures relevant to movement of natural persons, including accessibility of visas for essential service providers. Procedural liberalization could take the form of expedited processing of applications, greater transparency regarding immigration policies, mutual recognition of qualifications, reduced fees, and electronic procedures for visa applications. Example Option A below is derived from the Pacific Agreement on Closer Economic Relations Plus (PACER Plus) between Australia, Cook Islands, Kiribati, Nauru, New Zealand, Niue, Samoa, Solomon Islands, Tonga, Tuvalu, and Vanuatu.²¹³ This Agreement includes a best endeavour provision to expeditiously process applications for immigration formalities and notify the applicant on request of receipt, status, and decision regarding their application. Other agreements such as USMCA and CPTPP include chapters on temporary movement of natural persons, with provisions on expediting processing of applications for immigration formalities.²¹⁴ Example Option B below is taken from the RCEP, which requires parties to process all applications for immigration formalities as expeditiously as possible; this option notably also includes a best endeavour-based provision on the acceptance of applications in electronic format. Example Option C below goes a step further by requiring the online lodging and processing of identified immigration formalities.

Example Provisions on Procedural Liberalizations

Example Option A: Best Endeavour Provision on Expedited Processing of Immigration Formalities

In relation to the natural persons covered by Article 3, each Party shall endeavour to:

- (a) establish or maintain immigration formalities, which can be granted prior to arrival in its territory, to allow natural persons of another Party entry into and temporary stay in its territory;
- (b) expeditiously process complete applications for immigration formalities received from natural persons of another Party, including further immigration formality requests or extensions thereof;
- (c) on request, and within a reasonable period after an application by a natural person of another Party requesting temporary entry is lodged, notify the applicant of:
 - (i) receipt of the application;
 - (ii) the status of the application; and
 - (iii) the decision concerning the application, including: (A) if approved, the period of stay and other conditions; or (B) if refused, the reasons for refusal and any avenues for review.

Source: PACER Plus Agreement, Chapter 8, Article 5

Example Option B: Expedited Processing and Electronic Submissions

²¹³ The Pacific Agreement on Closer Economic Relations Plus (PACER Plus Agreement) between Australia, Cook Islands, Kiribati, Nauru, New Zealand, Niue, Samoa, Solomon Islands, Tonga, Tuvalu, and Vanuatu is not yet in force for Nauru, Tuvalu and Vanuatu.

²¹⁴ See USMCA, Chapter 16, Article 16.3, *supra* note 7; CPTPP, Chapter 12, Article 12.3, *supra* note 8.

1. Where an application for an immigration formality is required by a Party, that Party shall process, as expeditiously as possible, complete applications for immigration formalities or extensions thereof received from natural persons of another Party covered by Article 9.2 (Scope).
2. Each Party shall, upon request and within a reasonable period after receiving a complete application for an immigration formality from a natural person of another Party covered by Article 9.2 (Scope), notify the applicant of: (a) the receipt of the application; and (b) the decision concerning the application including, if approved, the period of stay and other conditions.
3. Each Party shall, upon request and within a reasonable period after receiving a complete application for an immigration formality from a natural person of another Party covered by Article 9.2 (Scope), endeavour to notify the applicant of the status of the application.
4. To the extent permissible under its laws and regulations, each Party shall endeavour to accept applications for immigration formalities in electronic format under the equivalent conditions of authenticity as paper submissions.
5. Where appropriate, each Party shall accept copies of documents authenticated in accordance with its laws and regulations in place of original documents, to the extent its laws and regulations permit.

Source: RCEP, Article 9.6

Example Option C: Electronic Submissions and Processing

As soon as possible after the date of entry into force of this Agreement, Parties shall provide facilities for online lodgement and processing:

- (a) in the case of Australia, of immigration formalities; and
- (b) in the case of Singapore, of employment passes which shall be applied for by the prospective employers.

Source: Singapore-Australia FTA, Chapter 11, Article 14

b. Mutual Recognition of Qualifications

Mutual Recognition of Qualifications is particularly helpful in allowing movement of high-skilled essential service providers across borders. Such provisions can reduce the procedural barriers faced by high skilled workers and can facilitate their movement to regions where there is shortage of needed skills. During health crises, such provisions can facilitate the movement of doctors, nurses, and other healthcare personnel to meet crisis needs as well as the mobility of scientists and innovators to research hubs.

The Baseline Option identified below is from the EU-Singapore FTA, which allows for the mutual recognition of qualifications. Agreements such as the EU-Viet Nam FTA, Japan Singapore FTA, and the PACER Plus Agreement all include provisions on the mutual recognition of qualifications.²¹⁵

The Baseline+ Option below is derived from the CETA between the EU and Canada, which includes a chapter on the recognition of professional qualifications. This option goes a step further by stating

²¹⁵ See EU-Viet Nam FTA, Article 8.21, *supra* note 152; Japan Singapore FTA, Article 93; PACER Plus, Chapter 8, Article 6, *supra* note 213.

that the host Party may not accord less favourable treatment to holders of those qualifications than have been recognized as set out in the agreement. CETA also prohibits the conditioning of recognition on citizenship or residency requirements or the acquisition of qualifications or experience in the territory of the host Party.

Example Provisions on Mutual Recognition of Professional Qualifications

Baseline Option: Mutual Recognition of Professional Qualifications

1. Nothing in this Article shall prevent a Party from requiring that natural persons possess the necessary qualifications and/or professional experience specified in the territory where the service is supplied, for the sector of activity concerned.
2. The Parties shall encourage the relevant professional bodies in their respective territories to develop and provide a joint recommendation on mutual recognition to the Committee on Trade in Services, Investment and Government Procurement established pursuant to Article 16.2 (Specialised Committees). Such a recommendation shall be supported by evidence on:
 - (a) the economic value of an envisaged an agreement on mutual recognition of professional qualifications (hereinafter referred to as ‘Mutual Recognition Agreement’); and
 - (b) the compatibility of the respective regimes, i.e., the extent to which the criteria applied by each Party for the authorisation, licensing, operation and certification of entrepreneurs and service suppliers are compatible.
3. On receipt of a joint recommendation, the Committee on Trade in Services, Investment and Government Procurement shall, within a reasonable time, review the joint recommendation with a view to determining whether it is consistent with this Agreement.
4. Where, on the basis of the information provided for in paragraph 2, the recommendation has been found to be consistent with this Agreement, the Parties shall take necessary steps to negotiate a Mutual Recognition Agreement through their competent authorities or authorised designees.

Source: EU-Singapore FTA, Article 8.16

Baseline+ Option: No Less Favourable Treatment for Recognized Qualifications

1. The recognition of professional qualifications provided by an MRA shall allow the service supplier to practice professional activities in the host jurisdiction, in accordance with the terms and conditions specified in the MRA.
2. If the professional qualifications of a service supplier of a Party are recognised by the other Party pursuant to an MRA, the relevant authorities of the host jurisdiction shall accord to this service supplier treatment no less favourable than that accorded in like situations to a like service supplier whose professional qualifications have been certified or attested in the Party's own jurisdiction.
3. Recognition under an MRA cannot be conditioned upon:
 1. a service supplier meeting a citizenship or any form of residency requirement; or
 2. a service supplier's education, experience or training having been acquired in the Party's own jurisdiction.

Source: CETA, Article 11.4

c. *Crisis-Specific Services Measures*

As the COVID-19 pandemic illustrates, health crises will invariably result in disruptions and limitations to international travel. However, ensuring that crises do not completely prohibit the movement of workers is vital, both to minimize the effects of such crises on services trade and, in the case of essential workers, to effectively respond to crisis. An example of such provisions is the creation of reciprocal fast-track channels or green lanes for essential travellers. Such channels can be established while taking the precautions necessary to contain an outbreak or other crisis. For instance, Singapore reached an understanding with Republic of Korea, Malaysia, Indonesia, Japan, Brunei, and Germany to establish green lanes for the movement of travellers with appropriate safeguards.²¹⁶ These safeguards, specific to the COVID-19 pandemic included quarantines, testing, monitoring measures, and others.²¹⁷ The Sample Model Provision below is designed to allow States to take such measures during crises to facilitate the movement of essential service providers, while applying safeguards appropriate to the nature of the crisis.

Sample Model Provision on Reciprocal Green Lanes for Essential Travellers

Sample Model Provision Option: Reciprocal Green Lanes for Essential Travellers

“During the period of time that an emergency or crisis declaration is in place as defined in this Agreement, Parties may institute, on mutual agreement, reciprocal green lanes for the movement of essential workers and business travellers, with appropriate safeguards to be determined by the Parties as befitting the nature of the emergency or crisis.”

Source: Sample Draft Language

²¹⁶ See Reciprocal Green Lanes, Immigration and Checkpoints Authority, Singapore, <https://safetravel.ica.gov.sg/rgl/overview>. Reciprocal green lanes with Germany, Republic of Korea, Japan, Indonesia and Malaysia are currently suspended.

²¹⁷ *An Overview of Singapore's Travel Green Lanes*, PRICEBREAKER, <https://www.pricebreaker.travel/inspiration/singapore-travel-green-lanes#southkorea>.

CHAPTER III - TRADE FACILITATION

Trade facilitation has emerged as one of the key pillars of the international trading system, and, as the pandemic has highlighted, it is particularly important for trade in times of crisis. Trade facilitation measures are focused on simplifying processes for cross-border trade, increasing transparency and accountability, sharing information, and facilitating harmonization in policy and regulatory reforms.²¹⁸ Implementing trade facilitation measures can significantly reduce trade costs and help expedite movement of goods and services across borders as well as create more integrated global supply chains. Trade facilitation measures have been central to many countries' pandemic responses, and this chapter focuses on key trade facilitation measures, building upon the more comprehensive discussion of measures affecting trade in essential goods covered in Chapter II.

Trade facilitation measures have a direct link with many SDGs, in particular SDG 9 (Industry, Infrastructure and Innovation) to “build resilient infrastructure, promote inclusive and sustainable industrialization and foster innovation” and Target 9.a “Facilitate sustainable and resilient infrastructure development in developing countries through enhanced financial, technological and technical support to African countries, least developed countries and small island developing States” and SDG 17 (Partnership for the Goals), specifically Targets 17.11 “to increase exports of developing countries” and 17.14 to “enhance policy coherence for sustainable development.”²¹⁹

The term “trade facilitation” does not have a universal definition, although all descriptions focus on simplifying and expediting trade across borders in order to enable quicker access to goods and services across the globe. The WTO states that trade facilitation is the “simplification, modernization and harmonization of export and import process”,²²⁰ while UNCTAD defines trade facilitation measures as those that “seek to establish a transparent, consistent and predictable environment for border transactions based on simple and standardized customs procedures and practices, documentation requirements, cargo and transit operations, and trade and transport conventions and arrangements”.²²¹ Perez and Wilson have defined trade facilitation along two dimensions, a “hard dimension” that includes infrastructure, such as roads and ports, to facilitate trade, and a “soft dimension” relating to transparency, customs procedures, and business environment.²²²

Trade facilitation has played a critical role during the COVID-19 pandemic, since countries have had the difficult task of maintaining a balance between free flow of essential goods and minimizing transmission of the virus, which has often involved “red tape” in the form of logistics and supply chain

²¹⁸ *World Trade Report 2015 Speeding Up Trade: Benefits and Challenges of Implementing the WTO Trade Facilitation Agreement*, 32, WTO, (2015) [hereinafter WTO 2015], https://www.wto.org/english/res_e/publications_e/wtr15_e.htm.

²¹⁹ The complete list of SDGs and related Targets may be accessed at *Sustainable Development Goals and Targets*, WORLD BANK, <https://datatopics.worldbank.org/sdgatlas/targets/> (last visited April 1, 2021) [hereinafter World Bank 2021].

²²⁰ *Trade Facilitation*, WTO, (last visited March 25, 2021), https://www.wto.org/english/tratop_e/tradfa_e/tradfa_e.htm

²²¹ *National Facilitation Bodies: Lessons from Experience*, in PART I OF TRADE FACILITATION HANDBOOK, UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT (UNCTAD), 6 (2006), https://unctad.org/system/files/official-document/sdtetlb20051_en.pdf.

²²² See WTO 2015, *supra* note 218; Alberto Portugal-Perez and John S. Wilson, *Export Performance and Trade Facilitation Reform: Hard and Soft Infrastructure*, WORLD DEVELOPMENT, 40(7): 1295-1307, (July 2012), <https://www.sciencedirect.com/science/article/abs/pii/S0305750X11003056>.

specifications, border controls, and documentation requirements relating to COVID-19.²²³ According to a WTO report, transport and travel costs during the pandemic have constituted around 15 to 31 per cent of trade costs (with variation by sector), which increase as restrictions remain in place.²²⁴ With restrictions reoccurring due to the spread of new variants of the virus,²²⁵ these costs are likely to remain. Many countries have largely kept borders closed or open only to essential traffic,²²⁶ and many countries have only allowed trade through select border crossings,²²⁷ which can adversely affect many businesses. Trade facilitation is also particularly important for vaccine distribution, where time is of the essence. There is a significant need for cooperation between border agencies and other relevant regional and national agencies to help streamline processes relating to flow of vaccines and other essential goods such as pharmaceutical and medical goods across borders.²²⁸

Many South Asian countries faced staffing issues at clearance locations, difficulty accessing customs brokers and freight forwarders, and onerous clearance requirements such as production of original documents before clearance.²²⁹ Other challenges have included physical requirements for paper filings, insufficient cooperation between border agencies, lack of business continuity protocols, and insufficient consideration provided to stakeholders such as SMEs, among others. SMEs have been particularly hard hit during the pandemic due to their lack of integration in global value chains. As the OECD and others have highlighted, it is important that measures are adopted that are targeted, transparent, and accessible to all traders, especially SMEs.²³⁰ These could take a variety of forms, including reduced fees and formalities for SMEs, equitable representation in National Trade Facilitation Committees (NTFCs), and other measures, and greater focus is warranted on this particular aspect of trade facilitation.²³¹

Services and business travel have also been particularly impacted by the pandemic. While many services have shifted to digital delivery where possible, some still rely on face-to-face interaction, such as those that are based on production activities or that cannot be delivered digitally.²³² Although this chapter will not address trade facilitation in services (essential services are addressed in Chapter III: Treatment of Essential Goods and Services), it is worth noting that in 2016, the Government of India

²²³ *Trade Facilitation and the COVID-19 Pandemic*, in OECD POLICY RESPONSES TO COVID-19, OECD, 1 (2020) [hereinafter OECD Trade Facilitation], <http://www.oecd.org/coronavirus/policy-responses/trade-facilitation-and-the-covid-19-pandemic-094306d2/>.

²²⁴ *Information Note: Trade Costs in the Time of Global Pandemic*, WTO, 1 (2020) [hereinafter WTO Trade Costs], <https://www.oecd-ilibrary.org/docserver/e29b9dca-en.pdf?expires=1616667354&id=id&accname=guest&checksum=7E0D9488652553DDDEC3560E0EFF74DA>.

²²⁵ Susan Bonney-Cox, *European Travel Restrictions: Nonessential Travel Curbed*, DEUTSCHE WELLE, (March 23, 2021), <https://www.dw.com/en/european-travel-restrictions-nonessential-travel-curbed/a-56350272>.

²²⁶ Craig McCulloh, *One Year After Closing, US-Canada Border Remains Closed*, VOICE OF AMERICA, (March 2, 2021), <https://www.voanews.com/covid-19-pandemic/one-year-after-closing-us-canada-border-remains-closed>.

²²⁷ See OECD Trade Facilitation, *supra* note 223.

²²⁸ *Id.*

²²⁹ Aileen Pangilinan and Satish Reddy, *Coping with Pandemic in South Asia by Making it Easier to Trade*, ASIAN DEVELOPMENT BLOG, (November 18, 2020), <https://blogs.adb.org/blog/coping-pandemic-south-asia-making-it-easier-trade>.

²³⁰ See OECD Trade Facilitation, *supra* note 223.

²³¹ See Duval, *supra* note 89.

²³² See WTO Trade Costs, *supra* note 224.

proposed negotiations for trade facilitation in services to complement the TFA. Even though these talks have not proceeded, this issue may be worth revisiting in the future.²³³

Recognizing the significance of trade facilitation rules during emergencies, international organizations, regional bodies, and national governments have reinforced measures focused on facilitating trade, minimizing costs at the border, and reducing the bureaucratic steps and time spent on trade of goods and services across countries. For example, the EU issued guidance to economic operators to accept scanned documents instead of originals unless a question arose as to the veracity of a document,²³⁴ thus allowing for digitalized solutions to documentation requirements and reducing in-person custom procedures. The Southern African Development Community (SADC) Secretariat operationalized a Regional Transport and Trade Facilitation Cell to coordinate implementation of trade facilitation measures amongst SADC Member States.²³⁵

Trade facilitation provisions exist both in the multilateral sphere through the TFA and in regional trade instruments, often through incorporation of trade facilitation chapters in RTAs. For the purpose of this Handbook, options for trade facilitation provisions that are particularly important in times of crisis have been identified based on the following categories: (i) paperless trade; (ii) expedited shipments and release of essential goods; (iii) other measures related to expedited release of essential goods; and (iv) facilitation of border cooperation, including cooperation between national authorities such as border agencies and trade facilitation committees.

A. Legal Aspects of Trade Facilitation

Regulation of trade facilitation is based on “positive integration” of trade rules, and the WTO TFA is considered to be a milestone in the multilateral trading system, as it is the first and only multilateral agreement to have been passed since the WTO was established. The agreement was tailored to incorporate and enhance three specific provisions in the GATT, i.e., GATT Article V (Freedom of Transit), Article VIII (Fees and Formalities Connected with Importation and Exportation), and Article X (Publication and Administration of Trade Regulations).²³⁶ The TFA captures these provisions in Section I, wherein it sets out substantive provisions on publication of information and other transparency related measures²³⁷ (transparency is covered in greater detail in Chapter VII of this Handbook), release and clearance of goods,²³⁸ border agency cooperation,²³⁹ movement of goods

²³³ BERNARD HOEKMAN, *Facilitating Trade in Services*, WORLD BANK GROUP, (May 2020), <http://documents1.worldbank.org/curated/en/836171588701385717/pdf/Facilitating-Trade-in-Services.pdf>.

²³⁴ *COVID-19 Measures Notified under the Trade Facilitation Agreement*, TRADE FACILITATION DATABASE, WTO, <https://tfadatabase.org/information-for-traders/import-export-and-transit-procedures/measures-related-to-covid-19>.

²³⁵ *SADC Adopts Regional Guidelines on Harmonizing and Facilitating Movement of Critical Goods and Services Across the Region During the COVID-19 Pandemic*, SOUTHERN AFRICAN DEVELOPMENT COMMUNITY (SADC), (2020), <https://www.tralac.org/news/article/14498-sadc-adopts-regional-guidelines-for-harmonising-and-facilitating-movement-of-critical-goods-and-services-across-the-region-during-the-covid-19.html>.

²³⁶ Agreement on Trade Facilitation, February 22, 2017, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1869 U.N.T.S. 401 [hereinafter TFA].

²³⁷ See TFA Article 6, *supra* note 236.

²³⁸ See TFA Article 7, *supra* note 236.

²³⁹ See TFA Article 8, *supra* note 236.

intended for import under customs control,²⁴⁰ formalities connected with importation, exportation and transit,²⁴¹ freedom of transit,²⁴² and customs cooperation.²⁴³

In December 2020, a group of WTO Members urged the full membership to accelerate the implementation of the TFA in light of the pandemic, in particular with respect to publication of information (increased transparency); pre-arrival processing to facilitate faster release of medical goods; separation of release from final determination of customs duties, taxes, fees, and charges; expedited shipments; border agency cooperation; formalities and documentation requirements; acceptance of copies; and implementation of a single window system.²⁴⁴ Further, these Members noted that implementing the TFA improves customs cooperation, allows for better revenue collection, and opens up export opportunities for SMEs.²⁴⁵ Since implementing the TFA can help address many of the challenges that countries face during the pandemic, TFA provisions often provide the basis for the Baseline Options presented in this chapter.

In addition to the provisions discussed above, Section II of the TFA allows for S&DT tailored to the needs of developing countries and LDCs and allows for these States to differentiate implementation of the TFA based on the following three categories:²⁴⁶

- a) Category A: Provisions that Members will implement by the time the TFA entered into force. For LDCs, this timeline was extended up to a year.
- b) Category B: Provisions that Members will implement after a transition period, following the entry into force of the TFA.
- c) Category C: Provisions that Members will implement on a date after a transitional period, following the entry into force of the TFA, which require capacity building support.

S&DT is a crucial element of building forward better, and RTAs should take the implementation capacities of States into consideration when establishing time periods to implement specific trade facilitation measures; this will be addressed more fully in Chapter VIII of the Handbook (Development). However, it is worth highlighting that adopting trade facilitation measures is critical for development, especially for LDCs that are landlocked, and the UN has called on governments to refrain from imposing unjustified trade restrictions on landlocked neighbouring countries and assist them instead.²⁴⁷

Section III of the TFA establishes a Committee on Trade Facilitation. Its functions include establishing subsidiary bodies if required, developing procedures for sharing of information and best practices by

²⁴⁰ See TFA Article 9, *supra* note 236.

²⁴¹ See TFA Article 10, *supra* note 236.

²⁴² See TFA Article 11, *supra* note 236.

²⁴³ See TFA Article 12, *supra* note 236.

²⁴⁴ *Supporting the Timely and Efficient Release of Global Goods through Accelerated Implementation of the WTO Trade Facilitation Agreement: Communication from Australia, Brazil, Colombia, European Union, Iceland, Japan, Norway, The Separate Customs Territory of Taiwan, Penghu, Kinmen And Matsu, and the United States*, WORLD TRADE ORG., G/TFA/W/25/Rev.2 (Dec 18, 2020), https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=269544&CurrentCatalogueIdIndex=0&FullTextHash=371857150&HasEnglishRecord=True&HasFrenchRecord=True&HasSpanishRecord=False.

²⁴⁵ *Id.*

²⁴⁶ See TFA Article 23, *supra* note 236.

²⁴⁷ *COVID-19: UN Calls on Government to Help Landlocked Neighbours*, UNCTAD, (June 2020), <https://unctad.org/news/covid-19-un-calls-governments-help-landlocked-neighbours>.

Members, maintaining contact with the World Customs Organization (WCO) and other international organizations to seek guidance on implementation of the TFA, and reviewing the implementation of the TFA, among other things.²⁴⁸ Members are also obligated to establish NTFCs to facilitate domestic coordination and implementation of the TFA; these committees have proven to be vital in bringing stakeholders from the public and private sectors together to simplify trade in essential goods.²⁴⁹

The TFA also has several links with the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement) and the Agreement on Technical Barriers to Trade (TBT Agreement), including in relation to provisions on border agency cooperation, single window systems, acceptance of copies, rejected goods, and trade facilitation committees. Notably, the TFA states that no provision in the TFA should be construed to diminish obligations of members under the SPS and TBT Agreements.²⁵⁰

Trade facilitation chapters and provisions are also common in RTAs, and the coverage of trade facilitation in this chapter (in combination with Chapter II on Treatment of Essential Goods and Services) is broader than the WTO TFA. Early RTAs did not contain many provisions on trade facilitation, which was often guided instead by cooperation arrangements between States that targeted specific subject matter and did not include broad commitments on cross-border trade facilitation.²⁵¹ This trend changed as RTA negotiations expanded beyond tariff commitments to address other aspects of trade. By the 1990s, many RTAs already contained comprehensive provisions on trade facilitation. For example, the North American Free Trade Agreement (NAFTA) included trade facilitation provisions in customs and transparency chapters. That said, the adoption of trade facilitation provisions in RTAs has been somewhat scattered and reflects the larger trend towards “deep” trade agreements, such as those concluded by the EU, European Free Trade Association, and United States that incorporate broad commitments.²⁵² These are in contrast with other agreements or treaties (e.g., agreements concluded by the Russian Federation) with more limited reach.²⁵³

The 2000s saw a proliferation of RTAs, and the incorporation of deeper trade facilitation commitments intensified in these agreements. Trade facilitation started to become a central point of focus in the international trading system, and governments began to increasingly acknowledge and identify the importance of non-discriminatory cross-border trading mechanisms to improve efficiency of global value chains and expedite trade flows. TFA negotiations also accelerated this trend, which led to the inclusion of TFA-modelled provisions in RTAs, including provisions relating to the simplification of documentation and border agency cooperation, among other things.²⁵⁴ For example, the RTA between Republic of Korea and Singapore contains provisions on paperless trading to enable cross-border transactions between the parties.²⁵⁵ Further, the United States-Peru RTA, which has a stand-alone

²⁴⁸ See TFA Article 23, *supra* note 236.

²⁴⁹ *National Trade Facilitation Committees lead Reforms, Response to COVID-19*, UNCTAD, (May 5, 2020), <https://unctad.org/news/national-trade-facilitation-committees-lead-reforms-respond-covid-19>.

²⁵⁰ See TFA Article 24.6, *supra* note 236.

²⁵¹ Nora Neufeld, *Trade Facilitation Provisions in Regional Trade Agreements*, WTO, 4 (January 25, 2014) [hereinafter Neufeld 2014], https://www.wto.org/english/res_e/reser_e/ersd201401_e.pdf.

²⁵² *Id.*

²⁵³ *Id.*

²⁵⁴ *Id.*

²⁵⁵ FTA Between the Republic of Korea and the Government of the Republic of Singapore, art. 5.13, August 4, 2005, <https://www.enterprisesg.gov.sg/-/media/esg/files/non-financial-assistance/for-companies/free-trade-agreements/korea-singapore-fta/legal-text/ksfta20legal20text1.pdf>.

chapter on Customs Administration and Trade Facilitation (Chapter 5) and another chapter on Electronic Commerce (Chapter 15), incorporated language obligating parties to use ICT to expedite procedures for the release of goods; however, this obligation was only subject to a “best endeavour” standard under the RTA.²⁵⁶ RTAs also influenced development of the TFA. For example, the provisions on express shipment in US RTAs with Chile and Singapore led to the incorporation of these provisions in the agreement.²⁵⁷

S&DT provisions relating to trade facilitation can also be found in RTAs; for example, Annex 4 A of the RCEP sets out the implementation period to which each State has committed regarding certain trade facilitation obligations. For example, Cambodia has committed to full implementation for pre-arrival processing, release of goods, express consignments, and customs cooperation within a time period of five years.

As noted earlier, the TFA will be used as a baseline where appropriate, as it contains provisions that can significantly contribute to expediting trade during times of crisis or pandemic. However, recent RTAs sometimes go beyond the TFA’s provisions. For example, Article 7.7 of the USMCA incorporates elements of Article 7 of the TFA and further obligates Parties to adopt procedures that provide for “immediate release of goods upon receipt of customs declaration and fulfilment of all applicable requirements and procedures”; this in particular could be extremely useful in an emergency situation.²⁵⁸ Further, the newly signed DEPA among New Zealand, Singapore, and Chile recognizes the role of electronic commerce in trade facilitation and includes provisions relating to expedited shipments in this context. However, most RTAs are yet to adopt many of these provisions, and RTAs also often contain provisions that are not well-suited to crisis situations.

B. RTA Trade Facilitation Options for Responding to Crises

COVID-19 has highlighted the bottlenecks and gaps in trade facilitation measures that should be addressed before another pandemic or crisis occurs. This will help States better prepare to mitigate losses and also set the stage for better coordination between stakeholders during a crisis. Many of the challenges arise from the lack of implementation of measures that countries have already committed to under RTAs; however, although this chapter discusses implementation aspects of trade facilitation, a complete assessment of implementation is beyond the scope of the Handbook.

The RTA options below address important aspects of trade facilitation that can help ensure the continuous flow of essential goods across borders during an emergency situation, namely: (i) paperless trade; (ii) expedited shipments and release of essential goods; (iii) other measures related to expedited release of essential goods; and (iv) facilitation of border cooperation, including cooperation between national authorities such as border agencies and trade facilitation committees. These options will be of particular help in times of crisis; however, they will also help make RTAs more efficient and resilient in other situations.

²⁵⁶ *Trade Facilitation in Regional Trade Agreements*, UNCTAD, 11 (2011), https://unctad.org/system/files/official-document/dtltlb2011d1_en.pdf. See also Free Trade Agreement between United States and Peru, Article 5.3, April 12, 2006, https://ustr.gov/sites/default/files/uploads/agreements/fta/peru/asset_upload_file921_9538.pdf.

²⁵⁷ See Neufeld 2014, *supra* note 251.

²⁵⁸ Gregory Spak, Francisco de Rosenweig, Dean A. Barclay, Matt Solomon, and Brian Picone, *Overview of Chapter 7 (Customs Administration and Trade Facilitation) of the US-Mexico-Canada Agreement*, WHITE & CASE, (2018) <https://www.whitecase.com/publications/alert/overview-chapter-7-customs-administration-and-trade-facilitation-us-mexico-canada>.

1. Paperless Trade

Customs automation and digitalization are central to the TFA and appear in RTAs as well (sometimes in digital trade chapters instead of among trade facilitation provisions). Implementation of digitalization provisions, with possible enhancements to respond to emergency situations, could make a significant difference in crisis situations. In the early stages of the pandemic, COVID-19 prompted an acceleration in the adoption of digital technologies; however, not many countries had fully implemented TFA commitments, leading many to accelerate the adoption of digitalized platforms for customs administration. Improving digital trade facilitation could encompass a number of aspects, including digitizing import formalities (e.g., payments and documentation) and increasing the use of electronic signatures, the latter of which is covered more fully in Chapter VI on E-Commerce and Digital Trade.

As goods cross borders during emergencies, information also needs to flow between relevant parties, such as private companies (including SMEs), border agencies, public bodies, customs officials, and consumers. Incorporating paperless trading mechanisms in cross-border procedures can enable faster exchange of information. Examples of paperless trading include approaches in China, the Eurasian Economic Commission, and elsewhere,²⁵⁹ and these measures also intersect with broader measures on electronic signatures discussed in Chapter VI of this Handbook.

The WTO TFA contains a number of provisions potentially relevant to paperless trade;²⁶⁰ these include provisions on pre-arrival processing, electronic submission of documents, e-payment systems, electronic single window systems, and international standards for paperless trade. The language in the TFA provides States with the policy space to adopt commitments according to their own capabilities. According to a 2017 study, implementation of provisions relating to paperless trade has been low; this could be potentially attributed to S&DT which allows for staged implementation, including with capacity building resources as needed (Category C).²⁶¹ The TFA obligates States to review the operational and implementation aspects of the agreement four years from its enforcement (i.e., in 2021)²⁶² as well as periodically; this opportunity could be used to adopt recommendations and proposals made by individual countries or draw from ongoing discussions in multilateral fora including those on e-commerce under the Joint Statement on E-commerce Initiative and other global instruments, including the WCO Framework of Standards on Cross-Border E-Commerce and United Nations Commission on International Trade Law (UNCITRAL) model law on electronic transferable records.²⁶³

Notably, the Framework Agreement on Facilitation of Cross-border Paperless Trade in Asia and the Pacific (Framework Agreement), a UN treaty focused on facilitation of paperless trade, entered into force on 20 February 2021.²⁶⁴ The Framework Agreement prescribes comprehensive and deep integration obligations related to paperless trade, including developing electronic single-window

²⁵⁹ See Duval, *supra* note 89 in Evenett & Baldwin 2020, *supra* note 23.

²⁶⁰ *Paperless Trading: How Does it Impact the Trade System?*, WEF, United Nations Economic Commission for Europe, October 2017, http://www3.weforum.org/docs/WEF_36073_Paperless_Trading_How_Does_It_Impact_the_Trade_System.pdf.

²⁶¹ *Id.*

²⁶² See TFA Article 23.1.6, *supra* note 236.

²⁶³ See Duval, *supra* note 89.

²⁶⁴ Framework Agreement on Facilitation of Cross-Border Paperless Trade in Asia and the Pacific (December 2020), <https://www.unescap.org/resources/framework-agreement-facilitation-cross-border-paperless-trade-asia-and-pacific> [hereinafter Framework Agreement].

systems; enabling exchange and mutual recognition of trade-related data and electronic documents; and institutional arrangements.

RTAs also include binding commitments on paperless trade. The EU-Singapore RTA²⁶⁵ provisions call for integration of automated systems, including for pre-arrival processing,²⁶⁶ release of goods,²⁶⁷ single window systems,²⁶⁸ and transparency.²⁶⁹ Further, the DEPA presents a new model for RTAs and proposes new ICT approaches to tackle digital trade issues, including those relevant to trade facilitation. These include provisions relating to acceptance of electronic copies of documents,²⁷⁰ maintaining a single window system,²⁷¹ express shipments,²⁷² and electronic payments.²⁷³ In Africa, the AfCFTA, which has been signed by 54 African countries, is increasingly being looked to as a platform to accelerate implementation of digital approaches to trade across the African continent, and it is likely that many similar provisions will be incorporated into the Protocol on Digital Trade under discussion within the AfCFTA framework.

Paperless trading will improve the efficiency of cross border trade during a crisis situation, but it can also raise implementation challenges for many poor countries. In 2020, UN ESCAP conducted a readiness assessment that highlighted the challenges in adopting paperless trading mechanisms in four LDCs (namely Bangladesh, Cambodia, Nepal, and Timor-Leste). The assessment found that the main challenges for these LDCs were lack of domestic legal rules concerning electronic transactions, lack of electronic systems, poor coordination between border agencies, and insufficient human resources.²⁷⁴ Although most of these are issues that need to be addressed at a national level, RTAs could also be leveraged, particularly through certain measures such as S&DT provisions.

a. Pre-arrival Processing Through Electronic Means

Pre-arrival processing allows countries to maintain procedures to process import documentation prior to the arrival of goods at the border, with the objective of releasing these goods immediately upon arrival. Such procedures are vital during an emergency situation, as they allow for immediate release of essential goods and assist stakeholders in maintaining business continuity by making it easier to anticipate issues that might arise with respect to import documentation.

The Baseline Option below is drawn from the TFA and obligates States to adopt pre-arrival procedures to expedite the release of goods; it also sets out a non-binding obligation to adopt an electronic platform

²⁶⁵ See EU-Singapore FTA, *supra* note 153.

²⁶⁶ See EU-Singapore RTA, Article 6.7 (a), *supra* note 153.

²⁶⁷ See EU-Singapore RTA, Article 6.7, *supra* note 153.

²⁶⁸ See EU-Singapore RTA, Article 6.13, *supra* note 153.

²⁶⁹ See EU-Singapore RTA, Article 6.15, *supra* note 153.

²⁷⁰ See DEPA, Article 2.2, *supra* note 15.

²⁷¹ See DEPA, Article 2.2 (4), *supra* note 15.

²⁷² See DEPA, Article 2.6, *supra* note 15.

²⁷³ See DEPA, Article 2.7, *supra* note 15.

²⁷⁴ Soo Hyun Kim and Yann Duval, *In the World's Poorest Countries, the Move to Digitalize Trade Procedures is Needed Now More Than Ever* (2020), <https://trade4devnews.enhancedif.org/en/op-ed/worlds-poorest-countries-move-digitalize-trade-procedures-needed-now-more-ever>.

for delivering documents.²⁷⁵ A number of RTAs, including the AfCFTA²⁷⁶ and RCEP,²⁷⁷ have incorporated this language verbatim.

Baseline+ Option A below, drawn from the U.S-Republic of Korea Free Trade Agreement (KORUS), obligate parties to provide for both the submission and processing of customs information electronically before goods can be released on arrival.²⁷⁸

A Sample Model Provision (Baseline+ Option B) is also included that is particularly tailored to crisis situations, which is based on initiatives undertaken by countries during the pandemic to make pre-arrival processing procedures more efficient. For example, the Malaysian government adopted measures for pre-arrival processing of goods declarations and immediate release of essential goods upon arrival.²⁷⁹

Example Provisions on Pre-Arrival Processing

Baseline Option: Pre-Arrival Processing

“1. Each Member shall adopt or maintain procedures allowing for the submission of import documentation and other required information, including manifests, in order to begin processing prior to the arrival of goods with a view to expediting the release of goods upon arrival.

2. Each Member shall, as appropriate, provide for advance lodging of documents in electronic format for pre-arrival processing of such documents.”

Source: TFA, Article 7.1.

Baseline+ Option A: Obligation to Accept Electronic Copies for Pre-Arrival Processing

“Each Party shall ensure that its customs authority or other competent authority adopts or maintains procedures that: [...] provide for customs information to be submitted and processed electronically before goods arrive in order for them to be released on their arrival”

Source: KORUS, Article 7.2 (b).

Sample Model Provision (Baseline+ Option B): Pre-Arrival Processing in Emergency Situations

“In times of emergency, each Party shall ensure that they adopt measures that allow for pre-arrival processing of documentation related to all essential goods in electronic format in order to expedite the release of these goods upon arrival. These will include, but are not limited to, documentation relating

²⁷⁵ See TFA Article 7, *supra* note 236 .

²⁷⁶ See AfCFTA Annex 4, Article 7, *supra* note 9.

²⁷⁷ See RCEP Article 4.9, *supra* note 13.

²⁷⁸ FTA Between United States and the Republic of Korea, Article 7.2 (b) 5.13, August 4, 2005, <https://www.enterprisesg.gov.sg/-/media/esg/files/non-financial-assistance/for-companies/free-trade-agreements/korea-singapore-fta/legal-text/ksfta20legal20text1.pdf> [hereinafter KORUS].

²⁷⁹ *What Customs Can Do to Mitigate the Effects of COVID-19 Pandemic: Highlights of WCO Members' Practices*, WCO, (April 2020), http://www.wcoomd.org/-/media/wco/public/global/pdf/topics/facilitation/activities-and-programmes/natural-disaster/covid_19/covid_19-categorization-of-member-input.pdf?la=en [hereinafter WCO 2020].

to completion of customs formalities and a pre-arrival declaration of goods, including submission of a provisional declaration.”²⁸⁰

Source: Sample Draft Language

b. Electronic Copies

Importation and exportation procedures are usually accompanied by a plethora of documentation and tend to concern multiple authorities. Acceptance of electronic copies instead of original documents can significantly reduce the time and cost related to these formalities. Digital solutions can be extended to procedures such as pre-arrival processing, inspections, testing procedures, health checks, and identification requirements, among others. During emergencies like COVID-19, acceptance of electronic copies may be preferred.

The Baseline Option below is taken from the TFA and encourages parties to accept electronic copies of documents. However, due to the non-binding nature of these obligations, the level of implementation among Members seems to be relatively low.²⁸¹

Several Baseline+ Options are included below as well, each of which goes beyond the Baseline in different ways. Baseline+ Option A below, drawn from the Australia-Singapore Digital Economy Agreement (SADEA), imposes binding obligations on States to accept electronic versions of trade administration documents. Baseline+ Option B, found in the ASEAN Trade in Goods Agreement (ATIGA), establishes a commitment for adoption of international standards on ICT, which is not found in other RTAs. Baseline+ Option B below also includes a provision from the Framework Agreement, which provides for the adoption of international standards based on the principle of interoperability. Baseline+ Option C (taken from the Framework Agreement) provides for mutual recognition of electronic documents and data based on a “substantially equivalent level of reliability” standard; this standard is to be set out by the institutions established under the Framework Agreement. Trade facilitation committees established under RTAs could possibly develop such standards, which could help increase States’ confidence in accepting electronic documents submitted by other States.

Finally, a Discretionary Option is also included below, which is taken from the DEPA. Although the Discretionary Option obligates parties to accept electronic copies of documents, it sets out two exceptions whereby Parties can refuse to accept electronic copies subject to domestic or international legal requirements or whereby accepting electronic copies would make trade administration less efficient.²⁸² This is noted as a Discretionary Option, since it provides States with greater policy space but might have an impact on vulnerable stakeholders and trading partners.

²⁸⁰ Pamela Ugas & Sijia Sun, *How Countries Can Leverage Trade Facilitation to Defeat the COVID-19 Pandemic*, UNCTAD, 3 (2020) [hereinafter Ugas & Sun], https://unctad.org/system/files/official-document/dtlinf2020d2_en.pdf.

²⁸¹ Some of the major RTAs like the CPTPP and USMCA have adopted a “best endeavor” approach to Paperless Trading.

²⁸² See DEPA, Article 2.2 (3), *supra* note 15.

Example Provisions on Acceptance of Electronic Copies

Baseline Option: Encouraging Acceptance of Electronic Copies

“1. Each Member shall, where appropriate, endeavour to accept paper or electronic copies of supporting documents required for import, export, or transit formalities. [...]

2. A Member shall not require an original or copy of export declarations submitted to the customs authorities of the exporting Member as a requirement for importation.”

Source: TFA Article 10.2 (2.1 and 2.3)

Baseline+ Option A: Mandatory Acceptance of Electronic Copies

“Each Party shall make publicly available, which may include through a process prescribed by that Party, electronic versions of all of its trade administration documents in English.”

Source: DEA Article 12

Baseline+ Option B: Binding Commitment/Encouraging Application of ICT in Customs Operations Based on International Standards

“Member States, where applicable, shall apply information technology in customs operations based on internationally accepted standards for expeditious customs clearance and release of goods.”

Source: ATIGA Article 58

“The Parties shall endeavour to apply international standards and guidelines in order to ensure interoperability in paperless trade and to develop safe, secure and reliable means of communication for the exchange of data.”

Source: Framework Agreement, Article 9

Baseline+ Option C: Binding Commitment of Mutual Recognition of Trade-related Data and Documents in Electronic Form

“1. The Parties shall provide for mutual recognition of trade-related data and documents in electronic form originating from other Parties on the basis of a substantially equivalent level of reliability

2. The substantially equivalent level of reliability would be mutually agreed upon among the Parties through the institutional arrangement established under the present Framework Agreement.”

Source: Framework Agreement, Article 8

Discretionary Option: Obligation to Accept Electronic Copies Subject to Domestic and International Law

“1. Each Party shall accept electronic versions of trade administration documents as the legal equivalent of paper documents, except where:

- (a) there is a domestic or international legal requirement to the contrary; or
- (b) doing so would reduce the effectiveness of trade administration.”

Source: DEPA, Article 2.2 (3)

c. Electronic Payments

The TFA also sets out provisions on electronic payment of duties, taxes, fees, and charges collected by customs, establishing a Baseline Option as noted below that could be incorporated into RTAs. However, the language in the TFA is not as strong as it could be, since it calls for each Member to adopt or maintain procedures related to electronic payments “to the extent practicable”.

Measures on electronic customs payments are not commonly found in RTAs. The CPTPP does have an extensive provision on electronic payments under the “Financial Services” Chapter; however, the scope of the provision is limited to payment card transactions. The Sample Model Provision (Baseline+ Option) below would obligate States to accept electronic payment for customs requirements during emergency situations. If a party does not have the capacity to adopt electronic payments, then it shall defer such payments and allow for immediate release of essential goods. Chapter VI on Digital Trade will cover electronic payments in more detail.

Example Provisions on Electronic Customs Payments

Baseline Option: Electronic Payment

“Each Member shall, to the extent practicable, adopt or maintain procedures allowing the option of electronic payment for duties, taxes, fees, and charges collected by customs incurred upon importation and exportation.”

Source: TFA, Article 7.2

Sample Model Provision (Baseline+ Option): Binding Obligation During Emergency Situation

“In times of emergency, the Parties shall allow for all customs duties, taxes and charges to be paid through an electronic payment system. If a Party does not have the capacity to facilitate electronic payments, and if payment collection is causing delay in the release of essential goods, Parties shall defer such payment and immediately release the goods.”

Source: Sample Draft Language

2. Expediting Release and Clearance of Goods

The COVID-19 pandemic was a wake-up call to the international trading system to further strengthen global value chains and ensure that essential goods can flow in the most expedited and cost-efficient manner possible. RTAs can play a role by obligating parties to adopt measures that would eliminate bottlenecks that arise in the movement of essential goods across borders. This sub-section highlights

provisions focused on expediting the flow of essential goods, many of which track with the WTO TFA and a number of RTAs; these include provisions prioritizing essential goods by treating them as express shipments, provisions for expedited release of essential goods, and the establishment of fast lanes.

a. Expedited Shipments

Express shipments represent an integral element of every State’s logistical and supply chain infrastructure²⁸³ and tend to be particularly significant in times of crisis. The TFA provision relating to expedited shipments (which is the Baseline Option below) includes a number of measures to minimize documentation for these shipments (and expedite release). The TFA does not define “expedited shipments” but implicitly applies to at least those goods entered through air cargo.²⁸⁴ That said, WTO Members can apply these measures to goods travelling by modes other than air,²⁸⁵ including road and railways.

The WTO TFA obligates States to undertake four obligations related to expedited shipments: (a) minimize documentation, and to the extent possible, provide for release based on single submission; (b) provide for the rapid release of shipments in case all required information has been submitted; (c) apply (a) and (b) regardless of value of the shipment; and (d) allow for a *de minimis* threshold for goods to be exempted from custom duties and taxes.²⁸⁶ This is reflected in the Baseline Option below.

Most RTAs have incorporated commitments on expedited shipments (also referred to as “express shipments” in many RTAs). RTAs have primarily adopted provisions consistent with the TFA (e.g., USMCA, CETA, RCEP, EU-Singapore RTA, and DEPA). The Baseline+ Option below has been adapted from the DEPA and requires States to implement the same procedures as set out in the TFA, including minimizing documentation, providing for single submission of information, expediting release, and other related measures discussed above. The DEPA provision has been chosen as the Baseline+ Option, as it recognizes the importance of facilitating electronic commerce through predictable, consistent, and transparent customs procedures. Electronic commerce grew multi-fold during the pandemic and acknowledging the role of trade facilitation provisions in relation to electronic commerce in RTAs would help focus State priorities in this area. (Note: Aspects of electronic commerce that go beyond trade facilitation are discussed in detail in Chapter VI on Digital Trade and E-Commerce). As is true throughout the Handbook, the Baseline+ Option below could complement the Baseline Option.

Example Provisions on Expedited Shipments

Baseline Option: Expedited Shipments

“Each Member shall adopt or maintain procedures allowing for the expedited release of at least those goods entered through air cargo facilities to persons who apply for such treatment, while maintaining customs control.”

²⁸³ WTO Agreement on Trade Facilitation: Analysis of Technical Measures, WCO, 49 (September 2016) [hereinafter WCO 2016], <http://www.wcoomd.org/-/media/wco/public/global/pdf/topics/wto-atf/analysis-of-section-i/analysis-of-technical-measures-en.pdf?db=web>.

²⁸⁴ See TFA Article 7.8, *supra* note 236.

²⁸⁵ See WCO 2016, *supra* note 283.

²⁸⁶ See TFA Article 7.8, *supra* note 236.

[and shall]

- (a) minimize the documentation required for the release of expedited shipments [...], and, to the extent possible, provide for release based on a single submission of information on certain shipments;
- (b) provide for expedited shipments to be released under normal circumstances as rapidly as possible after arrival, provided the information required for release has been submitted;
- (c) endeavour to apply the treatment in subparagraphs (a) and (b) to shipments of any weight or value recognizing that a Member is permitted to require additional entry procedures, including declarations and supporting documentation and payment of duties and taxes, and to limit such treatment based on the type of good, provided the treatment is not limited to low value goods such as documents; and
- (d) provide, to the extent possible, for a *de minimis* shipment value or dutiable amount for which customs duties and taxes will not be collected, aside from certain prescribed goods. [...]"

Source: TFA, Articles 7. 8 (1.1 and 1.2)

Baseline+ Option: Facilitating Electronic Commerce Transactions

“1. The Parties recognize that electronic commerce plays an important role in increasing trade. To this end, to facilitate trade of express shipments in electronic commerce, the Parties shall ensure that their respective customs procedures are applied in a manner that is predictable, consistent and transparent.”

Source: Adapted from DEPA, Chapter 2, (Customs Administration and Trade Facilitation), Article 2.6: Express Shipment

States have been adopting measures to expedite shipments in the context of the pandemic; for example, Republic of Korea’s Ministry of Food and Drug Safety exempted protective face masks from import requirements if meant for relief, donation, and distribution to employees.²⁸⁷ In April 2020, New Zealand and Singapore signed a joint statement, which was subsequently supported by other countries, to “eliminate all customs duties and all other duties and charges of any kind...with respect to all products in Annex I.”²⁸⁸ Annex I contained PPE, medical goods, and other essential goods (See also, Chapter II on Treatment of Essential Goods and Services).

b. Expedited Release of Essential and Perishable Goods

Expedited release of goods, especially essential and perishable goods, is particularly important and can have a significant impact during emergencies. The WTO TFA requires that Members provide priority to perishable goods and adopt mechanisms that would allow for the release of these goods in the shortest time possible,²⁸⁹ and this language is included as Baseline Option A below. This option also emphasizes the need to provide priority to perishable goods during examination and maintain communication with the importer in case of delays. It also obligates Members to allow the importer to

²⁸⁷ See WCO 2016, *supra* note 283.

²⁸⁸ See New Zealand 2020, *supra* note 165.

²⁸⁹ See TFA Article 7.9, *supra* note 236.

establish proper storage facilities. Recent RTAs, such as the USMCA, include provisions for simplified and efficient release of goods, which can provide a baseline for RTA provisions (Baseline Option B below).

The Baseline+ Option below, which is adapted from the TFA and DEPA, goes beyond these requirements and is further tailored to apply to essential goods, such as medicines and medical equipment, with the goals of expediting shipments during emergency situations including other essential goods.

Example Provisions on Release of Essential and Perishable Goods

Baseline Option A: Expedited Release of Perishable Goods

9.1 With a view to preventing avoidable loss or deterioration of perishable goods, and all regulatory requirements have been met, each Member shall:

1. (a) under normal circumstances within the shortest possible time; and
2. (b) in exceptional circumstances where it would be appropriate to do so, outside the business hours of customs and other relevant authorities.

9.2 Each Member shall give appropriate priority to perishable goods when scheduling any examinations that may be required.

9.3 Each Member shall either arrange or allow an importer to arrange for the proper storage of perishable goods pending their release. The Member may require that any storage facilities arranged by the importer have been approved or designated by its relevant authorities. The movement of the goods to those storage facilities, including authorizations for the operator moving the goods, may be subject to the approval, where required, of the relevant authorities. The Member shall, where practicable and consistent with domestic legislation, upon the request of the importer, provide for any procedures necessary for release to take place at those storage facilities.

9.4 In cases of significant delay in the release of perishable goods, and upon written request, the importing Member shall, to the extent practicable, provide a communication on the reasons for the delay.

Source: WTO TFA, Article 7.9.

Baseline Option B: Simplified and Efficient Release of Goods

“1. Each Party shall adopt or maintain simplified customs procedures for the efficient release of goods in order to facilitate trade between the Parties.

2. Pursuant to paragraph 1, each Party shall adopt or maintain procedures that:

(a) provide for the immediate release of goods upon receipt of the customs declaration and fulfilment of all applicable requirements and procedures;

- (b) provide for the electronic submission and processing of documentation and data, including manifests, in advance of the arrival of the goods in order to expedite the release of goods from customs control upon arrival;
- (c) allow goods to be released at the point of arrival without requiring temporary transfer to warehouses or other facilities; and
- (d) require that the importer be informed if a Party does not promptly release goods, including, to the extent permitted by its law, the reasons why the goods are not released and which border agency, if not the customs administration, has withheld release of the goods.”

Source: USMCA, Article 7.7 (2)

Baseline+ Option (with Sample Model Language Added): Expedited Release of Perishable and Essential Goods

“1. With a view to preventing avoidable loss or deterioration of perishable goods or *causing delay in trade of essential goods in emergency situations*, and provided that all regulatory requirements have been met, each *Party* shall provide for the release of perishable and essential goods:

- (a) under normal circumstances *within [X] hours* of submission of all necessary customs documentation; and
- (b) in exceptional circumstances or *time of emergencies*, where it would be appropriate to do so, outside the business hours of customs and other relevant authorities.
- (c) Each *Party* shall give appropriate priority to perishable goods and *essential goods* when scheduling any examinations that may be required.
- (d) In cases of significant delay in the release of perishable goods and *essential goods*, and upon written request, the importing *Party* shall, to the extent practicable, provide a communication on the reasons for the delay.”

Source: Adapted from TFA, Article 7.9 (1): Perishable Goods and DEPA Article 2.6: Express Shipments, with additional sample model language added in italics.

There are a number of ways in which customs could provide for the rapid release of a shipment, such as waiving a requirement for a declaration of goods in the event the declarant subsequently agrees to complete all formalities. Brazil, for example, has allowed for early release of goods before conducting inspection and customs clearance.²⁹⁰

c. Fast Track Lanes

Establishing fast track lanes could also help expedite cross-border trade in essential goods, as UNCTAD²⁹¹ called for in the context of essential goods during the pandemic. The Baseline Option below, taken from Article 11.5 of the TFA, obligates States to establish infrastructure (such as lanes and berths) for traffic in transit. These can include “green lanes” that set out mutual testing protocols

²⁹⁰ See Ugas & Sun, *supra* note 280.

²⁹¹ *Id.*

and standards for travellers to facilitate short-term essential business and official travel.²⁹² For example, Singapore has established Reciprocal Green Lanes (RGLs) with a number of countries; however, RGLs were suspended with Germany, Malaysia, and Republic of Korea due to an increase in COVID-19 cases.²⁹³ Thailand adopted ad-hoc green lanes for the importation of medical supplies and materials related to COVID-19.²⁹⁴ Republic of Korea's Customs Services operates a 24/7 clearance system to provide clearance for medical equipment, sanitary products, and raw materials for domestic production.²⁹⁵ Green Lanes can also be found within the EU and in some African Trade Corridors.²⁹⁶

The Sample Model Provision (Baseline+ Option) below provides for enhanced cooperation and the establishment of fast-track lanes between States for use in time of emergency that would operate without pause.

Example Provisions on Fast Track Lanes

Baseline Option: Freedom of Transit through Fast Track Lanes

“Members are encouraged to make available, where practicable, physically separate infrastructure (such as lanes, berths and similar) for traffic in transit.”

Source: TFA, Article 11.5

Sample Model Provision (Baseline+ Option): Establishing Fast Track Lanes for Use in Times of Emergency

“In times of emergency, Parties shall coordinate to set up a 24/7 fast track customs clearance system to facilitate transit of essential goods between the Parties.”

Source: Sample Draft Language

3. Other Measures Related to Expedited Release and Clearance of Essential Goods

Simplification of additional customs procedures and application of flexible customs rules during emergency situations could also have a significant impact on the cross-border movement of goods.

²⁹² *Singapore to Establish Green Lanes for Travel*, OUTLOOK TRAVELERS, (June 7, 2020), <https://www.outlookindia.com/outlooktraveller/travelnews/story/70316/ingapore-to-establish-green-lanes-for-essential-and-official-travel>

²⁹³ *Suspension of Reciprocal Green Lane Arrangement with Germany, Malaysia and the Republic of Korea*, MINISTRY OF FOREIGN AFFAIRS SINGAPORE, (January 30, 2021), <https://www.mfa.gov.sg/Newsroom/Press-Statements-Transcripts-and-Photos/2021/01/20210130-RGL-Suspension> .

²⁹⁴ See WCO 2020, *supra* note 279.

²⁹⁵ *Id.*

²⁹⁶ See Duval, *supra* note 89. Trade corridors can be critical for moving food and other essential goods and can, therefore, be particularly important during times of crisis. See Katrin Kuhlmann, *Africa's Development Corridors: Pathways to Food Security, Regional Economic Diversification, and Sustainable Growth*, in Joe Guinan, Katrin A. Kuhlmann, Timothy D. Searchinger, Elisio Contini, and Geraldo B. Martha, Jr., *Filling in the Gaps: Critical Linkages in Promoting African Food Security – An Atlantic Basin Perspective*, THE GERMAN MARSHALL FUND OF THE UNITED STATES, (2012), <https://www.gmfus.org/news/filling-gaps%E2%80%94critical-linkages-promoting-african-food-security-atlantic-basin> .

RTAs could incorporate provisions that streamline or eliminate more time-consuming and challenging customs procedures in an emergency situation. This could include adopting a flexible risk management process tailored to low-risk essential goods, adopting measures that reduce bureaucratic steps involved (e.g., by designating authorized economic operators (AEOs) or eliminating the need for customs brokers); and, over time, establishing a single window system for all import-related procedures.

a. Risk Management

Countries maintain risk management strategies for a number of reasons related to the importation of goods into their territories, and these measures have been especially important during COVID-19. Although they are highly significant; risk management systems can also pose a challenge to trade facilitation if not administered well. Therefore, it is important that these systems are applied based on actual assessment of risk and tailored to the type of imported goods. For example, the TFA distinguishes between high risk and low risk consignments and obligates parties to expedite the release of low-risk consignments; this is highlighted below as the Baseline Option.

Further, RTAs like the KORUS and CPTPP encourage adoption of electronic or automated risk management systems. This has been incorporated below as a Baseline+ Option, with language from the KORUS Agreement used as an example.

Example Provisions on Risk Management

Baseline Option: Risk Management

- “1. Each Member shall adopt or maintain a risk management system for customs control.
2. Each Member shall design and apply risk management in a manner as to avoid arbitrary or unjustifiable discrimination, or a disguised restriction on international trade.
3. Each Member shall concentrate customs control on high-risk consignments and expedite the release of low-risk consignments.
4. Each Member shall base risk management on an assessment of risk through appropriate selectivity criteria. Such selectivity criteria may include, *inter alia*, the Harmonized System code, nature and description of the goods, country of origin, country from which the goods were shipped, value of the goods, compliance record of traders, and type of means of transport.”

Source: TFA, Article 7.4 (4.4)

Baseline+ Option: Adoption of Automated Risk Management System

“Each Party shall adopt or maintain electronic or automated risk management systems for assessment and targeting that enable its customs authority to focus its inspection activities on high-risk goods and that simplify the clearance and movement of low-risk goods.”

Source: KORUS, Article 7.4

b. Designating Authorized Economic Operators

An Authorized Economic Operator (AEO) is defined by the WCO Framework of Standards to Secure and Facilitate Trade (SAFE Framework) as “a party involved in the international movement of goods, in whatever function, that has been approved by, or on behalf of, a national customs administration as complying with the WCO or equivalent supply chain security standards.”²⁹⁷ Designating importers as AEOs can assist in expediting cross border movement of essential goods while also mitigating the risks associated with trading with persons who do not meet these standards.²⁹⁸ The benefits of having AEO schemes are increased with mutual recognition.

The TFA provides guidance to States on the criteria that may be applied in order for a party to qualify as an AEO; once qualified, an AEO is subject to receive relaxed trade facilitation measures set out in the agreement.²⁹⁹ The TFA’s measures in this regard are set out below in the Baseline Option and could be incorporated into RTAs that do not have a provision on AEOs.

Baseline+ Option A, taken from the USMCA, includes binding obligations on States to establish AEOs in accordance with the SAFE Framework.³⁰⁰ The SAFE Framework sets out various security standards for AEOs which, if implemented, can help with facilitation of goods across borders. The USMCA also sets out a list of activities on which States shall “endeavour” to cooperate with respect to AEOs; these are also set out in the Baseline+ Option A.³⁰¹

Further, and as highlighted earlier, SMEs have been significantly affected by the pandemic, and inefficient border procedures can exacerbate their losses. SMEs could benefit from AEO status, which implies credibility as a more reliable business partner and also involves more manageable procedures at the borders.³⁰² However, SMEs may face challenges in maintaining AEO status, including through costs for maintaining security requirements under the SAFE Framework. States need to take these challenges into consideration before conferring AEO status onto SMEs. The Sample Model Provision (Baseline+ Option B) below encourages States to implement AEO programs for SMEs, with the qualifier that an AEO program will be administered in a way that is not burdensome for SMEs. For example, during the COVID-19 pandemic, India established a Liberalized SME AEO Package, under the Central Board of Indirect Taxes and Customs and encouraged all eligible SMEs to gain faster custom clearance and other benefits.³⁰³

²⁹⁷ *Authorized Economic Operation: Definition*, TRADE FACILITATION IMPLEMENTATION GUIDE, UNITED NATIONS ECONOMIC COMMISSION FOR EUROPE, <http://tfig.unece.org/contents/authorized-economic-operators.htm>.

²⁹⁸ See Ugas & Sun, *supra* note 280.

²⁹⁹ See TFA Article 7.7 (7.1, 7.2 and 7.3), *supra* note 236.

³⁰⁰ See USMCA, Article 7.14 (1), *supra* note 7.

³⁰¹ See USMCA, Article 7.14 (1), *supra* note 7.

³⁰² *The Authorized Economic Operator and the Small and Medium Enterprise: FAQ*, WCO, 5 (May 2010), www.wcoomd.org/en/topics/facilitation/instrument-and-tools/tools/~/_/media/93162547322F462A97F8767D0987A901.ashx.

³⁰³ *Liberalized Economic Operator Packages for MSMEs Rolled Out*, THE HINDU, (January 7, 2021), <https://www.thehindubusinessline.com/economy/policy/liberalised-authorized-economic-operator-package-for-msmes-rolled-out/article33521233.ece>.

Example Provisions on Authorized Economic Operators

Baseline Option: Authorized Economic Operators

“1. Each Member shall provide additional trade facilitation measures related to import, export, or transit formalities and procedures to operators who meet specified criteria, hereinafter called authorized operators. Alternatively, a Member may offer such trade facilitation measures through customs procedures generally available to all operators and is not required to establish a separate scheme.

2. The specified criteria to qualify as an authorized operator shall be related to compliance, or the risk of non-compliance, with requirements specified in a Member's laws, regulations, or procedures. Such criteria, which shall be published, may include: (i) an appropriate record of compliance with customs and other related laws and regulations;(ii) a system of managing records to allow for necessary internal controls (iii) financial solvency, including, where appropriate, provision of a sufficient security or guarantee; and (iv) supply chain security.

3. The trade facilitation measures shall include at least three of the following measures:_(a) low documentary and data requirements, as appropriate; (b) low rate of physical inspections and examinations, as appropriate; (c) rapid release time, as appropriate; (d) deferred payment of duties, taxes, fees, and charges; (e) use of comprehensive guarantees or reduced guarantees; (f) a single customs declaration for all imports or exports in a given period; and (g) clearance of goods at the premises of the authorized operator or another place authorized by customs.

4. Members are encouraged to develop authorized operator schemes on the basis of international standards, where such standards exist, except when such standards would be an inappropriate or ineffective means for the fulfilment of the legitimate objectives pursued.

5. In order to enhance the trade facilitation measures provided to operators, Members shall afford to other Members the possibility of negotiating mutual recognition of authorized operator schemes.”

Source: TFA, Article 7.7 (7.1, 7.2, 7.3, 7.4, and 7.5)

Baseline+ Option A: Applying the SAFE Framework to AEOs

“1. Each Party shall maintain a trade facilitation partnership program for operators who meet specified security criteria, hereinafter, referred to as AEO programs, in accordance with the Framework of Standards to Secure and Facilitate Global Trade of the World Customs Organization.

2. The Parties shall endeavour to cooperate by: (a) exchanging experiences on the operation of and improvements to their respective AEO programs, seeking to adopt, if appropriate, best practices; (b) exchanging information with each other on the operators authorized by each program, in accordance with each Party’s law and established processes; and (c) collaborating in the identification and implementation of trade facilitation benefits for operators authorized by the other Parties.”

Source: USMCA, Article 7.14

Sample Model Provision (Baseline+ Option B): AEO Schemes for SMEs

“Parties are encouraged to adopt AEO schemes for SMEs, provided that such schemes take into consideration the size and financial capabilities of SMEs.”

Source: Draft Sample Language

c. Self-Filing Customs Documents

The USMCA introduced a new provision, which allowed for importers to self-file customs documentation, i.e., without using a licensed customs broker, through an electronic customs platform.³⁰⁴ The agreement also introduced a prohibition limiting the number of platforms through which a broker can operate.³⁰⁵ The USMCA provision has been noted as an Example Option below.

In response to the pandemic, a few countries have also adopted flexibilities in relation to requirements for having customs brokers sign off on formalities, which could reduce the time for customs procedures. For example, during the COVID-19 pandemic, Japan eliminated the requirement to have custom brokers stamp documents if it was difficult to do so.³⁰⁶

Example Provision on Self-Filing Customs Declarations

Example Option: Self-Filing Customs Declarations

“1. Each Party shall allow an importer and any other person it deems appropriate, in accordance with its laws and regulations, to self-file a customs declaration and other import or transit documentation without the services of a customs broker. [...] Each Party shall ensure that access to the electronic systems is available for self-filers on a non-discriminatory basis relative to other categories of users [...]”

Source: USMCA, Article 7.20

d. Single Window Systems

A single window system can be described as a “system that allows traders to lodge information with a single body to fulfil all import- or export-related regulatory requirements”.³⁰⁷ Single window systems also have an electronic aspect, whereby all import-export documentation can be submitted electronically through a single point of entry into the system.³⁰⁸ A single window system can have a positive impact during emergency situations, as it reduces human contact and allows all formalities to be carried out through one portal, which is usually managed by a single agency in collaboration with other institutions. During the pandemic, countries have taken related initiatives; for example, India

³⁰⁴ *Customs and Trade Facilitation*, US CUSTOMS AND BORDER PROTECTION, (June 2020) www.cbp.gov/sites/default/files/assets/documents/2020-Jun/%20333_Customs%20Cooperation_USMCA%20Informational%20Fact%20Sheet.pdf.

³⁰⁵ *Id.*

³⁰⁶ See WCO 2020, *supra* note 279.

³⁰⁷ *The Single Window Concept: Enhancing the Efficient Exchange of Information Between Trade and Government*, UNECE, https://unece.org/fileadmin/DAM/trade/ctied7/ece_trade_324e.pdf.

³⁰⁸ See Framework Agreement Article 3(h), *supra* note 264.

established a “single window COVID-19 help desk” to deal with documentation requirements relating to the pandemic,³⁰⁹ and Russian Federation also established a “COVID-19 Single Window.”³¹⁰

The WTO TFA provides a Baseline Option and includes non-binding language that suggests that WTO Members “shall endeavour to establish or maintain a single window” for traders to submit documentation for “importation, exportation and transit of goods through a single-entry point”. This provision takes into account some of the institutional and resource challenges associated with establishing a single window system, as encountered by economies of varying sizes and levels of development around the globe.

Single window systems have also been incorporated into many RTAs, such as the DEPA and USMCA, among others. In this context, DEPA provides a useful Baseline+ Option A, which sets out a binding obligation to implement a single window system to facilitate exchange of documents,³¹¹ including sanitary and phytosanitary certificates, import and export data, and other documents.³¹² As the DEPA example also highlights, single window systems can be combined with electronic document submission, which could have an exponential impact on facilitating trade during a time of crisis. The Framework Agreement even incorporates the electronic feature in the definition of “single window”.³¹³

Other models go beyond these options. The ASEAN Single Window Agreement and its Protocol on Legal Framework to Implement the ASEAN Single Window is probably the most comprehensive commitment on the implementation of a single window system and is noted below as Baseline+ Option B. The Agreement provides for the establishment of an ASEAN Single Window, within which National Single Windows shall operate. Mega RTAs like the AfCFTA could consider such a system for more efficient management of the single window system across the continent. Provisions from the ASEAN Single Window Agreement and Protocol have been adapted in Baseline+ Option B below, which could be incorporated as a complement to the other Baseline or Baseline+ Options. A third Baseline+ Option C below further tailors these provisions to address crisis situations.

Example Provisions for a Single Window System

Baseline Option: Non-Binding Provision to Establish a Single Window System

“Members shall endeavour to establish or maintain a single window, enabling traders to submit documentation and/or data requirements for importation, exportation, or transit of goods through a single-entry point to the participating authorities or agencies. After the examination by the participating authorities or agencies of the documentation and/or data, the results shall be notified to the applicants through the single window in a timely manner.”

³⁰⁹ Erik Nora, Satya Prasad Sahu & Ivan Peterson, *COVID-19 Highlights Needs for Digitizing and Automating Trade in South Asia*, WORLD BANK BLOGS, (August 14, 2020), <https://blogs.worldbank.org/endpovertyinsouthasia/covid-19-highlights-need-digitizing-and-automating-trade-south-asia>.

³¹⁰ Yelena Vassilevskaya, *Trade Facilitation in Times of Pandemic: Practices from North and Central Asia*, ARTNeT WORKING PAPER NO. 197, 2020, <https://www.unescap.org/sites/default/files/AWP%20197%20Yelena%20Vassilevskaya.pdf>.

³¹¹ See DEPA, Article 2.2 (4), *supra* note 15.

³¹² See DEPA, Article 2.2 (4), *supra* note 15.

³¹³ UN Paperless Trade Agreement, Article 3(h) defines “single window” as a facility that allows parties involved in a trade transaction to electronically lodge data and documents with a single-entry point to fulfil all import, export and transit-related regulatory requirements.

Source: TFA, Article 10.4

Baseline+ Option A: Binding Provision to Establish a Single Window System

“1. Each Party shall accept electronic versions of trade administration documents as the legal equivalent of paper documents [...]

2. Each Party shall establish or maintain a single window that enables persons to submit documentation or data requirements for importation, exportation, or transit of goods through a single-entry point to the participating authorities or agencies.”

Source: DEPA, Articles 2.2 (3), (4) and (5)

Baseline+ Option B: Establishing a Legal Framework for National and Regional Single Window Systems

“1. The Parties shall establish a regional and national single window system which enables: (a) a single submission of data and information; (b) a single and synchronous processing of data and information; and (c) a single decision-making for customs release and clearance.

2. Parties shall enter into an agreement to provide a legal framework for operation, interactions, electronic processing transaction between the NSWs within the regional environment, taking into account the relevant international agreement and conventions concerning trade facilitation and modernization of customs techniques and practices.”

Source: ASEAN Single Window Agreement, Article 3 and its Protocol on Legal Framework to Implement the ASEAN Single Window, Article 3

Sample Model Provision (Baseline+ Option C): Establishing a 24/7 Single Window Helpdesk During Emergency

“In times of emergency, Parties shall, if they have not done so already, establish a National Single Window system, which shall have a 24/7 single window helpdesk to facilitate resolution of issues face by importers and exporters.”

Source: Sample Draft Language

4. Cooperation Between Border Agencies and Trade Facilitation Committees

The COVID-19 pandemic has underscored the importance of taking coordinated action while adopting measures to curb the spread of the pandemic, mitigate losses, and facilitate access to medicines, PPE, and vaccines. Such coordinated actions warrant cooperation at all levels, including government agencies, private sector stakeholders, business and civil society organizations, and individuals. As such, international and regional cooperation has been a cornerstone of trade facilitation provisions in both the TFA and RTAs.

Provisions relating to border agency cooperation and coordination between NTFCs have been key to maintaining trade during the pandemic. Countries often have a multitude of agencies at the border that need to coordinate with each other in order for trade to flow across borders. These agencies include customs, immigration, financial intelligence units, border police, coast guards, quarantine and national health agencies, sanitary and phytosanitary agencies, and consumer protection agencies, among others.³¹⁴ In addition, there is also a need to coordinate between various stakeholders including importers, exports, private sector stakeholders, individual traders, ports, airports, and brokers.³¹⁵ Hence, border agency cooperation is essential during times of crisis to maintain the flow of goods.

The Baseline Option below, taken from the TFA, sets out the obligation to ensure cooperation between border agencies with respect to activities related to import, export, and transit.³¹⁶ It also emphasizes the need to cooperate and coordinate on border procedures and sets out a non-exhaustive list of these procedures for States to consider. TFA provisions on border agency cooperation are particularly relevant for SPS agencies and are considered to be “SPS plus”, as they expand upon the provisions set out under the SPS Agreement.³¹⁷ Note that related provisions in this context are covered in Chapter IV on SPS and TBT.

Example Provision on Border Agency Cooperation

Baseline Option: Border Agency Cooperation

“1. Each Member shall ensure that its authorities and agencies responsible for border controls and procedures dealing with the importation, exportation, and transit of goods cooperate with one another and coordinate their activities in order to facilitate trade.

2. Each Member shall, to the extent possible and practicable, cooperate on mutually agreed terms with other Members with whom it shares a common border with a view to coordinating procedures at border crossings to facilitate cross-border trade. Such cooperation and coordination may include: (a) alignment of working days and hours; (b) alignment of procedures and formalities; (c) development and sharing of common facilities; (d) joint controls; (e) establishment of one stop border post control.”

Source: TFA, Article 8

In addition to establishing the WTO Trade Facilitation Committee, the TFA also obligates WTO Members to establish NTFCs to carry out the implementation of TFA provisions. NTFCs can be used as a platform to bring both State and non-state stakeholders together and lead reforms based on

³¹⁴ *International Border Agency Cooperation: A Practical Reference Guide*, United States Agency for International Development (USAID) [hereinafter USAID 2020], 7 (October 2020), https://tfafacility.org/sites/default/files/international_border_agency_cooperation_guide_final_october_2020.pdf.
Customs – FIU Cooperation Handbook, WCO & EGMONT GROUP (2020), http://www.wcoomd.org/-/media/wco/public/global/pdf/topics/enforcement-and-compliance/report/wco_fiu_handbook_sanitised-public-version_wco_en.pdf?la=en.

³¹⁵ See USAID 2020, *supra* note 314.

³¹⁶ See TFA Article 8, *supra* note 236.

³¹⁷ See USAID 2020, *supra* note 314.

stakeholder challenges. This broader role for NTFCs beyond the WTO TFA is aligned with UN recommendations and guidelines and applies throughout this chapter.³¹⁸

During the pandemic, NTFCs have been at the heart of countries' responses, but NTFCs have faced a number of challenges during the pandemic, including lack of connectivity, absence of national databases, lack of involvement in COVID Task Forces, and political interference.³¹⁹ Further, according to a survey conducted by ESCAP in 32 countries in the Asia Pacific Region, only 15 per cent of NTFCs in the focus countries introduced guidelines in response to the COVID-19 crisis.³²⁰ These aspects make it difficult to take coordinated actions during a pandemic; however, some challenges could be addressed by incorporating NTFC-specific provisions in RTAs and further tailoring them to pandemic or other crisis situations.

The Baseline Option below is drawn from the TFA and provides for the establishment of NTFCs, while the Baseline+ options envision a broader role for NTFCs. RTAs could incorporate specific provisions to empower NTFCs to act autonomously during a crisis situation. Most of the challenges faced by NTFCs are at the implementation level; however, RTAs could address some of these challenges by adopting provisions relating to mutual cooperation and stakeholder participation. Sample provisions related to these issues can be found in Chapter VII of the Handbook (Transparency).

Further, RTAs like the USMCA also provide for the establishment of a trade facilitation committee at the regional level. Committee functions include implementing a single window system, facilitating exchange of information between States under low-risk trader programs (including AEO programs), acting as a platform to discuss industry trends and issues, and reviewing international initiatives, among other functions. All of these functions would be considered relevant during an emergency situation and, therefore, have been included in the Baseline+ Option below. Additional aspects related to trade facilitation, such as blockchain and use of cybercurrencies and e-currencies, could also be considered in future RTAs.

Example Provisions on Trade Facilitation Committees

Baseline Option: Establishment of a NTFC

“Each Member shall establish and/or maintain a national committee on trade facilitation or designate an existing mechanism to facilitate both domestic coordination and implementation of the provisions of this Agreement.”

Source: TFA Article 23.2

³¹⁸ See Duval, *supra* note 89.

³¹⁹ *The Role of the National Trade Facilitation Committees in Global Economic Recovery Following COVID-19*, (July 2020), UNCTAD, <https://unctad.org/news/role-national-trade-facilitation-committees-global-economic-recovery-following-covid-19>.

³²⁰ *Trade Facilitation in Times of Crisis and Pandemic: Practices and Lessons from Asia-Pacific Regions*, UN ESCAP (2021), https://www.unescap.org/sites/default/d8files/knowledge-products/Regional%20report-Trade%20facilitation%20in%20times%20of%20crisis%20and%20pandemic_0.pdf.

Baseline+ Option (with Sample Model Language Added): Establishment of a Trade Facilitation Committee under RTAs

“1. The Parties hereby establish a Committee on Trade Facilitation (Trade Facilitation Committee), composed of government representatives of each Party.

2. The Trade Facilitation Committee shall:

(a) facilitate the exchange of information among the Parties with respect to their respective experiences regarding the development and implementation of a single window including information regarding each Party’s participating border agencies and the automation of its forms, documents, and procedures;

(b) facilitate the exchange of information among the Parties regarding the formulation and implementation of, and experiences under, each Party’s low-risk trader programs, including their AEO programs;

(c) provide a forum for the sharing of views on individual cases involving questions of tariff classification, customs valuation, other customs treatments, or emerging industry trends and issues, with a view to reconciling inconsistencies, supporting a competitive business environment, or otherwise facilitating trade and investment among the Parties;

(d) facilitate the exchange of information among the Parties regarding the formulation and implementation of, and experiences with, each Party’s measures that promote voluntary compliance by traders;

(e) providing a forum for the Parties to consult and endeavour to resolve issues relating to this Chapter, including, as appropriate, in coordination or jointly with other committees or other subsidiary bodies established under this Agreement;

(f) review international initiatives on trade facilitation;

(g) identify initiatives for joint action by their respective customs administrations, in cases where joint action could facilitate trade among the Parties, and taking into account priorities and experiences of their customs administrations;

(h) discuss technical assistance and support for capacity building to enhance the impact of trade facilitation measures for traders, and in particular to identify priorities for this assistance and support among their customs administrations and outside North America; and

(i) engage in other activities as the Parties may decide.

3. The Trade Facilitation Committee shall meet within one year of the date of entry into force of this Agreement, and thereafter at such times as the Parties decide. *During times of emergency, the Trade Facilitation Committee shall meet immediately and expedite any or all of its function set out in paragraph 2.*”

Source: Adapted from USMCA, Article 7.24, with additional sample model language added in italics.

CHAPTER IV - SANITARY AND PHYTOSANITARY MEASURES AND TECHNICAL BARRIERS TO TRADE

A variety of domestic regulations relate to crisis responses, particularly behind-the-border measures classified as non-tariff measures (NTMs). Unlike tariffs, which include the customs duties and taxes imposed on merchandise imports (these are covered, to the extent relevant to this Handbook, in Chapter II on Essential Goods and Services),³²¹ NTMs are a much broader category and include any policy or administrative measures other than tariffs that affect international trade. The Multi-Agency Support Team (MAST group)³²² categorizes NTMs into two broad groups, depending upon whether they affect imports or exports (within those categories, there is further sub-categorization into technical and non-technical measures).³²³ This chapter focuses on SPS measures and TBT, which are examples of technical NTMs that are adopted by governments to further specific public policy objectives. Other NTMs are discussed throughout the Handbook. While NTM measures may not always be designed to regulate trade per se, they may wind up restricting international trade and posing non-tariff barriers in both their design and application.

Overall, use of NTMs is on the rise, and TBT and SPS measures are among the most common of these measures. UNCTAD reports that “TBT measures are the most frequent form of NTMs, affecting around 40 per cent of product lines and about 65 per cent of world imports”.³²⁴ The same report finds that SPS measures come in third place amongst the most frequently-used NTMs and cover nearly 20 per cent of world imports, with a focus on agri-food products.³²⁵ Given the sheer volume of imports affected by SPS and TBT measures, and due to the resulting trade costs and burden on traders, their significance, especially during times of emergency when supply chains are stressed, cannot be overstated.

The SPS Agreement³²⁶ and the TBT Agreement³²⁷ are the principal multilateral instruments governing the development, adoption, and implementation of SPS and TBT measures. SPS measures are defined as any measure applied to protect animal or plant life or health from risks associated with, inter alia, pests, diseases, additives, contaminants, and toxins.³²⁸ With SPS, the *purpose* of the measure is particularly relevant when determining the applicability of the SPS Agreement.³²⁹ WTO Members

³²¹ *Tariffs*, WTO, https://www.wto.org/english/tratop_e/tariffs_e/tariffs_e.htm (last visited April 4, 2021).

³²² The Multi-Agency Support Team (MAST) group consists of the Food and Agriculture Organization of the United Nations, International Trade Centre, Organization for Economic Cooperation and Development, United Nations Conference on Trade and Development, United Nations Industrial Development Organization, World Bank, and World Trade Organization.

³²³ See generally *International Classification of Non-Tariff Measures*, UNCTAD/DITC/TAB/2019/5, UNCTAD, (2019), https://unctad.org/system/files/official-document/ditctab2019d5_en.pdf.

³²⁴ *The Unseen Impact of Non-Tariff Measures: Insights from a New Database*, UNCTAD/DITC/TAB/2018/2, UNCTAD, 9 (2018), https://unctad.org/system/files/official-document/ditctab2018d2_en.pdf.

³²⁵ *Id.*

³²⁶ Agreement on the Application of Sanitary and Phytosanitary Measures, April 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 493 [hereinafter SPS Agreement]. [Not reproduced in I.L.M.]

³²⁷ Agreement on Technical Barriers to Trade, April 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1868 U.N.T.S. 120 [hereinafter TBT Agreement].

³²⁸ See SPS Agreement, Annex A, Article 1, *supra* note 326.

³²⁹ *The WTO Agreements Series: Sanitary and Phytosanitary Measures*, WTO, 15 (2010).

have the right to take measures “necessary for the protection of human, animal or plant life or health,” subject to the conditions stipulated in the provisions of the SPS Agreement.³³⁰

The TBT Agreement, on the other hand, deals with three specific types of NTMs – technical regulations, standards, and conformity assessment procedures. Technical regulations lay out product characteristics and production processes with which compliance is mandatory.³³¹ Standards lay out product characteristics and production processes with which compliance is non-mandatory.³³² Conformity assessment procedures lay out the processes through which compliance with technical regulations and standards is determined.³³³ Therefore, in assessing the applicability of the TBT Agreement, the *type* of measure is at issue,³³⁴ even though the TBT Agreement also enumerates “legitimate objectives”. Under Article 2.2 of the TBT Agreement, WTO Members may prepare, adopt, and apply technical regulations aimed at fulfilling legitimate objectives such as, *inter alia*, the “protection of human health or safety, animal or plant life or health, or the environment”.³³⁵

Many RTAs also contain specific chapters and provisions dedicated to SPS and TBT measures. As discussed in Section A below, the majority of the RTAs that deal with trade in goods incorporate at least some of the WTO disciplines by reference to the SPS and TBT Agreements. Further, some RTAs enumerate additional disciplines that build upon and broaden the scope of the WTO disciplines.

Given that SPS and TBT measures may be justified under policy objectives, including protection of human, animal, or plant life or health (Chapter II also covers policy justifications in the form of general exceptions), linkages between such measures and SDGs become apparent. SPS and TBT measures may be targeted at issues related to food, nutrition, health, sustainable consumption, and climate change, among many others.³³⁶ In this regard, there are direct links between SPS and TBT measures and the SDGs including, for example, SDG 2 (Zero Hunger) and related Target 2.1 which seeks to “ensure access by all people [...] to safe, nutritious, and sufficient food”; SDG 3 (Good Health and Wellbeing) and related Target 3.9 which seeks to “substantially reduce the number of deaths and illnesses from hazardous chemicals and air, water, and soil pollution and contamination”; and SDG 12 (Responsible Consumption and Production) and related Target 12.4 which seeks to “achieve the environmentally sound management of chemicals and all wastes throughout their life cycle, in accordance with agreed international frameworks”.³³⁷

During the COVID-19 pandemic, the adoption and application of various SPS and TBT measures exacerbated trade frictions in some instances, while easing them in others.³³⁸ It should be noted that many of the SPS and TBT measures that caused trade frictions were necessary to ensure the safety of traded goods and the protection of human life and health, such as restrictions on medical products below quality standards. As another example, Russian Federation imposed a temporary restriction on

³³⁰ See SPS Agreement, Article 2.1 *supra* note 326.

³³¹ See TBT Agreement, Annex 1, Article 1, *supra* note 326327.

³³² See TBT Agreement, Annex 1, Article 2, *supra* note 326327.

³³³ See TBT Agreement, Annex 1, Article 3, *supra* note 326327.

³³⁴ *The WTO Agreements Series: Technical Barriers to Trade*, WTO, 13 (3d ed., 2021).

³³⁵ See, TBT Agreement, Article 2.2, *supra* note 326327.

³³⁶ See generally, *Non-Tariff Measures and Sustainable Development Goals: Direct and Indirect Linkages*, Policy Brief No. 37, UNCTAD, (2015), https://unctad.org/system/files/official-document/presspb2015d9_en.pdf.

³³⁷ See World Bank 2021, *supra* note 219.

³³⁸ See Bown 2020 in Baldwin & Evenett 2020, *supra* note 118.

the importation of exotic and decorative animals and live fish from China due to concern with the potential for them to be carriers of COVID-19.³³⁹

The early stages of the unfolding public health crisis saw a spike in demand for medical goods including face masks, PPE, and respirators. Despite the existence of international standards applicable to medical goods,³⁴⁰ there is a degree of heterogeneity in the specific standards adopted and applied by governments or regulatory bodies. Existing research points to the fact that such regulatory divergence represents a significant trade cost.³⁴¹ In case of disruptions or diversions to existing supply chains, as were seen during the pandemic, these costs may be compounded, and trade in medical goods essential to responding to a crisis may be hampered owing to the lack of mutual recognition or acceptance of differing standards and technical regulations.

To reduce the disruptions to the flow of medical goods and other essential supplies, some governments responded by either relaxing technical regulations or by recognizing the accreditation provided by other governments or regulators. For instance, in the United States, the Food and Drug Administration (FDA) issued Emergency Use Authorizations (EUAs) allowing the importation of various medical goods, including PPE and face masks, from manufacturers whose products had hitherto been considered non-compliant with US regulatory standards.³⁴² At the time the EUAs were announced, some overseas manufacturers that had been able to successfully ramp up production of the necessary medical goods had not been vetted through the relevant conformity assessment procedures. The relaxation of the technical regulations was, therefore, intended to allow the non-conforming goods into the US domestic market so as to alleviate their “insufficient supply and availability”.³⁴³ However, measures were put in place to ensure that consumer protection standards were also upheld. For instance, prior to issuing an EUA, the FDA required submission of a substantial amount of information, which includes device specifications and safety and efficacy information. Additionally, the products also needed to have FDA-compliant labelling.³⁴⁴ In similar fashion, the EU conducted market surveillance for PPE and medical devices imported under emergency authorizations to ensure health and safety.³⁴⁵ These examples illustrate instances in which the flexibility in technical requirements was instrumental, not only in keeping trade flowing during the COVID-19 pandemic, but also in ensuring

³³⁹ For a discussion on various trade-facilitative and trade-restrictive non-tariff measures adopted during the COVID-19 pandemic, see Lee & Prabhakar, *supra* note 77.

³⁴⁰ See e.g., *ISO 13485: Medical Devices*, ISO, <https://www.iso.org/iso-13485-medical-devices.html> (last visited April 5, 2021); and *Lists of References of Harmonized Standards for Medical Devices*, EUROPEAN COMMISSION (March 26, 2020), https://ec.europa.eu/growth/content/new-2020-lists-harmonised-standards-medical-devices-are-now-available_en.

³⁴¹ See *International Regulatory Cooperation and Trade: Understanding the Trade Costs of Regulatory Divergence and the Remedies*, OECD, 20–21 (2017), https://read.oecd-ilibrary.org/governance/international-regulatory-co-operation-and-trade_9789264275942-en#page1.

³⁴² *Personal Protective Equipment EUAs*, US FOOD AND DRUG ADMINISTRATION (FDA), <https://www.fda.gov/medical-devices/coronavirus-disease-2019-covid-19-emergency-use-authorizations-medical-devices/personal-protective-equipment-euas> (last updated April 1, 2021).

³⁴³ See e.g., *EUA Letter of Authorization – Umbrella EUA for Surgical Masks*, FDA (August 5, 2020), <https://www.fda.gov/media/140894/download>.

³⁴⁴ *Seeking FDA Emergency Use Authorization for a COVID-19 Medical Device?*, GARDNER LAW (Apr. 22, 2020), <https://gardner.law/alerts/april-2020-seeking-fda-emergency-use-authorization-for-a-covid-19-medical-device/>.

³⁴⁵ *Improving Access to Medical Products Through Trade: What Can Regional Trade Agreements Do in Times of Crisis?* UNCTAD/DITC/TNCD/2020/4, UNCTAD, 24 (2020), https://unctad.org/system/files/official-document/ditctnkd2020d4_en.pdf.

that countries were able to effectively trade in the essential goods necessary to respond to the burgeoning public health crisis.

Applying the lessons from the COVID-19 pandemic, it becomes imperative that governments and regulators fashion rules to respond in times of crisis and emergency. Section B of this chapter highlights crisis-specific RTA options for SPS and TBT measures that are: (i) proportional to the risk or threat at hand and (ii) compatible with measures taken by other countries. Baseline Options, which draw upon the core set of disciplines laid out in the WTO covered agreements, where relevant, are presented as the bare minimum set of rules for each category. In addition, Baseline+ Options, drawn from various RTAs, are included in order to aid governments and regulators in tailoring the respective rules to address crisis situations.

A. Legal Aspects of Sanitary and Phytosanitary Measures and Technical Barriers to Trade

The SPS and TBT Agreements entered into force on January 1, 1995 following the conclusion of the Uruguay Round of multilateral trade negotiations, which resulted in the establishment of the WTO. Attached as an annex to the Marrakesh Agreement Establishing the WTO, the SPS Agreement lays out the multilateral rules applicable to non-tariff measures imposed to protect human, animal or plant life or health from the threat posed by pests, diseases, and toxins, among others.³⁴⁶ At its core, the SPS Agreement allows WTO Members to take the necessary SPS measures to protect human, animal or plant life or health.³⁴⁷ However, this basic right enshrined in Article 2 of the SPS Agreement is subject to certain conditions. The SPS measure must be “applied only to the extent necessary”,³⁴⁸ must “not [be] maintained without sufficient scientific evidence” (subject to exceptions),³⁴⁹ should “not arbitrarily or unjustifiably discriminate between [WTO] Members”,³⁵⁰ and should “not be applied in a manner which would constitute a disguised restriction on international trade”.³⁵¹

Apart from the basic rights and obligations contained in Article 2, the SPS Agreement contains additional disciplines to guide WTO Members with respect to the adoption and application of SPS measures. To the extent available, WTO Members shall base SPS measures on international standards, guidelines, and recommendations in order to achieve harmonization “on as wide a basis as possible”.³⁵² International standards, guidelines, and recommendations are defined to mean those developed by the Codex Alimentarius Commission with respect to food safety, the International Office of Epizootics with respect to animal health and zoonoses, and the Secretariat of the International Plant Protection Convention with respect to plant health.³⁵³ WTO Members shall also accept the SPS measures of other Members as equivalent so long as “the exporting Member objectively demonstrates to the importing Member that its measures achieve the importing Member’s appropriate level of [SPS] protection”.³⁵⁴ Further, in adopting SPS measures, WTO Members are required to undertake appropriate risk assessment (this is presumed in the case of international standards) that takes into account scientific

³⁴⁶ See SPS Agreement, Article 2.1 and Annex A, Article 1, *supra* note 326.

³⁴⁷ See SPS Agreement, Article 2.1, *supra* note 326.

³⁴⁸ See SPS Agreement, Article 2.2, *supra* note 326.

³⁴⁹ See SPS Agreement, Article 2.2, and Article 5.7, *supra* note 326.

³⁵⁰ See SPS Agreement, Article 2.3, *supra* note 326.

³⁵¹ See SPS Agreement, Article 2.3, *supra* note 326.

³⁵² See SPS Agreement, Article 3.1, *supra* note 326.

³⁵³ See SPS Agreement, Annex A, Article 3(a)–(c), *supra* note 326.

³⁵⁴ See SPS Agreement, Article 4.1, *supra* note 326.

evidence, ecological factors, and any negative effects on trade.³⁵⁵ Further, Annex A, paragraph 4 of the WTO SPS Agreement differentiates between risk assessment for evaluating the likelihood of the entry, establishment, or spread of a pest or disease within an importing Member's territory (which requires evaluation of potential associated biological and economic consequences) and risk assessment in the context of measures to protect against foodborne risk, which requires a more streamlined evaluation of the potential for adverse health effects.³⁵⁶ WTO Members are also allowed to provisionally adopt SPS measures in instances in which there is insufficient scientific evidence available, subject to the condition that the measure is reviewed once additional information becomes available which allows for a more objective assessment of risk.³⁵⁷

Similar disciplines are found in the TBT Agreement. As noted, the TBT Agreement applies to three specific types of measures, namely, technical regulations, standards, and conformity assessment procedures. With regard to each of these NTMs, the TBT Agreement requires that WTO Members treat other Members' imports no less favourably than like products produced domestically or in another Member country, i.e., the products will be accorded national treatment and MFN treatment.³⁵⁸ Like SPS measures, TBT measures should not create "unnecessary obstacles to trade" and should "not be more trade-restrictive than necessary to fulfil a legitimate policy objective".³⁵⁹ WTO Members shall also, as possible, base their TBT measures on international standards.³⁶⁰ The equivalence principle is also reflected in the TBT Agreement. Most importantly, WTO Members are allowed to adopt TBT measures to address "urgent problems of safety, health, environmental protection or national security" without going through the notification and discussion process contained in Article 2.9 of the TBT Agreement prior to implementation.³⁶¹

With respect to the SPS and TBT Agreements, it is also relevant to note that they both contain provisions on technical assistance and S&DT, which can take the form of phased implementation³⁶² or time-limited exceptions.³⁶³ Provisions on technical assistance are included in the SPS Agreement, which may consist of "advice, credits, donations, and grants" that allow "countries to adjust to, and comply with, [SPS] measures necessary to achieve the appropriate level of [SPS] protection in their export markets".³⁶⁴ The TBT Agreement also includes S&DT and technical assistance provisions, which are more numerous and include assistance on matters ranging from the preparation of technical regulations to the conduct of conformity assessments.³⁶⁵ S&DT accorded to developing countries is a crucial element of building back better from the current COVID-19 pandemic and is dealt with in greater detail in Chapter VIII of this Handbook (Development).

RTA rules on SPS and TBT have some degree of overlap with the WTO covered agreements, and the SPS and TBT chapters in a number of RTAs begin by affirming the contracting parties' rights and

³⁵⁵ SPS Agreement, Articles 5.1–5.4, *supra* note 326.

³⁵⁶ *WTO Analytical Index: SPS Agreement – Annex A*, WTO, https://www.wto.org/english/res_e/publications_e/ai17_e/spa_anna_jur.pdf.

³⁵⁷ SPS Agreement, Article 5.7, *supra* note 326.

³⁵⁸ TBT Agreement, Articles 2.1 and 5.1.1; Annex 3, Paragraph D, *supra* note 326.

³⁵⁹ TBT Agreement, Articles 2.2 and 5.1.2; Annex 3, Paragraph E, *supra* note 326.

³⁶⁰ TBT Agreement, Articles 2.4 and 5.4; Annex 3, Paragraph F, *supra* note 326.

³⁶¹ TBT Agreement, Articles 2.10 and 5.7, *supra* note 326.

³⁶² SPS Agreement, Article 10.2, *supra* note 326.

³⁶³ SPS Agreement, Article 10.3, *supra* note 326.

³⁶⁴ SPS Agreement, Article 9.1, *supra* note 326.

³⁶⁵ See generally TBT Agreement, Article 11, *supra* note 326.

obligations under the WTO covered agreements. These chapters then build upon the WTO disciplines to varying degrees. For example, the SPS chapter in the USMCA affirms the rights and obligations of the parties under the SPS Agreement.³⁶⁶ The rest of the chapter provides additional guidance on the disciplines found in the SPS Agreement, especially with respect to risk assessment and compatibility of SPS measures.³⁶⁷ The Design of Trade Agreements (DESTA) database shows that more than half of the RTAs catalogued have provisions on TBT, and about one-sixth note harmonization in TBT as a general goal (38 include selective TBT harmonization and three indicate full TBT harmonization).³⁶⁸

The TBT chapter in the USMCA adopts a slightly different approach, albeit to the same effect. Instead of affirming the rights and obligations under the TBT Agreement, specific provisions of the TBT Agreement are enumerated and incorporated by reference into the USMCA.³⁶⁹ The chapter also contains more detailed rules with respect to technical regulations and conformity assessments, going beyond the purview of, and providing further clarity on, the disciplines contained within the TBT Agreement.³⁷⁰

The approach observed in the USMCA, whereby some or all existing WTO disciplines on SPS measures and TBT are reaffirmed and additional rules are elaborated upon, is not unique to that agreement. As noted in a publication by UN ESCAP, a majority of RTAs signed by Asia-Pacific economies between 2009 and 2018 referenced the SPS and TBT Agreements in their respective chapters, with a number of them also including additional commitments or elaborating upon the WTO disciplines themselves.³⁷¹ This bolsters the approach taken in Section B of this chapter, where the SPS and TBT disciplines relevant during times of crisis or emergency contained in the WTO covered agreements are presented as Baseline Options, with additional language found in RTAs shown as Baseline+ Options.

B. RTA Sanitary and Phytosanitary Measures and Technical Barriers to Trade Options for Responding to Crises

The trade fallout resulting from the COVID-19 pandemic has exposed a number of challenges with respect to application of SPS and TBT rules during crisis. As highlighted, the adoption and application of SPS and TBT measures during the initial stages of the pandemic sometimes eased bottlenecks and allowed goods to keep flowing despite disruptions in global supply chains. In other instances, however, the adoption of ad hoc SPS and TBT measures increased frictions along global trade lines and led to the inefficient movement of essential goods.³⁷²

³⁶⁶ USMCA, Article 9.4 (1), *supra* note 7.

³⁶⁷ See *e.g.*, USMCA, Article 9.6, *supra* note 7, which builds upon the existing obligations in the SPS Agreement regarding risk assessments, and Article 9.7, which builds upon the equivalence provisions in the SPS Agreement.

³⁶⁸ *Design of Trade Agreements Database* (DESTA), <https://www.designoftradeagreements.org> (last visited May 20, 2020); See also *How to Encode Non-Tariff Measures in Regional Trade Agreements: The Case of the CPTPP*, UNCTAD, 4, UNCTAD/DITC/TAB/2020/2 (2020), https://unctad.org/system/files/official-document/ditctab2020d2_en.pdf.

³⁶⁹ USMCA, Article 11.3, *supra* note 7.

³⁷⁰ USMCA, Articles 11.5 and 11.6, *supra* note 7.

³⁷¹ See generally Jhanvi Trivedi, Yann Duval, Danijel Bajt, & Jeong Ho Yoo, *Non-Tariff Measures in Regional Trade Agreements in Asia and the Pacific: SPS, TBT, and Government Procurement, Trade, Investment, and Innovation Working Paper No. 03/2019*, UN ESCAP TRADE, INVESTMENT, AND INNOVATION DIVISION (2019), <https://www.unescap.org/sites/default/d8files/knowledge-products/NTM%20in%20RTA%20paper%2025%20sep%202019-%20final.pdf>.

³⁷² See Bown 2020, *supra* note 118.

In considering policy space in the context of RTA SPS and TBT options tailored to trade in times of crisis, it is important to note that the options that are trade facilitative ought to be emphasized over options that are trade restrictive. Such an approach would also be in line with the WTO covered agreements. With that in mind, the RTA options below lay out rules and disciplines that ensure that even if trade is disrupted during times of crisis, the effects are minimized by adopting SPS and TBT measures that are: (i) proportional to the risk or threat at hand and (ii) compatible with measures taken by other countries.

1. Ensuring Proportionality of Sanitary and Phytosanitary Measures and Technical Barriers to Trade

During the course of the COVID-19 pandemic, some of the SPS and TBT measures adopted or applied were aimed at protecting human life and health. This is particularly the case for SPS measures and technical regulations applicable to medical goods such as surgical masks, PPE, and respirators. However, while the significance of such NTMs is valid, the implemented measures need to be proportional to the risk or threat posed so as to not unnecessarily or arbitrarily restrict trade. In this respect, provisions that require adequate risk assessments and emphasize proportional policy responses can guide policymakers in crafting measures that are tailored to the risk of threat being targeted.

a. Risk Assessment

SPS measures enacted to protect plant or animal life or health aim to reduce the risk posed by threats like pests, toxins, and pathogens. Before such measures are adopted and applied, if international standards do not exist, an adequate risk assessment must first be carried out to ensure that the measure is well designed and the need for protection is balanced against any negative trade effects.

The Baseline Option below, which is drawn from the SPS Agreement, strikes this balance by requiring that SPS measures are based on scientific evidence and by enumerating various factors that must be taken into account by policymakers prior to adopting the relevant SPS measure.³⁷³ It also includes a positive obligation for policymakers to consider relevant economic factors and to minimize negative trade effects.³⁷⁴

The Baseline+ Option, taken from the recently-concluded RCEP Agreement, builds upon the obligations in the SPS Agreement by allowing for trade in goods to take place during an interim period in which a review of the relevant SPS measure is taking place.³⁷⁵ This is more trade facilitative in nature, because it ensures that goods which had previously been allowed to be imported into a particular jurisdiction are not unnecessarily kept waiting in limbo for the time period during which a review or re-assessment of risk is taking place. Provisions that allow for goods to be traded during this interim period may be helpful during times of crises or emergency when SPS measures may be undergoing frequent review or change, and international standards may not yet exist.

³⁷³ SPS Agreement, Articles 5.2 and 5.3, *supra* note 326.

³⁷⁴ SPS Agreement, Articles 5.3, 5.4, and 5.6, *supra* note 326.

³⁷⁵ RCEP Agreement, Article 5.7 (4), *supra* note 13.

Example Provisions on Risk Assessment for SPS Measures

Baseline Option: Assessment of Risk and Determination of the Appropriate Level of SPS Protection

“1. Members shall ensure that their sanitary or phytosanitary measures are based on an assessment, as appropriate to the circumstances, of the risks to human, animal or plant life or health, taking into account risk assessment techniques developed by the relevant international organizations.”

“2. In the assessment of risks, Members shall take into account available scientific evidence; relevant processes and production methods; relevant inspection, sampling and testing methods; prevalence of specific diseases or pests; existence of pest- or disease-free areas; relevant ecological and environmental conditions; and quarantine or other treatment.”

“3. In assessing the risk to animal or plant life or health and determining the measure to be applied for achieving the appropriate level of sanitary or phytosanitary protection from such risk, Members shall take into account as relevant economic factors: the potential damage in terms of loss of production or sales in the event of the entry, establishment or spread of a pest or disease; the costs of control or eradication in the territory of the importing Member; and the relative cost-effectiveness of alternative approaches to limiting risks.”

Source: SPS Agreement, Articles 5.1–5.3

Baseline+ Option: Allowing Goods to be Traded During the Risk Assessment Period

“2. When conducting a risk analysis an importing Party shall:

(a) ensure that the risk analysis is documented and that it provides the relevant exporting Party or Parties with an opportunity to comment, in a manner to be determined by the importing Party;

(b) consider risk management options that are not more trade restrictive than required¹ to achieve its appropriate level of sanitary or phytosanitary protection; and

(c) select a risk management option that is not more trade restrictive than required to achieve its appropriate level of sanitary or phytosanitary protection, taking into account technical and economic feasibility.”

“3. On request of an exporting Party, an importing Party shall inform the exporting Party of the progress of a specific risk analysis request, and of any delay that may occur during the process.”

“4. Without prejudice to emergency measures, no Party shall stop the importation of a good of another Party solely for the reason that the importing Party is undertaking a review of a sanitary or

phytosanitary measure, if the importing Party permitted importation of the good of the other Party at the time of the initiation of the review.”

¹ For the purpose of subparagraphs (b) and (c), a risk management option is not more trade restrictive than required unless there is another option reasonably available, taking into account technical and economic feasibility, that achieves the appropriate level of sanitary or phytosanitary protection and is significantly less restrictive to trade.

Source: RCEP, Articles 5.7 (2)-(4)

b. Proportional Response

The SPS Agreement, while allowing WTO Members to take the necessary SPS measures to protect human life and health, among other policy justifications, is also based on a “proportionality principle” that calls for measures to be proportional to the risk or threat.³⁷⁶ The proportionality principle is evident in the Baseline Option below, which requires that policymakers minimize negative trade effects³⁷⁷ and refrain from imposing SPS measures that are more trade-restrictive than necessary to achieve the appropriate level of protection.³⁷⁸

The Baseline+ Option for SPS measures, which is adapted from the CPTPP, elaborates on the commitment found in the SPS Agreement by imposing a positive duty not only to consider the least trade-restrictive risk management options but also to select the least trade-restrictive SPS measure to achieve the required objective. Imposing the additional positive duty to select the measure which is least trade-restrictive provides additional clarity on the SPS disciplines and enshrines the idea that SPS measures implemented should be calibrated to the specific risk or threat, rather than being blanket measures that impose unnecessary obstacles to international trade. This may be particularly helpful in guiding policymakers during times of crisis by highlighting the fact that their decisions should not adversely affect international trade flows more than necessary.

The TBT Agreement stipulates that technical regulations, standards, and conformity assessment procedures should not create unnecessary obstacles to international trade or be more trade-restrictive than necessary.³⁷⁹ The Baseline Option below illustrates this in the context of adopting or applying technical regulations. The Baseline+ Option for TBT, taken from the EU-Viet Nam Free Trade Agreement,³⁸⁰ broadens the scope of technical regulations that may be considered by requiring policymakers to assess both regulatory and non-regulatory options to fulfil the stated policy objective. This broader scope may be useful in times of crisis or emergency, as it would permit policymakers to

³⁷⁶ For a general discussion of the “proportionality principle” in the context of the WTO, see Andrew D. Mitchell, *Proportionality and Remedies in WTO Disputes*, 17 EUR. J. INT’L L. 985 (2006).

³⁷⁷ SPS Agreement, Article 5.4, *supra* note 326. The Panel in *EC – Hormones* held that while Article 5.4 does not impose an obligation on Members, the objective of minimizing negative trade effects should nonetheless guide the interpretation of other provisions of the SPS Agreement. See Panel Report, *European Communities – Measures Concerning Meat and Meat Products (Hormones)*, ¶ 8.166, WTO Doc. WT/DS26/R/USA (adopted February 13, 1998).

³⁷⁸ SPS Agreement, Article 5.6, *supra* note 326.

³⁷⁹ TBT Agreement, Article 2.2. and 5.1.; Annex 3, Paragraph E, *supra* note 326.

³⁸⁰ EU–Viet Nam FTA, *supra* note 152.

look beyond their usual toolbox of regulatory options and possibly consider non-regulatory options that not only achieve the same policy objective but also are less restrictive of trade.

Example Provisions on SPS and TBT Measures that Minimize Negative Trade Effects

Baseline Option for SPS Measures: Minimizing Negative Trade Effects and Ensuring Adopted Measures are Not More Trade-Restrictive Than Required

“4. Members should, when determining the appropriate level of sanitary or phytosanitary protection, take into account the objective of minimizing negative trade effects.”

“6. Without prejudice to [paragraph 2] of [Article 3], when establishing or maintaining sanitary or phytosanitary measures to achieve the appropriate level of sanitary or phytosanitary protection, Members shall ensure that such measures are not more trade-restrictive than required to achieve their appropriate level of sanitary or phytosanitary protection, taking into account technical and economic feasibility.³”

³ For purposes of paragraph 6 of Article 5, a measure is not more trade-restrictive than required unless there is another measure, reasonably available taking into account technical and economic feasibility, that achieves the appropriate level of sanitary or phytosanitary protection and is significantly less restrictive to trade.

Source: SPS Agreement, Articles 5.4, 5.6

Baseline+ Option for SPS Measures: Considering and Selecting Least Trade-Restrictive Measure

“6. When *establishing or maintaining sanitary or phytosanitary measures to achieve the appropriate level of sanitary or phytosanitary protection*, each Party shall:

[...]

(b) consider *measures* that are not more trade restrictive⁵ than required, including the facilitation of trade by not taking any measure, to achieve the level of protection that the Party has determined to be appropriate; and

(c) select a *measure* that is not more trade restrictive than required to achieve the sanitary or phytosanitary objective, taking into account technical and economic feasibility.”

⁵ For the purposes of subparagraphs (b) and (c), a risk management option is not more trade-restrictive than required unless there is another option reasonably available, taking into account technical and economic feasibility, that achieves the appropriate level of sanitary or phytosanitary protection and is significantly less restrictive to trade.

Source: Adapted from CPTPP, Article 7.9 (6)(b)–(c), with additional sample draft language added in italics.

Baseline Option for TBT Measures: Avoiding Unnecessary Obstacles to Trade and Not Being More Trade-Restrictive Than Necessary

“2.2 Members shall ensure that technical regulations are not prepared, adopted or applied with a view to or with the effect of creating unnecessary obstacles to international trade. For this purpose, technical regulations shall not be more trade-restrictive than necessary to fulfil a legitimate objective, taking account of the risks non-fulfilment would create.”

Source: TBT Agreement, Article 2.2

Baseline+ Option for TBT Measures: Assessing Available Regulatory and Non-Regulatory Options

“1. Each Party shall make best use of good regulatory practices, as provided for in the TBT Agreement and in this Chapter, in particular, by:

(a) assessing the available regulatory and non-regulatory alternatives to a proposed technical regulation that would fulfil the Party's legitimate objectives, in accordance with Article 2.2 of the TBT Agreement, and endeavouring to assess, inter alia, the impact of a proposed technical regulation by means of a regulatory impact assessment, as recommended by the Committee on Technical Barriers to Trade established under Article 13 of the TBT Agreement;”

Source: EU-Viet Nam Free Trade Agreement, Article 5.4 (1)(a)

2. Ensuring Compatibility of Sanitary and Phytosanitary Measures and Technical Barriers to Trade

The disruptions and diversions to established supply chains during the COVID-19 pandemic highlighted issues with the compatibility of SPS and TBT measures, particularly with respect to essential goods. While general principles regarding SPS and TBT measures apply (harmonization with relevant international standards, scientific basis in the case of SPS, etc.), States do take different approaches to SPS and TBT. When supply chain shocks require that products are imported from new countries or manufacturers, trade frictions can arise from differences in SPS measures or TBT regulations. Therefore, to improve the resilience of international trade flows during times of crisis or emergency, special attention should be given to incorporating and implementing RTA provisions on harmonization, equivalence, and mutual recognition of SPS and TBT measures.

a. Harmonization

Harmonization is a core concept in both the SPS and TBT Agreements, as noted above. Accordingly, harmonization provisions are included below as the Baseline Options for both SPS and TBT measures, respectively.

The Sample Baseline+ Option below, which is adapted from Article 3.1 of the SPS Agreement, adds a crisis-specific aspect to the reference to international standards, guidelines, or recommendations, which would integrate the work of international organizations involved in developing international standards or providing guidance during a time of crisis or emergency.

The Discretionary Option for SPS measures below, taken from the Japan–Mongolia Economic Partnership Agreement,³⁸¹ reaffirms the commitments in Article 3 of the SPS Agreement, along with the clarification that parties would not be required to change the appropriate level of SPS protection that has been determined in accordance with Article 5 of the SPS Agreement. This arguably increases the policy space afforded to policymakers as they retain the discretion to determine an appropriate level of SPS protection while exploring ways in which differing measures may be coordinated. As is true with other Discretionary Options, it would be important to determine whether the policy space inherent in this option would be exercised in a way that benefits a wide range of stakeholders and does not disadvantage trading partners.

The Baseline+ Option for TBT measures, taken from the China-Republic of Korea FTA, clarifies the scope of the harmonization rule contained in the TBT Agreement by including a non-exhaustive list of international organizations on whose standards and guidelines a party’s technical regulations may be based. In times of crisis and emergency, it may be helpful to have guidance regarding harmonization efforts in order to avoid any confusion or mismatch over the applicable standards.

Example Provisions on Harmonization of SPS and TBT Measures

Baseline Option for SPS Measures: Harmonization

“1. To harmonize sanitary and phytosanitary measures on as wide a basis as possible, Members shall base their sanitary or phytosanitary measures on international standards, guidelines or recommendations, where they exist, except as otherwise provided for in this Agreement, and in particular in [paragraph 3].”

Source: SPS Agreement, Article 3.1

Sample Baseline+ Option for SPS Measures: Harmonization

“To harmonize sanitary and phytosanitary measures on as wide a basis as possible, the parties shall base their sanitary or phytosanitary measures on international standards, guidelines or recommendations where they exist, *including standards and technical guidance developed by relevant international organizations during a crisis or emergency situation.*”

Source: Adapted from SPS Agreement, Article 3.1, with sample draft language added in italics.

Discretionary Option for Harmonization of SPS Measures

“The Parties shall endeavour to cooperate on the matters related to the harmonization of SPS measures, on as wide a basis as possible, as prescribed under Article 3 of the SPS Agreement. Such cooperation shall be conducted without requiring either Party to change its appropriate level of protection of human, animal or plant life or health that the Party has determined in accordance with Article 5 of the SPS Agreement.”

Source: Japan–Mongolia Economic Partnership Agreement, Article 5.3

³⁸¹ Japan–Mongolia Economic Partnership Agreement, February 10, 2015, <https://www.mofa.go.jp/files/000067716.pdf> [hereinafter Japan-Mongolia EPA]

Baseline Option for TBT Measures: Harmonization

“2.4 Where technical regulations are required and relevant international standards exist or their completion is imminent, Members shall use them, or the relevant parts of them, as a basis for their technical regulations except when such international standards or relevant parts would be an ineffective or inappropriate means for the fulfilment of the legitimate objectives pursued, for instance because of fundamental climatic or geographical factors or fundamental technological problems.”

Source: TBT Agreement, Article 2.4

Baseline+ Option for TBT Measures: Harmonization Based on Standards Developed by International Organizations

“4. In determining whether an international standard in the sense of Article 2.4 of the TBT Agreement exists, each Party shall consider the Decision of [the] WTO Committee on Technical Barriers to Trade (hereinafter referred to as “WTO TBT Committee”). Such international standards shall include, but are not limited to, those developed by the International Organization for Standardization (ISO), the International Electrotechnical Commission (IEC), the International Telecommunication Union (ITU) and [the] Codex Alimentarius Commission (CAC).”

Source: China-Republic of Korea Free Trade Agreement, Article 6.4 (4)

b. Equivalence

Recognizing the equivalence of measures that appear different at face value but achieve the same level of protection or address the same policy concern is another way in which compatibility between the SPS and TBT measures of different jurisdictions may be improved. As noted, during the early stages of the COVID-19 pandemic, trade in essential medical goods was severely affected due to both supply and demand shocks. In order to address critical shortages of essential medical goods, many governments either treated the standards developed by other countries as equivalent or waived compliance requirements altogether. For example, when faced with a shortage of respirators, the US Centers for Disease Control and Prevention approved the use of respirators that satisfied equivalent foreign standards, including China’s GB 2626-2006 and GB 2626-2019 standards, as well as the European EN 149-2001 standards.³⁸² This allowed the potential pool of manufacturers from whom imports of respirators could be sourced to become far wider than before the pandemic. Similarly, Brazil’s National Health Regulatory Agency, better known by its Portuguese acronym ANVISA, adopted Resolution RDC 346/2020 that allowed the importation of critical medical devices approved by foreign regulatory authorities that are members of the Pharmaceutical Inspection Cooperation Scheme, Medical Device Single Audit Program, or the Harmonization of the Good Manufacturing Practices.³⁸³ This illustrates the importance of including provisions within RTA SPS and TBT chapters that oblige parties to explicitly recognize the equivalence of different standards that offer the same

³⁸² Matteo Fiorini, Bernard Hoekman & Aydin Yildirim, COVID-19: Expanding Access to Essential Supplies in a Value Chain World, in Baldwin & Evenett 2020, *supra* note 118.

³⁸³ ANVISA: Brazil Implements Special Regulatory Framework, REGDESK (May 1, 2020), <https://www.regdesk.co/brazil-anvisa-implements-special-regulatory-framework/>.

level of protection, making it possible for parties to retain different domestic regulatory measures while limiting their trade restrictive effects.³⁸⁴

In this regard, the SPS and TBT Agreements once again provide the respective Baseline Options whereby WTO Members are required to accept another Member's SPS or TBT measures as equivalent so long as there is an objective demonstration of such fact.³⁸⁵ These Baseline Options could be incorporated into RTAs, consistent with the practice of incorporating other WTO provisions.

The Baseline+ Options below elaborate further on the process of seeking equivalence. The Baseline+ Option for SPS measures, taken from the Chile-Indonesia Comprehensive Economic Partnership Agreement (CEPA),³⁸⁶ allows a party to request technical consultations in order to achieve bilateral recognition of the equivalence of SPS measures. Similarly, the Baseline+ Option A for TBT measures, taken from the EU-Japan EPA,³⁸⁷ provides an avenue for a party to seek recognition of equivalence from another party by providing detailed reasons for the request in writing. Baseline+ Option B showcases sample draft language that could be included to confer equivalence on technical regulations developed by appropriate authorities that are members of international fora or organizations.

Finally, Sample Model Language for TBT is included below that establishes equivalence for members of international organizations and establishes the International Medical Device Regulators Forum (IMDRF) as the relevant international regulatory body for medical devices.

The recognition of equivalence of different measures and regulations that provide the same level of SPS protection or are in furtherance of the same policy goal is especially helpful during times of crisis and emergency in ensuring that market access is provided to the broadest pool of goods and manufacturers possible. This leads to more resilient supply chains, which can respond adequately to supply and demand shocks.

Example Provisions on Equivalence of SPS and TBT Measures

Baseline Option for SPS Measures: Equivalence

“1. Members shall accept the sanitary or phytosanitary measures of other Members as equivalent, even if these measures differ from their own or from those used by other Members trading in the same product, if the exporting Member objectively demonstrates to the importing Member that its measures achieve the importing Member's appropriate level of sanitary or phytosanitary protection.”

Source: SPS Agreement, Article 4.1

³⁸⁴ Frode Veggeland & Christel Elvestad, *Equivalence and Mutual Recognition in Trade Agreements: Relevance for the WTO and the Codex Alimentarius Commission*, 8, CENTRE FOR FOOD POLICY, NORWEGIAN AGRICULTURAL ECONOMICS RESEARCH INSTITUTE REPORT, 2004-9 (2004), https://www.regjeringen.no/globalassets/upload/kilde/fkd/red/2004/0009/ddd/pdfv/228920-nilf_rapport_2004_9_s.pdf.

³⁸⁵ SPS Agreement, Article 4.1, *supra* note 326; TBT Agreement, Article 2.7, *supra* note 326.

³⁸⁶ Indonesia-Chile CEPA, *supra* note 203.

³⁸⁷ EU-Japan Economic Partnership Agreement, July 17, 2018, OJ/L 330/1, <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32018D1907&from=EN> [hereinafter EU-Japan EPA].

Baseline+ Option for SPS Measures: Request for Recognition of Equivalence

“2. Upon request, the Parties may enter into technical consultations with the aim of achieving bilateral recognition of the equivalence of specified sanitary and phytosanitary measures in line with the principle of equivalence in the SPS Agreement, standards, guidelines, and recommendations, developed by the WTO Committee on SPS and relevant international standard-setting bodies, consistent with Annex A to the SPS Agreement.”

Source: Chile-Indonesia CEPA, Article 6.7 (2)

Baseline Option for TBT Measures: Equivalence

“2.7 Members shall give positive consideration to accepting as equivalent technical regulations of other Members, even if these regulations differ from their own, provided they are satisfied that these regulations adequately fulfil the objectives of their own regulations.”

Source: TBT Agreement, Article 2.7

Baseline+ Option A for TBT Measures: Request for Equivalence

“2. When a Party considers that its technical regulation and a technical regulation of the other Party that have the same objectives and product coverage are equivalent, that Party may request in writing, providing detailed reasons, that the other Party recognise those technical regulations as equivalent. The requested Party shall give positive consideration to accepting those technical regulations as equivalent, even if they differ, provided that it is satisfied that the technical regulation of the requesting Party adequately fulfils the objectives of its own technical regulation. If the requested Party does not accept a technical regulation of the requesting Party as equivalent, the requested Party shall, on request of the requesting Party, explain the reasons for its decision.”

Source: EU–Japan EPA, Article 7.5 (2)

Sample Model Provision for TBT Measures (Baseline+ Option B): Equivalence for Members of International Fora or Organizations

“A Party shall give positive consideration to accepting technical regulations of the other Party as equivalent, even if they differ, provided that:

- (a) the other Party’s technical regulation adequately fulfils the objectives of its own technical regulation; or
- (b) the technical regulations are developed by a Designated Authority that is accredited by and/or regulated under a relevant international regulatory body. For medical devices, the Parties agree that the International Medical Device Regulators Forum (IMDRF) shall be the relevant international regulatory body.”

Source: Sample Draft Language

c. Mutual Recognition

Mutual recognition of SPS and TBT regulations is another important way of facilitating trade. Mutual recognition allows countries to accept differing rules, standards, and procedures as valid and also implies that imports lawfully produced in the exporting country will be accepted in the importing country.³⁸⁸ Mutual recognition can be particularly useful in the context of conformity assessment procedures, and, in relation to the COVID-19 pandemic, the WTO notes that mutual recognition agreements (MRAs) pertaining to conformity assessment procedures “can speed up the provision of critical supplies and reduce the cost of conducting inspections of sites in other countries”.³⁸⁹

The Baseline Option below, taken from the TBT Agreement, contains non-binding language for contracting parties to enter into MRAs. Due to the lack of enforceability of such ‘best endeavour’ language, these options fail to create a positive obligation for contracting parties to explore MRAs that could expedite trade between them.

The Baseline+ Option, taken from the MRA signed between New Zealand and Singapore,³⁹⁰ improves upon the WTO language by including specific commitments which recognize the competence of the other party’s designated conformity assessment bodies and obliges both parties to accept the results of the conformity assessment furnished by the other party’s designated body. Binding obligations such as these can facilitate trade during times of emergency and crisis when producers might not be able to undergo conformity assessment in the importing country. Similar bilateral MRAs also exist between Australia and New Zealand (Trans-Tasman MRA), and between the EU and select other countries.³⁹¹

Example Provisions on Mutual Recognition

Baseline Option: Non-Binding Language on Mutual Recognition

“6.3. Members are encouraged, at the request of other Members, to be willing to enter into negotiations for the conclusion of agreements for the mutual recognition of results of each other’s conformity assessment procedures. Members may require that such agreements fulfil the criteria of paragraph [x] and give mutual satisfaction regarding their potential for facilitating trade in the products concerned.”

Source: TBT Agreement, Article 6.3

Baseline+ Option: Binding Language on Mutual Recognition

“1. Each Party recognises that the Conformity Assessment Bodies designated by the other Party in accordance with this Agreement are competent to undertake the conformity assessment activities necessary to demonstrate compliance with its Mandatory Requirements.”

³⁸⁸ See Veggelan and Elvestad, *supra* note 384.

³⁸⁹ *Treatment of Medical Products in Regional Trade Agreements: Information Note*, WTO, 9 (2020) [hereinafter WTO Medical Products], https://www.wto.org/english/tratop_e/covid19_e/medical_products_report_e.pdf.

³⁹⁰ Mutual Recognition Agreement on Conformity Assessment Between the Government of New Zealand and the Government of the Republic of Singapore, NEW ZEALAND PARLIAMENT, May 17, 2019, <https://www.mfat.govt.nz/assets/Trade-agreements/Singapore-NZ-CEP/CEP-Upgrade-Protocol-all-chapters-and-annexes/Mutual-Recognition-Agreement.pdf>.

³⁹¹ See WTO Medical Products, *supra* note 389.

“2. New Zealand shall accept the results of conformity assessment activities to demonstrate conformity of products with its Mandatory Requirements when the conformity assessment activities are undertaken by Conformity Assessment Bodies designated by Singapore's Designating Authorities in accordance with this Agreement.”

“3. Singapore shall accept the results of conformity assessment activities to demonstrate conformity of products with its Mandatory Requirements when the conformity assessment activities are undertaken by Conformity Assessment Bodies designated by New Zealand's Designating Authorities in accordance with this Agreement.”

Source: New Zealand-Singapore MRA, Article 5

3. Ensuring Transparency in SPS and TBT Measures and Reporting of Non-Tariff Barriers

Transparency obligations feature prominently in both the SPS and TBT Agreements. Article 7 of the SPS Agreement stipulates that notification and provision of information by WTO Members regarding SPS measures shall be done in accordance with Annex B of the SPS Agreement. The transparency obligations included in Annex B encompass rules on publication of information, comment period, establishment of enquiry points, and notification procedures.³⁹² It is notable that the SPS Agreement allows Members to omit some steps “where urgent problems of health protection arise or threaten to arise for a Member” and includes specific rules of publication and notification which apply during urgent circumstances, allowing a Member to adopt an SPS measure without early notification or a comment period.³⁹³ These provisions in the SPS Agreement are included below as a Baseline Option, as they would enhance the transparency of SPS measures during a health crisis.

Similar to the SPS Agreement, the TBT Agreement includes transparency obligations related to the publication of information,³⁹⁴ establishment of enquiry points,³⁹⁵ and notification procedures.³⁹⁶ In addition, separate transparency obligations have been set out that apply “where urgent problems of safety, health, environmental protection or national security arise”.³⁹⁷ In these instances, WTO Members are neither required to publish their technical regulations and conformity assessment procedures prior to their adoption nor must they provide for an advance comment period. Instead, and similar to the SPS Agreement, WTO Members are given the flexibility to notify and open the regulation or procedure for comments from other Members *ex post facto*.³⁹⁸

According to data available from the WTO SPS Information Management System, emergency SPS notifications to the WTO made between January and December 2020 were more than double the

³⁹² See SPS Agreement, Annex B, Articles 1–5, *supra* note 326.

³⁹³ SPS Agreement, Annex B, Article 6, *supra* note 326. Some RTAs impose a time limit for the notification of emergency measures. For example, Article 5.8 of the Israel–Ukraine FTA stipulates that emergency SPS measures must be notified to the other party within 24 hours of implementation, with consultations being held, upon request, within 10 days of the notification.

³⁹⁴ See TBT Agreement, Article 2.11 and 5.8; Annex 3, Paragraph O, *supra* note 326.

³⁹⁵ See TBT Agreement, Article 10, *supra* note 326.

³⁹⁶ See TBT Agreement, Article 2.9 and 5.6; Annex 3, Paragraph I, *supra* note 326.

³⁹⁷ See TBT Agreement, Article 2.10 and 5.7, *supra* note 326.

³⁹⁸ See TBT Agreement, Article 2.10 and 5.7, *supra* note 326.

emergency notifications made in 2019.³⁹⁹ The total number of SPS notifications received for the year 2020 was also 20 per cent higher than 2019.⁴⁰⁰ Notwithstanding these figures, academics have commented that the transparency provisions in both the SPS and TBT Agreements tailored to emergency situations have not been enough to ensure the timely notification and publication of SPS and TBT measures adopted during the pandemic. In fact, it has been noted that “the notifications issued during the COVID-19 pandemic fall short of the transparency yardsticks on several counts,” with SPS and TBT notifications recorded by the WTO Secretariat falling far short of the number compiled by the Global Trade Alert database.⁴⁰¹

SPS and TBT measures are common NTMs (which are essentially policy and administrative trade measures other than tariffs). NTMs can be applied in a way that discriminates against trading partners, functioning as non-tariff barriers (NTBs), which can cause unjustified delays and increase trade costs. These can take the form of discriminatory rules of origin, unnecessarily restrictive SPS and TBT measures, duplicative documentation, and import bans, among other measures.⁴⁰² During a crisis such as COVID-19, such measures can be extremely problematic.

One RTA innovation to address NTBs is to establish a platform for reporting and addressing NTBs, including SPS and TBT measures and other non-tariff measures such as customs and trade facilitation measures. Few RTAs have incorporated such obligations, but such a platform does appear under several African RTAs, namely the East African Community Elimination of Non-Tariff Barriers Act, 2017⁴⁰³ and AfCFTA in the form of a NTB Reporting, Monitoring, and Eliminating Mechanism. The NTB Reporting, Monitoring, and Eliminating Mechanism contained in the AfCFTA is included as a Baseline+ Option below. It sets out guidance on the categorization of NTBs, establishment of national monitoring committees for NTBs, and national focal points, and it obligates African Regional Economic Communities to strengthen NTB monitoring mechanisms. To implement these provisions, an online mechanism for reporting, monitoring and eliminating NTBs has been established (<https://tradebarriers.africa>), whereby complaints can be sent formally to national focal points through the website or via mobile phone.⁴⁰⁴ This mechanism is open to both trading partners and private sector stakeholders.⁴⁰⁵

Although other transparency obligations also form an integral part of both the SPS and TBT Agreements, RTA options aimed at bolstering transparency in times of crisis are covered in greater detail in Chapter VII of this Handbook (Transparency), which presents options for policymakers on a range of transparency-related issues including, inter alia, notification, publication, and enquiry points.

³⁹⁹ See *Sanitary and Phytosanitary Information Management System*, WTO, <http://spsims.wto.org/en/PredefinedReports/NumberOfSPSNotificationsPage?DateFrom1=01%2F01%2F2019&DateTo1=31%2F12%2F2019&DateFrom2=01%2F01%2F2020&DateTo2=31%2F12%2F2020> (last visited April 23, 2021).

⁴⁰⁰ Id.

⁴⁰¹ Biswajit Dhar, *Technical Regulations in the WTO: The Need to Improve Transparency*, in Evenett & Baldwin 2020, *supra* note 23.

⁴⁰² *Non-Tariff Barriers to Trade*, COMMON MARKET FOR EASTERN AND SOUTH AFRICA (COMESA), EAST AFRICAN COMMUNITY (EAC) AND SADC) https://www.tradebarriers.org/ntb/non_tariff_barriers

⁴⁰³ EAC Elimination of Non-Tariff Barriers Act, 2017, Article 7 <https://www.eala.org/index.php/documents/view/eac-elimination-of-non-tariff-barriers-act-2017>.

⁴⁰⁴ *AfCFTA Support Programme to Eliminate Non-Tariff Barriers, Increase Regulatory Transparency and Promote Industrial Diversification*, UNCTAD, (2018), <https://unctad.org/project/afcfta-support-programme-eliminate-non-tariff-barriers-increase-regulatory-transparency-and>.

⁴⁰⁵ Id.

Example Provisions on Transparency and Reporting Mechanism

Baseline Option for SPS Measures: Transparency

“Members shall notify changes in their sanitary or phytosanitary measures and shall provide information on their sanitary or phytosanitary measures in accordance with the provisions of Annex B.”

5. Whenever an international standard, guideline or recommendation does not exist or the content of a proposed SPS regulation is not substantially the same as the content of an international standard, guideline or recommendation, and if the regulation may have a significant effect on trade of other Members, Members shall:

- (a) publish a notice at an early stage in such a manner as to enable interested Members to become acquainted with the proposal to introduce a particular regulation;
- (b) notify other Members, through the Secretariat, of the products to be covered by the regulation together with a brief indication of the objective and rationale of the proposed regulation. Such notifications shall take place at an early stage, when amendments can still be introduced and comments taken into account;
- (c) provide upon request to other Members copies of the proposed regulation and, whenever possible, identify the parts which in substance deviate from international standards, guidelines or recommendations;
- (d) without discrimination, allow reasonable time for other Members to make comments in writing, discuss these comments upon request, and take the comments and the results of the discussions into account.

6. However, where urgent problems of health protection arise or threaten to arise for a Member, that Member may omit such of the steps enumerated in paragraph 5 of this Annex as it finds necessary, provided that the Member:

- (a) immediately notifies other Members, through the Secretariat, of the particular regulation and the products covered, with a brief indication of the objective and the rationale of the regulation, including the nature of the urgent problem(s);
- (b) provides, upon request, copies of the regulation to other Members;
- (c) allows other Members to make comments in writing, discusses these comments upon request, and takes the comments and the results of the discussions into account.

Source: SPS Agreement, Article 7

Baseline+ Option for NTB Reporting, Monitoring, and Eliminating Mechanism

“1. The RECs shall establish or strengthen NTBs monitoring mechanisms responsible for:

- (a) tracking and monitoring NTBs affecting intra-African trade and updating regional and national plans for the elimination of NTBs; and

(b) capacity building and sensitisation of stakeholders on the reporting, monitoring and evaluation tools such as the web based system.

2. Working closely with the NTB Sub-Committee, RECs NTB Units and National Focal Points shall ensure timely and effective resolution of identified NTBs. RECs shall cooperate in resolving identified NTBs with a view to facilitating trade.

3. RECs NTB Monitoring mechanisms shall support the NTB Coordination Unit at the Secretariat in the resolution of inter-REC NTBs.”

Source: AfCFTA, Annex B, Article 10.

CHAPTER V - INTELLECTUAL PROPERTY RIGHTS

In a global economy that is increasingly driven by technological advances, IPR plays a central role.⁴⁰⁶ IPRs are a component of innovation-based economic development,⁴⁰⁷ and they also have a public interest dimension of ensuring balance between the rights of innovators and access to the products of innovation needed in times of crisis or emergency. IPR regimes also have links with the SDGs and, in particular, are important in the achievement of SDG 9 (fostering innovation) and SDG 3 (good health and well-being), with specific reference in Target 3(b) “support[ing] the research and development of vaccines and medicines” and “provid[ing] access to affordable essential medicines and vaccines, in accordance with the Doha Declaration on the TRIPS Agreement and Public Health.”⁴⁰⁸

As the COVID-19 pandemic has highlighted, IPRs essential to build resilience in trade systems and building forward better. In a global health crisis, IPRs are particularly important. Some States and stakeholders stress that IPRs prevent access to essential medicines, vaccines, and equipment, while others argue that they form part of the solution by encouraging fast and efficient innovation. In the wake of the COVID-19 pandemic, many countries adopted a range of IP-related measures as part of their crisis response strategy. The majority of these are administrative measures aimed at easing procedural requirements at IP offices during lockdowns and developing online services; and approximately one-quarter are substantive measures aimed at promoting innovation or facilitating access to COVID-19-related health technologies. These latter measures normally require the enactment of government decrees or amendments to existing legislation.⁴⁰⁹ For instance, Canada introduced a bill modifying its Patent Act to allow the Commissioner of Patents to permit the government or an authorized person “to supply a patented invention to the extent necessary to respond to a public health emergency that is a matter of national concern,” with due safeguards to protect the rights of the patentholders.⁴¹⁰ Israel issued a permit for the import of generic versions of therapeutics such as lopinavir/ritonavir from India.⁴¹¹ The Russian Federation issued compulsory licenses for some patents related to remdesivir, valid until the end of 2021.⁴¹² These measures were used to enhance access to vital therapeutics to combat the pandemic.

At the multilateral level, the TRIPS Agreement sets out minimum standards for protection of covered IPRs and recognizes the need to balance the interests of creators and innovators with those of the users of the creations and/or inventions. The TRIPS Agreement is the most comprehensive multilateral treaty

⁴⁰⁶ See *Some Considerations on Intellectual Property, Innovation, and COVID-19*, WORLD INTELLECTUAL PROPERTY ORGANIZATION, https://www.wipo.int/export/sites/www/about-wipo/en/dg_gurry/pdf/ip_innovation_and_access_24042020.pdf.

⁴⁰⁷ See, e.g., *Would Exempting COVID-19 Vaccines from Intellectual Property Rights Improve Global Access and Equity?*, CENTER FOR GLOBAL DEVELOPMENT, <https://www.cgdev.org/debate/would-exempting-covid-19-vaccines-intellectual-property-rights-improve-global-access>; See Wu Export Restrictions 2020, *supra* note 145 in Handbook of Deep Trade Agreements 2020, *supra* note 45.

⁴⁰⁸ Report of the Inter-Agency and Expert Group on Sustainable Development Goal Indicators (E/CN.3/2016/2/Rev.1), Annex IV, UNITED NATIONS.

⁴⁰⁹ See *COVID-19: Measures Regarding Trade-related Intellectual Property Rights*, WTO, https://www.wto.org/english/tratop_e/covid19_e/trade_related_ip_measure_e.htm.

⁴¹⁰ *Id.*

⁴¹¹ *Id.*

⁴¹² *Id.*

on IPR protection.⁴¹³ Recent RTAs reaffirm TRIPS obligations to protect IPRs and, in some cases, establish TRIPS plus IPR protection.

A. Legal Aspects of Intellectual Property Rights

The TRIPS Agreement entered into force in 1995 and established minimum standards of protection for patents, copyrights, trademarks, geographical indications, industrial designs, layout-designs of integrated circuits, and undisclosed information.⁴¹⁴ In addition to general principles, including MFN and national treatment principles, the TRIPS Agreement has three main features:⁴¹⁵ (a) a set of minimum standards for each of the covered IPRs, which must be protected by WTO Members; (b) principles governing domestic enforcement procedures for IPRs; and (c) application of the WTO's Dispute Settlement Understanding to TRIPS obligations, whereby disputes under the TRIPS Agreement are subject to the WTO's dispute settlement mechanisms. While all WTO members are bound by the TRIPS Agreement, longer transition periods were envisioned for developing and LDC members to bring their domestic legislation in line with the TRIPS Agreement.⁴¹⁶ Most of these transition period has lapsed. Currently, LDCs have until 2021 to implement the basic obligations of the TRIPS Agreement and until 2033 to establish patent protection in accordance with TRIPS obligations.⁴¹⁷

In the objectives contained in Article 7, the TRIPS Agreement recognizes the need to balance the rights of creators or IPR holders with the users of technological knowledge, as well as the need to enforce IPR in a manner that promotes social and economic welfare.⁴¹⁸ Further, Article 8 of the TRIPS Agreement specifically sets out the rights of Members to adopt measures necessary for public health and nutrition and promote vital public interests.⁴¹⁹ The TRIPS Agreement, therefore, includes some flexibilities specifically intended to promote such interests. The most relevant flexibilities for pharmaceuticals include the freedom for WTO members to choose their own system of exhaustion of IPRs under Article 6⁴²⁰ and the establishment of a compulsory licensing mechanism under Article 31. A compulsory licence is a licence granted by a government authority to a person other than the patent owner that authorizes the production, importation, sale or use of the patent-protected product without the consent of the patent owner.⁴²¹ While Article 31 refers to 'use without authorization of the right holder', it covers both compulsory licences granted to third parties for their own use and use by or on

⁴¹³ Overview: *The Trade Related Aspects of Intellectual Property Rights (TRIPS Agreement)*, WTO, https://www.wto.org/english/tratop_e/trips_e/intel2_e.htm.

⁴¹⁴ Id.

⁴¹⁵ Id.

⁴¹⁶ Id.

⁴¹⁷ *Responding to Least Developed Countries' Special Needs in Intellectual Property*, WTO, [https://www.wto.org/english/tratop_e/trips_e/ldc_e.htm#:~:text=Least%20developed%20countries%20\(LDCs\)%20are%20In%20Intellectual%20Property%20Rights%20\(TRIPS\).&text=Initially%2C%20it%20also%20allowed%20LDCs,the%20bulk%20of%20TRIPS%20obligations](https://www.wto.org/english/tratop_e/trips_e/ldc_e.htm#:~:text=Least%20developed%20countries%20(LDCs)%20are%20In%20Intellectual%20Property%20Rights%20(TRIPS).&text=Initially%2C%20it%20also%20allowed%20LDCs,the%20bulk%20of%20TRIPS%20obligations).

⁴¹⁸ Agreement on Trade-Related Aspects of Intellectual Property Rights, Article 7, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299, 33 I.L.M. 1197, (1994) [hereinafter TRIPS Agreement].

⁴¹⁹ See TRIPS Agreement, Article 8, *supra* note 418.

⁴²⁰ Brook K. Baker, *A Full Description of WTO Trips Flexibilities Available to ARIPO Member States and a Critique of ARIPO's Comparative Study Analyzing and Making Recommendations Concerning Those Flexibilities*, <https://www.bu.edu/gdp/files/2020/05/ARIPO-Member-States-obligations-and-flexibilities-under-the-WTO-TRIPS-Agreement-March-2019.pdf>.

⁴²¹ *Module V: Patents*, WTO, https://www.wto.org/english/tratop_e/trips_e/ta_docs_e/modules5_e.pdf.

behalf of governments without the authorization of the right holder. In 2001, against the background of the HIV/AIDS crisis, WTO Member States realized that the compulsory licensing mechanism set out under Article 31 was not sufficient to ensure access to vital pharmaceuticals for countries that lacked sufficient manufacturing capacity.⁴²² In 2003, Members agreed to waive the requirement that compulsory licenses be issued for products intended predominantly for the domestic market, and in 2005 this waiver was permanently incorporated into the TRIPS Agreement in the form of Article 31*bis*. This amendment to the TRIPS Agreement expanded the scope of the compulsory licensing mechanism and came into effect in 2017, when it was accepted by two-thirds of the WTO membership.⁴²³ Article 31*bis* created a new legal avenue to export pharmaceuticals produced under compulsory licences with the objective of assisting WTO members with no or insufficient manufacturing capacity.⁴²⁴ The only formal requirement is a notification to the TRIPS Council.⁴²⁵

Since the WTO was established, there has been a proliferation of RTAs that include comprehensive IP Chapters. Many RTAs contain provisions that go beyond the TRIPS Agreement and are generally referred to as "TRIPS plus" obligations. As of 2020, 76 per cent of the RTAs notified to the WTO and in force contain IPR provisions,⁴²⁶ The incidence of IPR provisions in RTAs increases significantly for RTAs concluded after 2009, and 90 per cent of these more recent RTAs have IPR chapters.⁴²⁷ The most common IPR provisions in RTAs are those related to patents, copyrights, trademarks, and geographical indications.⁴²⁸ Other common provisions cover industrial designs, traditional knowledge, and genetic resources.⁴²⁹ The least common IPR provisions are those related to integrated circuits, domain names, and encrypted-program carrying satellite signals.⁴³⁰

In the World Bank Handbook of Deep Trade Agreements, Wu identifies four geographic hubs that have driven the integration of deeper IP-related obligations in RTAs, namely the United States, the EU, the European Free Trade Area (EFTA), and a set of advanced countries in the Asia-Pacific region.⁴³¹ The US template, which has remained relatively consistent with only moderate modification over the years, includes TRIPS plus provisions for patents, copyrights, and trademarks, along with more stringent domestic enforcement requirements.⁴³² The EU model similarly requires TRIPS plus provisions; however, it differs notably from the US model in its push for greater protection of geographical indications.⁴³³ While the EFTA model also imposes higher standards for IPR protection, it varies from the other two approaches in terms of a more limited focus on copyright, along with the

⁴²² Amendment to the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), WORLD TRADE ORG., https://www.wto.org/english/tratop_e/trips_e/tripsfacsheet_e.htm.

⁴²³ Members which have not yet accepted the amendment have until December 31, 2021 (or such later date fixed by the Ministerial Conference) to accept it, and, until their acceptance, the waiver decision of 2003 will apply. See Amendment to the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), WORLD TRADE ORG., https://www.wto.org/english/tratop_e/trips_e/tripsfacsheet_e.htm.

⁴²⁴ *Annex III: Special Compulsory Licenses for Export of Medicine*, WTO, https://www.wto.org/english/res_e/booksp_e/who-wipo-wto_2020_e/annex_3_who-wipo-wto_2020_e.pdf.

⁴²⁵ *Guide to Notifications*, WTO, https://www.wto.org/english/tratop_e/trips_e/par6_modelnotifs_e.htm.

⁴²⁶ Raymundo Valdés & Maegan McCann, *Intellectual Property Provisions in Regional Trade Agreements: Revision and Update*, WTO STAFF WORKING PAPERS ERSD-2014-14 (2014).

⁴²⁷ See Wu Export Restrictions 2020, *supra* note 145 in Handbook of Deep Trade Agreements 2020, *supra* note 45.

⁴²⁸ See Valdés and McCann, *supra* note 426.

⁴²⁹ *Id.*

⁴³⁰ *Id.*

⁴³¹ See Wu Export Restrictions 2020, *supra* note 145 in Handbook of Deep Trade Agreements 2020, *supra* note 45.

⁴³² *Id.*

⁴³³ *Id.*

adoption of some developing country priorities in the protection of pharmaceuticals, namely the requirement for disclosure of inclusion of the source of genetic material in patent applications and an option for compensation in lieu of test data term exclusivity.⁴³⁴ The advanced economies of the Asia-Pacific region are another important sources of deeper provisions, although there is variation in the approaches of the countries of this region.⁴³⁵ However, the IP chapter of the CPTPP,⁴³⁶ for example, highlights a common approach for TRIPS plus provisions.⁴³⁷

B. RTA options for Intellectual Property Rights

As noted above, recent RTAs tend to contain comprehensive IP chapters and specific provisions. The scope of this chapter is limited, however, to those IPR provisions that are specifically relevant during times of crises. Guided by the considerations brought to light by the COVID-19 pandemic, this chapter examines the aspects of IPR protection that are important to resilience during times of crisis and efforts to build forward better: (i) TRIPS plus provisions related to pharmaceuticals; (ii) compulsory licensing; and (iii) alternative incentive models. It is important to note here that crisis-sensitive IP provisions alone cannot create a surplus of essential medicines and technology. Often the lack of manufacturing capacity, shortage of skilled labour and technical know-how, lack of equipment and supplies, and disruptions to supply chains are the key factors undermining access to medical technology.⁴³⁸

In assessing RTA options under these categories, this chapter follows the Handbook's general approach in categorizing options as Baseline, Baseline+, and Discretionary approaches, with the TRIPS Agreement serving as a useful baseline comparator. Sample Model Provisions also noted where relevant. The sections below also include options that contain more tailored IPR provisions in response to crisis circumstances as well as provide countries with differing degrees of policy space. Notably, while the TRIPS Agreement forms the baseline for most IPR provisions given its comprehensive coverage, there is no baseline (multilateral or regional) for alternative incentive models. Therefore, this section is limited to various options derived from proposals made by countries, multilateral entities, and academic commentators.

1. TRIPS Plus Provisions for Pharmaceuticals

IPR protection for pharmaceuticals raises critical questions during times of pandemic or crisis. TRIPS plus IPR provisions are common in RTAs, and those most relevant to pharmaceuticals include patent linkage, patent term extension, exhaustion, expanded definitions of patentability, and protection for undisclosed test data and biologics.⁴³⁹

Patent linkage prevents the concerned health regulatory body from granting marketing approval for a generic version of a protected medicine without permission from the patentholder during the term of

⁴³⁴ Id.

⁴³⁵ Id.

⁴³⁶ See CPTPP, Article 3.20.3, *supra* note 8.

⁴³⁷ See Wu Export Restrictions 2020, *supra* note 145 in Handbook of Deep Trade Agreements 2020, *supra* note 45.

⁴³⁸ Parsa Erfani, Lawrence O. Gostin, & Vanessa Kerry, *Beyond a Symbolic Gesture: What's Needed to Turn the IP Waiver into Covid-19 Vaccines*, STAT (May 19, 2021), <https://www.statnews.com/2021/05/19/beyond-a-symbolic-gesture-whats-needed-to-turn-the-ip-waiver-into-covid-19-vaccines/>; Rachel Thrasher, *Why Innovation Would Survive a COVID-19 TRIPS Waiver*, IP WATCHDOG (March 24, 2021), <https://www.ipwatchdog.com/2021/03/24/innovation-survive-covid-19-trips-waiver/id=131194/>.

⁴³⁹ See Wu Export Restrictions 2020, *supra* note 145 in Handbook of Deep Trade Agreements 2020, *supra* note 45.

protection.⁴⁴⁰ This can delay the entry of generic drugs into the market and ease the enforcement obligation of the patentholder, while passing on some obligations to regulatory authorities.⁴⁴¹ It could arguably also affect the operation of the compulsory licensing mechanism during the term of the patent.⁴⁴² However, it should be noted that many RTAs commonly affirm the compulsory licensing system set out under the TRIPS Agreement. In some cases, RTAs expressly stress the rights of parties to use the full flexibilities given under the compulsory licensing system to pursue their public health goals, which is highlighted as an option below.

TRIPS plus obligations also appear in the form of expanded scope of patentability and patent term extensions. Expansions include patenting of new uses of a known product or the patenting of plants and animals.⁴⁴³ Patent term extensions are also common and allow patentholders to recoup the time lost due to unreasonable delays in regulatory processes through the lengthening of the patent term beyond the TRIPS prescribed period of twenty years.⁴⁴⁴ Another particularly controversial provision is expanded data protection for test data and other biologics. Such provisions have the effect of increasing costs for generic manufacturers, who will be required to conduct their own tests.⁴⁴⁵

Many proponents of TRIPS plus provisions for pharmaceuticals argue that such enhanced protections are necessary to stimulate innovation by allowing the private sector more efficient ways in which to recoup the costs of their investments.⁴⁴⁶ However, such provisions often have the effect of creating increased barriers for the entry of generics into the market, through delays and heightened costs. These measures can thus reduce access to low-cost medications, while adding to the price of generics. While there are variations for each of the TRIPS plus provisions discussed above, this section will focus on provisions related to the protection of undisclosed test data as an example to illustrate the various options that can protect the interests of patent holders while allowing for the fast production of generic alternatives.

The national implementation of the TRIPS Agreement and any relevant RTAs is key and can make a difference in the effects of TRIPS plus provisions. For example, the international obligations of Peru on the protection of test data are derived from: the TRIPS Agreement, Decision 486 of the Andean Community, the Free Trade Agreement with the United States, the Free Trade Agreement with EFTA, the Association Agreement with the European Union, and the CPTPP. Peru implemented these obligations at the national level and, at the same time, defined "new chemical entity" and provided for

⁴⁴⁰ See *Intellectual Property Rights and International Trade*, CONGRESSIONAL RESEARCH SERVICE, 34–35 (2020), <https://crsreports.congress.gov/product/pdf/RL/RL34292>.

⁴⁴¹ Bryan Christopher Mercurio, *TRIPS-Plus Provisions in FTAs: Recent Trends*, [hereinafter Mercurio, 2006] in *REGIONAL TRADE AGREEMENTS AND THE WTO LEGAL SYSTEM* 215, 224–227 (Lorand Bartels & Federico Ortino eds. 2006) [hereinafter Bartels and Ortino].

⁴⁴² *Id.*, at 226.

⁴⁴³ See Wu Export Restrictions 2020, *supra* note 145 in *Handbook of Deep Trade Agreements 2020*, *supra* note 45.

⁴⁴⁴ See Mercurio 2006, in Bartels and Ortino *supra* note 441 at 229–231.

⁴⁴⁵ *Id.*, at 226–229.

⁴⁴⁶ Tom Wilbur, *IP Explained: Why IP Protections are Important for Biologic Medicines*, PHARMA, (July 18, 2019), <https://catalyst.pharma.org/ip-explained-why-ip-protections-are-important-for-biologic-medicines>; Philip Stevens & Mark Schultz, *Why Intellectual Property Rights Matter for COVID-19*, GENEVA NETWORK (January 14, 2021), <https://geneva-network.com/research/why-intellectual-property-rights-matter-for-covid-19/>.

the period of protection depending upon when and where the first application for marketing approval was filed.⁴⁴⁷

The Baseline Option below is derived from the TRIPS Agreement, which sets out the minimum standard for protection of undisclosed test data, i.e., effective protection against unfair competition. The Baseline Option also contains an exception as “necessary to protect the public.”

Two other options are noted that allow States more policy space; however, the manner in which governments exercise policy space can be critical during a crisis. Discretionary Option A below is derived from the EFTA-Republic of Korea Agreement and provides that a Party may allow reliance upon test data through national law if compensation is provided for the rights holder. This option allows other applicants to seek regulatory approval using the test data of the rights holder, while recognizing and protecting the latter’s rights through compensation. Nevertheless, the degree of compensation required may present a hurdle for the effective use of the provision during an emergency. This option is also challenging, because it does not specify the term of protection for undisclosed test data, referring instead to “an adequate number of years from the date of approval,” which creates uncertainty in terms of the provision’s reach.

Discretionary Option B below is derived from the USMCA and goes beyond the TRIPS minimum standard and provides for a fixed term of protection for undisclosed test data. While this option exercises governments’ ability to build upon TRIPS, a fixed term of protection could potentially lead to challenges for stakeholders and trading partners, particularly during a time of emergency.

Example Provisions on Undisclosed Test Data Protection

Baseline Option: Protection of Undisclosed Test Data

“1. In the course of ensuring effective protection against unfair competition as provided in Article 10bis of the Paris Convention (1967), Members shall protect undisclosed information in accordance with paragraph 2 and data submitted to governments or governmental agencies in accordance with paragraph 3.

2. Natural and legal persons shall have the possibility of preventing information lawfully within their control from being disclosed to, acquired by, or used by others without their consent in a manner contrary to honest commercial practices so long as such information:

(a) is secret in the sense that it is not, as a body or in the precise configuration and assembly of its components, generally known among or readily accessible to persons within the circles that normally deal with the kind of information in question;

(b) has commercial value because it is secret; and

⁴⁴⁷ Maritza Reátegui Valdiviezo, Test data for Pharmaceutical products. Analysis of Peruvian Legislation and Applicable Treaties, (2016), DERECHO & SOCIEDAD, <https://revistas.pucp.edu.pe/index.php/derechoysociedad/article/view/19884/19923>

(c) has been subject to reasonable steps under the circumstances, by the person lawfully in control of the information, to keep it secret.

3. Members, when requiring, as a condition of approving the marketing of pharmaceutical or of agricultural chemical products which utilize new chemical entities, the submission of undisclosed test or other data, the origination of which involves a considerable effort, shall protect such data against unfair commercial use. In addition, Members shall protect such data against disclosure, except where necessary to protect the public, or unless steps are taken to ensure that the data are protected against unfair commercial use.”

Source: TRIPS Agreement, Article 39

Discretionary Option A: Compensation for Undisclosed Information

“The Parties shall protect undisclosed information in accordance with Article 39 of the TRIPS Agreement. The Parties shall prevent applicants for marketing approval for pharmaceuticals and agricultural chemical products from relying on undisclosed test or other undisclosed data, the origination of which involves a considerable effort, submitted by the first applicant to the competent authority for marketing approval for pharmaceuticals and agricultural chemical products, utilising new chemical entities, for an adequate number of years from the date of approval, except where approval is sought for original products. Any Party may instead allow in their national legislation applicants to rely on such data if the first applicant is adequately compensated.”

Source: EFTA – Republic of Korea Free Trade Agreement, Annex XIII, Article 3

Discretionary Option B: Fixed Term Protection for Undisclosed Test Data

“If a Party requires, as a condition for granting marketing approval for a new pharmaceutical product, the submission of undisclosed test or other data concerning the safety and efficacy of the product, that Party shall not permit third persons, without the consent of the person that previously submitted that information, to market the same or a similar product on the basis of:

(i) that information, or

(ii) the marketing approval granted to the person that submitted that information,

for at least five years from the date of marketing approval of the new pharmaceutical product in the territory of the Party.”

Source: USMCA, Article 20.48

2. Compulsory Licensing

Compulsory licensing is a mechanism whereby countries may grant licenses to produce a patent protected product during the term of the patent without consent from the patentholder.⁴⁴⁸ In order to

⁴⁴⁸ *Compulsory Licensing of Pharmaceuticals and TRIPS*, WTO, https://www.wto.org/english/tratop_e/trips_e/public_health_faq_e.htm [hereinafter WTO Compulsory Licensing].

grant such licenses, the applicant should generally have failed to obtain a voluntary license from the patentholder on reasonable commercial terms, and there should be adequate compensation (a term that is defined in the TRIPS Agreement) paid to the patentholder.⁴⁴⁹ However, Article 31 of the TRIPS Agreement provides that during a time of emergency, countries can dispense with the requirement of seeking a voluntary license; under Article 31(b) such a requirement “may be waived by a Member in the case of a national emergency or other circumstances of extreme urgency or in cases of public non-commercial use.”⁴⁵⁰ The original system of compulsory licensing under the TRIPS Agreement was intended primarily for domestic production of generics through compulsory licensing.⁴⁵¹ The Amended TRIPS Agreement and, more specifically, Article 31*bis* expanded this flexibility to members that lack the manufacturing capacity to produce generic drugs domestically under a compulsory license by allowing special compulsory licenses for purposes of export.⁴⁵²

The existence of the compulsory licensing mechanism is a notable flexibility included in the TRIPS Agreement, and its implementation at the national level plays a key role. Article 31*bis* requires the exporting and importing parties to notify the TRIPS Council regarding their use of the special compulsory license system. In the notification, the importing member indicates that it has insufficient or no manufacturing capacity to produce the required product.⁴⁵³ It also provides that the total of pharmaceutical products produced under a special compulsory license for export needs to be sent to the importing member and have to be distinguished through special packaging or another differentiating feature.⁴⁵⁴ Therefore, the access to the required pharmaceutical products is balanced with measures to avoid unlawful re-exportation and diversion to third markets.⁴⁵⁵ It has been argued that these conditions could result in the need for excessive documentation and the creation of a separate production line for products under the mechanism and affect economies of scale.⁴⁵⁶ Critics, therefore, have argued that the process remains a ‘case-by-case’, ‘country-by-country’ mechanism,⁴⁵⁷ resulting in limited use during health crises.⁴⁵⁸

⁴⁴⁹ TRIPS Agreement, Article 31. Article 31 (b) holds, “such use may only be permitted if, prior to such use, the proposed user has made efforts to obtain authorization from the right holder on reasonable commercial terms and conditions and that such efforts have not been successful within a reasonable period of time. This requirement may be waived by a Member in the case of a national emergency or other circumstances of extreme urgency or in cases of public non-commercial use. In situations of national emergency or other circumstances of extreme urgency, the right holder shall, nevertheless, be notified as soon as reasonably practicable. In the case of public non-commercial use, where the government or contractor, without making a patent search, knows or has demonstrable grounds to know that a valid patent is or will be used by or for the government, the right holder shall be informed promptly”.

⁴⁵⁰ TRIPS Agreement, Article 31, *supra* note 418.

⁴⁵¹ See WTO Compulsory Licensing, *supra* note 451.

⁴⁵² See WTO Compulsory Licensing, *supra* note 451.

⁴⁵³ *Annex III: Special Compulsory Licenses for Export of Medicine*, WTO, https://www.wto.org/english/res_e/booksp_e/who-wipo-wto_2020_e/annex_3_who-wipo-wto_2020_e.pdf.

⁴⁵⁴ Annex to the TRIPS Agreement, Article 2.

⁴⁵⁵ Caroline Freund & Christine McDaniel, *Three Steps to Facilitate Global Distribution of a COVID-19 Vaccine*, in REVITALISING MULTILATERALISM: PRAGMATIC IDEAS FOR THE NEW WTO DIRECTOR-GENERAL 9 (Simon J. Evenett & Richard Baldwin eds., 2020), <https://voxeu.org/content/revitalising-multilateralism-pragmatic-ideas-new-wto-director-general>.

⁴⁵⁶ *Id.*

⁴⁵⁷ Brin Anderson, *Better Access to Medicines: Why Countries are Getting Tripped Up and Not Ratifying Article 31-Bis*, 1 CASE W. RES. J.L. TECH. & INTERNET 165, 174 (2010).

⁴⁵⁸ Katrin Kuhlmann, Tara Francis, Indulekha Thomas, Malou Le Graet, Mushfiqur Rahman, Fabiola Madrigal, Maya Cohen, Ata Nalbantoglu, *Re-conceptualizing Free Trade Agreements Through a Sustainable Development Lens* (July 27, 2020) (A Contribution to the Policy Hackathon on Model Provisions for Trade in Times of Crisis and Pandemic in Regional

However, a 2017 WHO study showed that TRIPS flexibilities have been used more frequently than is commonly assumed and have proven effective for procuring generic versions of essential medicines, particularly for treating HIV infection. The compulsory licensing system has been successfully used in negotiations with providers, which have lowered prices without the need to resort to the use of compulsory licensing.⁴⁵⁹

Baseline Option A below is taken from the TRIPS Agreement, which allows countries to use the compulsory licensing mechanism for export. Many RTAs contain a reference to the TRIPS Agreement, and in particular to the Doha Declaration on the TRIPS Agreement and Public Health. While not universally prevalent, this recognition of adherence to the Declaration can be considered another baseline as set out below (Baseline Option B).

The Discretionary Option, derived from the RCEP, specifically affirms the rights of countries to use the full flexibilities of the compulsory licensing mechanism set out under the TRIPS Agreement to protect public health and promote access to medicines for all. This is in line with SDG Target 3.b, which calls for the application of TRIPS flexibilities for the promotion of public health and access to medicines.

Example Provisions on Compulsory Licensing

Baseline Option A: Compulsory Licensing

“1. The obligations of an exporting Member under Article 31(f) shall not apply with respect to the grant by it of a compulsory licence to the extent necessary for the purposes of production of a pharmaceutical product(s) and its export to an eligible importing Member(s) in accordance with the terms set out in paragraph 2 of the Annex to this Agreement.

2. Where a compulsory licence is granted by an exporting Member under the system set out in this Article and the Annex to this Agreement, adequate remuneration pursuant to Article 31(h) shall be paid in that Member taking into account the economic value to the importing Member of the use that has been authorized in the exporting Member. Where a compulsory licence is granted for the same products in the eligible importing Member, the obligation of that Member under Article 31(h) shall not apply in respect of those products for which remuneration in accordance with the first sentence of this paragraph is paid in the exporting Member.

3. With a view to harnessing economies of scale for the purposes of enhancing purchasing power for, and facilitating the local production of, pharmaceutical products: where a developing or least developed country WTO Member is a party to a regional trade agreement within the meaning of Article XXIV of the GATT 1994 and the Decision of 28 November 1979 on Differential and More Favourable Treatment Reciprocity and Fuller Participation of Developing Countries (L/4903), at least half of the current membership of which is made up of countries presently on the United Nations list of least developed countries, the obligation of that Member under Article 31(f) shall not apply to

and Other Trade Agreements), <https://www.unescap.org/sites/default/files/145%20Final-Team%20Katrin%20Kuhlmann-USA.pdf>.

⁴⁵⁹ Ellen ‘t Hoen, *Medicine procurement and the use of flexibilities in the TRIPS Agreement, 2001–2016*, WORLD HEALTH ORGANIZATION, https://www.who.int/bulletin/online_first/BLT.17.199364.pdf.

the extent necessary to enable a pharmaceutical product produced or imported under a compulsory licence in that Member to be exported to the markets of those other developing or least developed country parties to the regional trade agreement that share the health problem in question. It is understood that this will not prejudice the territorial nature of the patent rights in question.

4. Members shall not challenge any measures taken in conformity with the provisions of this Article and the Annex to this Agreement under subparagraphs 1(b) and 1(c) of Article XXIII of GATT 1994.

5. This Article and the Annex to this Agreement are without prejudice to the rights, obligations and flexibilities that Members have under the provisions of this Agreement other than paragraphs (f) and (h) of Article 31, including those reaffirmed by the Declaration on the TRIPS Agreement and Public Health (WT/MIN(01)/DEC/2), and to their interpretation. They are also without prejudice to the extent to which pharmaceutical products produced under a compulsory licence can be exported under the provisions of Article 31(f).

Source: TRIPS Agreement, Article 31 *bis*

Baseline Option B (RTA Baseline): Reference to TRIPS Agreement and Public Health Declaration

“1. The Parties recognise the importance of the Declaration on the TRIPS Agreement and Public Health, adopted on 14 November 2001 by the Ministerial Conference of the WTO, in Doha. In interpreting and implementing the rights and obligations under this Chapter, the Parties are entitled to rely upon that Declaration.

2. The Parties shall respect the Decision of the WTO General Council of 30 August 2003 on Implementation of Paragraph 6 of the Doha Declaration on the TRIPS Agreement and Public Health.”

Source: EU-Viet Nam Free Trade Agreement and Economic Integration Agreement, Article 12.39

Discretionary Option: Affirmations of Rights to Protect Public Health

“1. The Parties reaffirm the Doha Declaration on the TRIPS Agreement and Public Health adopted on 14 November 2001. In particular, the Parties have reached the following understandings regarding this Chapter:

(a) the Parties affirm the right to fully use the flexibilities as duly recognised in the Doha Declaration on the TRIPS Agreement and Public Health;

(b) the Parties agree that this Chapter does not and should not prevent a Party from taking measures to protect public health; and

(c) the Parties affirm that this Chapter can and should be interpreted and implemented in a manner supportive of each Party’s right to protect public health and, in particular, to promote access to medicines for all.

2. In recognition of the Parties' commitment to access to medicines and public health, this Chapter does not and should not prevent the effective utilisation of Article 31bis of the TRIPS Agreement, and the Annex and Appendix to the Annex to the TRIPS Agreement.

3. The Parties recognise the importance of contributing to the international efforts to implement Article 31bis of the TRIPS Agreement, and the Annex and Appendix to the Annex to the TRIPS Agreement.”

Source: RCEP, Article 11.8

In October 2020, India and South Africa introduced a proposal requesting a "Waiver from Certain Provisions of the TRIPS Agreement for the Prevention, Containment and Treatment of COVID-19" ([IP/C/W/669](#) and addenda),⁴⁶⁰ and the co-sponsors introduced a revised proposal ([IP/C/W/669/Rev.1](#)). As of September 2021, the proposal had been supported by 62 WTO members ([IP/C/W/677](#)).⁴⁶¹ Proponents of the waiver argue that IPR protections impede the ability of countries to access low-cost pharmaceuticals and other essential products to successfully respond to the pandemic, citing the cumbersome nature of the existing compulsory licensing mechanism which prevent its effective use; they also point out that no system similar to the compulsory licensing framework exists for copyrights, trade secrets, and industrial design.⁴⁶² On the other hand, other Members have underscored the importance of strong IPR provisions in stimulating innovation, maintaining that a waiver could discourage future research and development.⁴⁶³

In July 2021, the European Union proposed a "Draft General Council declaration on the TRIPS Agreement and Public Health in the Circumstances of a Pandemic" ([IP/C/W/681](#)), which calls for limiting export restrictions, supporting the expansion of vaccine production, and facilitating the use of current compulsory licensing provisions in the TRIPS Agreement, particularly by clarifying that the requirement to negotiate with the right holder of the vaccine patent does not apply in urgent situations such as a pandemic, among others. The two texts discussed in the TRIPS Council reflect that the positions remain divergent (September 2021). While governments remain committed to the common goal of providing timely and secure access to high-quality, safe, efficacious, and affordable vaccines and medicines for all, disagreement persists on the fundamental question of the appropriate and most effective way to address the shortage and inequitable access to vaccines and other COVID-related

⁴⁶⁰ *Draft Decision Text: Waiver from Certain Provisions of the TRIPS Agreement for the Prevention, Containment and Treatment of Covid-19: Communication from India and South Africa*, WTO, (October 2, 2020), <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:IP/C/W669.pdf&Open=True> .

⁴⁶¹ *Draft Decision Text: Waiver from Certain Provisions of the TRIPS Agreement for the Prevention, Containment and Treatment of Covid-19: Communication from the African Group, the Plurinational State of Bolivia, Egypt, Eswatini, Fiji, India, Indonesia, Kenya, the LDC Group, Maldives, Mozambique, Mongolia, Namibia, Pakistan, South Africa, Vanuatu, The Bolivarian Republic of Venezuela and Zimbabwe*, (2021), <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:IP/C/W677.pdf&Open=True> .

⁴⁶² Peter Ungphakorn, *The WTO's Deadlock Over an Intellectual Property Waiver for COVID-19*, TRADE BETA BLOG (December 17, 2020), <https://tradebetablog.wordpress.com/2020/12/17/wto-deadlock-trips-waiver/> .

⁴⁶³ See Tom Wilbur, *The Latest: What They are Saying: Intellectual Property Protections Vital to Incentivize Ongoing COVID-19 Research and Development*, PHARMA (October 2020), <https://catalyst.phrma.org/the-latest-what-they-are-saying-intellectual-property-protections-vital-to-incentivize-ongoing-covid-19-research-and-development-2> .

products. If this issue moves forward at the multilateral level, further work might be necessary with regard to national implementation and coexistence with RTAs.

3. Alternative Incentive Models

During the initial stages of the pandemic, in recognition of the need for rapid innovation, several proposals emerged to allow for collaboration among actors in encouraging innovation and creating alternative incentives for such innovation.⁴⁶⁴ One such proposal was put forward by Costa Rica and supported by the World Health Organization for the creation of an IPR pool for the development of products and technology to respond to the pandemic.⁴⁶⁵ Other commentators proposed the establishment of prizes or grants as alternative financial incentives for innovators to recoup the risks and costs of their investments.⁴⁶⁶

Here too, there are no baseline provisions, given that such models are not commonly found in RTAs or multilateral rules. Sample Model Provision A below proposes a patent pooling mechanism at the regional level that would coordinate with similar mechanisms and allow the use of pooled IPR in the creation of new technology.

Sample Model Provision B, on the other hand, allows RTA parties to cooperate to explore collaborative solutions to promote innovation, including through the creation of grants or prizes for innovation. It should be noted that neither of these mechanisms is intended to supplant the current system of IPRs. They should be read as complementary to the existing IPR framework under TRIPS and RTAs to allow for greater collaboration.

Example Provisions on Alternative Incentive Models

Sample Model Provision A: IPR Pooling

“Contracting Parties shall establish a [bilateral/regional] mechanism for pooling intellectual property rights in relation to the prevention, mitigation or containment of a health crisis or emergency, as determined under this Agreement.

The Contracting Parties shall strive to cooperate and coordinate with existing regional and multilateral intellectual property pooling arrangements in the establishment of this mechanism.”

Source: Sample Draft Language

Sample Model Provision B: Establishment of Prize/Grant

“Contracting Parties shall explore cooperative solutions to promote innovation at the [bilateral/regional] level, by inter alia, considering the establishment and channelling of funds to provide financial incentives for the private sector in the development of preventatives,

⁴⁶⁴ See Kuhlmann et al. Hackathon 2020, *supra* note 5.

⁴⁶⁵ *Solidarity Call to Action: Making the Response to COVID-19 a Public Common Good*, WHO, <https://www.who.int/emergencies/diseases/novel-coronavirus-2019/global-research-on-novel-coronavirus-2019-ncov/covid-19-technology-access-pool/solidarity-call-to-action> ; Ed Silverman, *WHO is Asked to Create a Voluntary Intellectual Property Pool to Develop COVID-19 Products*, STAT (March 24, 2020), <https://www.statnews.com/pharmalot/2020/03/24/covid19-coronavirus-costa-rica-intellectual-property/>

⁴⁶⁶ Lester & Mercurio, *supra* note 101.

therapeutics or other technologies in relation to the prevention, containment, or mitigation of a public health crisis or emergency situation as determined under this Agreement in the territory of one or more Contracting Parties.”

Source: Sample Draft Language

CHAPTER VI - DIGITAL TRADE

The rising trend in e-commerce experienced an unprecedented boost during the COVID-19 pandemic, as digital trade provided consumers with access to essential and non-essential goods and services when physical trade channels were not available.⁴⁶⁷ Not only have an increasing number of businesses shifted to e-commerce, an increasing number of consumers have started to engage in cross-border e-commerce as well,⁴⁶⁸ in both cases likely due to government orders to close non-essential brick and mortar shops for safety reasons. Although e-commerce transactions often occur within the borders of a State, e-commerce suppliers often import their goods, making cross-border trade vital to digital trade and e-commerce. Due to the critical role of cross-border e-commerce during the pandemic, it has become ever more imperative to ensure that international trading rules are designed to foster digital trade, even under the most challenging circumstances.

Although the terms digital trade and e-commerce are often used interchangeably, digital trade is broader and includes data flows as well as the exchange of goods and services via the Internet. However, there is currently no single definition of what constitutes e-commerce or digital trade, and the terms are sometimes used interchangeably. For instance, the OECD defines e-commerce as the “sale or purchase of goods or services, conducted over computer networks by methods specifically designed for the purpose of receiving or placing orders”⁴⁶⁹. The WTO, in its Work Programme on Electronic Commerce, adopts a comparatively broad definition, noting that “electronic commerce is understood to mean the production, distribution, marketing, sale or delivery of goods and services by electronic means”⁴⁷⁰.

This chapter addresses several priority areas for digital trade rules in the context of the pandemic and future crises: data privacy, cross-border data flows, and data localization; consumer protection; electronic signatures and electronic authentication; electronic payments (which are introduced in Chapter III); and bridging the digital divide, including through improved access to digital infrastructure. Although multilateral rules on digital trade do not yet exist, States are putting in place a number of legal measures related to the digital realm, and RTAs increasingly incorporate digital trade provisions. As this chapter will highlight, due to the central role that digital trade played during the pandemic, digital trade provisions must be a focus in the context of responding to and preparing for

⁴⁶⁷ Dylan Loh, *Coronavirus Pandemic Fuels Asia E-Commerce Boom*, NIKKEI ASIA (May 31, 2020), <https://asia.nikkei.com/Business/Retail/Coronavirus-pandemic-fuels-Asia-e-commerce-boom>; Kok Xinghui, *Coronavirus: E-Commerce in Southeast Asia Rides High on Pandemic Boom*, SOUTH CHINA MORNING POST (August 1, 2020), <https://www.scmp.com/week-asia/economics/article/3095585/coronavirus-e-commerce-southeast-asia-rides-high-pandemic-boom>; Ananya Bhattacharya, *Indians Are Now Spending More on E-Commerce Than They Did in 2019*, QUARTZ INDIA (August 19, 2020), <https://qz.com/india/1892653/despite-covid-19-slump-indians-are-spending-more-on-e-commerce/>; Sarah Perez, *COVID-19 Pandemic Accelerated Shift to E-Commerce by 5 Years, New Report Says*, TECH CRUNCH (Aug. 24, 2020), <https://techcrunch.com/2020/08/24/covid-19-pandemic-accelerated-shift-to-e-commerce-by-5-years-new-report-says/>.

⁴⁶⁸ See Cheng, *supra* note 104.

⁴⁶⁹ Javier Lopez Gonzalez and Marie-Agnes Jouanjean, *Digital Trade: Developing a Framework for Analysis*, 205 OECD Trade Policy Papers (2017).

⁴⁷⁰ *Work Programme on Electronic Commerce - Adopted by the General Council on 25 September 1998*, WTO Doc. WT/L/274, WTO, (1998) https://www.wto.org/english/tratop_e/ecom_e/wkprog_e.htm.

crisis. Within this broader framing, RTA provisions on digital trade could be particularly tailored to crisis considerations in some cases as well, and examples will be noted in the sections that follow.

Free flow of data across borders is the lifeblood of digital trade, particularly during a crisis. However, other considerations factor into how data is regulated, including differing social and cultural views on the right to privacy and political views on data sovereignty. Data protection and privacy provisions in RTAs reflect the ways in which States have agreed to strike a balance between the need for free flow of data and these social, cultural, and political considerations.

COVID-19 has shed light on several particular aspects that are important to data privacy and protection during a crisis. First, the increase in data flows due to increased digitalization during the pandemic necessitated both strengthening data privacy and protection regimes from the stakeholder perspective and assessing data privacy rules in order for trading partners to trust in each other's digital systems.⁴⁷¹ Second, the increased use of data collection by contact-tracing applications and devices placed increased attention on how governments use data collected and how States ensure privacy protection for their personnel abroad.⁴⁷² Third, States' differing approaches to data sovereignty, as reflected in data localization provisions, also took on additional dimensions in the context of the pandemic.

Recently, States also started introducing vaccine passports as a means of verifying whether individuals who want to travel or access services have been vaccinated against COVID-19. For example, the City of New York has rolled out the Excelsior pass developed by IBM,⁴⁷³ and the EU has introduced vaccine certificates for its nationals.⁴⁷⁴ Generally, most privacy regimes treat health data as a special category of data requiring a higher level of protection.⁴⁷⁵ For an international traveller, health data will have to move across borders freely in order for the vaccine passport to be functional. This would require free flow of data and, most importantly, require that the receiving state or entity to afford an adequate level of protection to that data.

As States mandated closure of non-essential retail stores during the pandemic, e-commerce sales rose around the world, further fuelled by public anxiety about disease transmission, including in the United States, Europe, South America, China, and Asia.⁴⁷⁶ The rise in online-shopping and e-commerce also boosted revenue and the stock value of several online platforms across the globe.⁴⁷⁷ In addition, the

⁴⁷¹ *Comparing Digital Rules in Trade Agreements*, ASIAN TRADE CENTRE (July 24, 2019), <http://asiantradecentre.org/talkingtrade/comparing-digital-rules-in-trade-agreements>.

⁴⁷² Patrick O'Neill, Tate Ryan-Mosley & Bobbie Johnson, *A Flood of Coronavirus Apps are Tracking us. Now it's Time to Keep Track of Them*, MIT TECHNOLOGY REVIEW (May 7, 2020), <https://www.technologyreview.com/2020/05/07/1000961/launching-mittr-covid-tracing-tracker/>.

⁴⁷³ Sharon Otterman, *Will the Excelsior Pass, New York's Vaccine Passport, Catch On?*, NEW YORK TIMES (June 1, 2021), <https://www.nytimes.com/2021/06/01/nyregion/excelsior-pass-vaccine.html>.

⁴⁷⁴ *EU Digital COVID Certificate*, EUROPEAN COMMISSION, https://ec.europa.eu/info/live-work-travel-eu/coronavirus-response/safe-covid-19-vaccines-europeans/eu-digital-covid-certificate_en?mc_cid=7b73084a87&mc_eid=302aff3c9b.

⁴⁷⁵ Jonathan Keane, *Vaccine Passports Could Prove to be a Privacy Minefield for Regulators*, CNBC (March 30, 2021), <https://www.cnbcm.com/2021/03/30/vaccine-passports-could-prove-to-be-a-privacy-minefield.html>; Allison Grande, *Vaccine Passport Plans Can't Ignore Web Of Privacy Laws*, LAW360 (April 22, 2021), <https://www.law360.com/articles/1377404/vaccine-passport-plans-can-t-ignore-web-of-privacy-laws>; Richard Hunt, *Security Think Tank: Vaccine Passports Cannot be Taken Lightly*, COMPUTER WEEKLY (April 14, 2021), <https://www.computerweekly.com/opinion/Security-Think-Tank-Vaccine-passports-cannot-be-taken-lightly>.

⁴⁷⁶ *COVID-19 and E-Commerce: A Global Review*, UNCTAD, 40-41, (2020), <https://unctad.org/webflyer/covid-19-and-e-commerce-global-review>.

⁴⁷⁷ Amazon saw growth of more than 35 per cent in both US and international sales revenue in the third quarter of 2020. D. Davis, *Amazon's Profits Nearly Triple in Q3 as North America Sales Soar 39%*, DIGITAL COMMERCE, 360 (2020),

financial payment services that facilitated these online trades saw increased demand. The fear of contracting the virus while exchanging cash could also have been a reason for the growth in digital payments.⁴⁷⁸ For instance, Paystack, a financial payments company operating across Africa, recorded a five-fold surge in transactions compared with pre-pandemic levels.⁴⁷⁹ Similarly, India's Unified Payment Interface, which enables digital payments, saw transactions double from 2020-21.⁴⁸⁰ Businesses that provide network services and videoconferencing experienced similar growth, with significant increases within a few short weeks at the start of the pandemic.⁴⁸¹ In Europe and the Americas, satellite operators providing broadband connectivity directly to users also experienced growth of up to 70 per cent, especially in remote and rural areas.⁴⁸² In the United States, Latin America, and the Caribbean, the use of teleworking and video conferencing services grew by over 300 per cent in the beginning of the pandemic, and the data traffic from Zoom in Thailand alone increased by 828 per cent.⁴⁸³

Increased digital trade also has also given rise to a greater emphasis on electronic transactions, including rules on electronic signatures, electronic authentication, and the interoperability of authentication systems of different states. Without rules or regulations recognizing electronic signatures as equally valid to handwritten signatures, a transaction can be bound in uncertainty. Electronic payments, introduced in Chapter III, are extremely beneficial during times of crises when there is a dearth of physical cash, and the interoperability of payment systems across borders is critical for enabling cross-border e-commerce transactions. In making these facilities available, States are also bound to ensure the safety and security of consumers online, including through legal mechanisms. Conventional consumer protection laws are often not capable of handling the issues faced by consumers in the e-commerce space. This requires adoption of consumer protection laws tailored to e-commerce transactions, including with cross-border redressal mechanisms.

There is a strong connection between digital trade and the SDGs.⁴⁸⁴ Digital trade can be used empower women entrepreneurs to achieve SDG 5 (Achieve Gender Equality and Empower All Women) and corresponding Target 5.b "Enhance the use of enabling technology, in particular ICT, to promote empowerment of women." ICT related financial services, such as online payments services,⁴⁸⁵ can

<https://www.digitalcommerce360.com/article/amazon-sales/>; Jumia saw an increase of over 50 per cent in the volume of transactions in the first half of 2020 compared to 2019, *See Towards eTrade for All: The Impact of COVID-19 on e-Commerce in Africa*, UNECA (2021); Pallavi Pengonda, *Flipkart IPO May Ride Piggyback on Post Covid-19 Boom in E-Commerce*, LIVEMINT (December 7, 2020), <https://www.livemint.com/market/mark-to-market/flipkart-ipo-may-ride-piggyback-on-post-covid-boom-in-e-commerce-11607343275121.html> [hereinafter Pengonda 2020].

⁴⁷⁸ Stephanie Walden, *Banking After Covid-19: The Rise of Contactless Payments in the US*, FORBES (June 12, 2020), <https://www.forbes.com/advisor/banking/banking-after-covid-19-the-rise-of-contactless-payments-in-the-u-s/>; Nathaniel Lee, *The coronavirus pandemic has caused a surge in demand for contactless payments, accelerating the shift from cash to digital options*, CNBC (Dec. 3, 2020), <https://www.cnbc.com/2020/12/03/covid-19-pandemic-accelerating-the-shift-from-cash-to-digital-payments.html>

⁴⁷⁹ See Pengonda 2020, *supra* note 478.

⁴⁸⁰ *UPI Transactions More Than Doubled in A Year to 2.7 Bn.*, LIVEMINT (April 1, 2021), <https://www.livemint.com/news/india/upi-transaction-in-india-doubles-in-a-year-11617261866805.html>.

⁴⁸¹ *Pandemic in the Internet Age: Communications Industry Responses*, International Telecommunication Union (2020), https://reg4covid.itu.int/wp-content/uploads/2020/06/ITU_COVID-19_and_Telecom-ICT.pdf.

⁴⁸² *Id.*

⁴⁸³ *Making Deals in Cyberspace: What's the Problem?*, WEF (October 17, 2017), <https://www.weforum.org/whitepapers/making-deals-in-cyberspace-what-s-the-problem> [hereinafter WEF 2017].

⁴⁸⁴ See World Bank 2021, *supra* note 219.

⁴⁸⁵ *Harness E-commerce for Sustainable development*, UNCTAD, 8 (2017), https://www.wto.org/english/res_e/booksp_e/aid4trade17_chap7_e.pdf.

enable SMEs to access finance, in turn achieving SDG 8 (Decent Work and Economic Growth) and Target 8.3 “Promote development-oriented policies that support productive activities, decent job creation, entrepreneurship, creativity and innovation, and encourage the formalization and growth of micro, small- and medium-sized enterprises, including through access to financial services.”

The benefits of e-commerce can only be achieved with access to the internet, however. The 2021 SDG Progress Report released by UNCTAD reported that, as of 2019, only 20 per cent of the population in LDCs had access to internet.⁴⁸⁶ ICT is recognized within the SDGs, specifically SDG 9 (Industry, Infrastructure and Innovation) to “build resilient infrastructure, promote inclusive and sustainable industrialization and foster innovation” and Target 9.c “significantly increase access to information and communications technology and strive to provide universal and affordable access to the Internet in least developed countries by 2020”. It also significant to SDG 17 (Partnership for the Goals) and Target 17.8 “Strengthen the science, technology and innovation capacity for LDCs” whereby the target indicator is the proportion of individuals using the internet.

Given that a large portion of the global population remains disconnected from the internet, either due to lack of affordable internet or due to lack of affordable devices to connect to the internet, RTA approaches that can help bridge the digital divide and increase digital inclusion are particularly important in the context of crisis and building forward better.

A. Legal Aspects of Digital Trade

Despite the increasing digitalization occurring around the world, current WTO rules only touch upon digital trade and e-commerce tangentially. The GATT could be linked with regulation of e-commerce through rules on cross-border delivery of goods, yet its provisions are not well suited in a digital context. The more recent WTO TFA includes some provisions on electronic transactions and digitalization, as discussed in Chapter III, but it does not cover every aspect of digital trade. The GATS, through its principles of non-discrimination and market access in the cross-border delivery of services, including in the context of digital trade, also falls short of fully addressing digital services. To date, critical aspects of digital trade including data protection and privacy, cross-border data flows, and other aspects of e-commerce like electronic signatures and electronic authentication are not explicitly regulated under WTO rules.⁴⁸⁷

In December 2017, a group of WTO Members initiated the process of negotiating rules for e-commerce under a Joint Statement Initiative on Electronic Commerce,⁴⁸⁸ which remained under negotiation as of the publication of this Handbook. Once concluded, this new set of rules would have the potential to broadly regulate and govern all aspects of digital trade, thus creating a Baseline for States. In the absence of a multilateral agreement, digital trade will continue to be governed through unilateral measures taken at the State (and sub-national level), such as domestic regulations and a range of

⁴⁸⁶ *Progress Towards the Sustainable Development Goals: Report of the Secretary General*, UNCTAD, 26 (2021), <https://unstats.un.org/sdgs/files/report/2021/secretary-general-sdg-report-2021--EN.pdf>.

⁴⁸⁷ The GATS regulate these aspects of digital trade only if the measure in question “affects” trade in services and violates principles of non-discrimination. Additionally, certain obligations, like Market Access and National Treatment, are applicable only if the State in question has assumed such commitments for the particular service(s). *See generally* LEÏLA CHOUKROUNE & JAMES J. NEDUMPARA, *INTERNATIONAL ECONOMIC LAW: TEXT, CASES AND MATERIALS* 746-752 (2021).

⁴⁸⁸ *Joint Statement on Electronic Commerce – 13 December 2017*, WTO Doc. WT/MIN(17)/60, WTO MINISTERIAL CONFERENCE, https://www.wto.org/english/news_e/archive_e/jsec_arc_e.htm.

RTAs.⁴⁸⁹ RTAs cover this chapter's priority areas to varying degrees, with options for each presented in Section B below. Since these options vary somewhat widely, they are presented as Example Options in the sections below, with no baseline identified.

The legal landscape associated with increased data flows during the pandemic, including data privacy and data protection frameworks is particularly noteworthy and does include international principles, even though most are not binding. With increasing digitalization, privacy concerns have escalated and are becoming increasingly significant. Traditionally, international trade liberalization was based on free movement of goods, services, capital, and persons.⁴⁹⁰ Increasing digitalization is now demanding the inclusion of a fifth freedom: free movement of data.⁴⁹¹ According to a 2015 UNCTAD study, 50 per cent of all traded services are enabled by technology and cross-border data flows.⁴⁹² According to a 2016 McKinsey Global Institute report, data flows contributed \$2.8 trillion to the 2014 global GDP.⁴⁹³

Currently over 66 per cent of States across the globe have adopted or are in the process of adopting data protection and privacy regulations.⁴⁹⁴ It has become quite common for privacy regulations to include restrictions on cross-border data flows as a tool for protecting privacy.⁴⁹⁵ For instance, the EU General Data Protection Regulation (GDPR) sets various conditions for cross-border, extra-territorial transfer of personal data.⁴⁹⁶ Under the GDPR, the EU permits cross-border data flows to jurisdictions that have received adequacy determinations, which involve evaluating the receiving State's privacy protection in light of the legal, regulatory and even democratic system to determine whether they meet certain standards.⁴⁹⁷ Currently, thirteen States have received adequacy decisions from the EU, out of which only Argentina and Uruguay are developing economies.⁴⁹⁸ In recent times, adequacy decisions

⁴⁸⁹ University of Lucerne's Trade Agreements Provisions on Electronic-commerce and Dataset (TAPED), and Mira Burri and Rodrigo Polanco's article were in drafting this chapter and unravelling the "spaghetti bowl" of RTAs. University of Lucerne, TAPED, <https://www.unilu.ch/en/faculties/faculty-of-law/professorships/managing-director-internationalisation/research/taped/> (See Mira Burri & Rodrigo Polanco, *Digital Trade Provisions in Preferential Trade Agreements: Introducing a New Dataset*, JOURNAL OF INTERNATIONAL ECONOMIC LAW (2020) [hereinafter Burri & Polanco]. The term "spaghetti bowl" was initially used by Jagdish Bhagwati to refer to the creation of several miniature trade regimes outside the WTO through RTAs. Jagdish Bhagwati, *US Trade Policy: The Infatuation with Free Trade Agreements*, in THE DANGEROUS DRIFT TO PREFERENTIAL TRADE AGREEMENTS (Jagdish Bhagwati & Anne O. Krueger, 1995).

⁴⁹⁰ Dan Ciuriak & Maria Ptashkina, *The Digital Transformation and the Transformation of International Trade*, 2, RTA Exchange. Geneva: International Centre for Trade and Sustainable Development (ICTSD) and the Inter-American Development Bank (January 2018); Rajat Kathuria, Mansi Kedia, Gangesh Varma & Kaushambi Bagchi, *Economic Implications of Cross-Border Data Flows*, Indian Council for Research on International Economic Relations (November 2019), https://icrier.org/pdf/Economic_Implications_of_Cross-Border_Data_Flows.pdf.

⁴⁹¹ Id.

⁴⁹² *Information Economy Report 2015: Unlocking the Potential of E-Commerce for Developing Countries*, UNCTAD (2015), https://unctad.org/system/files/official-document/ier2015_en.pdf.

⁴⁹³ James Manyika, Susan Lund, Jacques Bughin, Jonathan Woetzel, Kalin Stamenov & Dhruv Dhingra, *Digital Globalization: The New Era of Global Flows* (2014).

⁴⁹⁴ UNCTAD *Global Cyberlaw Tracker*, UNCTAD, https://unctad.org/en/Pages/DTL/STI_and ICTs/ICT4D-Legislation/eCom-Global-Legislation.aspx

⁴⁹⁵ States may have reasons apart from privacy to restrict cross-border data flows.

⁴⁹⁶ Regulation 2016/679 of the European Parliament and of the Council of Apr. 27, 2016 on the Protection of Natural Persons with Regard to the Processing of Personal Data and on the Free Movement of Such Data, and Repealing Directive 95/46/EC (General Data Protection Regulation), Article 3, 2016 O.J. (L 119) 33 (EU) [hereinafter referred to as GDPR].

⁴⁹⁷ See GDPR, Article 45, *supra* note 496.

⁴⁹⁸ The adequacy decision for Republic of Korea is yet to be adopted. See *Adequacy Decisions*, EUROPEAN COMMISSION, https://ec.europa.eu/info/law/law-topic/data-protection/international-dimension-data-protection/adequacy-decisions_en.

appear to have become more difficult and time consuming to obtain.⁴⁹⁹ For instance, Japan recently received an adequacy decision after “80 rounds of negotiations played out over 300 hours” which took place between April 2016 and January 2019.⁵⁰⁰ Apart from adequacy determinations, the GDPR also permits cross-border data flows based on Standard Contractual Clauses and Binding Corporate Rules.⁵⁰¹ For developing economies, these options may be more realistic than obtaining an adequacy decision.⁵⁰²

Data localization is also particularly relevant in the context of the pandemic, since the free transfer of health data, which can be considered sensitive, is important.⁵⁰³ States like Russian Federation⁵⁰⁴ and China⁵⁰⁵ have put in place, or are in the process of enacting, horizontal data localization rules under domestic law, i.e., rules or regulations that do not differentiate between industry sectors. India currently has sectoral data localization measures and is in the process of establishing a horizontal restriction.⁵⁰⁶ Although privacy and cybersecurity remain the most common rationales for imposing restrictions on data flows, other considerations like consumer protection, law enforcement, and even plain protectionism can influence States to restrict data flows.⁵⁰⁷

⁴⁹⁹ Anupam Chander, Meaza Abraham, Sandeep Chandy, Yuan Fang, Dayoung Park & Isabel Yu, *Achieving Privacy: Costs of Compliance and Enforcement of Data Protection Regulation*, WORLD BANK POLICY RESEARCH WORKING PAPER 9594, (2021) [hereinafter Chander et al.], <http://documents.worldbank.org/curated/en/890791616529630648/Achieving-Privacy-Costs-of-Compliance-and-Enforcement-of-Data-Protection-Regulation>.

⁵⁰⁰ Martin Braun, Frederic Louis & Itsiq Benizri, *The European Commission Adopts Adequacy Decision on Japan*, WILMERHALE (January 24, 2019), <https://www.wilmerhale.com/en/insights/blogs/wilmerhale-privacy-and-cybersecurity-law/20190124-the-european-commission-adopts-adequacy-decision-on-japan>.

⁵⁰¹ Standard Contractual Clauses are standard contracts which the sender and the receiver of personal data both sign up to, for protecting personal data leaving the GDPR’s jurisdiction (see *Standard Contractual Clauses*, EUROPEAN COMMISSION, https://ec.europa.eu/info/law/law-topic/data-protection/international-dimension-data-protection/standard-contractual-clauses-scc_en); Binding corporate rules are “data protection policies adhered to by companies established in the EU for transfers of personal data outside the EU within a group of undertakings or enterprises” (See *Binding Corporate Rules*, EUROPEAN COMMISSION, https://ec.europa.eu/info/law/law-topic/data-protection/international-dimension-data-protection/binding-corporate-rules-bcr_en); see also GDPR, Articles 44-49, *supra* note 496.

⁵⁰² See Chander et al., *supra* note 500.

⁵⁰³ Deborah Elms, *Digital Trade in the Asia Pacific: Issues for 2021 and Beyond*, HINRICH FOUNDATION, 18 (December 2020), <https://static1.squarespace.com/static/5393d501e4b0643446abd228/t/5ff54b665513902cd3253e51/1609911149107/Digital-trade-in-the-Asia-Pacific-Hinrich-Foundation-December-2020.pdf>.

⁵⁰⁴ Federal Law No. 242-FZ of July 21, 2014 on Amendments to Certain Legislative Acts of the Russian Federation with Regard to Specifying the Procedure for the Processing of Personal Data in Data Telecommunications Networks, Article 18(5).

⁵⁰⁵ Lisa M. Thomas, Julia K. Kadish, and Kari M. Rollins, *Update on the State of Privacy Law in China*, THE NATIONAL LAW REVIEW (May 13, 2021) <https://www.natlawreview.com/article/update-state-privacy-law-china>; *China Released Updated Draft Data Security Law and Personal Information Protection Law for Public Comments*, COVINGTON (May 3, 2021), <https://www.cov.com/en/news-and-insights/insights/2021/05/china-released-updated-draft-data-security-law-and-personal-information-protection-law-for-public-comments>.

⁵⁰⁶ The Reserve Bank of India has imposed data localization requirements on financial institutions. See *Storage of Payment System Data*, DPSS.CO.OD No.2785/06.08.005/2017-2018, RESERVE BANK OF INDIA (Apr. 6, 2018). India is also in the process of implementing a comprehensive privacy legislation which mandates data localization of personal data. See Rishab Bailey, *The Issues Around Data Localisation*, THE HINDU (February 25, 2020), <https://www.thehindu.com/opinion/op-ed/the-issues-around-data-localisation/article30906488.ece>.

⁵⁰⁷ For a discussion on these rationales, see Andrew D Mitchell & Neha Mishra, *Regulating Cross-Border Data Flows in a Data-Driven World: How WTO Law Can Contribute*, 22(3) JOURNAL OF INTERNATIONAL ECONOMIC LAW, 389 (September 2019); Anupam Chander & Uyên P. Lê, *Data Nationalism*, 64 EMORY LAW JOURNAL (2015), 677.

There is currently no globally accepted standard for personal data protection, and there are no multilateral rules on privacy and cross-border data flows.⁵⁰⁸ This void has been filled through a patchwork of binding obligations included in RTAs and certain unilateral instruments.⁵⁰⁹ Various organizations like the OECD, APEC, and international standards organizations have also contributed through non-binding privacy guidelines, frameworks, and technical standards that States can consider while drafting their domestic regulation on privacy.⁵¹⁰ Table 1 below provides a brief overview of these instruments.

Table 1 Instruments Facilitating Cross-border Data Flows

<p>International Instruments Soft Law Instruments: OECD Guidelines on the Protection of Privacy and Transborder Flows of Personal Data, APEC Privacy Framework, and ASEAN Framework on Personal Data Protection Hard Law Instruments: African Union Convention on Cyber Security and Personal Data Protection, Convention 108 of the Council of Europe, APEC Cross-Border Privacy Rules System</p>	<p>Regional Trade Agreements Soft Law Approaches: EFTA–Central America FTA, EU and Colombia and Peru FTA Hard Law Approaches: CPTPP, RCEP, USMCA, EU-UK Trade and Cooperation Agreement</p>
<p>Unilateral and Bilateral Instruments EU GDPR’s Adequacy Decisions, Standard Contractual Clauses, Binding Corporate Rules, and US-EU Privacy Shield</p>	<p>Other Initiatives Standards – ISO/IEC 27701:2019 Privacy-enhancing technologies - Cryptography</p>

Source: Adapted from OECD MAPPING APPROACHES TO DATA AND DATA FLOWS (2020)⁵¹¹

Plurilateral arrangements can take the form of soft law or hard law with binding commitments. The OECD’s 2013 Guidelines on the Protection of Privacy and Transborder Flows of Personal Data⁵¹² and APEC’s 2005 Privacy Framework⁵¹³ are the best examples of soft law plurilateral arrangements. Both of these instruments contain a set of principles and implementation guidelines to establish domestic regulations on privacy and enable cross-border data flows. Table 2 provides a comparison of OECD and APEC’s privacy principles.

⁵⁰⁸ This does not mean that there needs to be a globally accepted standard for personal data protection. Consistent with other areas of international law, each State could develop its own form of data protection regulation, based on capacity and other considerations., *Digital Economy – Enabling Environment Guide*, NEW MARKETS LAB AND CENTER FOR INTERNATIONAL PRIVATE ENTERPRISE [hereinafter New Markets Lab & CIPE], <https://www.cipe.org/wp-content/uploads/2018/10/Digital-Economy-Guidebook-FINAL-PDF.pdf>.

⁵⁰⁹ *Mapping Approaches to Data and Data Flows, Report for the G20 Digital Economy Task Force*, OECD, (2020), <https://www.oecd.org/sti/mapping-approaches-to-data-and-data-flows.pdf>.

⁵¹⁰ Id.

⁵¹¹ Id.

⁵¹² *The OECD Privacy Framework*, OECD (2013), https://www.oecd.org/sti/ieconomy/oecd_privacy_framework.pdf

⁵¹³ *APEC Privacy Framework*, ASIA-PACIFIC ECONOMIC COOPERATION (2005), APEC#205-SO-01.2, <https://www.apec.org/Publications/2005/12/APEC-PrivacyFramework>.

Table 2 Comparison of OECD’s Privacy Guidelines and APEC’s Privacy Framework Principles

OECD Privacy Guidelines	APEC Privacy Framework Principles
<ul style="list-style-type: none"> • Collection should be: <ul style="list-style-type: none"> ○ Lawful, fair, and with the consent of the individual; ○ Accurate, complete, up to date; and ○ Limited to fulfil the specified purpose. • Data should: <ul style="list-style-type: none"> ○ Not be disclosed or made available without consent or legal authority; ○ Be protected by security safeguards; and ○ Be available for establishing existence, nature, and purpose. • Individuals should have the right to access personal data collected and challenge data to correct, amend, or delete. • Data controller should be accountable for compliance. 	<ul style="list-style-type: none"> • Design privacy protection measures to prevent misuse of personal information • Provide clear notice about personal data collection • Lawfully collect only relevant information as needed • Use personal information only for specific purposes • Give individuals choice for data collection • Update, correct personal data collected • Establish security safeguards to protect data • Allow individuals access and ability to correct data • Ensure compliance and accountability of information controller

Source: Rachel F. Fefer, *Data Flows, Online Privacy, and Trade Policy*, Congressional Research Service (2020)⁵¹⁴

Additional legal instruments include the 2014 African Union Convention on Cyber Security and Personal Data Protection (Malabo Convention),⁵¹⁵ the EU’s 1981 Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (Convention 108),⁵¹⁶ and APEC’s Cross-Border Privacy Rules.⁵¹⁷ These instruments also contain enforcement mechanisms to varying degrees.

International standard setting organizations like the ISO and private organizations like the Business Software Alliance (BSA) have also taken steps to facilitate data flows across borders. ISO’s 27701:2019 standard specifies requirements and provides guidance for establishing, implementing,

⁵¹⁴ *Data Flows, Online Privacy, and Trade Policy*, CONGRESSIONAL RESEARCH SERVICE (March 26, 2020) <https://crsreports.congress.gov/product/pdf/R/R45584>.

⁵¹⁵ *African Union Convention on Cyber Security and Personal Data Protection*, AFRICAN UNION (2014), [https://au.int/sites/default/files/treaties/29560-treaty-0048 -_african_union_convention_on_cyber_security_and_personal_data_protection_e.pdf](https://au.int/sites/default/files/treaties/29560-treaty-0048_-_african_union_convention_on_cyber_security_and_personal_data_protection_e.pdf)

⁵¹⁶ *Council of Europe Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data*, European Treaty Series No. 108; COUNCIL OF EUROPE, adopted 28 Jan. 1981; *Additional Protocol to the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data regarding Supervisory Authorities and Transborder Data Flows*, Strasbourg, 8.XI.2001, COUNCIL OF EUROPE, , <http://conventions.coe.int/Treaty/en/Treaties/Html/181.htm>. For more on EU’s Convention 108, see Graham Greenleaf, *The Influence of European Data Privacy Standards Outside Europe: Implications for Globalization of Convention 108*, 2(2) INTERNATIONAL DATA PRIVACY LAW, 68 (2012).

⁵¹⁷ More information on APEC’s Cross-Border Privacy Rules (CBPR) is available at <http://cbprs.org/>.

maintaining, and continually improving a Privacy Information Management System.⁵¹⁸ BSA’s Privacy Framework serves as a guide for policymakers to draft privacy legislation and includes a recommendation that governments create tools to bridge gaps among different domestic privacy regimes in ways that both protect privacy and facilitate the free flow of data.⁵¹⁹

B. Digital Trade Options in RTAs

The RTA Options below addresses the priority areas of digital trade: (i) data protection, cross border data flows, and data localization; (ii) online consumer protection; and (iii) electronic signatures and electronic authentication; (iv) electronic payments (introduced in Chapter III), and (v) provisions to address the digital divide. The sections below also address data localization and cross-border data transfers, due to the importance of maintaining the free flow of data, particularly during a crisis. While all of these issue areas have implications well beyond crisis situations, they are included in this Handbook due to the central role that digital trade has played in the pandemic, which will likely continue well beyond the current crisis. It is, however, important to note RTA approaches that could be tailored to a crisis context, which may vary depending upon the different stakeholders involved. While crises will increase the vulnerability of individuals (with implications for issues like data privacy, consumer protection, and the digital divide, in particular), they will also increase uncertainty for States and strengthen focus on non-economic interests (with implications for data localization requirements and limitations on cross-border data transfer, or both). In all cases, digital rules should be assessed with these heightened vulnerabilities and State interests in mind, and RTA provisions should be evaluated depending upon how they might be interpreted and applied during a crisis.

1. Data Protection, Cross-border Data Flows, and Data Localization

A number of RTAs contain data privacy and protection provisions that require that each party adopt or maintain a legal framework for the protection of data privacy. RTAs also tend to afford States the policy space to comply with these obligations through a variety of approaches, such as a comprehensive data protection law, sector-specific law, or through regulations that provide for the enforcement of contractual obligations assumed by juridical persons relating to the protection of personal information.⁵²⁰ While some of the recent RTAs, including the mega-regionals, require legal frameworks on data privacy or protection, the lack of domestic regulations and high costs of enforcement limit the broad adoption of RTA provisions on data privacy.

RTAs that contain a binding commitment on data privacy and protection also tend to include provisions on cross-border data flows.⁵²¹ The general structure of these provisions begin with a commitment to ensure free flow of data across borders, followed by exceptions as to when parties could prevent this movement. Exceptions can correspond with legitimate public policy objectives or protection of essential security interests.

⁵¹⁸ For a brief overview of ISO 27701:2019, see *Using ISO/IEC 27701 for Cross-Border Data Transfers Post “Scheme II”*, <https://iapp.org/news/a/using-iso-iec-27701-for-cross-border-data-transfers-post-schrems-ii/>.

⁵¹⁹ BSA Privacy Framework, BSA & THE SOFTWARE ALLIANCE, https://www.bsa.org/files/policy-filings/BSA_2018_PrivacyFramework.pdf.

⁵²⁰ USMCA Article 19.8.2, *supra* note 7; CPTPP Article 14.8, *supra* note 8; RCEP 12.8, *supra* note 13.

⁵²¹ This is a non-exhaustive list of such RTAs: Chile-Uruguay FTA, Article 8.10; 2016 SAFTA, Chapter 14, Article 13; Argentina-Chile FTA, Article 11.6; Singapore-Sri Lanka FTA, Article 9.9; Australia-Peru FTA, Article 13.11; USMCA, Article 19.11; Brazil-Chile FTA, Article 10.12; Australia-Indonesia FTA, Article 13.11; Japan-US DTA, Article 11.

a. Data Protection and Privacy Provisions in RTAs

The newer mega-RTAs, such as the CPTPP, RCEP, CETA, and USMCA, contain language requiring parties to “adopt or maintain a legal framework that provides for the protection of the personal information of the users of digital trade or electronic commerce, where applicable”.⁵²² In other words, these RTAs contain a binding obligation to maintain a data protection framework, which could be implemented through a variety of means, i.e., a comprehensive regulation, sectoral regulations, or enforcement of contractual obligations. While this could be challenging for some parties, to an extent, RTAs have addressed this by either granting extended compliance periods or making the obligation discretionary for certain RTA parties.⁵²³ Often, the precise rights to be protected are listed, although there is variation in the scope and coverage of these rights across RTAs and domestic legal measures.⁵²⁴ For example, Article 4.2 (Personal Information Protection) of the DEPA specifies, as elaborated in footnote 11, that “the principles underpinning a robust legal framework for the protection of personal information should include: collection limitation, data quality, purpose specification, use limitation, security safeguards, transparency, individual participation, and accountability.”⁵²⁵

Requiring States to put in place a data protection regime under an RTA may be challenging, as noted, and data protection regulations carry costs of compliance and enforcement. According to one study, the high costs of enforcement of these regulations can dissuade developing and least-developed States from adopting and effectively implementing regulations,⁵²⁶ and this should be considered in the RTA context. Likewise, the high costs of compliance can put SMEs at a disadvantage and may place them outside of the digital economy.⁵²⁷

Because RTA approaches vary considerably, options are noted as examples below and in the following sections. Example Option A below is adapted from the USMCA and DEPA and refers to international principles such as the APEC Privacy Framework and the OECD Recommendation of the Council concerning Guidelines governing the Protection of Privacy and Transborder Flows of Personal Data (2013), but it does not create a binding obligation. This option also provides States with the policy space to adopt either a comprehensive privacy law, sector-specific laws covering privacy, or laws that provide for the enforcement of voluntary undertakings by enterprises relating to privacy. Some States’ data protection laws (Republic of Korea, for example) contain provisions related to certain sectors or functions, like financial transactions.⁵²⁸ Other countries, including the EU, have special protection for personal health data. The GDPR requires special protection for certain health data like genetic data and biometric data. The US government requires that healthcare entities protect patients’ health data under the Health Insurance Portability and Accountability Act (HIPAA). As noted above, such regulations will have to consider flexibilities for sharing data cross-border in order to facilitate

⁵²² USMCA Article 19.8.2, *supra* note 7; CPTPP Article 14.8.2, *supra* note 8; RCEP Article 12.8.1, *supra* note 13; CETA, Article 16.4, *supra* note 150.

⁵²³ CPTPP, Article 14.8, *supra* note 8; RCEP, Article 12.8, *supra* note 13.

⁵²⁴ See New Markets Lab & CIPE, *supra* note 508.

⁵²⁵ DEPA, Article 4.2 (3) (a-h), *supra* note 15. Footnote 11 to Article 4.2 (3) states “For greater certainty, a Party may comply with the obligation in this paragraph by adopting or maintaining measures such as comprehensive privacy, personal information or personal data protection laws, sector-specific laws covering data protection or privacy, or laws that provide for the enforcement of voluntary undertakings by enterprises related to data protection or privacy.”

⁵²⁶ See Chander et al., *supra* note 499.

⁵²⁷ *Id.*

⁵²⁸ See New Markets Lab & CIPE, *supra* note 508.

measures such as vaccine passports. Undoubtedly, these developments will have implications for future laws and RTA provisions.

Example Option A below is adapted from the DEPA and the USMCA and includes specific references to personal health data. It also incorporates language in clause 8 from the UN Joint Statement on Data Protection and Privacy in the COVID-19 Response limiting the use of exceptions to data protection laws in times of crisis. Other Example Options taken from the CPTPP, CETA, RCEP, and USMCA are included below as well. Example Option E, taken from the Supplementary Act on Personal Data Protection within the Economic Community of West African States is also noteworthy in its treatment of data as a right and ‘fundamental liberty.’⁵²⁹

Example Provisions on Data Protection

Example Option A: Personal Information Protection

“1. The Parties may consider adopting or maintaining a legal framework that provides for the protection of the personal information of the users of digital trade. This legal framework can be in the form of measures such as a comprehensive privacy, personal information, or personal data protection laws, sector-specific laws covering privacy, laws specific to types of personal data like personal health data, or laws that provide for the enforcement of voluntary undertakings by enterprises relating to privacy.

2, Recognising that the Parties may take different legal approaches to protecting personal information, each Party shall pursue the development of mechanisms to promote compatibility and interoperability between their different regimes for protecting personal information. These mechanisms may include:

- (a) the recognition of regulatory outcomes, whether accorded autonomously or by mutual arrangement;
- (b) broader international frameworks;
- (c) where practicable, appropriate recognition of comparable protection afforded by their respective legal frameworks’ national trustmark or certification frameworks;
- (d) other avenues of transfer of personal information between the Parties.

3. The Parties shall exchange information on how the mechanisms in paragraph 2 are applied in their respective jurisdictions and explore ways to extend these or other suitable arrangements to promote compatibility and interoperability between them.

4. The Parties shall encourage adoption of data protection trustmarks by businesses that would help verify conformance to personal data protection standards and best practices.

5. The Parties shall exchange information on and share experiences on the use of data protection trustmarks.

⁵²⁹ Economic Community of West African States, Supplementary Act A/SA.1/01/10 on Personal Data Protection Within ECOWAS, February 16, 2010, Ch. IV., Art. 19, available at <https://www.statewatch.org/media/documents/news/2013/mar/ecowas-dp-act.pdf>.

6. The Parties shall endeavour to mutually recognise the other Parties' data protection trustmarks as a valid mechanism to facilitate cross-border information transfers while protecting personal information.

7. In the development of this legal framework, each Party should take into account principles and guidelines of relevant international bodies, such as the *APEC Privacy Framework* and the *OECD Recommendation of the Council concerning Guidelines governing the Protection of Privacy and Transborder Flows of Personal Data (2013)*.

8. The Parties recognize the use of exceptions in data protection laws in times of emergency, including public health emergencies. The Parties shall endeavour to ensure that the use of exceptions is limited in scope and time and necessary and proportionate to the specified purpose.”

Source: Adapted from USMCA, Article 19.8, DEPA, Article 4.2 and UN's Joint Statement on Data Protection and Privacy in the COVID-19 Response⁵³⁰

Example Option B: Personal Information Protection

“1. The Parties recognise the economic and social benefits of protecting the personal information of users of electronic commerce and the contribution that this makes to enhancing consumer confidence in electronic commerce.

2. To this end, each Party shall adopt or maintain a legal framework that provides for the protection of the personal information of the users of electronic commerce. In the development of its legal framework for the protection of personal information, each Party should take into account principles and guidelines of relevant international bodies.

3. Each Party shall endeavour to adopt non-discriminatory practices in protecting users of electronic commerce from personal information protection violations occurring within its jurisdiction.

4. Each Party should publish information on the personal information protections it provides to users of electronic commerce, including how:

- (a) individuals can pursue remedies; and
- (b) business can comply with any legal requirements.

5. Recognising that the Parties may take different legal approaches to protecting personal information, each Party should encourage the development of mechanisms to promote compatibility between these different regimes. These mechanisms may include the recognition of regulatory outcomes, whether accorded autonomously or by mutual arrangement, or broader international frameworks. To this end, the Parties shall endeavour to exchange information on any such mechanisms applied in their jurisdictions and explore ways to extend these or other suitable arrangements to promote compatibility between them.

Footnote 6 - For greater certainty, a Party may comply with the obligation in this paragraph by adopting or maintaining measures such as a comprehensive privacy, personal information or personal

⁵³⁰ *Joint Statement on Data Protection and Privacy in the COVID-19 Response*, WHO (November 19, 2020), <https://www.who.int/news/item/19-11-2020-joint-statement-on-data-protection-and-privacy-in-the-covid-19-response>.

data protection laws, sector-specific laws covering privacy, or laws that provide for the enforcement of voluntary undertakings by enterprises relating to privacy.

Source: CPTPP, Article 14.8 (footnote 5 omitted)

Example Option C: Personal Information Protection

Article 16.4: Trust and Confidence in Electronic Commerce

Each Party should adopt or maintain laws, regulations or administrative measures for the protection of personal information of users engaged in electronic commerce and, when doing so, shall take into due consideration international standards of data protection of relevant international organisations of which both Parties are a member.

Source: CETA, Article 16.4

Example Option D: Personal Information Protection

Article 12.8: Online Personal Information Protection

“1. Each Party shall adopt or maintain a legal framework which ensures the protection of personal information of the users of electronic commerce.

2. In the development of its legal framework for the protection of personal information, each Party shall consider international standards, principles, guidelines, and criteria of relevant international organisations or bodies.

3. Each Party shall publish information on the personal information protection it provides to users of electronic commerce, including how:

- (a) individuals can pursue remedies; and
- (b) business can comply with any legal requirements.

4. The Parties shall encourage juridical persons to publish, including on the internet, their policies and procedures related to the protection of personal information.

5. The Parties shall cooperate, to the extent possible, for the protection of personal information transferred from a Party.”

Footnote 8 - For greater certainty, a Party may comply with the obligation under this paragraph by adopting or maintaining measures such as comprehensive privacy or personal information protection laws and regulations, sector-specific laws and regulations covering the protection of personal information, or laws and regulations that provide for the enforcement of contractual obligations assumed by juridical persons relating to the protection of personal information.

Source: RCEP, Article 12.8 (footnote 7 omitted)

Example Option E: Personal Information Protection

1. The Parties recognize the economic and social benefits of protecting the personal information of users of digital trade and the contribution that this makes to enhancing consumer confidence in digital trade.
2. To this end, each Party shall adopt or maintain a legal framework that provides for the protection of the personal information of the users of digital trade. In the development of this legal framework, each Party should take into account principles and guidelines of relevant international bodies,⁴ such as the *APEC Privacy Framework* and the *OECD Recommendation of the Council concerning Guidelines governing the Protection of Privacy and Transborder Flows of Personal Data (2013)*.
3. The Parties recognize that pursuant to paragraph 2, key principles include: limitation on collection; choice; data quality; purpose specification; use limitation; security safeguards; transparency; individual participation; and accountability. The Parties also recognize the importance of ensuring compliance with measures to protect personal information and ensuring that any restrictions on cross-border flows of personal information are necessary and proportionate to the risks presented.
4. Each Party shall endeavour to adopt non-discriminatory practices in protecting users of digital trade from personal information protection violations occurring within its jurisdiction.
5. Each Party shall publish information on the personal information protections it provides to users of digital trade, including how:
 - (a) a natural person can pursue a remedy; and
 - (b) an enterprise can comply with legal requirements.
6. Recognizing that the Parties may take different legal approaches to protecting personal information, each Party should encourage the development of mechanisms to promote compatibility between these different regimes. The Parties shall endeavour to exchange information on the mechanisms applied in their jurisdictions and explore ways to extend these or other suitable arrangements to promote compatibility between them. The Parties recognize that the *APEC Cross-Border Privacy Rules* system is a valid mechanism to facilitate cross-border information transfers while protecting personal information.”

Footnote 4 - For greater certainty, a Party may comply with the obligation in this paragraph by adopting or maintaining measures such as comprehensive privacy, personal information or personal data protection laws, sector-specific laws covering privacy, or laws that provide for the enforcement of voluntary undertakings by enterprises relating to privacy.

Source: USMCA, Article 19.8

Example Option E: Reference to Human Rights and ‘Fundamental Liberties’ of the Data Holder

“1. The Data Protection Authority shall ensure that ICTs do not constitute a threat to public liberties and privacy. To this end, it shall:

- (a) inform data subjects and data controllers of their rights and obligations;
- (b) respond to all requests for an opinion relating to processing of personal data;
- (c) inform data subjects and data controllers of their rights and obligations;

- (d) authorize the processing of files in a certain number of cases, in particular sensitive files;
- (e) examine the prerequisite conditions for implementing personal data processing;

[...]3. In case of emergency, when processing and use of personal data that leads to violation of rights and liberties, the Data Protection Authority, after a hearing inter parties, may decide:

- (a) To suspend the processing;
- (b) To block certain personal data processed;
- (c) To temporarily or permanently prohibit any processing that is contrary to the provisions of this Supplementary Act.”

Source: ECOWAS Supplementary Act on Personal Data Protection Within ECOWAS, Chapter 19, Article 19.

b. RTA Provisions on Cross-border Data Flows and Data Localization

As discussed above, many RTAs that include disciplines on data privacy also regulate cross-border data flows. Exceptions to cross-border data flows vary across RTAs, but among the most recent RTAs, the narrowest exception is contained in the UK-EU Trade and Cooperation Agreement (TCA), followed by CPTPP and USMCA, and then the RCEP, which contains the broadest exception. The UK-EU TCA prohibits parties from restricting cross-border data flows and sets out a list of measures that would be considered a restriction.⁵³¹ Like the UK-EU TCA, the CPTPP also prohibits restrictions on cross-border data flows; however, the agreement includes a public policy exception, provided that the restriction is non-discriminatory.⁵³² The RCEP’s provision on cross-border data flows is similar to the provision in CPTPP. A point of divergence, however, is the broader degree of discretion included in the exceptions, which are not subject to dispute settlement.⁵³³ This could have broad implications for measures affecting cross-border data flows under the RCEP.⁵³⁴

Currently, the major trading nations (US, EU, China, and India) are taking different approaches to regulating cross-border data flows.⁵³⁵ The primary reason for this is their contrasting approaches towards privacy and data governance. The United States has placed minimal restrictions on cross-border data flows,⁵³⁶ as evidenced in US trade agreements. For instance, the USMCA places a blanket prohibition on data localization.⁵³⁷ The EU approaches data protection to be a human and consumer

⁵³¹ UK – EU TCA, Article DIGIT.6; There is a view that broader general exceptions and security exceptions included in the agreement can be invoked to restrict cross-border data flows. See [https://www.europarl.europa.eu/RegData/etudes/IDAN/2021/690536/EPRS_IDA\(2021\)690536_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/IDAN/2021/690536/EPRS_IDA(2021)690536_EN.pdf)

⁵³² CPTPP, Article 14.11, *supra* note 8; Andrew D Mitchell, Neha Mishra, *Regulating Cross-Border Data Flows in a Data-Driven World: How WTO Law Can Contribute*, 22(3) JOURNAL OF INTERNATIONAL ECONOMIC LAW (September 2019).

⁵³³ RCEP, Article 12.15, *supra* note 13; Patrick Leblond, *Digital Trade: Is RCEP the WTO’s Future?*, CENTRE FOR INTERNATIONAL GOVERNANCE INNOVATION (November 23, 2020) [hereinafter Leblond], <https://www.cigionline.org/articles/digital-trade-rcep-wtos-future>.

⁵³⁴ See Leblond, *supra* note 533.

⁵³⁵ Susan Ariel Aaronson & Patrick Leblond, *Another Digital Divide: The Rise of Data Realms and its Implications for the WTO*, 21(2), JOURNAL OF INTERNATIONAL ECONOMIC LAW (2018), 245 [hereinafter Aaronson & Leblond]. See generally, Nivedita Sen, *Understanding the Role of the WTO in International Data Flows: Taking the Liberalization or the Regulatory Autonomy Path?*, 21(2), JOURNAL OF INTERNATIONAL ECONOMIC LAW (2018), 323.

⁵³⁶ See Aaronson & Leblond, *supra* note 535.

⁵³⁷ USMCA, Article 19.12, *supra* note 7.

right and permits cross-border movement of personal data to jurisdictions or entities offering adequate data protection.⁵³⁸ Unlike the United States and EU, China and India seem to be leaning towards an almost absolute data localization, albeit for different reasons. The Chinese consider data to be a security risk, while India has pressed for data sovereignty.⁵³⁹ The RCEP is an example of China's and India's positions on data flows, with a weaker prohibition on data localization as compared to the EU-UK TCA, CPTPP, and USMCA.⁵⁴⁰

Given the current lack of consensus on regulating cross-border data flows and data localization, the least prescriptive option (CPTPP and DEPA) is used as Example Option A. Other example options are included as well, including the UK-EU TCA (for cross-border data flows), USMCA, and RCEP. Overall, it will be important to consider the degree to which all of these example options afford policy space but perhaps also limit stakeholders' and trading partners' rights.

Example Provisions on Cross-Border Data Flows

Example Option A: Cross-Border Data Transfer of Information by Electronic Means

"1. The Parties recognise that each Party may have its own regulatory requirements concerning the transfer of information by electronic means.

2. Each Party shall allow the cross-border transfer of information by electronic means, including personal information, when this activity is for the conduct of the business of a covered person.

3. Nothing in this Article shall prevent a Party from adopting or maintaining measures inconsistent with paragraph 2 to achieve a legitimate public policy objective, provided that the measure:

(a) is not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on trade; and

(b) does not impose restrictions on transfers of information greater than are required to achieve the objective."

Source: CPTPP, Article 14.11; DEPA, Article 4.3

Example Option B: Cross-Border Transfer of Information by Electronic Means

"1. The Parties are committed to ensuring cross-border data flows to facilitate trade in the digital economy. To that end, cross-border data flows shall not be restricted between the Parties by a Party:

⁵³⁸ See Aaronson & Leblond, *supra* note 549. Anupam Chander, *Is Data Localization a Solution for Schrems II?*, 23(3), JOURNAL OF INTERNATIONAL ECONOMIC LAW (2020), 771.

⁵³⁹ Henry Gao, *Digital or Trade? The Contrasting Approaches of China and US to Digital Trade*, JOURNAL OF INTERNATIONAL ECONOMIC LAW (2018), 21(2), 297; See also, Aaronson & Leblond, *supra* note 535. Basu, *India's Role in Global Cyber Policy Formulation*, LAWFARE (Nov. 7, 2019), <https://www.lawfareblog.com/indias-role-global-cyber-policy-formulation>.

⁵⁴⁰ India is not a party to the RCEP, but it played a key role in negotiating the agreement. For a comparison of prohibitions of data localization in the RCEP and CPTPP, see Leblond, *supra* note 533.

- (a) requiring the use of computing facilities or network elements in the Party's territory for processing, including by imposing the use of computing facilities or network elements that are certified or approved in the territory of a Party;
- (b) requiring the localisation of data in the Party's territory for storage or processing;
- (c) prohibiting the storage or processing in the territory of the other Party; or
- (d) making the cross-border transfer of data contingent upon use of computing facilities or network elements in the Parties' territory or upon localisation requirements in the Parties' territory."

Source: UK – EU Trade and Cooperation Agreement, Title III, Chapter 1, Article DIGIT.6.1

Example Option C: Cross-Border Transfer of Information by Electronic Means

"1. No Party shall prohibit or restrict the cross-border transfer of information, including personal information, by electronic means if this activity is for the conduct of the business of a covered person.

2. This Article does not prevent a Party from adopting or maintaining a measure inconsistent with paragraph 1 that is necessary to achieve a legitimate public policy objective, provided that the measure:

- (a) is not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on trade; and
- (b) does not impose restrictions on transfers of information greater than are necessary to achieve the objective.⁵

Footnote 5 - A measure does not meet the conditions of this paragraph if it accords different treatment to data transfers solely on the basis that they are cross-border in a manner that modifies the conditions of competition to the detriment of service suppliers of another Party."

Source: USMCA, Article 19.11

Example Option D: Cross-Border Transfer of Information by Electronic Means

"1. The Parties recognise that each Party may have its own regulatory requirements concerning the transfer of information by electronic means.

2. A Party shall not prevent cross-border transfer of information by electronic means where such activity is for the conduct of the business of a covered person

3. Nothing in this Article shall prevent a Party from adopting or maintaining:

- (a) any measure inconsistent with paragraph 2 that it considers necessary to achieve a legitimate public policy objective,¹⁴ provided that the measure is not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on trade; or
- (b) any measure that it considers necessary for the protection of its essential security interests. Such measures shall not be disputed by other Parties.

Footnote 14 - For the purposes of this subparagraph, the Parties affirm that the necessity behind the implementation of such legitimate public policy shall be decided by the implementing Party.”

Source: RCEP, Article 12.15 (footnote 13 omitted)

One restrictive measure affecting data flows, which is explicitly regulated in trade agreements, is ‘location of computing facilities’, commonly referred to as data localization. Data localization measures require that citizens’ data be stored within the jurisdiction of the particular State. Data localization can have particular implications in times of crisis, where the free transfer of health data across borders is especially important.⁵⁴¹

In the USMCA, parties are explicitly prohibited from imposing data localization measures.⁵⁴² Unlike the USMCA, both CPTPP and the RCEP permit parties to impose data localization requirements to achieve a legitimate public policy objective, provided that the restriction is non-discriminatory.⁵⁴³ This exception in CPTPP is subject to dispute settlement, while the exception in RCEP is discretionary and is not subject to dispute settlement.⁵⁴⁴ Example Option A below is adopted from CPTPP and USMCA. This provision is similar to the obligation on data localization in CPTPP, with the necessity test from USMCA’s obligation on cross-border data flows included, which could provide greater scrutiny of the measure in question by a dispute settlement panel.⁵⁴⁵ It would also require that the parties demonstrate that no other less trade-restrictive measures are available.⁵⁴⁶ Other Example Options are noted, which are taken from the CPTPP, DEPA, RCEP, and the USMCA.

Example Provisions on Data Localization / Location of Computing Facilities

Example Option A: Location of Computing Facilities

“1. The Parties recognise that each Party may have its own regulatory requirements regarding the use of computing facilities, including requirements that seek to ensure the security and confidentiality of communications.

2. No Party shall require a covered person to use or locate computing facilities in that Party’s territory as a condition for conducting business in that territory.

⁵⁴¹ Deborah Elms, *Digital Trade in the Asia Pacific: Issues for 2021 and Beyond*, HINRICH FOUNDATION, 18 (December 2020),

<https://static1.squarespace.com/static/5393d501e4b0643446abd228/t/5ff54b665513902cd3253e51/1609911149107/Digital+trade+in+the+Asia+Pacific+Hinrich+Foundation+December+2020.pdf> .

⁵⁴² See USMCA, Article 19.12, *supra* note 7.

⁵⁴³ See CPTPP, Article 14.13, *supra* note 8; RCEP, Article 12.14, *supra* note 13; Andrew D. Mitchell & Neha Mishra, *Regulating Cross-Border Data Flows in a Data-Driven World: How WTO Law Can Contribute*, 22(3) JOURNAL OF INTERNATIONAL ECONOMIC LAW, Volume 22, Issue 3, (September 2019).

⁵⁴⁴ See Mitchell and Mishra, *supra* note 543.

⁵⁴⁵ Simon Lester, *Digital Trade Agreements and Domestic Policy*, CATO INST. (April 14, 2021), <https://www.cato.org/free-trade-bulletin/digital-trade-agreements-domestic-policy> .

⁵⁴⁶ *Id.*

3.Nothing in this Article shall prevent a Party from adopting or maintaining measures inconsistent with paragraph 2 that is necessary to achieve a legitimate public policy objective, provided that the measure:

(a) is not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on trade; and

(b) does not impose restrictions on the use or location of computing facilities greater than are necessary to achieve the objective”

Source: Adapted from CPTPP, Article 14.13; USMCA, Article 19.11

Example Option B: Location of Computing Facilities

“No Party shall require a covered person to use or locate computing facilities in that Party’s territory as a condition for conducting business in that territory.”

Source: USMCA, Article 19.12

Example Option C: Location of Computing Facilities

“1. The Parties recognise that each Party may have its own regulatory requirements regarding the use of computing facilities, including requirements that seek to ensure the security and confidentiality of communications.

2. No Party shall require a covered person to use or locate computing facilities in that Party’s territory as a condition for conducting business in that territory.

3.Nothing in this Article shall prevent a Party from adopting or maintaining measures inconsistent with paragraph 2 to achieve a legitimate public policy objective, provided that the measure:

(a) is not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on trade; and

(b) does not impose restrictions on the use or location of computing facilities greater than are required to achieve the objective.”

Source: CPTPP, Article 14.13; DEPA, Article 4.4

Example Option D: Location of Computing Facilities

“1. The Parties recognise that each Party may have its own measures regarding the use or location of computing facilities, including requirements that seek to ensure the security and confidentiality of communications.

2. No Party shall require a covered person to use or locate computing facilities in that Party’s territory as a condition for conducting business in that Party’s territory.

3.Nothing in this Article shall prevent a Party from adopting or maintaining:

- (a) any measure inconsistent with paragraph 2 that it considers necessary to achieve a legitimate public policy objective, 12 provided that the measure is not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on trade; or
- (b) any measure that it considers necessary for the protection of its essential security interests. Such measures shall not be disputed by other Parties.

Footnote 12 - For the purposes of this subparagraph, the Parties affirm that the necessity behind the implementation of such legitimate public policy shall be decided by the implementing Party.”

Source: RCEP, Article 12.14 (footnote 11 omitted)

2. RTA Provisions on Online Consumer Protection

Consumer protection is an important area of law that protects individuals and businesses purchasing goods and services from the marketplace through electronic and non-electronic means. Consumer protection laws seek to shield consumers from “improperly described, damaged, faulty, and dangerous goods and services as well as from unfair trade and credit practices”.⁵⁴⁷ Consumer protection in the e-commerce space is particularly important, due to lack of personal interaction while making the purchase. This can make consumers more vulnerable to deceptive practices, unfair contracts, and violation of terms of service, especially in cross-border e-commerce. Further, protecting consumers from fraudulent transactions, breaches, spam and malware attacks, and data misuse by service providers and third-party advertising services is important for digital trade.⁵⁴⁸ Conventional consumer protection laws often are not designed to address the issues faced in the e-commerce space, and, as a result, many governments do not provide adequate mechanisms for redress. In case of divergent consumer protection laws, SMEs and other stakeholders would find it challenging and costly to comply with each jurisdiction’s laws.

Most of the recently concluded RTAs include a general obligation on consumer protection and a specific obligation to maintain an online consumer protection law. For instance, under Article 14 of the CPTPP, parties are required to adopt or maintain a consumer protection law to “proscribe fraudulent and deceptive commercial activities that cause harm or potential harm to consumers engaged in online commercial activities.”⁵⁴⁹ Apart from this specific obligation, under Article 16, CPTPP parties are required to maintain a general consumer protection law.⁵⁵⁰ This obligation also recognizes that “fraudulent and deceptive commercial activities” transcend borders and, therefore, encourages parties to cooperate and coordinate to address these activities.⁵⁵¹ The UN Guidelines on

⁵⁴⁷ Consumer Protection Law – Legal Definition, YOUR DICTIONARY, <https://www.yourdictionary.com/consumer-protection-law>; See New Markets Lab & CIPE, *supra* note 508.

⁵⁴⁸ See, e.g., *Joint Statement on Electronic Commerce: Establishing an Enabling Environment for Electronic Commerce - Communication from the EU*, *Joint Statement on Electronic Commerce: Establishing an Enabling Environment for Electronic Commerce*, WTO, WTO Doc JOB/GC/188 (May 16, 2018), https://trade.ec.europa.eu/doclib/docs/2018/october/tradoc_157457.pdf; see generally Andrew Mitchell & Neha Mishra, *Data at the Docks: Modernising International Trade Law for the Digital Economy*, 20(4) VANDERBILT JOURNAL OF ENTERTAINMENT AND TECHNOLOGY LAW, 1073 (2018).

⁵⁴⁹ Emphasis added. CPTPP, Article 14.7.2, *supra* note 8.

⁵⁵⁰ CPTPP, Article 16.6.3, *supra* note 8.

⁵⁵¹ CPTPP, Article 16.6.4 *supra* note 8.

Consumer Protection encourage Member States to advance international cooperation in the field of consumer protection more generally, while also addressing consumer protection for e-commerce more specifically.⁵⁵²

Unlike CPTPP,⁵⁵³ USMCA,⁵⁵⁴ and RCEP,⁵⁵⁵ DEPA requires parties to maintain laws that are tailored specifically to protecting consumers in the e-commerce space. For instance, “fraudulent, misleading or deceptive conduct” is defined to include “advertising goods or services for supply without intention to supply” so as to include online fraudulent and misleading advertising.⁵⁵⁶ Likewise, the consumer protection law is required to “at the time of delivery, goods and services provided to be of acceptable and satisfactory quality, consistent with the supplier’s claims regarding the quality of the goods and services”.⁵⁵⁷ However, one major gap in consumer protection obligations across RTAs is the lack of a cross-border redressal mechanism for aggrieved consumers.⁵⁵⁸

The DEPA, identified here as the Example Option A, is tailored to protecting consumers in the e-commerce space, which is important in the context of the pandemic and other potential crises. It contains provisions that address suppliers’ fraudulent and deceptive conduct by obligating States to maintain laws and regulations that prohibit such activities; improves customer access to laws; obligates States to, subject to respective laws and regulation, cooperate on enforcement of consumer protection laws; and adopts alternative dispute settlement mechanisms to solve online consumer disputes. The Discretionary Option has been adapted from provisions in the USMCA and RCEP on online consumer protection. Unlike the DEPA, this option requires the parties to maintain a general law that can address potential harm to consumer engaged in online activities. The law should also include an online consumer redressal mechanism that is available to consumers located in other territories. This option also requires the parties to publish the law, including on how to pursue remedies and how businesses can comply with this law.

Example Provision on Online Consumer Protection

Example Option A: Online Consumer Protection

- “1. The Parties recognize the importance of transparent and effective measures to protect consumers from fraudulent, misleading or deceptive conduct when they engage in electronic commerce.
2. The Parties recognize the importance of cooperation between their respective national consumer protection agencies or other relevant bodies on activities related to cross-border electronic commerce in order to enhance consumer welfare.
3. Each Party shall adopt or maintain laws or regulations to proscribe fraudulent, misleading or deceptive conduct that causes harm, or is likely to cause harm, to consumers engaged in online

⁵⁵² *Guidelines on Consumer Protection*, UNCTAD (2016), https://unctad.org/system/files/official-document/ditccplmisc2016d1_en.pdf.

⁵⁵³ See CPTPP, Article 14.7 and CPTPP, Article 16.6, *supra* note 8 .

⁵⁵⁴ See USMCA, Article 19.7 and USMCA, Article 21.4, *supra* note 7.

⁵⁵⁵ See RCEP, Article 12.7, *supra* note 13.

⁵⁵⁶ See DEPA, Article 6.3.3, *supra* note 15.

⁵⁵⁷ See DEPA, Article 6.3.4, *supra* note 15.

⁵⁵⁸ See New Markets Lab and CIPE, *supra* note 265.

commercial activities. Such laws or regulations may include general contract or negligence law and may be civil or criminal in nature. “Fraudulent, misleading or deceptive conduct” includes:

- (a) making misrepresentations or false claims as to material qualities, price, suitability for purpose, quantity or origin of goods or services;
- (b) advertising goods or services for supply without intention to supply;
- (c) failing to deliver products or provide services to consumers after the consumers have been charged; or
- (d) charging or debiting consumers’ financial, telephone or other accounts without authorization.

4. Each Party shall adopt or maintain laws or regulations that:

- (a) require, at the time of delivery, goods and services provided to be of acceptable and satisfactory quality, consistent with the supplier’s claims regarding the quality of the goods and services; and
- (b) provide consumers with appropriate redress when they are not.

5. Each Party shall make publicly available and easily accessible its consumer protection laws and regulations.

6. The Parties recognize the importance of improving awareness of, and access to, policies and procedures related to consumer protection, including consumer redress mechanisms, including for consumers from one Party transacting with suppliers from another Party.

7. The Parties shall promote, as appropriate and subject to the respective laws and regulations of each Party, cooperation on matters of mutual interest related to misleading and deceptive conduct, including in the enforcement of their consumer protection laws, with respect to online commercial activities.

8. The Parties endeavour to explore the benefits of mechanisms, including alternative dispute resolution, to facilitate the resolution of claims relating to electronic commerce transactions.”

Source: DEPA, Article 6.3

Example Option B: Online Consumer Protection

“1. Each Party shall adopt or maintain consumer protection laws to proscribe fraudulent and deceptive commercial activities that cause harm or potential harm to consumers engaged in online commercial activities.

2. The law mentioned in paragraph 1 shall also include an online redressal mechanism that is available to consumers located in the other Party’s territory.

3. Each Party shall publish information on the consumer protection it provides to users of electronic commerce, including how:

- (a) consumers can pursue remedies; and

(b) business can comply with any legal requirements.”

Source: Adapted from USMCA, Article 19.7 & RCEP, Article 12.7

3. RTA Provisions on Electronic Signatures, Electronic Authentication, and Domestic Electronic Transactions Framework

A key factor in enabling digital trade is the ability of the parties in a transaction to validate the transaction online. Online validation is generally achieved through the use of electronic signatures and electronic authentication mechanisms. An electronic signature means “data in electronic form in, affixed to or logically associated with, a data message, which may be used to identify the signatory in relation to the data message and to indicate the signatory’s approval of the information contained in the data message.”⁵⁵⁹ Electronic signatures typically use cryptography to cipher the signed information and then deciphers it for the recipient. Electronic authentication refers “to the techniques used to identify individuals, confirm a person’s authority or prerogative, or offer assurance on the integrity of information”.⁵⁶⁰

Electronic authentication and signatures can make trade faster, smoother, and simpler. According to the UNCTAD Global Cyberlaw Tracker, only 66 per cent of States have e-transaction laws.⁵⁶¹ A key feature of e-transaction laws is the equivalence granted to electronic signatures, which enables businesses and individuals to use electronic signatures as a valid, legal, and enforceable alternative to handwritten signatures. Measures that prohibit or deny the equivalence of digital signatures can serve as an impediment to digital trade, making laws on electronic trade and digital signatures critical for boosting intra-regional e-commerce.⁵⁶²

An increasing number of RTAs (68 out 184 RTAs) contain provisions on electronic authentication and signatures.⁵⁶³ These provisions typically contain a definition of electronic authentication and electronic signatures, permission allowing electronic authentication of transactions, recognition of electronic authentication as a valid counterpart of handwritten signatures, and mutual recognition of electronic signatures. Depending upon the RTA, the language of these obligations is either couched as a positive or a negative obligation. For instance, KORUS prohibits parties from adopting or maintaining specific types of measures, while the Australia-Republic of Korea FTA requires that parties adopt or maintain specific types of measures.⁵⁶⁴

⁵⁵⁹ *UNCITRAL Model Law on Electronic Signatures*, UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW, Article 2(a) (2005).

⁵⁶⁰ WEF 2017, *supra* note 483.

⁵⁶¹ The UNCTAD Tracker tracks e-transaction laws that “facilitate e-commerce by providing legal certainty for the recognition of electronic communications, electronic records and electronic signatures”. See *Data Protection and Privacy Legislation Worldwide*, UNCTAD, <https://unctad.org/page/data-protection-and-privacy-legislation-worldwide> .

⁵⁶² See Karishma Banga, Mohamed Gharib, Max Mendez-Parra & Jamie Macleod Banga, *E-Commerce in Preferential Trade Agreements Implications for African Firms and the AfCFTA* (2021), <https://cdn.odi.org/media/documents/e-commerce-in-preferential-trade-agreements-report.pdf> .

⁵⁶³ Burri & Polanco, *supra* note 489.

⁵⁶⁴ KORUS, Article 15.4, *supra* note 278; Republic of Korea-Australia FTA, Article 15.5, December 12, 2014, <https://www.dfat.gov.au/trade/agreements/in-force/kafta/official-documents/Pages/full-text-of-kafta> ; Burri & Polanco, *supra* note 489.

a. *Electronic Signatures*

A number of RTAs contain provisions on electronic signatures, which prohibit parties from denying legal validity to a signature solely because it is in electronic form.⁵⁶⁵ Such a provision essentially grants equivalence to electronic signatures and can be central to facilitating digital trade, particularly during times of crisis when in-person signature may not be possible or advisable.

A number of RTAs also encourage parties to ensure the interoperability of electronic signatures, with mutual recognition based on international standards.⁵⁶⁶ As these obligations are non-binding, the interoperability and mutual recognition of digital signatures will largely depend upon the domestic law of the State.

Another method for ensuring the legal validity of electronic signatures is through the adoption of the 1996 UNCITRAL Model Law on Electronic Commerce (MLEC). Its purported aim is to provide a set of model rules for lawmakers to remove obstacles and increasing predictability for e-commerce.⁵⁶⁷ Under the MLEC, States are *inter alia* required to give functional equivalence to handwritten and electronic signatures.⁵⁶⁸ The 2001 UNCITRAL Model Law on Electronic Signatures (MLES) added to the MLEC by establishing criteria of technical reliability for the equivalence between electronic and hand-written signatures.⁵⁶⁹ Along with the 2005 United Nations Convention on the Use of Electronic Communications in International Contracts (ECC), these instruments give legal validity to contracts concluded and communications exchanged electronically.⁵⁷⁰ The 2017 UNCITRAL Model Law on Electronic Transferable Records (MLETR) further builds on the prior UNCITRAL model laws to

⁵⁶⁵ Australia-Indonesia Comprehensive Economic Partnership Agreement, Article 13.5.1, February 27, 2009, <https://www.dfat.gov.au/trade/agreements/in-force/iacepa/iacepa-text/Pages/default> ; Brazil-Chile FTA, Article 10.6.1, November 21, 2018, http://www.sice.oas.org/TPD/BRA_CHL/FTA_CHL_BRA_s.pdf ; USMCA, Article 19.6.1, *supra* note 7; EU-Japan EPA, Article 8.77.1, December, 8, 2017, <https://trade.ec.europa.eu/doclib/press/index.cfm?id=1684> ; Australia-Peru FTA, Article 13.6.1, February 11, 2020, <https://www.dfat.gov.au/trade/agreements/in-force/pafta/Pages/peru-australia-fta#:~:text=PAFTA%20will%20launch%20a%20new,chains%20between%20Americas%20and%20Asia> ; Singapore-Sri Lanka FTA, Article 9.6.1, May 1, 2018, <https://www.enterprisesg.gov.sg/-/media/esg/files/non-financial-assistance/free-trade-agreements/sri-lanka-singapore-fta/sri-lanka-legal-text-slsfta.pdf?la=en> ; Argentina-Chile FTA, Article 11.3.1 November 2, 2017, http://www.sice.oas.org/TPD/ARG_CHL/Negotiations/ARG_CHL_sign_TA_s.pdf ; Australia-Singapore FTA, Chapter 14, Article 7.1, 2016, <https://www.dfat.gov.au/trade/agreements/in-force/safta/official-documents/Pages/default> ; Chile-Uruguay FTA, Article 8.5.1, October 4, 2016, http://www.sice.oas.org/TPD/CHL_URY/Negotiations/4th_round_neg_s.pdf ; CPTPP, Article 14.6.1, *supra* note 8; RCEP, Article 12.6.1, *supra* note 13; USMCA, Article 19.6, *supra* note 7; *See Burri & Polanco, supra* note 489.

⁵⁶⁶ Australia-Indonesia FTA, Article 13.5.4, *supra* note 565; Brazil-Chile FTA, Article 10.6.4, *supra* note 565; USMCA, Article 19.6.4, *supra* note 7; EU-Mexico Modernised Global Agreement, Article 6.4, <https://ec.europa.eu/trade/policy/in-focus/eu-mexico-trade-agreement/> ; Australia-Peru FTA, Article 13.6.4, *supra* note 565; Singapore-Sri Lanka FTA, Article 9.6.4, *supra* note 565; Argentina-Chile FTA, Article 11.3.4, *supra* note 565; Australia-Singapore FTA, *supra* note 565, Chapter 14, Article 7.4; Chile-Uruguay FTA, Article 8.5.4, *supra* note 565; CPTPP, Article 14.6.3, *supra* note 8; *See Burri & Polanco, supra* note 489.

⁵⁶⁷ *UNCITRAL Model Law on Electronic Commerce*, UNCITRAL (1996), https://uncitral.un.org/en/texts/ecommerce/modellaw/electronic_commerce [hereinafter *UNCITRAL Electronic Commerce*]

⁵⁶⁸ *Id.*; *See generally Making Deals in Cyberspace: What's the Problem?*, WEF, (October 17, 2017) <https://www.weforum.org/whitepapers/making-deals-in-cyberspace-what-s-the-problem> .

⁵⁶⁹ *See UNCITRAL Electronic Commerce, supra* note 567.

⁵⁷⁰ *United Nations Convention on the Use of Electronic Communications in International Contracts*, G.A. Res. 60/21, U.N. Doc. A/60/515; *United Nations Convention on the Use of Electronic Communications in International Contracts*, UNCITRAL (2005), https://uncitral.un.org/en/texts/ecommerce/conventions/electronic_communications [UNCITRAL *Electronic Communications* 2005].

enable the legal use of electronic transferable records,⁵⁷¹ both domestically and across borders.⁵⁷² As of the time of release of this Handbook, 76 States had adopted the MLEC,⁵⁷³ 35 States had adopted MLES,⁵⁷⁴ 15 States were party to the ECC,⁵⁷⁵ and 3 States had adopted the MLETR.⁵⁷⁶ Quite a few RTAs, especially those concluded by Australia, contain references to these UN instruments.⁵⁷⁷ Some of these RTAs expressly require the domestic regulation be based on the MLEC.⁵⁷⁸ An obligation to ‘adopt or maintain’ the MLEC will give functional equivalence to electronic signatures and handwritten signatures, in line with international standards, along with enabling domestic electronic transactions. This is included as an option below to complement Example Options A and B.

The most widely adopted provision for legal validity of electronic signatures, which appears in the CPTPP, RCEP, USMCA, and the Australia-Singapore Digital Economy Agreement (DEA), is included below as Example Option A. This provision requires the parties to grant legal validity to electronic signatures, and, at the same time, it provides policy space for determining the circumstances in which the validity can be denied. Example Option B goes a step further by requiring parties to be technology neutral. Further, users should be given the opportunity to prove in court that their electronic transactions comply with the legal requirements. An Example Option has also been provided for mutual recognition and interoperability of electronic signatures. Finally, an Example Option, taken from DEPA, is presented, which covers domestic electronic transaction frameworks more broadly and references the MLEC, ECC, and MLETR.

Example Provisions on Legal Validity, Mutual Recognition and Interoperability of Electronic Signatures, and Domestic Electronic Transaction Framework

Example Option A for Legal Validity of Electronic Signatures

“Except in circumstances otherwise provided for under its laws and regulations, a Party shall not deny the legal validity of a signature solely on the basis that the signature is in electronic form.”

Source: CPTPP, Article 14.6.1; RCEP, Article 12.6.1; USMCA, Article 19.6

Example Option B for Legal Validity of Electronic Signatures

“1. Except in circumstances otherwise provided for under its law, a Party shall not deny the legal validity of a signature solely on the basis that the signature is in electronic form.

⁵⁷¹ Transferable documents or instruments are “paper-based documents or instruments that entitle the holder to claim the performance of the obligation indicated therein and that allow the transfer of the claim to that performance by transferring possession of the document or instrument. Transferable documents or instruments typically include bills of lading, bills of exchange, promissory notes and warehouse receipts”. *UNCITRAL Model Law on Electronic Transferable Records*, UNCITRAL (2017), https://uncitral.un.org/en/texts/ecommerce/modellaw/electronic_transferable_records [UNCITRAL Electronic Transferable Records 2017].

⁵⁷² See UNCITRAL Electronic Communications 2005.

⁵⁷³ See UNCITRAL Electronic Commerce, *supra* note 567.

⁵⁷⁴ *Id.*

⁵⁷⁵ See UNCITRAL Electronic Communications 2005 *supra* note, 570.

⁵⁷⁶ *Id.*

⁵⁷⁷ See Burri & Polanco, *supra* note 489, Mark Wu, *Digital Trade-Related Provisions in Regional Trade Agreements: Existing Models and Lessons for the Multilateral Trade System*, INTERNATIONAL CENTRE FOR TRADE AND SUSTAINABLE DEVELOPMENT WORKING PAPER (2017).

⁵⁷⁸ *Id.*

2. Neither Party shall adopt or maintain measures for electronic authentication that would:

- (a) prohibit parties to an electronic transaction from mutually determining the appropriate authentication methods for that transaction; or
- (b) prevent parties to an electronic transaction from having the opportunity to establish before judicial or administrative authorities that their transaction complies with any legal requirements with respect to authentication.

3. Notwithstanding paragraph 2, a Party may require that, for a particular category of transactions, the method of authentication meets certain performance standards or is certified by an authority accredited in accordance with its law.”

Source: Australia-Peru FTA, Article 13.6

Example Option for Mutual Recognition and Interoperability of Electronic Signatures

“1. The Parties shall work towards the mutual recognition of electronic signatures issued by either Party, based on internationally accepted standards.

2. The Parties shall work towards interoperability of electronic signatures issued by either Party.”

Source: Australia-Korea FTA, Article 15.5

Example Option on Domestic Electronic Transactions Framework

“1. Each Party shall maintain a legal framework governing electronic transactions consistent with the principles of UNCITRAL Model Law on Electronic Commerce 1996 or the United Nations Convention on the Use of Electronic Communications in International Contracts, done at New York, November 23, 2005.

2. Each Party shall endeavour to adopt the UNCITRAL Model Law on Electronic Transferable Records (2017).

3. Each Party shall endeavour to:

- (a) avoid imposing any unnecessary regulatory burden on electronic transactions; and
- (b) facilitate input by interested persons in the development of its legal framework for electronic transactions.”

Source: DEPA, Article 2.3

b. Definitions of Electronic Authentication and Electronic Signatures

RTAs have adopted different approaches to defining electronic signatures and electronic authentication. Since there is no consensus on these approaches, one of the two approaches provided below could apply.

One approach would be to not define the particular terms, following the DEPA model. This would permit each party to give their own meaning to relevant terms, and, if there is a dispute, adjudicators would be required to ascertain the ordinary meaning of the disputed term using Article 31 and 32 of the Vienna Convention on the Law of Treaties.⁵⁷⁹ Such an approach could, however, run the risk of an evolutionary interpretation if subject to dispute settlement proceedings.⁵⁸⁰

Another approach would be for parties to define ‘electronic authentication’ and/or ‘electronic signature’. This would allow the parties to arrive at a common meaning for these terms which would be reflected in the text of the agreement. Example Option A below from the Australia-Korea FTA and the USMCA defines both ‘electronic authentication’ and ‘electronic signature’.⁵⁸¹ A variant of this approach is identified as Example Option B, which only defines electronic authentication. This approach is seen in the CPTPP and RCEP.⁵⁸²

Example Provisions on Electronic Authentication and Electronic Signature

Example Option A: Defined Terms for Electronic Authentication and Electronic Signature

Electronic Authentication: “The process or act of verifying the identity of a party to an electronic communication or transaction and ensuring the integrity of an electronic communication”.⁵⁸³

Electronic Signature: “Data in electronic form that is in, affixed to, or logically associated with, an electronic document or message, and that may be used to identify the signatory in relation to the electronic document or message and indicate the signatory’s approval of the information contained in the electronic document or message”.⁵⁸⁴

Source: USMCA, Article 19.1

Example Option B: Defined Term for Electronic Authentication

Electronic Authentication: “The process of verifying or testing an electronic statement or claim, in order to establish a level of confidence in the statement’s or claim’s reliability”.⁵⁸⁵

Source: RCEP, Article 12.1

c. Enabling Electronic Authentication of Transactions

A further differentiating factor in RTAs is the adoption of negative or positive obligation approaches to enable electronic authentication of transactions. Under a negative approach, parties are prohibited from adopting or maintaining measures that: (i) prohibit parties to an electronic transaction from mutually determining the appropriate authentication methods for that transaction; (ii) prevent parties

⁵⁷⁹ Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 331, 8 I.L.M. 679.

⁵⁸⁰ See generally, Graham Cook, *The illusion of ‘evolutionary interpretation’ in WTO dispute settlement* in *EVOLUTIONARY INTERPRETATION AND INTERNATIONAL LAW* (G. Abi-Saab, K. Keith, G. Marceau, and C. Marquet eds. 2019).

⁵⁸¹ See USMCA, Article 19.1, *supra* note 7; Australia-Republic of Korea FTA, Article 15.10, *supra* note 565.

⁵⁸² See RCEP, Article 12.1, *supra* note 13; CPTPP, Article 14.1, *supra* note 8.

⁵⁸³ See USMCA, Article 19.1, *supra* note 7.

⁵⁸⁴ See USMCA, Article 19.1, *supra* note 7.

⁵⁸⁵ See RCEP, Article 12.1, *supra* note 13.

from having the opportunity to establish, before judicial or administrative authorities, that their electronic transaction complies with any legal requirements with respect to authentication; or (iii) deny a signature legal validity solely on the basis that the signature is in electronic form.⁵⁸⁶ The positive obligation approach meanwhile requires parties to adopt and maintain measures enumerated above.⁵⁸⁷

There does not appear to be a discernible difference between the two approaches, so both options are included as example options below, and negotiators could opt for either of the approaches to enable electronic authentication of transactions. Example Option A below presents the negative approach to electronic authentication, as adopted by the USMCA, CPTPP, and Republic of Korea-US FTA. Example Option B below provides the positive approach to electronic authentication, as adopted by the RCEP and Australia-Republic of Korea FTA.

Example Provisions on Electronic Authentication

Example Option A: Negative Approach to Electronic Authentication

“1. Neither Party may adopt or maintain legislation for electronic authentication that would:

- (a) prohibit parties to an electronic transaction from mutually determining the appropriate authentication methods for that transaction;
- (b) prevent parties from having the opportunity to establish before judicial or administrative authorities that their electronic transaction complies with any legal requirements with respect to authentication; or
- (c) deny a signature legal validity solely on the basis that the signature is in electronic form.”

Source: Republic of Korea-US FTA, Article 15.4

Example Option B: Positive Approach to Electronic Authentication

“Taking into account international norms for electronic authentication, each Party shall:

- (a) permit participants in electronic transactions to determine appropriate electronic authentication technologies and implementation models for their electronic transactions;
- (b) not limit the recognition of electronic authentication technologies and implementation models for electronic transactions; and
- (c) permit participants in electronic transactions to have the opportunity to prove that their electronic transactions comply with its laws and regulations with respect to electronic authentication.”

Source: RCEP, Article 12.6

Under either of these approaches, RTAs could include exceptions to the enumerated commitments. For instance, this could be done through a requirement of certain performance standards for electronic signatures, methods of authentication in a particular category of sensitive transactions or communications, or through certification by an authority or a supplier of certification services accredited under the Party’s regulations.

⁵⁸⁶ See USMCA, Article 19.6, *supra* note 7; CPTPP, Article 14.6, *supra* note 8; KORUS, Article 15.4, *supra* note 278.

⁵⁸⁷ See Australia-Republic of Korea, Article 15.5; RCEP, Article 12.6, *supra* note 13.

With respect to exceptions to commitments on electronic authentication, negotiators could choose between two different options. Example Option A below, which is drawn from the Australia-Korea FTA, provides a more specific exception. Example Option B, which is found in the USMCA, CPTPP, RCEP, and Korea-US RTA provides a more general exception.

Example Provisions on Exceptions to Commitments on Electronic Authentication

Example Option A: Specific Exception to Commitments on Electronic Authentication

“Notwithstanding paragraph [X], where prescribed by a Party’s laws and regulations, a Party may require that, for transactions where a high degree of reliability and security is required, such as electronic financial transactions, the method of authentication meet certain security standards or be certified by an authority accredited in accordance with the Party’s laws or policies.”

Source: Australia-Korea RTA, Article 15.5

Example Option B: General Exception to Commitments on Electronic Authentication

“Notwithstanding paragraph [X], a Party may require that, for a particular category of transactions, the method of authentication meets certain performance standards or is certified by an authority accredited in accordance with its law.”

Source: CPTPP, Article 14.6

4. Electronic Payments

The COVID-19 pandemic highlighted the benefits of electronic payment (or e-payment) systems, as stakeholders increasingly relied on e-wallets and contactless transactions to make essential purchases. Although cash payments are still prevalent in many States (especially LDCs), adopting e-payments systems can be critical during times of crisis when access to physical cash becomes difficult. E-payments can also set the stage for a stronger e-commerce environment in the future, especially cross-border e-commerce.⁵⁸⁸

While a number of RTAs regulate electronic signatures and other aspects of electronic transactions, far fewer RTAs regulate electronic payments. In fact, the DEPA, which recognizes certain principles that would assist in fostering the adopting of e-payment systems, was the first agreement with provisions in this field, followed by the Australia-Singapore DEA. The Australia-Singapore DEA differs notably from the DEPA, as it includes binding provisions on electronic payments.

Example Option A below is drawn from the DEPA and includes provisions to make relevant regulations publicly available, adopt international payment standards, promote the use of Application Programming Interface (API), enable cross-border authentication and electronic know-your-customer of individuals and businesses using digital identities, implement regulations commensurate with risks of e-payment systems, and use regulatory sandboxes to bring innovation and new players into the market. However, the DEPA only obligates States to “endeavour” to adopt measures in relation to

⁵⁸⁸ *COVID-19 and E-Commerce: A Global Review*, UNCTAD, 82 (2021), https://unctad.org/system/files/official-document/dtlstict2020d13_en.pdf.

these provisions. The Australia-Singapore DEA, which sets out a more binding obligation is provided as an Example Option B below.

Example Provisions on Electronic Payments

Example Option A: Electronic Payments

“1. Noting the rapid growth of electronic payments, in particular, those provided by new payment service providers, Parties agree to support the development of efficient, safe and secure cross border electronic payments by fostering the adoption and use of internationally accepted standards, promoting interoperability and the interlinking of payment infrastructures, and encouraging useful innovation and competition in the payments ecosystem.

2. To this end, and in accordance with their respective laws and regulations, the Parties recognize the following principles:

(a) The Parties shall endeavour to make their respective regulations on electronic payments, including those pertaining to regulatory approval, licensing requirements, procedures and technical standards, publicly available in a timely manner.

(b) The Parties shall endeavour to take into account, for relevant payment systems, internationally accepted payment standards to enable greater interoperability between payment systems.

(c) The Parties shall endeavour to promote the use of API and to encourage financial institutions and payment service providers to make available APIs of their financial products, services and transactions to third party players where possible to facilitate greater interoperability and innovation in the electronic-payments ecosystem.

(d) The Parties shall endeavour to enable cross-border authentication and electronic know-your-customer of individuals and businesses using digital identities.

(e) The Parties recognize the importance of upholding safety, efficiency, trust and security in electronic payment systems through regulation. The implementation of regulation should, where appropriate, be proportionate to and commensurate with the risks posed by the provision of electronic payment systems.

(f) The Parties agree that policies should promote innovation and competition in a level playing field and recognize the importance of enabling the introduction of new financial and electronic payment products and services by incumbents and new entrants in a timely manner such as through adopting regulatory and industry sandboxes”

Source: DEPA, Article 2.7

Example Option B: Electronic Payments

“1. Recognising the rapid growth of electronic payments, in particular those provided by non-bank, non-financial institution and FinTech enterprises, the Parties shall support the development of efficient, safe and secure cross-border electronic payments by: (a) fostering the adoption and use of internationally accepted standards for electronic payments; (b) promoting interoperability and the interlinking of electronic payment infrastructures; and (c) encouraging innovation and

competition in electronic payments services.

2. To this end, each Party shall:

- (a) make regulations on electronic payments, including in relation to regulatory approval, licensing requirements, procedures and technical standards, publicly available;
- (b) endeavour to finalise decisions on regulatory or licensing approvals in a timely manner;
- (c) not arbitrarily or unjustifiably discriminate between financial institutions and non-financial institutions in relation to access to services and infrastructure necessary for the operation of electronic payment systems;
- (d) adopt, for relevant electronic payment systems, international standards for electronic payment messaging, such as the International Organization for Standardization *Standard ISO 20022 Universal Financial Industry Message Scheme*, for electronic data exchange between financial institutions and services suppliers to enable greater interoperability between electronic payment systems;
- (e) facilitate the use of open platforms and architectures such as tools and protocols provided for through Application Programming Interfaces (“APIs”) and encourage payment service providers to safely and securely make APIs for their products and services available to third parties, where possible, to facilitate greater interoperability, innovation and competition in electronic payments; and
- (f) facilitate innovation and competition and the introduction of new financial and electronic payment products and services in a timely manner, such as through adopting regulatory and industry sandboxes.

3. In view of paragraph 1, the Parties recognise the importance of upholding safety, efficiency, trust and security in electronic payment systems through regulations, and that the adoption and enforcement of regulations and policies should be proportionate to the risks undertaken by the payment service providers.”

Source: Australia-Singapore DEA, Article 11

5. Bridging the Digital Divide

The ongoing pandemic has brought about greater adoption of e-commerce and digital delivery of services by both consumers and businesses alike. However, these efforts have been hampered by unequal access to the internet and the infrastructure and electronic devices that enable access to the internet. The OECD terms this situation the ‘digital divide’, wherein ‘a whole series of interlocking “divides” separate segments of society as well as entire nations into those able to take advantage of digital opportunities and those who cannot’.⁵⁸⁹ The digital divide has left communities and businesses disconnected from the internet, either due to lack of availability of affordable internet, or due to lack of availability of affordable devices that can connect to the internet. As the world pushes for greater digitalization, it will be vital to bridge the digital divide, which will be impacted by a number of factors, as discussed briefly below.

⁵⁸⁹ *Learning to Bridge the Digital Divide*, SCHOOLING FOR TOMORROW, OECD, <https://doi.org/10.1787/9789264187764-en>.

A number of factors contribute to the global digital divide. The OECD notes seven dimensions that would contribute to bridging the divide: (i) access to communications infrastructure, services, and data; (ii) effective use of digital technologies and data; (iii) data-driven and digital innovation; (iv) good jobs for all; (v) social prosperity and inclusion; (vi) trust in the digital age; and (vii) market openness in digital business environments. In the context of this Handbook, two major factors are particularly relevant: (i) access to affordable devices and (ii) access to affordable internet.

a. Access to Affordable Devices

To access the internet, one needs to have access to an internet enabled device. This device is most often a personal computer or a mobile phone. With nearly 22 per cent of the world's population living in poverty and half of those in developing economies living at a subsistence level of under \$1.90 per day, the affordability of internet enabled devices plays a critical role.⁵⁹⁰ In low-income States, the cost of a smartphone (US\$ 150) represents more than 1.2 months' wages (at least 3-4 months' wages are needed for a laptop).⁵⁹¹ These cost factors are notable, given that only 30-60 per cent of the population in low-income States owns a smartphone and only 21 per cent of owns a personal computer.⁵⁹²

One of the key factors driving up the cost of ICT products is customs duties imposed by the importing State on the ICT goods and input products. To an extent, the Information Technology Agreement (ITA-1), concluded by a subset of 81 WTO Members in 1996, managed to eliminate customs duties on ICT products.⁵⁹³ According to a 2015 study by the WTO Secretariat, the share of ITA products in manufactured goods rose between 1996 and 2015 (with 2000 as the high at 20 per cent), with prices dropping during that time period (see Figure 1). However, the products covered under ITA-1 quickly became subject to rapid technological transformations, potentially placing them outside of the scope of the agreement.⁵⁹⁴ This led to an expansion in product coverage through ITA-2, which contains 201 products, with 54 signatories out of 164 WTO Members.⁵⁹⁵ A wider acceptance of ITA-1 and ITA-2, along with broader coverage of ICT products, would have the potential to drastically bring down the cost of digital devices and bridge the existing digital divide.

Figure 1 Share of ITA Products in World Exports of Manufactures and Price Index of US Imports of Capital Goods and of Computers, Peripherals, and Semiconductors, 1996-2015

(percentage share)

⁵⁹⁰ *Charting Pathways Out of Multidimensional Poverty: Achieving the SDGs*, UNITED NATIONS DEVELOPMENT PROGRAMME & OXFORD POVERTY AND HUMAN DEVELOPMENT INITIATIVE (2020), https://ophi.org.uk/wp-content/uploads/G-MPI_Report_2020_Charting_Pathways.pdf.

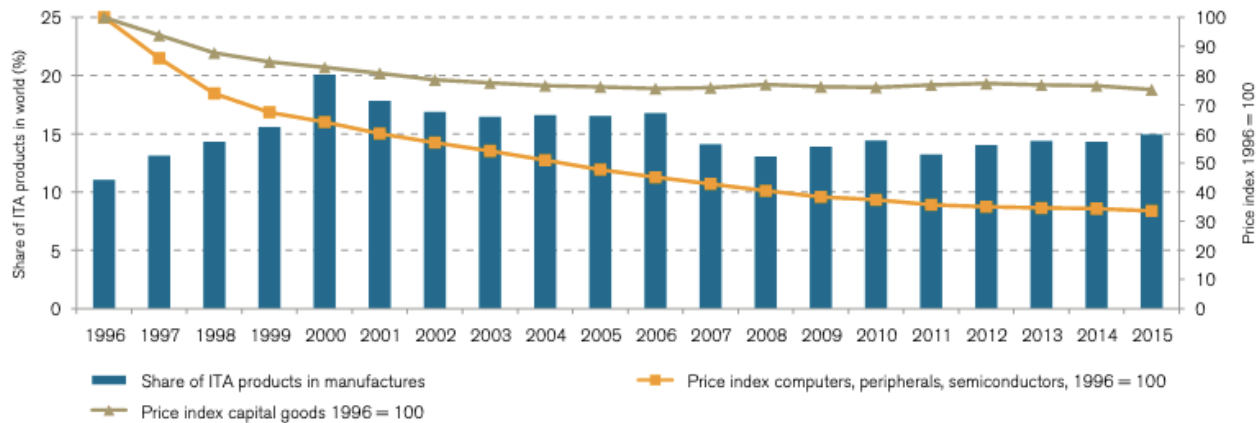
⁵⁹¹ *Accelerating Digital Inclusion in the New Normal*, WORLD ECONOMIC FORUM (2020), http://www3.weforum.org/docs/WEF_Accelerating_Digital_Inclusion_in_the_New_Normal_Report_2020.pdf.

⁵⁹² Id.

⁵⁹³ Originally, there were 29 signatories. This later expanded to 81 signatories. *see Information Technology Agreement — an explanation*, WTO, https://www.wto.org/english/tratop_e/inftec_e/itaintro_e.htm.

⁵⁹⁴ *See generally* Panel Report, *European Communities and its Member States — Tariff Treatment of Certain Information Technology Products*, WTO Doc. WT/DS375/R (adopted Sept. 21, 2010).

⁵⁹⁵ *20 Years of the Information Technology Agreement*, WTO, 58, https://www.wto.org/english/res_e/booksp_e/ita20years_2017_full_e.pdf



Source: WTO, *20 Years of the Information Technology Agreement*⁵⁹⁶

b. Access to Affordable Internet

The ongoing pandemic has managed to catalyse the digitalization of a host of activities, including attending school, buying and selling groceries, and commuting to the office. Even telemedicine witnessed significant growth due to pandemic-related restrictions imposed by various authorities. Some aspects of digitalization, such as online classes in lieu of in-person attendance, could be considered a temporary phenomenon, but others like working from home, online shopping, online food delivery, and access to public services could signal permanent shifts. Access to affordable internet is, therefore, imperative for all to enjoy the benefits of digitalization.

Among the inequalities exposed by the pandemic, the digital divide caused by lack of access to the internet has been one of the starkest. This issue is not limited to developing and least-developed economies. Even in more developed economies, access to affordable internet remains a distant dream for many.⁵⁹⁷ The digital divide further widens in rural communities.⁵⁹⁸ The lack of access to internet

⁵⁹⁶ Id.

⁵⁹⁷ For example, in the United States, 163 million do not have access to affordable internet. The official statistics from the Federal Communications Commission suggests 25 million in the US lack access to broadband. However, a recent study by Microsoft puts this figure at 163 million. See John Kahan, *It's Time for a New Approach for Mapping Broadband Data to Better Serve Americans*, MICROSOFT (August 8, 2019), <https://blogs.microsoft.com/on-the-issues/2019/04/08/its-time-for-a-new-approach-for-mapping-broadband-data-to-better-serve-americans/>; See also Marguerite Reardon, *COVID-19 Shines Light on 'Digital Divide' Across the US*, CNET (March 8, 2020), <https://www.cnet.com/news/covid-19-shines-light-on-digital-divide-across-the-us/>. In the EU, affordable internet seems to be more widely available than other parts of the world. In 2007, about 58 per cent of households had access to the internet. In 2012, this increased to 75 per cent, and in 2014 it increased to about 80 per cent; by 2019, almost 90 per cent of households in the EU had access to internet. *Digital Economy and Society Statistics - Households and Individuals*, EUROSTAT, https://ec.europa.eu/eurostat/statistics-explained/index.php/Digital_economy_and_society_statistics_-_households_and_individuals#Internet_access.

⁵⁹⁸ According to a 2019 survey conducted by Pew Research Center, one in three rural Americans did not have access to broadband internet. The EU also experiences an urban-rural divide in terms of access to the internet. In 2019, only 86 per cent of rural households had internet access, while 92 per cent in cities and 89 per cent in towns had access to internet. Monica Anderson, *Mobile Technology and Home Broadband 2019*, PEW RESEARCH CENTER (June 13, 2019), <https://www.pewresearch.org/internet/2019/06/13/mobile-technology-and-home-broadband-2019/>. According to US data,

occurs either because service is not available where consumers live or the available options do not offer service at an acceptable speed.⁵⁹⁹

Developing economies face the issues of digital divide, urban-rural divide, and the gender gap in access to internet most starkly. For instance, India has the second largest number of internet users (12 per cent of all internet users globally), but half of India's population lacks access to the internet.⁶⁰⁰ According to government data, only 20 per cent of Indians knew how to access digital services.⁶⁰¹ Such a divide exists despite some of the lowest mobile internet prices in the world. Among those connected, only 14.9 per cent were from the rural communities, while 42 per cent of urban communities had access to the internet.⁶⁰² The primary users in India are men, who comprise 36 per cent of users, while only 16 per cent of women have access to the internet.⁶⁰³

c. Addressing the Digital Divide and Fostering Digital Inclusion in RTAs

Currently, the only trade agreement in force that explicitly recognizes the concepts of digital divide and digital inclusion is the DEPA, although addressing the digital divide is also included in the draft negotiated text of the Partnership Agreement between the EU and Members of the Organisation of African, Caribbean, and Pacific States.⁶⁰⁴ While the DEPA merely references the importance of digital inclusion, its provisions, noted as an Example Option below, could still be considered an important first step towards bridging the digital divide and could be replicated in other RTAs.

Example Provision on Digital Inclusion

Example Option: Digital Inclusion

“1. The Parties acknowledge the importance of digital inclusion to ensure that all people and businesses have what they need to participate in, contribute to, and benefit from the digital economy.

2. The Parties recognise the importance of expanding and facilitating digital economy opportunities by removing barriers. This may include enhancing cultural and people-to-people links, including

fewer than 50 per cent of rural Americans have access to broadband connection. Brian Whitacre & Roberto Gallardo, *COVID-19 Lockdowns Expose the Digital Have-Nots in Rural Areas – Here's Which Policies Can Get Them Connected*, THE CONVERSATION (September 2, 2020), <https://theconversation.com/covid-19-lockdowns-expose-the-digital-have-nots-in-rural-areas-heres-which-policies-can-get-them-connected-144324>.

⁵⁹⁹ Monica Anderson, *Mobile Technology and Home Broadband 2019*, PEW RESEARCH CENTER (June 13, 2019), <https://www.pewresearch.org/internet/2019/06/13/mobile-technology-and-home-broadband-2019/>.

⁶⁰⁰ Vrishti Beniwal, *Covid Risks a Lost Generation Amid India's Digital Divide*, BLOOMBERG (December 17, 2020), <https://www.bloomberg.com/news/articles/2020-12-16/covid-risks-a-lost-generation-in-india-as-digital-divide-widens>.

⁶⁰¹ *Key Indicators of Household Social Consumption on Education in India*, GOVT. OF INDIA – MINISTRY OF STATISTICS AND PROGRAMME IMPLEMENTATION, (2019), http://mospi.nic.in/sites/default/files/publication_reports/KI_Education_75th_Final.pdf.

⁶⁰² Id.

⁶⁰³ Id.

⁶⁰⁴ See Negotiated Agreement Text for the Partnership Agreement between the European Union/The European Union and its Member States, of the One Part, and Members of the Organisation of African, Caribbean and Pacific States, of the Other Part (April 15, 2021) https://ec.europa.eu/international-partnerships/system/files/negotiated-agreement-text-initialled-by-eu-oacps-chief-negotiators-20210415_en.pdf.

between Indigenous Peoples, and improving access for women, rural populations and low socio-economic groups.

3. To this end, the Parties shall cooperate on matters relating to digital inclusion, including participation of women, rural populations, low socio-economic groups and Indigenous Peoples in the digital economy. Cooperation may include:

- (a) sharing of experiences and best practices, including exchange of experts, with respect to digital inclusion;
- (b) promoting inclusive and sustainable economic growth, to help ensure that the benefits of the digital economy are more widely shared;
- (c) addressing barriers in accessing digital economy opportunities;
- (d) developing programmes to promote participation of all groups in the digital economy;
- (e) sharing methods and procedures for the collection of disaggregated data, the use of indicators, and the analysis of statistics related to participation in the digital economy; and
- (f) other areas as jointly agreed by the Parties.

4. Cooperation activities relating to digital inclusion may be carried out through the coordination, as appropriate, of the Parties' respective agencies, enterprises, labour unions, civil society, academic institutions and non-governmental organisations, among others.”

Source: DEPA, Article 11.1

CHAPTER VII - TRANSPARENCY

‘Transparency’ in trade law and agreements can have multiple meanings. At its most basic, transparency refers generally to “the sharing [of] information or acting in an open manner” or “a measure of the degree [to] which information about official activity is made available to an interested party.”⁶⁰⁵ In the realm of international trade rules, transparency refers to the “degree to which trade policies and practices, and the process by which they are established, are open and predictable.”⁶⁰⁶ Transparency measures also track with the SDGs, in particular SDG 16 (Peace, Justice, and Strong Institutions) and associated targets 16.6 “Develop effective, accountable, and transparent institutions at all levels” and 16.7 “Ensure responsive, inclusive, participator, and representative decision-making at all levels.”

Transparency has been particularly important since the start of the COVID-19 pandemic because many countries have acted unilaterally, and often on an ad hoc basis, to enact measures aimed at curbing the spread of COVID-19.⁶⁰⁷ Stakeholders have often been caught unaware of the latest policy developments, which in some cases has caused further disruptions in international trade due to challenges with compliance.⁶⁰⁸ Further, during times of crisis, governments are also more likely to bypass review and accountability procedures, which can cause widespread discrimination, arbitrary decision making, and even corruption. For instance, the COVID-19 pandemic response has brought about many allegations of conflicts of interest, opacity, and bias in the award of procurement contracts for essential goods.⁶⁰⁹

Rules and provisions on transparency appear in both the WTO covered agreements and RTAs, as noted below. These existing disciplines are included for reference, both with regard to existing law and in the context of particular transparency needs in times of crisis. Transparency provisions most relevant to trade in times of crisis include (1) notification of new rules or changes to existing rules, (2) provisions designed to increase participation in the rulemaking process, (3) disciplines on accountability, and (4) mechanisms for cooperation and information pooling.⁶¹⁰ These will be discussed in greater detail below, with Baseline and Baseline+ options noted, referencing example provisions from existing agreements where possible and also incorporating sample model provisions tailored to trade in times of crisis.

⁶⁰⁵ Padideh Ala’i & Matthew D’Orsi, *Transparency in International Economic Relations and the Role of the WTO*, in RESEARCH HANDBOOK ON TRANSPARENCY 368, 369 n. 12 (Padideh Ala’i & Matthew D’Orsi eds., 2014).

⁶⁰⁶ *Glossary of Terms*, WTO, https://www.wto.org/english/thewto_e/minist_e/min99_e/english/about_e/23glos_e.htm (last visited Dec. 20, 2020).

⁶⁰⁷ Evenett and Fritz noted that out of the 2,031 policy interventions tracked till October 31, 2020, over 70% had negative consequences on foreign commercial interests. See Evenett & Fritz, *supra* note 24.

⁶⁰⁸ *Transparency – Why it Matters at Times of Crisis*, Information Note, WTO, (2020), https://www.wto.org/english/tratop_e/covid19_e/transparency_report_e.pdf.

⁶⁰⁹ See, e.g., *Investigation into Government Procurement During COVID-19 Pandemic*, NATIONAL AUDIT OFFICE, (2020), <https://www.nao.org.uk/report/government-procurement-during-the-covid-19-pandemic/>.

⁶¹⁰ This classification is adapted from Iza Lejárraga, *Multilateralising Regionalism: Strengthening Transparency Disciplines in Trade*, OECD TRADE POLICY PAPERS NO. 152 (2013), <http://dx.doi.org/10.1787/5k44t7k99xzq-en>. See also Batshur Gootiiz, Giulia Jonetzko, Joscelyn Magdeleine, Juan Marchetti, & Aaditya Mattoo, *Chapter 4: Services*, HANDBOOK OF DEEP TRADE AGREEMENTS 2020, *supra* note 145.

A. Legal Aspects of Transparency

Transparency is acknowledged as a critical obligation under the WTO agreements.⁶¹¹ This is captured in Article X of the General Agreement on Tariffs and Trade 1994 (GATT 1994),⁶¹² which encompasses three key tenets:

- a) Members are obliged to publish their “[l]aws, regulations, judicial decisions and administrative rulings of general application;”⁶¹³
- b) Members are disallowed from enforcing a measure of general application prior to official publication;⁶¹⁴ and
- c) Members are required to administer their laws, regulations, decisions, and rulings in a “uniform, impartial, and reasonable manner.”⁶¹⁵

Article X of GATT 1994 is incorporated and cross-referenced in other WTO covered agreements, such as the Customs Valuation Agreement,⁶¹⁶ Agreement on Rules of Origin,⁶¹⁷ and the Agreement on Safeguards.⁶¹⁸ In addition, Article III of the GATS⁶¹⁹ and Article 63 of the TRIPS Agreement⁶²⁰ also include transparency obligations for WTO Members. For the WTO covered agreements where Article X is not explicitly incorporated, the SPS Agreement⁶²¹ and the TBT Agreement⁶²² impose obligations to publish regulations promptly, establish enquiry points and notification authorities, and notify other WTO Members, through the WTO Secretariat, of any proposed regulations, including coverage, objective, and rationale.⁶²³ Transparency is also an important component of the TFA, which includes obligations on publication of information, notifications, advance rulings, review and appeal, and consultations.⁶²⁴

Since 2000, transparency provisions have increasingly been incorporated into RTAs.⁶²⁵ Substantively, transparency provisions in RTAs tend to focus on the areas noted and can also include review mechanisms (for both administrative and judicial decisions), transparency obligations within dispute

⁶¹¹ William Alan Reinsch, Jack Caporal, and Sanvid Tuljapurkar, *Transparency at the WTO: Why Does Transparency Matter, and Are Members Meeting Their Obligations?*, CTR. STRATEGIC & INT’L STUD (Apr. 22, 2020), <https://www.csis.org/analysis/transparency-wto-why-does-transparency-matter-and-are-members-meeting-their-obligations>.

⁶¹² See GATT 1994, *supra* note 128.

⁶¹³ See GATT 1994, Article X.1, *supra* note 128.

⁶¹⁴ See GATT 1994, Article X.2, *supra* note 128.

⁶¹⁵ See GATT 1994, Article X.3, *supra* note 128.

⁶¹⁶ Agreement on the Implementation of Article VII of GATT 1994, Article 12, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1868 U.N.T.S. 279. [Not reproduced in I.L.M.]

⁶¹⁷ Agreement on Rules of Origin, Articles 2(g), 3(e), and Annex II para. 3(c), Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1868 U.N.T.S. 397. [Not reproduced in I.L.M.]

⁶¹⁸ Agreement on Safeguards, Article 3.1, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1869 U.N.T.S. 154. [Not reproduced in I.L.M.]

⁶¹⁹ General Agreement on Trade in Services, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, 1869 U.N.T.S. 183, 33 I.L.M. 1167 (1994).

⁶²⁰ See TRIPS Agreement, *supra* note 418.

⁶²¹ See SPS Agreement, *supra* note 326.

⁶²² See TBT Agreement, *supra* note 326.

⁶²³ See SPS Agreement, Article 7 and Annex B, *supra* note 326; TBT Agreement, Article 10, *supra* note 326. See generally World Trade Org., Report of the Working Group on Notification Obligations and Procedures, G/L/112, Oct. 7, 1996.

⁶²⁴ TFA, Articles 1 – 5, *supra* note 236.

⁶²⁵ MATTHEW JENKINS, ANTI-CORRUPTION AND TRANSPARENCY PROVISIONS IN TRADE AGREEMENTS 1 (2018) [hereinafter JENKINS].

settlement provisions, and commitments to exercise transparency to prevent corruption and bribery. Transparency provisions are sometimes contained in a stand-alone chapter (e.g., the CETA, the Indonesia-Australia CEPA, and the Chile-Thailand FTA include stand-alone transparency chapters), and they can also be incorporated into other substantive chapters like the trade facilitation chapter,⁶²⁶ and provisions (e.g., obligations specific to trade in services,⁶²⁷ competition,⁶²⁸ and government procurement).⁶²⁹ As is common in other areas of law, RTA provisions on transparency often go beyond the obligations of the WTO covered agreements, allowing parties to further expand upon protections, rights, and obligations through “WTO plus” commitments.

Transparency provisions in RTAs can be a useful tool to respond to changing rules in times of crisis. In this respect, RTAs could help advance collaboration, representation, and participation in the trade policymaking process. However, this potential may be limited due to factors like weak compliance with RTA obligations and lack of coherence between RTAs and national law. RTA implementation may be particularly strained during a time of crisis,⁶³⁰ and notification requirements at the RTA level are reportedly underused,⁶³¹ necessitating further focus on how RTAs are designed with a crisis context in mind.

One way of increasing the impact of RTA disciplines is to link them with multilateral obligations. As of December 15, 2020, WTO Members had provided a total of 292 notifications to the WTO Secretariat on new and amended legal and regulatory measures affecting trade,⁶³² however, experts believe that many more trade-related measures exist than those that have been notified.⁶³³ Lack of notification also seems to not have resulted in penalties at the multilateral level, which points to the lack of enforcement of existing measures.⁶³⁴ Further, the issues relating to the lack of engagement of non-State stakeholders and insufficient cooperation between RTA parties in formulating and implementing policy rules have also exacerbated the challenges that have arisen during the pandemic. The presence of a well-designed transparency structure could have helped countries deal with the pandemic in a more inclusive, collaborative, and efficient manner. For example, in a COVID-19-related policy statement, SADC reported that country measures were not aligned,⁶³⁵ which could have been partially avoided through

⁶²⁶ *Trade Facilitation in Regional Trade Agreements*, WCO RESEARCH PAPER NO. 30 (2014), See Duval et. al, *supra* note 97

⁶²⁷ See Japan–381 EPA, Article 7.14, *supra* note.

⁶²⁸ See e.g., FTA Between the Government of the People’s Republic of China and the Government of the Republic of Korea, Article 14.4, June 1, 2015, http://fta.mofcom.gov.cn/korea/annex/xdzw_en.pdf.

⁶²⁹ See USMCA Article 13.15, *supra* note 7.

⁶³⁰ Muchopa Hackathon 2020, *supra* note 21.

⁶³¹ See Lejárraga, *supra* note 610.

⁶³² WTO Members Notifications on COVID-19, WTO, https://www.wto.org/english/tratop_e/covid19_e/notifications_e.htm (last visited Dec. 20, 2020).

⁶³³ Robert Wolfe, *Exposing Governments Swimming Naked in the COVID-19 Crisis with Trade Policy Transparency (and Why WTO Reform Matters More Than Ever)*[hereinafter Wolfe], in Baldwin & Evenett 2020, *supra* note 118.

⁶³⁴ Imposing penalties on Members who do not comply with WTO notification obligations has previously been proposed by Argentina, Costa Rica, the European Union, Japan, and the United States. See *Procedures to Enhance Transparency and Strengthen Notification Requirements Under WTO Agreements: Communication from Argentina, Costa Rica, the European Union, Japan, and the United States*, WTO, JOB/GC/204, JOB/CTG/14 (Nov. 1, 2018), <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:Jobs/GC/204.pdf&Open=True>. See also Marianne Scheider-Petsinger, *Reforming the World Trade Organization: Prospects for Transatlantic Cooperation and the Global Trade System*, 31-32 (2020), <https://www.chathamhouse.org/sites/default/files/publications/research/2020-09-11-reforming-wto-schneider-petsinger.pdf.pdf>.

⁶³⁵ See Muchopa Hackathon 2020, *supra* note 21.

consultative policymaking. In this context, parties could also use committees established under an RTA to coordinate in a crisis context.

Transparency provisions in RTAs also require other changes in order to become operational in practice, and capacity building is a critical component in this regard. When adopting transparency measures at the RTA level, during a crisis or otherwise, factors such as fiscal capacities, national law and regulation, technical capacity, and implementation issues need to be considered, and needs will differ across parties. For example, before the pandemic, countries from the African Group,⁶³⁶ Cuba, and India had communicated to the WTO that small and vulnerable economies and LDCs were struggling to adhere to notification obligations beyond their capacity.⁶³⁷ Such challenges are now exacerbated and could possibly be resolved through tailored S&DT provisions and an enhanced focus on S&DT and capacity building, as covered in greater detail in Chapter IX of this Handbook and aligned with SDG 17 (Peace, Justice, and Strong Institutions) and targets 17.2 “developed countries to implement fully their official development assistance commitments”, 17.3 “mobilize additional financial resources for developing countries from multiple sources” and 17.6 “enhance knowledge sharing on mutually agreed terms”.⁶³⁸

RTA coverage of transparency has a politically expedient nature as well. As the WTO has expanded to take on new members and issues, consensus around rulemaking has become more nuanced and challenging, making it difficult to continue to create and revise obligations⁶³⁹ as circumstances change, which has led to RTAs emerging as a preferred tool to negotiate “deep commitments”.⁶⁴⁰ Further, given the evolving nature of international trade and ever-increasing prevalence of non-tariff measures,⁶⁴¹ transparency is particularly important for cross-border trade.⁶⁴²

B. RTA Options for Enhanced Transparency Provisions During Crises

In order for international trade to be made more resilient to exogenous shocks, policymakers should draw upon the lessons learned from the COVID-19 pandemic to craft transparency provisions that can

⁶³⁶ The African Group comprises all African countries that are WTO Members, namely, Angola, Benin, Botswana, Burkina Faso, Burundi, Cameroon, Central African Republic, Chad, Congo, Congo (Democratic Republic), Côte d’Ivoire, Djibouti, Egypt, Gabon, The Gambia, Ghana, Guinea, Guinea Bissau, Kenya, Lesotho, Madagascar, Malawi, Mali, Mauritania, Mauritius, Morocco, Mozambique, Namibia, Niger, Nigeria, Rwanda, Senegal, Sierra Leone, South Africa, Swaziland, Tanzania, Togo, Tunisia, Uganda, Zambia, and Zimbabwe.

⁶³⁷ *An Inclusive Approach to Transparency and Notification Requirements in the WTO*, Communication from the African Group, Cuba, and India, WTO, (July 10, 2019), https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=261912,258694,255927,255538,255263,255258,255243,255030,253153,252866&CurrentCatalogueIdIndex=3&FullTextHash=&HasEnglishRecord=True&HasFrenchRecord=True&HasSpanishRec.

⁶³⁸ United Nations, Report of the Inter-Agency and Expert Group on Sustainable Development Goal Indicators (E/CN.3/2016/2/Rev.1), Annex IV.

⁶³⁹ For example, transparency in government procurement was included in the package of “Singapore issues” (along with investment and competition), which some WTO members pushed to include in the Doha Development Agenda, but discussions did not advance due to a lack of consensus. See Stephen Woolcock, *European Union Policy Towards Free Trade Agreements*, EUROPEAN CENTRE FOR INTERNATIONAL POLITICAL ECONOMY (ECIPE) WORKING PAPER NO. 03/2007 (2007), <https://ecipe.org/wp-content/uploads/2014/12/european-union-policy-towards-free-trade-agreements.pdf>.

⁶⁴⁰ See, e.g., Aaditya Mattoo, Nadia Rocha & Michele Ruta, *The Evolution of Deep Trade Agreements*, in HANDBOOK OF DEEP TRADE AGREEMENTS 2020, *supra* note 145; See JENKINS, *supra* note 625.

⁶⁴¹ See, e.g., *Introduction: The Rise of Non-Tariff Measures*, ASIA-PACIFIC TRADE AND INVESTMENT REPORT (2019), https://www.unescap.org/sites/default/d8files/APTIR2019_Introduction.pdf; Lamy Warns Rise of Regional Trade Agreements Could Lead to “Policy Fragmentation”, WTO (Sept. 20, 2012), https://www.wto.org/english/news_e/sppl_e/sppl246_e.htm.

⁶⁴² See JENKINS, *supra* note 625.

facilitate cross-border trade even in times of crisis.⁶⁴³ The RTA options below address four critical areas with respect to transparency: (1) notification of new rules or changes to existing rules, (2) provisions designed to increase participation in the rulemaking process, (3) disciplines on accountability, and (4) mechanisms for cooperation and information pooling.⁶⁴⁴ Within each of these four categories, different options are presented (Baseline Option and additional Baseline+ or Discretionary Options), with references to existing RTA provisions and selected secondary literature noted as applicable.

While the design of RTA provisions is important, however, it should be noted that the addition of enhanced transparency measures will be of little effect if there is weak implementation. Some commentators have highlighted that transparency provisions have not worked well, with incomplete and/or inaccurate notification and publication, as well as the absence of penalties and overall weak enforcement, contributing to this poor record.⁶⁴⁵ While a full assessment of the implementation dimension is beyond this version of the Handbook, implementation aspects are noted here and in other chapters to the degree possible.

1. Providing Information

Provisions related to providing information are central to transparency, both during periods of crisis and more generally. Parties to an RTA are often required to provide information on laws, regulations, and policies (collectively referred to as measures) in order to allow other interested parties to obtain the information needed to assess compliance requirements and the impact of new and existing measures on their own commercial interests.⁶⁴⁶ As seen during the COVID-19 pandemic, policymakers will often fast-track the adoption and enforcement of new laws and regulations (or amendments to existing measures) in order to respond to an imminent and evolving crisis.⁶⁴⁷ Inadequate information about these measures can create an “empirical vacuum” and can also trigger reactive policymaking in other jurisdictions and further inhibit international trade flows.⁶⁴⁸ Lack of information is also a significant cost for traders and other stakeholders who must comply with rapidly changing rules, resulting in additional delays in cross-border trade. Therefore, provisions on notification, publication, and contact points ensure the accurate and timely relay of information.

The set of transparency provisions related to providing information, in particularly those related to notification and publication below, include a wider range of options than are common in most other RTA issue areas. Like other areas, these provisions track with Baseline and Baseline+ Options, with Baseline Options largely following WTO provisions and Baseline+ Options providing for greater transparency. However, RTAs also contain more qualified transparency provisions, referred to below

⁶⁴³ An earlier OECD study has shown a positive empirical relationship between transparency obligations in an RTA and the level of trade thereunder. See Iza Lejárraga & Ben Shepherd, *Quantitative Evidence on Transparency in Regional Trade Agreements*, OECD TRADE POLICY PAPERS NO. 153 (2013) [hereinafter Lejárraga and Shepherd].

⁶⁴⁴ This classification is adapted from Lejárraga, *supra* note 610.

⁶⁴⁵ See e.g., Leonardo Borlini, *A crisis looming in the dark: Some remarks on the reform proposals on notifications and transparency*, QUESTIONS OF INTERNATIONAL LAW (January 31, 2020), <http://www.qil-qdi.org/a-crisis-looming-in-the-dark-some-remarks-on-the-reform-proposals-on-notifications-and-transparency/>.

⁶⁴⁶ Carl-Sebastian Zoellner, *Transparency: An Analysis of an Evolving Fundamental Principle in International Economic Law*, 27 MICH. J. INT’L L. 579, 584 (2006).

⁶⁴⁷ See generally *Regulatory Quality and COVID-19: The Use of Regulatory Management Tools in a Time of Crisis*, OECD, (2020), https://read.oecd-ilibrary.org/view/?ref=136_136858-iv4xb9i639&title=Regulatory-quality-and-COVID-19-The-use-of-regulatory-management-tools-in-a-time-of-crisis.

⁶⁴⁸ See Evenett & Fritz, *supra* note 24.

as Discretionary Options, which may afford countries greater policy space but could also make it more difficult for both trading partners and other stakeholders, including SMEs and vulnerable groups, to be informed of changes to relevant rules and measures.

Further, sample model provisions are proposed below to respond to particular issues that arise during times of crisis. The option below is consistent with proposals for reform at the WTO level in the wake of the COVID-19 pandemic, many of which have also focused on enhanced notification and monitoring at the multilateral level.⁶⁴⁹

a. Notification

Notifying new measures, or amendments to existing measures, contributes to a positive enabling environment for trade by allowing interested parties to assess the scope of legal and regulatory changes and make better-informed decisions. While WTO Members are subject to notification obligations under the WTO-covered agreements, RTAs can play a complementary role by mirroring these commitments through the inclusion of a Baseline Option for notification.

The Baseline Option below, which is drawn from the New Zealand-Korea FTA,⁶⁵⁰ imposes a general obligation on parties to notify one another of actual or proposed measures deemed to be of material effect to the other party. This essentially tracks with some of the notification provisions in the WTO-covered agreements, such as the language from the SPS Agreement, which creates notification obligations for SPS measures that differ from international standards where such regulations *may have a significant effect on trade* with other WTO Members.⁶⁵¹

The Baseline+ option below, taken from the Turkey–Singapore FTA,⁶⁵² piggybacks on the notification obligations at the WTO level and allows for a determination that satisfactory notification under the WTO requirements would concurrently satisfy the RTA notification obligation. Similar provisions are also found in, inter alia, the Australia-Hong Kong, China FTA, the Peru-Australia FTA, and the China-Mauritius FTA.⁶⁵³ During an emergency, notification through the WTO's mechanisms can be exceptionally helpful, as it puts a broader group of countries on notice. In addition to these general notification provisions, RTAs also sometimes include chapter-specific notification obligations relating to, inter alia, SPS measures, TBT, and trade in services.⁶⁵⁴

The other two options below afford RTA parties slightly more discretion. Under Discretionary Option A, taken from the China-Mauritius FTA,⁶⁵⁵ the notification obligation is only triggered for measures

⁶⁴⁹ See Espitia et al., *supra* note 168.

⁶⁵⁰ New Zealand-Korea FTA, *supra* 200.

⁶⁵¹ SPS Agreement, Annex B, *supra* note 326.

⁶⁵² FTA between the Republic of Singapore and the Republic of Turkey, Nov. 14, 2015, <https://www.enterprisesg.gov.sg/-/media/esg/files/non-financial-assistance/for-companies/free-trade-agreements/trsfta/turkey-legal-text-trsfta.pdf?la=en> [hereinafter Turkey-Singapore FTA].

⁶⁵³ FTA Between Australia and Hong Kong, China, Article 16.3, Mar. 26, 2019, <https://www.dfat.gov.au/trade/agreements/in-force/a-hkfta/a-hkfta-text/Pages/default> ; Peru-Australia FTA, Article 25.5, Feb. 12, 2018, <https://www.dfat.gov.au/trade/agreements/in-force/pafta/full-text/Pages/fta-text-and-associated-documents> ; China-Mauritius FTA Article 13.2 (3), *supra* note 208.

⁶⁵⁴ See, e.g., Agreement between the European Union and Japan for an Economic Partnership, Articles 6.11 (transparency obligations relating to sanitary and phytosanitary measures), 7.9 (transparency obligations relating to technical barriers to trade), 8.23 (transparency obligations relating to entry and temporary stay by natural persons), July 17, 2018, O.J. L 330/3, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52018PC0192#document2> .

⁶⁵⁵ China-Mauritius FTA Article 13.2 (3), *supra* note 208.

that might affect the operation of the agreement or otherwise substantially affect the legitimate interests of the other party. The qualifier of “legitimate interests” here is important, because, naturally, not all interests will meet the legitimacy threshold. Discretionary Option B, taken from the Chile-Indonesia CEPA,⁶⁵⁶ is possibly the most discretionary option of the group, as it adds a further qualifier subjecting the notification obligation to the notifying party’s laws and regulations. This means that even in instances where a notification obligation would be triggered, such an obligation may be waived if a party’s laws or regulations stipulate otherwise.

Example Provisions on Notification

Baseline Option: Standard Notification Provision

“Where a Party considers that any actual or proposed measure may materially affect the operation of this Agreement or otherwise substantially affect the other Party’s interests under this Agreement, that Party shall notify the other Party, to the extent possible, of the actual or proposed measure.”

Source: New Zealand-Korea FTA Article 17.5 (1)

Baseline+ Option: Satisfaction of Notification Obligation in Instances of WTO Notification

“When the information pursuant to paragraph 1 has been made available by notification to the WTO in accordance with its relevant rules and procedures or when the mentioned information has been made available on the official, publicly accessible and fee-free websites of the Parties, the information exchange shall be considered to have taken place.”

Source: Turkey–Singapore FTA Article 16.3 (5)

Discretionary Option A: Notification for Instances Where Legitimate Interests Are Affected

“To the extent possible, each Party shall notify the other Party of any proposed or actual measure that the Party considers might materially affect the operation of this Agreement or otherwise substantially affect the other Party’s legitimate interests under this Agreement.”

Source: China-Mauritius FTA Article 13.2 (1)

Discretionary Option B: Notification Subject to Domestic Laws and Regulations

“If a Party considers that any proposed or actual measure may materially affect the operation of this Agreement or otherwise substantially affect the other Party’s [legitimate] interests under this Agreement, it shall, to the extent possible and subject to its laws and regulations, inform the other Party of the proposed or actual measure.”

Source: Chile-Indonesia CEPA Article 10.4 (1)

⁶⁵⁶ Indonesia-Chile CEPA, *supra* note 203.

b. Publication

Publication provisions include the obligation to notify parties of new or amended laws and regulations. This ensures greater transparency regarding measures enacted and enforced and enhances access for interested stakeholders.

The Baseline Option below, drawn from the Israel-Ukraine FTA,⁶⁵⁷ contains a standard publication obligation, which tracks with WTO obligations, calling upon the parties to publish, or make publicly available, their laws, regulations, and other legal and administrative materials which might have an effect on the operation of the agreement.

A Sample Model Provision is also included below that contains model language to provide guidance for publication during times of crisis and emergencies, noting that information shall be made public within a certain number of days. This option could be coupled with the Baseline Option. While it may not always be possible for new or amended laws and regulations to be published and disseminated before going into effect during emergencies, it is also important to ensure that they are published as soon as possible to reduce the possibility of disruptions to trade flows or confusion regarding applicable rules. Therefore, this option includes an obligation to publish the laws and regulations within a certain period of time after coming into effect. While parties to an RTA are free to negotiate the period of time best suited to their individual capacities to satisfy the publication requirement, it is preferable to limit this to a short period of time (one to two weeks maximum) so that information is made available to the public at the soonest possible date.

Two Discretionary Options are included below as well. Discretionary Option A, which is found in the ASEAN-Hong Kong, China FTA,⁶⁵⁸ affords greater discretion to a party by subjecting the publication obligation to a party's laws and regulations and allowing for provision of rules and measures upon request. As observed during the COVID-19 pandemic, forms, documentation, and procedures requiring compliance, particularly at entry-points, can change significantly and quickly in response to changing circumstances, and trading partners and stakeholders may not always be aware of relevant changes. Import and export restrictions may be imposed as an attempt to manage domestic supply and demand of essential goods. Some governments may also relax requirements, including rules of origin requirements, in order to source essential goods from a broader group of suppliers. Provision upon request will present challenges during a crisis, due to changing circumstances and measures (often across multiple trading partners) and heightened information needs.

While broader publication options have merit as discussed, expedited information sharing can also be beneficial, and this can be tailored to certain classes of information. Discretionary Option B, drawn from the RCEP, narrows the publication obligation to specific classes of identified information.⁶⁵⁹ Similar provisions identifying specific categories of information to be published can also be found in, inter alia, the USMCA, CPTPP, and Turkey-Singapore FTA.⁶⁶⁰ While specifically referring to certain categories of information in RTA transparency provisions could provide traders and other interested

⁶⁵⁷ FTA Between the Government of the State of Israel and the Cabinet Ministers of Ukraine, Jan. 21, 2019, https://www.gov.il/BlobFolder/policy/isr-ukraine-fta/he/sahar-hutz_agreements_israel-ukraine-fta-en.pdf.

⁶⁵⁸ FTA Between Hong Kong, China and the Association of Southeast Asian Nations, Mar. 28, 2018, https://www.tid.gov.hk/english/ita/fta/hkasean/text_agreement.html.

⁶⁵⁹ RCEP, *supra* note 13.

⁶⁶⁰ USMCA, Article 7.2, *supra* note 7; CPTPP, Article 2.16, *supra* note 8; Turkey-Singapore FTA, Article 2.12, *supra* note 652.

stakeholders with assurance that the latest measures in a particular jurisdiction will be shared in a transparent and timely manner, thereby allowing stakeholders to anticipate changes in rules and keep cross-border trade flowing with minimal interruptions, it will be important that these provisions are not crafted too narrowly.

Example Provisions on Publication

Baseline Option: Standard Publication Provision

“The Parties shall publish or otherwise make publicly available their laws, regulations, judicial decisions, administrative rulings of general application and their respective international agreements, that may affect the operation of this Agreement.”

Source: Israel–Ukraine FTA Article 8.1

Sample Model Provision (Baseline+ Option): Publication During Emergencies

“In times of emergency, each Party shall ensure that new or amended laws and regulations of general application, as referred to in this Article, are published or information on them is otherwise made publicly available within [x] days of the law or regulation coming into effect.”

Source: Sample Draft Language

Discretionary Option A: Provision Upon Request

“Unless otherwise provided in this Agreement, in accordance with its laws and regulations, each Party shall make publicly available or, if not publicly available, provide upon request, its laws, regulations, administrative procedure, and administrative rulings and judicial decisions of general application as well as international agreements to which the Party is a party, that pertain to or affect the implementation and operation of this Agreement.”

Source: ASEAN-Hong Kong, China FTA Chapter 11, Article 1.1

Discretionary Option B: Publication of Specific Information

“Each Party shall promptly publish, on the internet to the extent possible, the following information in a non-discriminatory and easily accessible manner in order to enable governments, traders, and other interested persons to become acquainted with them:

- (a) Procedures for importation, exportation, and transit (including port, airport, and other entry-point procedures), and required forms and documents; [...]
- (e) Laws, regulations, and administrative rulings of general application relating to rules of origin;
- (f) Import, export, or transit restrictions or prohibitions [...].”

Source: RCEP Article 4.5 (1)

b. Contact Points

Generally, RTAs include provisions requiring that parties establish one or more contact points (also sometimes referred to as enquiry points) through which interested persons may seek assistance on matters arising under the RTA. Having a point of contact is especially beneficial during times of crisis, as it provides clear guidance for interested parties and facilitates access to information on changes to law and regulation. A physical point of contact may also be of relevance in instances in which policy changes have yet to be published but have already taken effect. In these situations, traders and other interested stakeholders may seek guidance from the point of contact to ensure continued compliance with the changed regulations.

The Baseline Option below, included in the APEC Model Chapter on Transparency for RTAs/FTAs,⁶⁶¹ requires that a contact point be established through which the contracting party and other interested persons can obtain information on a timely basis. This option is also noteworthy, as it includes an additional obligation to require coordination among contact points in responding to enquiries. RTAs also sometimes include issue-specific contact points, e.g., for SPS measures, trade facilitation, or SME matters, and coordination among these contact points could be of additional value.

The Baseline+ Option below, reproduced from the USMCA, is an alternative way of drafting an obligation on contact points. It is noteworthy because of sub-paragraph (2) which forbids a party from charging a fee for answering a query. Such a prohibition is particularly useful during an emergency or a time of crisis, as it is likely that many interested parties, including the financially constrained or vulnerable, may require up-to-date information on the changing legal and regulatory landscape. Reducing, or wholly removing, the costs associated with obtaining accurate information can help level the playing field for smaller traders. In addition, the Baseline+ Option can be interpreted as providing parties more leeway in answering the queries posed via the contact point, as it only requires that the response be made within a reasonable time, taking into account the nature or complexity of the request. This is arguably a more flexible standard than that of the Baseline Option, which requires that responses be given on a timely basis instead. However, in weighing such options, the needs of stakeholders and trading partners should be taken into account.

Example Provisions on Contact Points

Baseline Option: Establishing Contact Points to Provide Information on a Timely Basis

“1. Each Party shall provide to the other Party the details of the contact points established or maintained in accordance with this Agreement, including those that provide assistance to the other Party and its interested persons.

2. The relevant contact point, upon the request of a Party or its interested persons shall assist in finding and obtaining copies, on a timely basis, of published measures of general application. Such measures shall be made available to the interested persons, while they are in effect and for a reasonable period after they are no longer in effect. [...]

⁶⁶¹ *Annex A – APEC Model Chapter on Transparency for RTAs/FTAs*, APEC (Sept. 5, 2012), https://www.apec.org/Meeting-Papers/Annual-Ministerial-Meetings/2012/2012_amm/annex-a

4. Each Party shall ensure that its contact points are able to coordinate and facilitate a response on the matters covered by this Agreement, including any enquiries referred to in Article Notification and Provision of Information.”

Source: APEC Model Chapter on Transparency for RTAs/FTAs Articles 6.1, 6.2, and 6.4

Baseline + Option: Establishing Contact Points to Provide Specific Classes of Information Within Reasonable Period

“1. Each Party shall establish or maintain one or more enquiry points to respond to enquiries by interested persons concerning importation, exportation, and transit procedures.

2. A Party shall not require the payment of a fee or charge for answering enquiries under paragraph 1.¹

3. Each Party shall ensure that its enquiry points respond to enquiries within a reasonable period of time, which may vary depending on the nature or complexity of the request.”

¹ For greater certainty, a Party may require payment of a fee or charge with respect to other enquiries requiring document search, duplication, and review in connection with requests in accordance with its laws and regulations providing public access to government records.

Source: USMCA Articles 7.4.1–7.4.3

2. Increasing Participation

Participatory elements of transparency stem from the understanding that, in addition to improving accessibility to trade rules, there needs to be greater access to the actual *process* of crafting these rules.⁶⁶² To ensure greater procedural transparency, RTAs often call for a clear articulation of the objectives behind policy decisions and the establishment of mechanisms for soliciting public comments.⁶⁶³ Some RTAs go a step further by creating working groups and sub-committees of interested non-state stakeholders to give them a greater voice in trade policy formulation.⁶⁶⁴ Provisions for more active participation of non-state actors through committee representation are usually seen in RTA chapters covering non-traditional trade issues, such as sustainable development.⁶⁶⁵ These mechanisms allow policymakers to accommodate a broader range of interests and concerns, as well as assess the impacts of policies and other measures. Such consultative mechanisms are also effective in revealing the gaps and weaknesses in trade rules.⁶⁶⁶ Participation is vital in ensuring greater inclusivity by allowing traditionally under-represented stakeholders a greater say in policymaking, and this would be an important aspect of transparency in times of crisis.

⁶⁶² See Lejárraga, *supra* note 610; See also Kuhlmann 2021, *supra* note 19.

⁶⁶³ *Id.*

⁶⁶⁴ See e.g., CETA, Article 22.5, *supra* note 150.

⁶⁶⁵ *Id.*

⁶⁶⁶ See Wolfe, *supra* note 633 in Baldwin & Evenett 2020, *supra* note 118.

Broad procedural transparency considerations often take a backseat during crises, as clearly illustrated by the COVID-19 pandemic, with traders and other concerned stakeholders left to operate in an informational vacuum. As a result, trade policy changes undertaken to protect vital interests during crises may not reflect a sufficiently wide range of stakeholder needs and could have unintended economic consequences. Therefore, while it may be desirable for governments to preserve the right to make rapid policy changes, avenues for participation and input by non-state actors during the policymaking process should remain open, and even be enhanced, during crises. Dialogue between government and non-state stakeholders is also especially critical in the recovery phase in order to best prioritize resources and rebuilding efforts.⁶⁶⁷

Several existing RTAs establish mechanisms to improve procedural transparency and make trade policy making more accessible to non-state actors and stakeholders, including RTA committees. These committees are generally not included under the transparency chapters of RTAs, however, and are instead often included in the institutional mechanisms set out in other RTA chapters.

A number of RTAs also envision the creation of specific committees for different trade issues covered by the agreement. For instance, CETA includes provisions for the establishment of committees for trade in goods,⁶⁶⁸ SPS measures,⁶⁶⁹ joint customs cooperation,⁶⁷⁰ services and investment,⁶⁷¹ mutual recognition of professional qualifications,⁶⁷² financial services,⁶⁷³ government procurement,⁶⁷⁴ and trade and sustainable development.⁶⁷⁵ Other RTAs such as the RCEP, CPTPP, USMCA, and AfCFTA contain provisions establishing both general committees to address issues under the relevant agreements (RCEP and AfCFTA) and subsidiary committees to focus on issues such as labour, the environment, and development, which vary across agreements.⁶⁷⁶ These committees are, *inter alia*, fora for discussions, consultation, and review of trade issues within their ambit. Membership in these committees is usually restricted to representatives of the parties to the agreement. However, these committees do tend to include mechanisms to allow for participation by concerned non-state stakeholders. As highlighted in the examples below, RTAs can provide opportunities for stakeholder consultations both through general and issue-specific committees. These mechanisms generally include consultation, publication of committee decisions, and public hearings or sessions, encouraging greater public dialogue and more open and accessible decision making.

The Baseline Option below provides for RTA committees or sub-committees to facilitate participation through dialogue forums or other informal channels that provide opportunities for stakeholders to voice

⁶⁶⁷ *Comments on the Impact of the COVID-19 Crisis: Ideas for the WCO and its Members from the WCO Private Sector Consultative Group*, WCO (2020), http://www.wcoomd.org/-/media/wco/public/global/pdf/media/important-notice/pscgcovid_19_en.pdf?db=web.

⁶⁶⁸ CETA, Article 2.13, *supra* note 150.

⁶⁶⁹ CETA, Article 5.14, *supra* note 150.

⁶⁷⁰ CETA, Article 6.14, *supra* note 150.

⁶⁷¹ CETA, Article 8.44, *supra* note 150.

⁶⁷² CETA, Article 11.5, *supra* note 150.

⁶⁷³ CETA, Article 13.18, *supra* note 150.

⁶⁷⁴ CETA, Article 19.19, *supra* note 150.

⁶⁷⁵ CETA, Article 22.4, *supra* note 150.

⁶⁷⁶ See e.g., CPTPP, Ch. 27, *supra* note 8; USMCA, Ch. 30, *supra* note 7; AfCFTA, Article 31, , *supra* note 9; RCEP, Ch. 18, *supra* note 13 (notably, the RCEP joint committee has a mandate to establish sub-committees on other issues, including sustainable development).

their concerns. Treaty language extracted from RCEP exemplifies this option, which is the most common for public participation in RTAs and has, accordingly, been highlighted as a Baseline.

Baseline+ Options also exist that provide for enhanced stakeholder participation. Baseline+ Option A, found in RTAs including CETA and the Indonesia-Australia CEPA, allows parties to invite external stakeholder participation in committee meetings.

Baseline+ Option B, adapted from CETA and modified to suit a crisis or emergency situation, goes even further and envisages a standing civil society forum comprising representatives of interested non-state stakeholders for greater engagement in issues of sustainable development.⁶⁷⁷ Unlike the previous two options, which provide for stakeholder participation through committees, Baseline+ Option B envisages the creation of a separate body to allow for such participation. Other recent EU RTAs also include similar mechanisms to elicit participation of non-State stakeholders on issues of sustainable development.⁶⁷⁸ This option could complement the Baseline Option or Baseline+ Option A to allow for enhanced stakeholder participation during crises.

Example Provisions on Establishment of Committees

Baseline Option: Informal Dialogue Forums

“The functions of the RCEP Joint Committee shall be as follows:

(j) to hold dialogue forums on topics to be agreed by Parties, which may include participation from the business sector, experts, academia, and other stakeholders, as appropriate.”

Source: RCEP Article 18.3 (1)

Baseline + Option A: Participation of Stakeholders in Committee Meetings

“Each regular meeting or dedicated session of the Committee on Trade and Sustainable Development includes a session with the public to discuss matters relating to the implementation of the relevant Chapters, unless the Parties decide otherwise.”

Source: CETA Article 22.4 (3)

“The Parties may invite, by agreement, representatives of other relevant entities, including from the private sector, with necessary expertise relevant to the issues to be discussed, to attend meetings of the Joint Committee.”

Source: Indonesia-Australia Comprehensive Economic Partnership Agreement, Article 18.5(3)

Baseline + Option B (with Sample Model Language Added): Informal Stakeholder Body

⁶⁷⁷ CETA, Article 22.5, *supra* note 150.

⁶⁷⁸ See e.g., FTA between the European Union and the Socialist Republic of Viet Nam, Article 13.15, June 30, 2019, O.J. L 186/3, 12.6.2020, <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:L:2020:186:FULL&from=EN> [hereinafter EU-Viet Nam FTA]; FTA between the European Union and the Republic of Singapore, Article 12.15, Oct. 19, 2018, O.J. L 294/3, 14.11.2019, <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:L:2019:294:FULL&from=EN> [hereinafter EU-Singapore FTA].

- “1. The Parties shall facilitate a joint Civil Society Forum composed of representatives of civil society organizations established in their territories, including participants in the consultative mechanisms referred to in Articles 23.8.3 (Institutional mechanisms) and 24.13 (Institutional Mechanisms), in order to conduct a dialogue on relevant issues, *including the effect of emergency measures adopted by Parties during periods of crises.*
2. The Civil Society Forum shall be convened on a regular basis, *including within a month of the adoption of emergency measures by any Party*, unless otherwise agreed by the Parties. The Parties shall promote a balanced representation of relevant interests, including independent representative employers, unions, labour and business organizations, environmental groups, as well as other relevant civil society organizations as appropriate. The Parties shall facilitate participation by virtual means as necessary.”

Source: Adapted from CETA, Article 22.5, with additional Sample Draft Language added in italics.

In times of crisis, RTAs could also potentially include provisions that allow for the establishment of a crisis management committee that includes those who have the expertise to deal with crisis situations.⁶⁷⁹ The crisis management committee could monitor and review actions taken by States to respond to the effects of the crisis within their territories, thereby functioning as a mechanism of peer review to enable States to take prompt action to mitigate the adverse trade effects of these policies.⁶⁸⁰ Stakeholder participation in such committees could be envisaged through modes prescribed in the Baseline or Baseline+ Options above. An informal working group or committee as set out in Baseline+ Option B could be used to enhance stakeholder participation during crises. Such bodies could complement crisis committees and allow non-state actors who are affected by rapid policy changes to consult and share recommendations, thus helping States assess the impact of policy changes on a broader and more diverse group of stakeholders. This would be a step towards improving inclusivity.

Regardless of the option adopted, it is important to give special consideration to vulnerable sections of the population, including minorities, women, and SMEs, to allow for their participation on an equal basis.⁶⁸¹ As the pandemic has also highlighted, to some extent, virtual meetings could be used to reduce travel costs and increase participation in regional meetings.⁶⁸² However, in order to allow under-represented stakeholders to properly take advantage of reduced costs of participation, improving digital inclusion (as discussed in chapter VI of this Handbook) will be important.

3. Ensuring Accountability

Increasing accountability can help ensure that the measures are impartial, non-arbitrary, and designed to advance a legitimate policy goal. This is an intrinsic element of transparency, as it requires that measures adopted by a party are justifiable, which ultimately fosters the development of a predictable, rules-based trading environment. To this end, RTAs generally allow for a review mechanism, whereby an individual who has received an administrative decision can have recourse to administrative or judicial review, or both. These processes promote transparency by allowing administrative decisions

⁶⁷⁹ Epps et al. Hackathon 2020, *supra* note 21.

⁶⁸⁰ See Alejandro Jara, *Against the Clock: Eight Steps to Improve WTO Crisis Management*, in Evenett & Baldwin 2020, *supra* note 23.

⁶⁸¹ See also Kuhlmann 2021, *supra* note 19.

⁶⁸² See Wolfe, *supra* note 633 in Baldwin & Evenett 2020, *supra* note 118.

to be scrutinized independently. In addition, some RTAs include commitments on transparency within the ambit of dispute settlement provisions, allowing parties to hold each other accountable during dispute settlement proceedings. Another key feature of transparency chapters in many RTAs, particular newer RTAs, is the presence of anti-corruption and anti-bribery provisions. Such provisions obligate parties to adopt measures through domestic law that establish corruption as a criminal offence, impose procedures to enforce criminal sanctions, and adhere to international conventions on anti-corruption, amongst other things.⁶⁸³

Many of the trade-related emergency measures implemented during times of crisis, such as the current pandemic, are likely to have long-term effects on international trade. RTAs can hold parties accountable through dispute settlement procedures, review mechanisms, and anti-corruption provisions. This section sets out options in relation to these three provisions that either have already been incorporated in existing RTAs or could be included to address issues that have arisen during the COVID-19 pandemic and are likely to arise in future crisis situations.

a. Dispute Settlement and Review Mechanisms

Dispute settlement provisions primarily ensure accountability of the parties. Expedited review by an independent body of any administrative or judicial decisions on emergency measures adopted by parties would further help promote transparency during times of crisis. The options highlighted below obligate parties to exercise transparency obligations in relation to dispute settlement proceedings and review mechanisms.

The Baseline Option, drawn from the GATT, sets out a general obligation to publish information on administrative rulings and judicial decisions. The provision also specifies instances in which contracting parties are obligated to publish this information, including any decisions made with respect to classification or the valuation of products; duty, taxes, or other charges; and import or export requirements, restrictions, or prohibitions, among other things. Under the GATT, contracting parties have the obligation to make sure the review procedures are carried out by tribunals that are independent of agencies that enforce their decisions. Further, the contracting parties here are required to publish information “promptly”; however, it is not clear what constitutes “prompt” in the context of this obligation.

To go a step further, Baseline+ Option B, adapted from language in CETA, emphasizes the need for urgent proceedings in the case of certain products (such as perishable agricultural products) and has been further modified to encompass crisis situations. The language “shall make every effort to accelerate the proceedings to the greatest extent possible” could be strengthened, however, since it does allow for some discretion.

Baseline + Option C, adapted from language in the USMCA, calls for the establishment or maintenance of judicial, quasi-judicial, or administrative tribunals for review and appeal, noting that expedited review of administrative action taken against States should be conducted in an impartial and independent manner. This would help in addressing challenges that have arisen from decision making that is trade restrictive, arbitrary, and not in furtherance of a legitimate policy objective during times of crisis. Additional sample model language tailored to emergency has also been added, calling for completion of review and publication of decisions within a set period of time.

⁶⁸³ See Lejárraga, *supra* note 610.

Example Provisions for Dispute Settlement and Review Mechanisms

Baseline Option: General Obligation to Publish Information

“1. Laws, regulations, judicial decisions and administrative rulings of general application, made effective by any contracting party, pertaining to the classification or the valuation of products for customs purposes, or to rates of duty, taxes or other charges, or to requirements, restrictions or prohibitions on imports or exports or on the transfer of payments therefor, or affecting their sale, distribution, transportation, insurance, warehousing inspection, exhibition, processing, mixing or other use, shall be published promptly in such a manner as to enable governments and traders to become acquainted with them. [...]

3. (b) Each contracting party shall maintain, or institute as soon as practicable, judicial, arbitral or administrative tribunals or procedures for the purpose, inter alia, of the prompt review and correction of administrative action relating to customs matters. Such tribunals or procedures shall be independent of the agencies entrusted with administrative enforcement and their decisions shall be implemented by, and shall govern the practice of, such agencies unless an appeal is lodged with a court or tribunal of superior jurisdiction within the time prescribed for appeals to be lodged by importers; Provided that the central administration of such agency may take steps to obtain a review of the matter in another proceeding if there is good cause to believe that the decision is inconsistent with established principles of law or the actual facts.”

Source: GATT, Article 9: Publication and Administration of Trade Regulations

Baseline + Option A: Addressing Emergency Situations

In cases of urgency, including those involving perishable or seasonal goods, *essential goods and services*, or services that rapidly lose their trade value, *or in emergency situations*, the arbitration panel and the Parties shall make every effort to accelerate the proceedings to the greatest extent possible. The arbitration panel shall aim at issuing an interim report to the Parties within 75 days of the establishment of the arbitration panel, and a final report within 15 days of the interim report. Upon request of a Party, the arbitration panel shall make a preliminary ruling within 10 days of the request on whether it deems the case to be urgent.

Source: Adapted from CETA, Chapter 29, (Dispute Settlement), Sub-Section A (Dispute Settlement Procedures) Article 29.11: Urgent Proceedings, with additional Sample Draft Language added in italics.

Baseline + Option B (with Sample Model Language Added): Review and Appeal

Each Party shall establish or maintain judicial, quasi-judicial, or administrative tribunals or procedures for the purpose of the prompt review and, if warranted, correction of a final administrative action with respect to any matter covered by this Agreement. These tribunals shall be impartial and independent of the office or authority entrusted with administrative enforcement and shall not have any substantial interest in the outcome of the matter. *In times of emergency, each Party shall ensure that review of judicial, quasi-judicial, or administrative tribunals decisions are*

completed and published or information on them is otherwise made publicly available within [•] days of such decision having been made.

Source: Adapted from USMCA, Article 29.4 (1): Review and Appeal, with additional Sample Draft Language added in italics.

4. Anti-Corruption Provisions

More recent RTAs contain provisions obligating parties to comply with anti-corruption and anti-bribery obligations. For example, the USMCA contains an entire chapter on anti-corruption. Recent RTAs signed by the EU, Canada, and Japan have also incorporated anti-corruption provisions (e.g., EU-Central America Association Agreement, Canada-Honduras RTA, CPTPP and Japan-Philippines RTA).

In times of crisis, anti-corruption provisions may be particularly important and could deter rent-seeking behaviour and help hold concerned parties accountable for corrupt practices.⁶⁸⁴ The Baseline Option below, taken from the EU-Central America Association Agreement, sets out the parties' obligation of to cooperate to increase transparency to eliminate corrupt practices. It was chosen as a baseline in this evolving area because it provides a minimum standard on which to build.

The Baseline+ Options below, taken from Article 26 of the CPTPP, builds upon this simple baseline to cooperate. It presses for measures to promote transparency in the behaviour of public officials and affirms adherence to international standards for both public and private sector actors. It also includes an obligation to ensure public awareness of anti-corruption authorities, so that private stakeholders can report corrupt practices. It also obligates the RTA parties to allow the public to report anonymously in order to protect stakeholders from retaliation. These different components of Article 26 of the CPTPP could be integrated into future RTAs in whole or in part, and they could be incorporated along with the Baseline Option noted below.

Example Provisions for Anti-Corruption

Baseline Option: Increased Transparency Related to Corrupt Practices

The Parties agree to cooperate in relevant bilateral and multilateral fora to increase transparency, including through the elimination of bribery and corruption in matters covered by Part IV (Trade) of this Agreement.

Source: EU-Central America Association Agreement Article 338: Cooperation on Increased Transparency

Baseline+ Option A: Adoption of Measures to Address Corruption and Subjecting Anti-Corruption Obligations to International Standards

“The Parties affirm their resolve to eliminate bribery and corruption in international trade and investment. Recognising the need to build integrity within both the public and private sectors and that each sector has complementary responsibilities in this regard, the Parties affirm their adherence

⁶⁸⁴ See JENKINS, *supra* note 625.

to the APEC Conduct Principles for Public Officials, July 2007, and encourage observance of the APEC Code of Conduct for Business: Business Integrity and Transparency Principles for the Private Sector, September 2007.”

“The scope of this Section is limited to measures to eliminate bribery and corruption with respect to any matter covered by this Agreement...”

“Each Party shall ratify or accede to the United Nations Convention against Corruption, done at New York on October 31, 2003.”

CPTPP Article 26.6: Scope of Anti-Corruption Provisions

Baseline+ Option B: Promoting Integrity Among Public Officials

To fight corruption in matters that affect trade and investment, each Party should promote, among other things, integrity, honesty and responsibility among its public officials. To this end, each Party shall endeavour, in accordance with the fundamental principles of its legal system, to adopt or maintain: ... (b) measures to promote transparency in the behaviour of public officials in the exercise of public functions; ...”

CPTPP Article 26.8: Promoting Integrity Among Public Officials

Baseline+ Option C: Participation of Private Sector

“Each Party shall take appropriate measures to ensure that its relevant anticorruption bodies are known to the public and shall provide access to those bodies, if appropriate, for the reporting, including anonymously, of any incident that may be considered to constitute an offence described in Article 26.7.1 (Measures to Combat Corruption).”

CPTPP Article 26.10: Participation of Private Sector and Society

5. Promoting Cooperation

The need for cooperative solutions, both specifically with respect to transparency and more broadly on issues of trade and investment, has been a prominent theme in the global trade dialogue. Since the start of the pandemic, cooperative mechanisms have been spearheaded by the OECD, the UN agencies, and other multilateral and regional fora.⁶⁸⁵ Cooperation at a regional or bilateral level can help to further the objectives highlighted throughout this chapter and can make the provision of information more efficient and cost effective. Cooperation also allows for greater accountability by complementing review and appeal mechanisms and promoting collaborative solutions.⁶⁸⁶ In addition, it helps to ensure greater participation in trade policy formulation by providing interested stakeholders with more efficient and accessible avenues for raising concerns. In general, RTA transparency chapters do not specifically recognize an obligation to cooperate to improve transparency. Relatively few RTAs specifically affirm the parties’ agreement to cooperate on improved transparency. Where transparency

⁶⁸⁵ *Impact of the COVID-19 Pandemic on Trade and Development*, UNCTAD, (2020), https://unctad.org/system/files/official-document/osg2020d1_en.pdf.

⁶⁸⁶ See Lejárraga, supra note 610.

chapters in RTAs do include specific provisions on cooperation, these usually take the form of overarching language related to cooperation through multilateral,⁶⁸⁷ regional,⁶⁸⁸ and bilateral fora⁶⁸⁹ for improving transparency. However, even in the absence of a specific provision calling for cooperation in enhancing transparency, some RTAs incorporate elements of such cooperation. Such provisions include those that recognize the limited capacity of some parties to undertake and fulfil broad transparency obligations,⁶⁹⁰ as well as mechanisms for technical assistance and capacity building under a broader S&DT mechanism,⁶⁹¹ as discussed in Chapter VIII.

Future RTAs may lay out the need for cooperation to improve transparency at the regional level. The spectrum of options can include overarching language setting out the need for cooperation (this could form a Baseline option) on the one hand and the identification of specific areas of cooperation (Baseline+ options) on the other. It should be noted, however, that language on cooperation is usually couched in best endeavour language, and giving more teeth to cooperation provisions will likely not be practical.

Although transparency-specific cooperation provisions are relatively rare in RTAs, as noted above, the Baseline Option below is derived from the CETA, which incorporates broad language on cooperation in its transparency chapter. This sets out a minimum commitment on cooperation by establishing a general intent by parties to cooperate to promote transparency.

The Baseline+ Option below, adapted from the USMCA, goes a step further by identifying specific areas in which increased transparency is required. It is important to note that this provision is derived from language in the USMCA's Agriculture Chapter, with bracketed language focused on agriculture-specific issues. The template for this provision may, however, be applied to other areas in which transparency is critical.

Example Provisions for Promoting Cooperation

Baseline Option: Overarching Cooperation Provision

“The Parties agree to cooperate in bilateral, regional and multilateral fora on ways to promote transparency in respect of international trade and investment.”

Source: CETA Article 27.5: Cooperation on Promoting Increased Transparency

Baseline+ Option: Identification of Issues for Cooperation

“The Parties shall work together at the WTO to promote increased transparency and to improve and further develop multilateral disciplines on [market access, domestic support, and export competition

⁶⁸⁷ CETA, Article 27.5, *supra* note 150; USMCA, Article 3.3, *supra* note 7.

⁶⁸⁸ CETA, Article 27.5, *supra* note 150.

⁶⁸⁹ CETA, Article 27.5, *supra* note 150.

⁶⁹⁰ See Lejárraga, *supra* note 610.

⁶⁹¹ Economic Partnership Agreement Between the CARIFORUM States, of the One Part, and the European Community and its Member States, of the Other Part, Article 121, October 15, 2008, O.J. L 289/I/3, 30.10.2008, [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:22008A1030\(01\)&from=EN](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:22008A1030(01)&from=EN) [hereinafter EU-CARIFORUM EPA].

with the objective of substantial progressive reductions in support and protection] resulting in fundamental reform.”

Source: USMCA Article 3.3: International Cooperation

While overarching language to promote transparency through greater cooperation is a good start, trade agreements could also highlight more concrete paths for cooperation. A commitment for cooperation on transparency could be supplemented by a list of instances in which regional or bilateral cooperation would be beneficial. Such a list could also identify priorities for collective action during times of crisis and highlight avenues for cooperation. Notably, cooperation would contribute to all of the functional elements set out above and could help establish higher standards for transparency, especially in times of crisis.

Information pooling would be one such area for enhancing cooperation and crisis-proofing trade agreements. Information pooling and dissemination have proven to be greatly beneficial in mitigating the trade costs of the COVID-19 pandemic. Multilateral and regional entities, as well as national governments, have adopted initiatives to combat information gaps caused by rapidly changing policies. These include the Observatory on Border Crosser Status due to COVID-19⁶⁹² facilitated by the UNECE, the WTO’s portal on COVID-19 related measures,⁶⁹³ and national information platforms such as Russian Federation’s COVID-19 single window.⁶⁹⁴ These examples highlight the value of regional/bilateral information pooling and dissemination. Replication of such efforts in a systemic manner through RTAs would be especially beneficial in certain cases, such as for non-tariff measures and policies affecting movement of persons. RTAs can also set up similar mechanisms for sharing data regarding the nature of the crisis.⁶⁹⁵

Further, in some RTAs, cooperation in improving transparency focuses on capacity building provisions. Such provisions reflect the particular circumstances of developing countries and LDCs, which often find it difficult to meet complex and highly technical notification requirements.⁶⁹⁶ During times of crisis, RTA parties could cooperate to set up mechanisms for enhanced transparency, while ensuring that all parties are able to meet their transparency commitments. It is important that parties to an RTA give effect to their obligations with regard to S&DT (as set out in Chapter VIII of the Handbook). In the context of transparency provisions, S&DT typically takes the form of capacity building or longer transition periods which give developing countries some flexibility in implementing RTA rules and making corresponding changes to their domestic laws in order to ensure that they meet the standards of transparency contained in an RTA. However, S&DT may not be able to wholly address transparency challenges during a pandemic, especially in the case of countries that are still struggling

⁶⁹² *Observatory on Border Crossings Status Due to COVID-19*, U.N. ECON. COMMISSION EUROPE, <https://wiki.unece.org/display/CTRBSBC/Observatory+on+Border+Crossings+Status+due+to+COVID-19+Home>

⁶⁹³ *COVID-19: Measures Affecting Trade in Goods*, WTO, https://www.wto.org/english/tratop_e/covid19_e/trade_related_goods_measure_e.htm

⁶⁹⁴ See Duval, *supra* note 89 in Evenett & Baldwin 2020, *supra* note 23.

⁶⁹⁵ See Freund and McDaniel, *supra* note 455.

⁶⁹⁶ *An Inclusive Approach to Transparency and Notification Requirement in the WTO*, Communication from the African Group, Cuba, and India, July 10, 2019, https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=261912,258694,255927,255538,255263,255258,255243,255030,253153,252866&CurrentCatalogueIdIndex=3&FullTextHash=&HasEnglishRecord=True&HasFrenchRecord=True&HasSpanishRec

with weak institutional and implementation capacity. In times of crisis, S&DT in the form of technical and financial assistance may also be needed. Some RTAs, such as the AfCFTA,⁶⁹⁷ already have provisions that address this concern; however, none have gone so far as to specifically note the needs in crisis situations, and most references to capacity building and technical assistance are in the form of non-binding aspirational provisions. Some RTAs, therefore, contain provisions for special assistance in meeting transparency obligations in the form of capacity support and technical assistance to allow effective compliance.⁶⁹⁸ These provisions would generally track with S&DT provisions, as noted above, which are covered in greater detail in Chapter VIII.

The Sample Model Provision below adopts a more tailored approach to cooperation, suggesting specific avenues for cooperation based on best practices observed during the pandemic. This option could supplement other provisions to set out areas in which regional cooperation would be particularly useful during times of crisis.

Sample Model Provision (Baseline + Option): Identifying Avenues for Cooperation

“Parties shall explore avenues of cooperation, including, for instance, establishment of mechanisms for the collection and dissemination of updated and accurate information on measures affecting trade and investment and coordination of technical assistance as may be required by Parties in complying with obligations under this Agreement.

Parties shall establish working groups to discuss additional avenues for cooperation to enhance transparency during times of crises.

While implementing the provisions of this Chapter, Parties shall give effect to their obligations under Chapter [X] on special and differential treatment.”

Source: Sample Draft Language

This option, in the form of a Sample Model Provision, recognizes that developing countries and LDCs could need some support in meeting enhanced transparency requirements, especially during times of crisis when trade policies change rapidly. As noted above, standard provisions for S&DT generally include flexibilities in terms of extended timelines and phase-in periods. Since this type of flexibility may be less relevant during emergency situations, where information must be made available quickly, the sample provision includes specific language calling for cooperation in the form of technical assistance to meet the enhanced transparency needs during crises. The sample model provision above also establishes processes for parties to collaborate on other avenues for cooperation, as deemed necessary during future crises.

⁶⁹⁷ See AfCFTA, Article 6 and Article 7, *supra* note 9.

⁶⁹⁸ See Lejárraga and Shepherd 643.

CHAPTER - VIII DEVELOPMENT

Development is a multi-faceted term. International economic law is premised on an understanding that countries would be able to participate more fully in international trade through “improv[ing] labour standards, economic advancement, and social security”,⁶⁹⁹ and, over the years the primarily economic focus of development has broadened to encompass non-economic concerns, such as the environment, quality of life, and gender equality, among others,⁷⁰⁰ reflecting a concomitant shift in trade norms. Sustainable development, as encompassed in the SDGs, is part of this shift in norms, and this can be seen in recent RTAs,⁷⁰¹ as discussed below and in the chapter that follows.

While there is no single multilateral instrument that addresses all facets of development, different international agreements accommodate development in their own ways. For instance, the GATT 1994 emphasizes different aspects of development in its preamble, noting the need for positive efforts to allow developing economies and LDCs to capture a share of growth in international trade commensurate with their economic development needs.⁷⁰² The preamble also references sustainable development, which is increasingly serving as a unifying principle for international trade law,⁷⁰³ as noted. However, the language in the preamble is not binding, although, to an extent, it has influenced WTO priorities and also WTO jurisprudence in the landmark Shrimp-Turtle case.⁷⁰⁴

It is notable that WTO Agreements do not include a definition of “developing country”, which has recently come under increased scrutiny.⁷⁰⁵ WTO Members are given the latitude to self-identify as a

⁶⁹⁹ The Atlantic Charter enumerated “common principles” which would undergird “a better future for the world”. These included equal access for States to the trade and raw materials required for economic development and full collaboration between States in the economic field. *See Joint Declaration by the President of the United States and the Prime Minister of the United Kingdom*, ATLANTIC CHARTER, Aug. 14, 1941, 55 Stat. 1603, Executive Agreement Series 236, <https://www.loc.gov/law/help/us-treaties/bevans/m-ust000003-0686.pdf>.

⁷⁰⁰ Yong-Shik Lee, *General Theory of Law and Development*, 50 CORNELL INT’L L. J. 415, 428–429 (2017).

⁷⁰¹ *See also* Kuhlmann 2021, *supra* note 19.

⁷⁰² “Recognizing that their relations in the field of trade and economic endeavour should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, and expanding the production of and trade in goods and services, while allowing for the optimal use of the world’s resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development.” GATT 1994, *supra* note 128.

⁷⁰³ *See* Gabrielle Marceau and Fabio Morosini, *The Status of Sustainable Development in the Law of the World Trade Organization*, ARBITRAGEM E COMERCIO INTERNACIONAL (2013).

⁷⁰⁴ The reference to sustainable development in the WTO Preamble was relied upon in the Shrimp-Turtle case, which illustrates how preambular language can become more binding precedent. United States — Import Prohibition of Certain Shrimp and Shrimp Products, WT/DS58/R (May 15, 1998) and Appellate Body Report, United States — Import Prohibition of Certain Shrimp and Shrimp Products, WT/DS58/AB/R (Oct. 12, 1998).

⁷⁰⁵ Article XVIII.1 of GATT 1994, *supra* note 128, specifies ‘developing countries’ as “those contracting parties the economies of which can only support a low standard of living and are in the early stages of development”.

developing country,⁷⁰⁶ whereas LDCs are designated based on UN criteria that track a country's income, human assets, and economic vulnerability.⁷⁰⁷

In the context of the WTO, development is generally addressed through S&DT provisions that apply to developing countries and LDCs. S&DT provisions appear throughout the WTO agreements and are classified using a six-fold typology developed by the WTO Secretariat, which consists of: (1) provisions aimed at increasing the trade opportunities of developing country Members; (2) provisions under which WTO Members should safeguard the interests of developing country Members; (3) flexibility in commitments, action, and use of policy instruments; (4) transitional time-periods; (5) technical assistance; and (6) provisions relating to LDC Members.⁷⁰⁸ Together, these provisions give greater consideration to the needs of developing countries and LDCs, reflecting foundational principles that could be built upon to work towards a “new international economic order”.⁷⁰⁹

While Section A below expounds upon the main legal aspects of S&DT provisions, some illustrative examples have been referenced in previous Handbook chapters and bear repeating here. As was touched upon in the preceding chapters of this Handbook, S&DT provisions are embedded in many of the WTO covered agreements. For instance, Chapter III (Trade Facilitation) incorporated the S&DT provisions found in the TFA,⁷¹⁰ including provisions that allow for WTO Members to prioritize implementation of TFA provisions and avail themselves of transitional time-periods to implement the commitments in the TFA, with added flexibility provided for LDC Members. Chapter IV (Sanitary and Phytosanitary Measures and Technical Barriers to Trade) highlighted the technical assistance and S&DT provisions found in both the SPS Agreement⁷¹¹ and TBT Agreement,⁷¹² which take the form of phased implementation and time-limited exceptions. Chapter V (Intellectual Property Rights) discussed some of the development-centric flexibilities found in the TRIPS Agreement,⁷¹³ including transitional time-periods, technical assistance, and provisions aimed at supporting LDC Members. These provisions are central to the treatment of development in an RTA, although they will not be covered again in the options noted below. In addition, Chapter IX (Building Forward Better) covers important issues on the trade agenda that have a bearing on development and should be covered in

⁷⁰⁶ *Who are the Developing Countries in the WTO?*, WTO, https://www.wto.org/english/tratop_e/devel_e/d1who_e.htm (last visited May 9, 2021). The self-identification of developing countries has routinely been accepted by other WTO Members. However, in recent years, some criticism has been levied against this self-assessment approach. *See, e.g.*, David A. Wemer, *What is Wrong with the WTO?*, ATLANTIC COUNCIL (June 14, 2019), <https://www.atlanticcouncil.org/blogs/new-atlanticist/what-is-wrong-with-the-wto/>.

⁷⁰⁷ *LDC – What is a Least Developed Country?*, UNCTAD/PRESS/IN/2017/012, UNCTAD, (last visited May 9, 2021 <https://unctad.org/press-material/ldc-what-least-developed-country>). For a current list of LDCs, *see List of Least Developed Countries*, UN COMMITTEE FOR DEVELOPMENT POLICY (Feb. 11, 2021), https://www.un.org/development/desa/dpad/wp-content/uploads/sites/45/publication/ldc_list.pdf.

⁷⁰⁸ *Special and Differential Treatment Provisions in WTO Agreements and Decisions: Note by the Secretariat*, WTO, WT/COMTD/W/258, Mar. 2, 2021, <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/COMTD/W/258.pdf&Open=True>.

⁷⁰⁹ *See generally* H. W. Singer, *The New International Economic Order: An Overview*, 16 J. MOD. AFR. STUD. 539 (1978). *See also* MATTHIAS HERDEGEN, *PRINCIPLES OF INTERNATIONAL ECONOMIC LAW* 70 (2d ed., 2016) [hereinafter HERDEGEN].

⁷¹⁰ *See* TFA, *supra* note 236.

⁷¹¹ SPS Agreement, Articles 9 and 10, *supra* note 326.

⁷¹² *See* TBT Agreement, Articles 11 and 12, *supra* note 326.

⁷¹³ *See* TRIPS Agreement, *supra* note 418.

greater depth in a subsequent stage of this Handbook, including labour, environment, gender, and SMEs.

Apart from the WTO covered agreements, RTAs also address development considerations, often in their preambular language or through specific S&DT provisions. For example, the preamble to the RCEP notes the different levels of development among the parties and acknowledges the need for “flexibility”, including through the provision of S&DT, especially for Cambodia, Lao People’s Democratic Republic, Myanmar, and Viet Nam.⁷¹⁴ Moreover, a “differentiated” model of S&DT is observed in the AfCFTA,⁷¹⁵ whereby, in addition to the reference to S&DT in the framework agreement, specific S&DT provisions and flexibilities are woven into the Protocols on Trade in Goods and Trade in Services, taking into account the “special economic situations and development, trade and financial needs” of the contracting parties on a case-by-case basis.⁷¹⁶ This is evidence of the fact that the push for deeper economic integration globally requires a shift away from a one-size-fits-all approach to international rulemaking to incorporate adequate flexibilities that allow greater and more inclusive participation by the economically vulnerable.⁷¹⁷

One trend that can be observed in RTAs, but which is not incorporated to a significant degree in any of the WTO covered agreements, is the inclusion of broader development concerns. This is typically done in one of two ways. Some RTAs include standalone chapters on issues such as environment and labour that link with the SDGs, incorporating references to certain international standards that prescribe benchmarks for environmental and labour protection, among others. This approach is common in RTAs between developed and developing country parties, although the development impact of commitments in such a context is often the subject of debate.⁷¹⁸ For example, the NAFTA between Canada, Mexico, and the United States included side agreements that contained commitments on labour⁷¹⁹ and environment, the latter encompassing the North American Agreement on Environmental Cooperation (NAAEC);⁷²⁰ the USMCA enhanced and strengthened these provisions, moving both labour and environment into the main agreement text.

An alternative approach is to include a chapter on sustainable development in an RTA. The RTAs signed by the EU are illustrative of this approach, and the EU-Viet Nam Free Trade Agreement,⁷²¹

⁷¹⁴ RCEP, *supra* note 13.

⁷¹⁵ See Kuhlmann & Agutu, *supra* note 11.

⁷¹⁶ AfCFTA, Article 7, *supra* note 9.

⁷¹⁷ See Kuhlmann, *supra* note 22.

⁷¹⁸ See, e.g., NAFTA AND SUSTAINABLE DEVELOPMENT: HISTORY, EXPERIENCE, AND PROSPECTS FOR REFORM (Hoi L. Kong & L. Kinvin Wroth eds., 2015).

⁷¹⁹ *Labour Provisions in G7 Trade Agreements: A Comparative Perspective*, ILO, 13 (2019), https://www.ilo.org/wcmsp5/groups/public/---dgreports/---inst/documents/publication/wcms_719226.pdf. The successor to NAFTA, the USMCA also includes binding labour commitments which can be enforced through state-to-state labour dispute settlement mechanism or through the Rapid Response Labour Mechanism. See Maquila Solidarity Network, *Labour Rights Enforcement in the USMCA: Briefing Paper* (2020), https://www.maquilasolidarity.org/sites/default/files/attachment/Labour_Rights_Enforcement_in_the_USMCA_MSN_ju_ljo_2020.pdf.

⁷²⁰ *Study Report on Environmental Provisions in APEC Member Economies’ FTAs/RTAs*, APEC COMMITTEE ON TRADE AND INVESTMENT, 8 (2017).

⁷²¹ EU-Viet Nam FTA, *supra* note 678.

EU–Singapore Free Trade Agreement,⁷²² and EU–Japan Economic Partnership Agreement⁷²³ all contain a chapter addressing trade and sustainable development.⁷²⁴ Some of the most recent RTAs, the post-Brexit agreements between the UK and key trading partners, also include sustainable development chapters.⁷²⁵

In addition to including options on S&DT, Section A below briefly discusses the legal aspects of a broader development agenda. However, a full assessment of the issues that would fall within sustainable development, particularly in the context of full alignment with the SDGs, is beyond the scope of the initial version of this Handbook and would require more robust chapters on environment, labour, gender, and other issues, as well as assessment of current combined approaches to sustainable development that are appearing in some RTAs.⁷²⁶

The conversation surrounding development has recently been brought to the forefront, especially in the context of the COVID-19 pandemic. The burgeoning public health crisis has resulted in the global economy shrinking by an estimated 4.4 per cent,⁷²⁷ with developing and least-developed economies feeling the brunt of the economic impact. An UNCTAD report highlighted the disproportionate impact of the fallout from the COVID-19 pandemic on the most vulnerable groups in developing countries and LDCs, which has primarily affected indigent populations, women, and migrant workers.⁷²⁸ The OECD also notes that the pandemic has impacted development finance negatively, which further contributes to the vulnerability of developing countries and LDCs in consideration of future pandemics, climate change, and other exogenous shocks.⁷²⁹ Further, a study by UNDP highlighted that the COVID-19 pandemic could drive over 1 billion people into extreme poverty, falling far short of the UN SDGs.⁷³⁰ The complexity of the issues facing developing countries and LDCs today, where

⁷²² EU-Singapore FTA, *supra* note 678.

⁷²³ See Economic Partnership Agreement Between the European Union and Japan, Chapter 16, July 17, 2018, OJ L 330/1, 27.12.2019, <https://trade.ec.europa.eu/doclib/press/index.cfm?id=1684>.

⁷²⁴ The Agreement in Principle of the EU-Mercosur Trade Agreement, which is yet to be ratified, also contains a chapter on trade and sustainable development. See *EU–Mercosur Trade Agreement: The Agreement in Principle and its Texts*, EUROPEAN COMMISSION (Jul. 12, 2019), <https://trade.ec.europa.eu/doclib/press/index.cfm?id=2048>.

⁷²⁵ See, e.g., Trade and Cooperation Agreement Between the European Union and the European Atomic Energy Community, of the One Part, and the United Kingdom of Great Britain and Northern Ireland, of the Other Part, Part One, Title XI, Dec. 24, 2020, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/948119/EU-UK_Trade_and_Cooperation_Agreement_24.12.2020.pdf. The FTAs signed by the United Kingdom with Ghana and Kenya also contain development-focused provisions relating to fisheries, food security, SMEs, and gender, among others. See UK–Ghana Interim Trade Partnership Agreement, Mar. 2, 2021, <https://www.gov.uk/government/publications/ukghana-interim-trade-partnership-agreement-cs-ghana-no12021>; UK–Kenya Economic Partnership Agreement, Dec. 8, 2020, <https://www.gov.uk/government/publications/economic-partnership-agreement-between-the-united-kingdom-of-great-britain-and-northern-ireland-of-the-one-part-and-the-republic-of-kenya-a-member>.

⁷²⁶ See, especially, Paul R. Baker, *Handbook on Negotiating Sustainable Development Provisions in Preferential Trade Agreements*, UN ESCAP (2018).

⁷²⁷ Dan Burns & Mark John, *COVID-19 Shook, Rattled, and Rolled the Global Economy in 2020*, REUTERS (Dec. 31, 2020), <https://www.reuters.com/article/us-global-economy-yearend-graphic-idUSKBN2950GH>.

⁷²⁸ *Impact of the COVID-19 Pandemic on Trade and Development: Transitioning to a New Normal*, UNCTAD, 26–37 (2020).

⁷²⁹ *The Impact of the COVID-19 Crisis on Development Finance*, OECD, (2020), [https://read.oecd-ilibrary.org/view/?ref=134_134569-xnlgol1113&title=The-impact-of-the-coronavirus-\(COVID-19\)-crisis-on-development-finance](https://read.oecd-ilibrary.org/view/?ref=134_134569-xnlgol1113&title=The-impact-of-the-coronavirus-(COVID-19)-crisis-on-development-finance).

⁷³⁰ *Impact of COVID-19 on the Sustainable Development Goals*, UNDP, <https://sdgintegration.undp.org/accelerating-development-progressduring-covid-19> (last visited May 11, 2021).

economic crises ripple out into the social sphere, necessitates a broader conception of development within a country's trade agenda, namely one that is not measured purely in economic terms but in a more holistic way which also addresses non-economic parameters such as human development and environmental protection.

The important role that trade can play in fostering development makes it imperative for policymakers to explore ways in which RTAs can continue to address the needs of developing countries and LDCs to achieve their respective development goals through more tailored S&DT provisions and perhaps other mechanisms as well. In this regard, Section B proposes sample language from RTAs that could help promote resilience for developing countries and LDCs against crises and future pandemics. Baseline Options, which are either drawn from the WTO covered agreements or from RTAs that track WTO language closely, are indicated as the starting point for policymakers. Baseline+ Options, where applicable, are drawn from RTAs which broaden the scope of WTO commitments to account for more nuanced development needs. Discretionary Options, where appropriate, present language that provides a greater degree of policy space for governments but also has the potential to disadvantage the interests of other stakeholders if not used with due caution.

A. Legal Aspects of Development

Understanding how development provisions enter into trade agreements first necessitates a return to the fundamental principles of international trade law, namely non-discrimination in the forms of MFN and national treatment, along with the principle of reciprocity. MFN treatment prohibits WTO Members from discriminating between their trading partners, i.e., if preferential terms are extended to one Member, they must be extended to all other WTO Members.⁷³¹ This can be found in Article I of the GATT 1994, Article II of the GATS, and Article 4 of the TRIPS Agreement. National treatment requires WTO Members to treat both imported and locally produced goods equally once the foreign goods have entered the domestic market.⁷³² This is embodied in Article III of GATT, Article XVII of GATS, and Article 3 of the TRIPS Agreement. MFN and national treatment appear in other contexts as well, including the WTO TBT Agreement. Reciprocity, on the other hand, refers to “a balance of mutual benefits and obligations” between WTO Members.⁷³³ This is reflected in Articles XXIII and XXVIII of GATT, Article 7 and 8 of the TRIPS Agreement, and other provisions. RTAs similarly encompass these principles in their provisions as well.

S&DT provisions, as found in the WTO covered agreements, represent a departure from these fundamental principles in order to safeguard the interests of developing country and LDC Members. A recent study by Hegde and Wouters goes beyond the six-fold typology developed by the WTO Secretariat, as mentioned previously, and classifies S&DT provisions into those that create rights and duties and those that are simply political commitments.⁷³⁴

While S&DT arises in the context of several legal provisions, two of the most important of these are GATT Part IV, which was adopted in 1964, and the ‘Decision on More Favourable Treatment, Reciprocity, and Fuller Participation of Developing Countries’, otherwise known as the Enabling

⁷³¹ *Principles of the Trading System*, WORLD TRADE ORG., https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact2_e.htm (last visited May 11, 2021).

⁷³² *Ibid.*

⁷³³ See HERDEGEN, *supra* note 709.

⁷³⁴ See Vineet Hegde & Jan Wouters, *Special and Differential Treatment Under the World Trade Organization: A Legal Typology*, Working Paper No. 227, LEUVEN CENTRE FOR GLOBAL GOVERNANCE STUDIES (2020).

Clause, which was adopted in 1979. In addition to these key provisions, GATT Article XVIII confers a right on developing Members to impose import restrictions in instances in which doing so would assist in the establishment or maintenance of a particular industry or assist in cases of balance-of-payment difficulties.⁷³⁵

Notably, both GATT Part IV and the Enabling Clause enshrine the principle of non-reciprocity,⁷³⁶ which is a central feature of S&DT. Overall Part IV contains provisions that deviate from the non-discrimination and reciprocity principles in order to support developing countries and LDCs and ostensibly help goods from developing countries gain a competitive advantage in global markets.⁷³⁷ For instance, GATT Article XXXVI.4 recognizes the dependence of less developed WTO Members on the exportation of limited primary products and acknowledges the need to provide favourable access to world markets for these products, coupled with measures allowing for stable, equitable, and remunerative prices. GATT Article XXXVI.5 aims to create favourable conditions to improve market access for manufactured goods from developing countries to allow for their economic diversification. However, although Part IV of the GATT focuses exclusively on trade and development, its provisions largely contain best endeavour language without binding obligations.⁷³⁸

The Enabling Clause additionally provides the legal basis for the Generalized System of Preferences (GSP) program (and duty-free quota-free preferences for LDCs), under which Member States can extend non-reciprocal preferential treatment to developing Members States.⁷³⁹ The Enabling Clause also establishes a separate legal standard for RTAs between developing economies, including the Global System of Trade Preferences (GSTP), which is a mechanism under which developing WTO Members exchange trade concessions among themselves.⁷⁴⁰ This is a deviation from the standard under GATT Article XXIV, which requires that free trade areas and customs unions cover “substantially all the trade.”

The GATS also includes provisions related to development. Article IV of the GATS on Increasing Participation of Developing Countries includes several provisions, including Article IV (1)(c), which aims to facilitate the participation of developing country Members in world trade by liberalizing market access in the sectors and modes of supply that are of interest to them.⁷⁴¹ GATS Article IV (3) gives special priority to LDCs in light of their development, trade, and financial needs. In addition, Article XIX.2 of GATS balances the process of services liberalization with respect to both overall and sectoral development levels of Members. This gives developing country Members flexibility in terms of their commitments and use of policy instruments in line with their development situation.

⁷³⁵ GATT Article XVIII is to be read with the Decision on Safeguard Action for Development Purposes, GATT Council, Decision of Nov. 28, 1979, L/4897, the Declaration on Trade Measures Taken for Balance-of-Payments Purposes, GATT Council, Adopted on Nov. 28, 1979, L/4904, and the Understanding on the Balance of Payments Provisions of the GATT 1994, https://www.wto.org/english/docs_e/legal_e/09-bops.pdf.

⁷³⁶ Decision on More Favourable Treatment, Reciprocity, and Fuller Participation of Developing Countries, GATT Council, Decision of Nov. 28, 1979, L/4903, https://www.wto.org/english/docs_e/legal_e/enabling_e.pdf.

⁷³⁷ See HERDEGEN, *supra* note 709.

⁷³⁸ *Special and Differential Treatment Provisions*, WTO, https://www.wto.org/english/tratop_e/dev_e/dev_special_differential_provisions_e.htm (last visited May 14, 2021).

⁷³⁹ *Id.*

⁷⁴⁰ *Id.*

⁷⁴¹ *See GAT): Objectives, Coverage, and Disciplines*, WTO, https://www.wto.org/english/tratop_e/serv_e/gatsqa_e.htm#13 (last visited May 11, 2021).

S&DT provisions are also contained in a number of WTO agreements, as noted, including the TRIPS Agreement, where special flexibilities exist to facilitate access to medicines. The compulsory licensing mechanism contained in TRIPS Articles 31 and, under the only amendment to the WTO agreements, TRIPS 31*bis* allows countries to override intellectual property rights in order to address public health concerns, particularly in the fight against infectious diseases.⁷⁴² These provisions have been helpful to an extent, as discussed in Chapter V on intellectual property, but alone they have not been able to jumpstart additional productive capacity in pharmaceuticals, leading a group of developing countries to propose more substantial IP waivers and additional efforts.⁷⁴³

A number of S&DT provisions establish transitional time periods. For instance, the TRIPS Agreement relieves LDC Members from obligations under the agreement, save for Articles 3, 4, and 5, for a stipulated period of time in cognizance of their economic, financial, and administrative constraints.⁷⁴⁴ While most of these transition periods have lapsed, some, including LDC obligations on patent protection, have been extended and remain in place. The TFA also contains transition periods (as highlighted in Chapter III), although the TFA is particularly notable in its overall structure, which allows developing country and LDC Members to prioritize and classify commitments under the agreement based on three categories (A, B, and C), with transition periods for the implementation of categories B and C (combined with trade capacity building in the case of Category C).⁷⁴⁵ This differentiated and tailored model allows developing country and LDC Members to determine for themselves how and when they will implement their TFA commitments based on their national priorities and respective institutional capacities.

Technical assistance provisions are another type of S&DT provisions found in the WTO covered agreements and RTAs as well. They feature prominently in both the SPS and TBT Agreements (as discussed in Chapter IV), which call for the provision of technical assistance to developing country Members in the form of, inter alia, advice, credits, donations, and grants.⁷⁴⁶ WTO Members also expressly recognized the need for capacity building in the Doha Development Round as a critical component of the Doha Development Agenda.⁷⁴⁷ Technical assistance and capacity building are also central to the TFA, as noted above, in the case of Category C commitments that require technical assistance and capacity building.⁷⁴⁸

⁷⁴² Decision of the General Council on the Implementation of Paragraph 6 of the Doha Declaration on the TRIPS Agreement and Public Health, WT/L/540 (2003).

⁷⁴³ See Colm Quinn, *Rich vs. Poor (Again) at WTO*, FOREIGN POLICY (March 10, 2021), <https://foreignpolicy.com/2021/03/10/wto-intellectual-property-waiver-india-south-africa/>. More recently, it was announced that the US and EU are in support of the proposal for an IP waiver for the COVID-19 vaccine. See *Statement from Ambassador Katherine Tai on the COVID-19 TRIPS Waiver*, OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE (May 5, 2021), <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2021/may/statement-ambassador-katherine-tai-covid-19-trips-waiver>; Philip Blenkinsop & Francesco Guarascio, *EU 'Ready to Discuss' COVID Vaccine Patent Waiver as Drugmakers Push Back*, NASDAQ (May 6, 2021), <https://www.nasdaq.com/articles/eu-ready-to-discuss-covid-vaccine-patent-waiver-as-drugmakers-push-back-2021-05-06>

⁷⁴⁴ TRIPS Agreement, Article 66(1), *supra* note 418. The TRIPS Council has relieved LDC Members of their obligations under the TRIPS Agreement until 2021, and for patents on pharmaceutical products until 2033. See HERDEGEN, *supra* note 709.

⁷⁴⁵ See generally TFA, Articles 14, 15, and 16 *supra* note 236.

⁷⁴⁶ See SPS Agreement, Article 9, *supra* note 326; TBT Agreement, Article 11, 327.

⁷⁴⁷ *Building Trade Capacity*, WTO, https://www.wto.org/english/tratop_e/devel_e/build_tr_capa_e.htm.

⁷⁴⁸ See TFA, Article 14, *supra* note 236.

With respect to provisions on sustainable development, little guidance can be gleaned from the WTO covered agreements. As noted in the introduction, over the years, RTAs have broadened the development agenda through the inclusion, initially, of dedicated chapters on labour and the environment. This has, more recently, given rise to standalone chapters on sustainable development in some RTAs, discussed under the options below, although this has yet to become the norm. It must be noted that the two approaches are not mutually exclusive. For example, the CPTPP includes standalone chapters on both labour and the environment, as well as a dedicated chapter on development.⁷⁴⁹

One of the key features of this broader development agenda is the reference in RTAs to other international agreements and standards. In its survey of RTAs entered into by the G7, the International Labour Organization (ILO) notes that labour provisions most frequently reference the ILO 1998 Declaration on the Fundamental Principles and Rights at Work. Additional references are also made to the ILO Conventions (particularly the eight fundamental ILO conventions), the Decent Work Agenda, and the 2008 Declaration on Social Justice for a Fair Globalization.⁷⁵⁰ With respect to provisions relating to the environment, references are made to the major multilateral environmental agreements (MEAs), such as the Kyoto Protocol to the United Nations Framework Convention on Climate Change, Convention on Biological Diversity, Cartagena Protocol on Biosafety, and Montreal Protocol on Substances that Deplete the Ozone Layer, with States agreeing to fulfil their applicable obligations under the respective MEAs to which they are parties.⁷⁵¹ Some “progressive” RTAs also establish specific funding mechanisms aimed at assisting developing countries in enhancing their environmental standards.⁷⁵²

The next section presents example provisions that policymakers and other stakeholders could consider in order to integrate development into future RTAs and improve resilience during times of crisis and pandemic. The provisions that follow relate to: (i) differentiating among countries with particular needs, such as different categories of developing countries and LDCs; (ii) transitional time periods for the implementation of commitments; and (iii) capacity building. Provisions on sustainable development are also discussed briefly, although a full analysis of sustainable development issues and chapters is beyond the ambit of this chapter. In light of recent developments, building upon the 2018 publication by UN ESCAP on this topic, this could be integrated more fully into subsequent versions of this Handbook.⁷⁵³

B. RTA Development Options for Responding to Crises

The effects of the COVID-19 pandemic have highlighted the need for nuanced trade rules which account for the challenges faced by developing countries and LDCs. As previously mentioned, UNCTAD has noted that developing countries and LDCs are disproportionately affected both by the

⁷⁴⁹ See CPTPP Chapter 19 (Labour), Chapter 20 (Environment), Chapter 23 (Development), *supra* note 8.

⁷⁵⁰ *Labour Provisions in G7 Trade Agreements: A Comparative Perspective*, ILO, 23 (2019), https://www.ilo.org/wcmsp5/groups/public/---dgreports/---inst/documents/publication/wcms_719226.pdf. See also Christian Häberli, Marion Jansen & José-Antonio Monteiro, *Regional Trade Agreements and Domestic Labour Market Regulation*, in POLICY PRIORITIES FOR INTERNATIONAL TRADE AND JOBS (Douglas Lippoldt ed., 2012), <https://www.oecd.org/site/tadicite/50258009.pdf>.

⁷⁵¹ See e.g., CPTPP, Article 20.5, *supra* note 8.

⁷⁵² Jean-Frédéric Morin & Rosalie Gauthier Nadeau, *Environmental Gems in Trade Agreements: Little-Known Clauses for Progressive Trade Agreements*, CIGI Papers No. 148, 4, CENTRE FOR INTERNATIONAL GOVERNANCE INNOVATION (2017).

⁷⁵³ See PAUL R. BAKER, HANDBOOK ON NEGOTIATING SUSTAINABLE DEVELOPMENT PROVISIONS IN PREFERENTIAL TRADE AGREEMENTS, UN ESCAP (2018).

public health crisis and the resulting economic fallout.⁷⁵⁴ In light of this, policymakers should prioritize provisions that differentiate among countries with particular needs, provide transitional time periods for the implementation of certain commitments, and address the capacity constraints experienced by developing countries and LDCs in particular.

1. Differentiating Among Countries with Particular Needs

One aspect of S&DT that deserves particular attention in light of the crisis is whether differences among developing countries and LDCs warrant more tailored S&DT. RTAs are beginning to incorporate more nuanced categories, including small and vulnerable, landlocked, and less diverse economies.

The Baseline Option below, taken from the preamble to the Marrakesh Agreement, recognizes the need to design rules which specifically allow developing countries and LDCs to participate in international trade. However, as noted earlier in this chapter, these categories are broadly defined, if at all.

Baseline+ Option A below, taken from the preamble to RCEP, identifies a specific group of countries (Cambodia, Lao People's Democratic Republic, Myanmar, and Viet Nam) for which "appropriate forms of flexibility, including [...] special and differential treatment" is to be extended. In addition, the RCEP preamble also identifies the expansion of trade and investment opportunities and increased participation in regional and global supply chains as specific benefits accruing to LDCs through their participation in the agreement.

Baseline+ Option B below, taken from the AfCFTA, showcases a nuanced and differentiated approach towards distinguishing between countries that might be in need of preferential treatment.⁷⁵⁵ Article 6 of the AfCFTA Protocol on Trade in Goods extends the parameters for which S&DT is extended to countries beyond just economic considerations, allowing other parties to recognize individual specificities that might render them eligible for preferential treatment. This differentiated approach is also reflected in Article 7 of the AfCFTA Protocol on Trade in Services, which allows contracting parties to grant flexibilities on a case-by-case basis, premised on "economic situations and development, trade and financial needs".

On a related note, there have also been attempts at defining different criteria that would help identify groups of developing countries with particular needs. For example, UNCTAD recently proposed a criteria-based definition for Small Island Developing States.⁷⁵⁶ Similarly, a criteria-based definition was proposed for small and vulnerable economies in both the Draft Modalities for Non-Agricultural Market Access and Draft Modalities for Agriculture.⁷⁵⁷ While such criteria-based definitions can be complementary to a differentiated approach, such as the approach adopted in the AfCFTA, by defining

⁷⁵⁴ See generally *Impact of the COVID-19 Pandemic on Trade and Development: Transitioning to a New Normal*, UNCTAD, (2020).

⁷⁵⁵ See Kuhlmann & Agutu, *supra* note 11.

⁷⁵⁶ See S. MacFeely, A. Petolta, N. Barnat, O. Hoffmeister & D. Hopp, *Constructing a Criteria-Based Classification for Small Island Developing States: An Investigation*, UNCTAD RESEARCH PAPER NO. 66, UNCTAD/SER.RP/2021/9 (2021), https://unctad.org/system/files/official-document/ser-rp-2021d9_en.pdf.

⁷⁵⁷ See Fourth Revision of Draft Modalities for Non-Agricultural Market Access, Paragraph 13, WTO, TN/MA/W/103/Rev.3 (Dec. 6, 2008), https://www.wto.org/english/tratop_e/markacc_e/namachairtxt_dec08_e.pdf; Revised Draft Modalities for Agriculture, Paragraph 157, WTO, TN/AG/W/4/Rev.4 (Dec. 6, 2008), https://www.wto.org/english/tratop_e/agric_e/agchairtxt_dec08_a_e.pdf.

certain categories of countries, the pandemic has highlighted the importance of identifying the specific needs of different States (and stakeholders) in order to better enable their development through more targeted trade rules.

Example Provisions on Criteria for Differentiating Among Countries with Particular Needs

Baseline Option: General Preambular Language Referring to Developing Countries and LDCs

“The Parties to this Agreement [...]

RECOGNIZING further that there is need for positive efforts designed to ensure that developing countries, and especially the least developed among them, secure a share in the growth in international trade commensurate with the needs of their economic development,”

Source: Marrakesh Agreement, Preamble

Baseline+ Option A: Preambular Language Identifying Specific Developing Countries and Recognizing Special Needs of LDCs

“The Parties to this Agreement [...]

TAKING ACCOUNT OF the different levels of development among the Parties, the need for appropriate forms of flexibility, including provision for special and differential treatment, especially for Cambodia, Lao People’s Democratic Republic, Myanmar, and Viet Nam as appropriate, and additional flexibility for Least Developed Country Parties;

CONSIDERING the need to facilitate the increasing participation of Least Developed Country Parties in this Agreement so that they can more effectively implement their obligations under this Agreement and take advantage of the benefits from this Agreement, including expansion of their trade and investment opportunities and participation in regional and global supply chains;”

Source: RCEP, Preamble

Baseline+ Option B: Differentiated RTA Language Identifying Special Needs of Developing Countries and LDCs

“In conformity with the objective of the AfCFTA in ensuring comprehensive and mutually beneficial trade in goods, State Parties shall, provide flexibilities to other State Parties at different levels of economic development *or that have individual specificities as recognised by other State Parties*. These flexibilities shall include, among others, special consideration and an additional transition period in the implementation of this Agreement, on a case by case basis.”

Source: AfCFTA, Protocol on Trade in Goods, Article 6 [emphasis added]

“In order to ensure increased and beneficial participation in trade in services by all parties, State Parties shall: [...]

(b) take into account the challenges that may be encountered by State Parties and may grant flexibilities such as transitional periods, within the framework of action plans, *on a case by case basis, to accommodate special economic situations and development, trade and financial needs in*

implementing this Protocol for the establishment of an integrated and liberalised single market for trade in services;”

Source: AfCFTA, Protocol on Trade in Services, Article 7 [emphasis added]

2. Transitional Time Periods

Transitional time periods essentially provide a longer period during which developing countries and LDCs can implement their commitments. This is crucial in promoting inclusive trade, because it acknowledges the fact that developing countries and LDCs may be subject to technical, financial, or administrative constraints. Therefore, by incorporating a transitional time period, international agreements provide developing countries and LDCs with the necessary lead time to prepare for implementation.

The Baseline Option below, taken from the WTO TRIPS Agreement, extends a blanket transitional time period to developing country Members. While a provision such as this can be helpful in allowing additional time for developing countries to take measures necessary to implement commitments, it also runs the risk of treating all developing countries the same and fails to take into account important differences in the level of development and other factors.

Baseline+ Option A, taken from the TFA, is illustrative of differentiated implementation with tailored transition periods. Such an approach could have much broader application, particularly as RTAs incorporate new disciplines. The TFA model allows WTO Members to classify their commitments based on their capacity for implementation. Commitments under Category A are to be implemented at the time of entry into force of the TFA, or, for LDC Members, within one year of the entry into force of the TFA.⁷⁵⁸ Category B commitments must be implemented after a transitional period of time following the entry into force of the TFA.⁷⁵⁹ Commitments designated as Category C are those which are to be implemented after a transition period, but for which developing country and LDC Members require assistance and capacity building.⁷⁶⁰ A phased implementation such as this is helpful for developing country and LDC Members, as they can schedule the implementation of their commitments based on their respective priorities and capacities. This is especially the case for the more technically intensive commitments contained in the TFA, such as electronic payments and single window systems.⁷⁶¹ A similar phased implementation of trade facilitation commitments with varying transitional time periods for different contracting parties is found in the RCEP.⁷⁶²

Baseline+ Option B, below taken from the WTO Agreement on Subsidies and Countervailing Measures (SCM Agreement),⁷⁶³ has differentiated transitional time periods for developing country WTO Members to phase out subsidies that are contingent upon export performance and the use of domestic over imported goods.⁷⁶⁴ The SCM Agreement also completely exempts certain developing

⁷⁵⁸ See TFA, Article 14.1(a), *supra* note 236.

⁷⁵⁹ See TFA, Article 14.1(b), *supra* note 236.

⁷⁶⁰ See TFA, Article 14.1(c), *supra* note 236.

⁷⁶¹ See TFA, Article 7.2 ; Article 10.4, *supra* note 236.

⁷⁶² See RCEP, Article 4.21 and Annex 4A, *supra* note 13.

⁷⁶³ Agreement on Subsidies and Countervailing Measures, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1869 U.N.T.S. 14 [hereinafter SCM Agreement]. [Not reproduced in I.L.M.]

⁷⁶⁴ See SCM Agreement, Articles 27.2 (b) and 27.3, *supra* note 763.

country and LDC Member States, as identified in Annex VII of the SCM Agreement, from the prohibition on export subsidies contingent upon export performance.⁷⁶⁵ The differentiated transitional time period is also extended to instances in which developing country and LDC Member States subsequently reach export competitiveness, with developing country Member States generally allowed two years to phase out the subsidies thereafter, and certain developing country and LDC Member States allowed eight years to do so.⁷⁶⁶ While this example is specific to the SCM Agreement, it could also have broader application going forward.

Example Provisions on Transitional Time Periods

Baseline Option: Blanket Transitional Time Periods

“1. Subject to the provisions of paragraphs 2, 3 and 4, no Member shall be obliged to apply the provisions of this Agreement before the expiry of a general period of one year following the date of entry into force of the WTO Agreement.

2. A developing country Member is entitled to delay for a further period of four years the date of application, as defined in paragraph 1, of the provisions of this Agreement other than Articles 3, 4 and 5.”

3. Any other Member which is in the process of transformation from a centrally-planned into a market, free-enterprise economy and which is undertaking structural reform of its intellectual property system and facing special problems in the preparation and implementation of intellectual property laws and regulations, may also benefit from a period of delay as foreseen in paragraph 2.

4. To the extent that a developing country Member is obliged by this Agreement to extend product patent protection to areas of technology not so protectable in its territory on the general date of application of this Agreement for that Member, as defined in paragraph 2, it may delay the application of the provisions on product patents of Section 5 of Part II to such areas of technology for an additional period of five years.”

Source: TRIPS Agreement, Article 65.1–65.4

Baseline+ Option A: Differentiated Transitional Time Periods

“1. There are three categories of provisions:

(a) Category A contains provisions that a developing country Member or a least- developed country Member designates for implementation upon entry into force of this Agreement, or in the case of a least-developed country Member within one year after entry into force, as provided in Article 15.

(b) Category B contains provisions that a developing country Member or a least- developed country Member designates for implementation on a date after a transitional period of time following the entry into force of this Agreement, as provided in Article 16.

(c) Category C contains provisions that a developing country Member or a least- developed country Member designates for implementation on a date after a transitional period of time following the

⁷⁶⁵ See SCM Agreement, Article 27.2 (a), *supra* note 763.

⁷⁶⁶ See SCM Agreement, Article 27.5, *supra* note 763.

entry into force of this Agreement and requiring the acquisition of implementation capacity through the provision of assistance and support for capacity building, as provided for in Article 16.”

Source: TFA, Article 14.1

Baseline+ Option B: Differentiated Transitional Time Periods and Phasing Out of Commitment Exemptions

“27.2 The prohibition of paragraph 1(a) of Article 3 shall not apply to:

(a) developing country Members referred to in Annex VII.

(b) other developing country Members for a period of eight years from the date of entry into force of the WTO Agreement, subject to compliance with the provisions in paragraph 4.

27.3 The prohibition of paragraph 1(b) of Article 3 shall not apply to developing country Members for a period of five years, and shall not apply to least developed country Members for a period of eight years, from the date of entry into force of the WTO Agreement.

27.5 A developing country Member which has reached export competitiveness in any given product shall phase out its export subsidies for such product(s) over a period of two years. However, for a developing country Member which is referred to in Annex VII and which has reached export competitiveness in one or more products, export subsidies on such products shall be gradually phased out over a period of eight years.”

Source: SCM Agreement, Articles 27.2, 27.3, and 27.5

3. Technical Assistance and Capacity Building

Capacity building has been identified as an important element of S&DT, both multilaterally and in RTAs. Multilaterally, capacity building finds express inclusion in the SPS Agreement, the TBT Agreement and the TFA. Capacity building at the WTO level takes the form of helping trade officials of developing countries and LDCs understand and navigate the complex multilateral trading rules.⁷⁶⁷ Other international organizations, such as the UN Agencies and the World Bank, provide support to build infrastructural capacity, another critical component of capacity building.⁷⁶⁸ Many RTAs also include specific provisions for assistance and capacity building, both as part of their institutional provisions and in specific chapters on labour, environment, trade facilitation and customs, and competition policy.

Article 21 of the TFA, which sets out a comprehensive outline for providing technical assistance and capacity building support is noted below as the Baseline Option. Some RTAs go a step further and identify specific forms of cooperation. Baseline+ Option A, derived from the Pakistan-Malaysia FTA, specifically addresses capacity building in its customs cooperation chapter and specifies the forms that such support can take. In contrast to the Baseline Option, which includes the language “shall endeavour”, the Baseline+ option creates a stronger obligation through the language “shall include.”

⁷⁶⁷ *Building Trade Capacity*, WTO, https://www.wto.org/english/tratop_e/devel_e/build_tr_capa_e.htm .

⁷⁶⁸ *Id.*

In some instances, capacity building provisions specifically identify the kinds of cooperation and assistance that would be made available in different sectors. An example is the EU-Morocco FTA (Baseline+ Option B) extracted below, that sets out specific types of cooperation across sectors, with varied forms of assistance and capacity building, including the transfer of technical know-how as appropriate. Here, the type of cooperation and support envisaged is specific to the nature of the sector.

In other instances, RTAs include binding language on cooperation, with capacity support made subject to the availability of funds. An example is the Japan-Malaysia FTA, extracted here as a Discretionary Option, where cooperation is conditioned on the availability of resources and the applicable laws of the countries. This is highlighted as a Discretionary Option and not a Baseline+ option, since capacity building support is contingent on funding, which could create uncertainty for stakeholders.

Example Provisions on Technical Assistance and Capacity Building

Baseline Option: Framework for Capacity Building

“1. Donor Members agree to facilitate the provision of assistance and support for capacity building to developing country and least-developed country Members on mutually agreed terms either bilaterally or through the appropriate international organizations. The objective is to assist developing country and least-developed country Members to implement the provisions of Section I of this Agreement.

2. Given the special needs of least-developed country Members, targeted assistance and support should be provided to the least-developed country Members so as to help them build sustainable capacity to implement their commitments. Through the relevant development cooperation mechanisms and consistent with the principles of technical assistance and support for capacity building as referred to in paragraph 3, development partners shall endeavour to provide assistance and support for capacity building in this area in a way that does not compromise existing development priorities.

3. Members shall endeavour to apply the following principles for providing assistance and support for capacity building with regard to the implementation of this Agreement:

- (a) take account of the overall developmental framework of recipient countries and regions and, where relevant and appropriate, ongoing reform and technical assistance programs;
- (b) include, where relevant and appropriate, activities to address regional and subregional challenges and promote regional and sub-regional integration;
- (c) ensure that ongoing trade facilitation reform activities of the private sector are factored into assistance activities;
- (d) promote coordination between and among Members and other relevant institutions, including regional economic communities, to ensure maximum effectiveness of and results from this assistance. To this end:
 - (i) coordination, primarily in the country or region where the assistance is to be provided, between partner Members and donors and among bilateral and multilateral donors should aim to

avoid overlap and duplication in assistance programs and inconsistencies in reform activities through close coordination of technical assistance and capacity building interventions;

- (ii) for least-developed country Members, the Enhanced Integrated Framework for trade-related assistance for the least-developed countries should be a part of this coordination process; and
- (iii) Members should also promote internal coordination between their trade and development officials, both in capitals and in Geneva, in the implementation of this Agreement and technical assistance.

(e) encourage use of existing in-country and regional coordination structures such as roundtables and consultative groups to coordinate and monitor implementation activities; and

(f) encourage developing country Members to provide capacity building to other developing and least-developed country Members and consider supporting such activities, where possible.”

Source: TFA, Article 21

Baseline+ Option A: Specific Forms of Capacity Building

“2. Bilateral cooperation shall include capacity building, such as training, technical assistance, exchange of experts and any other forms of cooperation, as may be mutually agreed upon by the Parties, for trade facilitation.”

Source: Pakistan – Malaysia Free Trade and Economic Integration Agreement, Article 40

Baseline+ Option B: Sector-Specific Forms of Capacity Building

“The aim of cooperation shall be to:

(a) encourage the establishment of permanent links between the Parties’ scientific communities, notably by means of:

- providing Morocco with access to Community research and technological development programmes in accordance with Community rules governing non-Community countries' involvement in such programmes,
- Moroccan participation in networks of decentralised cooperation,
- promoting synergy in training and research;

(b) improve Morocco’s research capabilities;

(c) stimulate technological innovation and the transfer of new technology and know-how;

(d) encourage all activities aimed at establishing synergy at regional level.”

Source: EU-Morocco FTA, Article 47

Discretionary Option: Capacity Building Conditioned on Availability of Resources

“2. Both Countries, through the Sub-Committee, shall cooperate in the areas of SPS measures including capacity building, technical assistance and exchange of experts subject to the availability of appropriated funds and the applicable laws and regulations of each Country.”

Source: Japan – Malaysia FTA, Article 70.2

4. Sustainable Development

As noted earlier in this chapter, there is a recent trend to incorporate sustainable development into RTAs in line with the SDGs, which has particular implications for trade in times of crisis and building forward better. Sustainable development provisions can span commitments on multiple issues including labour, environment, gender, and climate change. However, the precise scope and nature of relevant RTA provisions should be carefully considered in order to ensure that development, and not veiled protectionism, is the result. While this version of the Handbook does not aim to cover sustainable development provisions in full detail, a brief discussion follows on the type of RTA options that may be explored by policymakers.

Standalone chapters on sustainable development are one option, and these usually vary in the contents of their commitments. The EU has consistently included standalone chapters on sustainable development in recent RTAs, starting with the EU-Republic of Korea FTA. The general approach adopted by the EU is three-pronged. First, the sustainable development chapters seek to promote effective implementation of international labour conventions and MEAs. Second, the sustainable development chapters establish a level playing field by not lowering environmental and labour standards with the aim of attracting investment (race to the bottom). Last, the sustainable development chapters advocate for the sustainable management of natural resources.⁷⁶⁹

Short of a standalone RTA chapter on sustainable development, sustainable development could be incorporated in other ways. Example Option A for sustainable development below is drawn from the preamble to the GATT 1994. This language is non-binding and, at most, can serve to guide the interpretation of other substantive provisions or application of the agreement without giving rise to any positive commitments in and of itself.

Example Option B below, drawn from the preamble to the EFTA–Indonesia Comprehensive Economic Partnership Agreement, reaffirms the commitment of the parties in achieving the UN SDGs.⁷⁷⁰ Similar explicit references to the UN SDGs can be found in the preamble to the DEPA, which reaffirms the importance of promoting corporate social responsibility, indigenous rights, and inclusive trade, as well as in other agreements.⁷⁷¹

Some RTAs improve upon preambular language by including specific enforceable commitments on different aspects of sustainable development, such as labour and environment in the USMCA.⁷⁷² Similarly, the Agreement on Climate Change, Trade and Sustainability, which is currently being negotiated between Costa Rica, Fiji, Iceland, New Zealand, Norway, and Switzerland, is expected to establish rules that remove tariffs on environmental goods and include binding commitments on environmental services, among other substantive provisions.⁷⁷³ These examples would build upon the general recognition of the need for sustainable development by incorporating concrete, actionable

⁷⁶⁹ *Trade and Sustainable Development Chapters in EU FTAs*, 11.07.2017, http://trade.ec.europa.eu/doclib/docs/2017/july/tradoc_155686.pdf . See also *The Future of Sustainable Development Chapters in EU Free Trade Agreements*, EUROPEAN PARLIAMENT, (2018), [https://www.europarl.europa.eu/RegData/etudes/IDAN/2018/603877/EXPO_IDA\(2018\)603877_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/IDAN/2018/603877/EXPO_IDA(2018)603877_EN.pdf) .

⁷⁷⁰ CEPA Between the Republic of Indonesia and the EFTA States, Dec. 16, 2018, <https://www.efta.int/sites/default/files/documents/legal-texts/free-trade-relations/indonesia/efta-indonesia-main-agreement.pdf> .

⁷⁷¹ DEPA, Preamble, *supra* note 15.

⁷⁷² See USMCA, Chapters 23 and 24, *supra* note 7.

⁷⁷³ See New Zealand MoFT 2020, *supra* note 12.

rules, and they could be covered in subsequent Handbook editions. A standalone chapter on sustainable development would also go substantially beyond the Example Options noted below.

Example Provision on Sustainable Development

Example Option A: Preambular Language on Sustainable Development

“The Parties to this Agreement,

Recognizing that their relations in the field of trade and economic endeavour should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, and expanding the production of and trade in goods and services, *while allowing for the optimal use of the world’s resources in accordance with the objective of sustainable development*, seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development, [...]

Source: Marrakesh Agreement, Preamble [emphasis added]

Example Option B: Preambular Language with Reference to UN SDGs

“REAFFIRMING their commitment to support and promote the development objectives of the United Nations 2030 Agenda for Sustainable Development, including the objective to eradicate poverty in all its forms and dimensions, and the need for holistic and integrated approaches to achieve economic growth, social development and environmental sustainability, at national, regional and global levels, and recalling in this context their rights and obligations under applicable environmental agreements and those deriving from membership of the International Labour Organisation (hereinafter referred to as the “ILO”); [...]

Source: EFTA–Indonesia Comprehensive Economic Partnership Agreement, Preamble

CHAPTER IX - BUILDING FORWARD BETTER AND CONCLUSION

This Handbook covers a number of fundamental trade issues that been the primary focus of States and stakeholders during the pandemic and global crisis response and highlights possible Baseline, Baseline+, Discretionary, Example, and Sample Model Options for RTAs to address ongoing and future crises. However, any concerted effort at crisis-proofing RTAs will require attention to a range of additional and emerging issues that have a significant bearing on international trade and its impact. This chapter covers five such issues as suggestions for further study and focus – investment, labour regulation, environmental protection, SMEs, and gender – as a first step towards a detailed study of crisis-proof RTA options in these areas that could be covered more fully in future iterations of this work. These issues are generally regarded as WTO extra or WTO-x in the sense that these disciplines have largely evolved outside the ambit of the WTO covered agreements, with RTAs as a key driver in the development of international law and standards in these areas.⁷⁷⁴ This chapter summarizes the evolution of these disciplines through RTAs, building upon work done by the New Markets Lab and other contributors to the Summer 2020 ESCAP hackathon,⁷⁷⁵ briefly discussing the impact of the COVID-19 pandemic on these issues, and suggests areas for future focus.

A. Investment

The COVID-19 pandemic caused large-scale disruptions to international investments, resulting in a steep decline in foreign direct investment (FDI)⁷⁷⁶ and causing greater scrutiny of RTA and bilateral investment agreement provisions. The health crisis also caused a deceleration of investment projects worldwide, with several actions taken by host governments to combat the pandemic, including export bans on medical supplies and food, temporary nationalization of hospitals, and heightened screening of FDI causing large-scale losses to investors.⁷⁷⁷ While these measures were often viewed as necessary to combat the crisis, commentators suggest that they could lead to future claims under investor-state dispute settlement (ISDS) mechanisms available through a range of regional and bilateral treaties.⁷⁷⁸ Beyond these risks, the decline in FDI is also likely to affect post-pandemic recovery, due to decreased access to vital capital by developing countries.⁷⁷⁹ The crisis has thus demonstrated the importance of intensifying focus on investment

⁷⁷⁴ It should be noted that WTO allows for the consideration of non-trade issues in derogating from trade obligations in the general exceptions (Article XX of the GATT and Article XIV of the GATS) and includes some provisions on investment (GATS and TRIMS).

⁷⁷⁵ See Kuhlmann et al. Hackathon 2020, *supra* note 5.

⁷⁷⁶ Abhishek Saurav, Peter Kusek Ryan Kuo & Brody Viney, *The Impact of COVID-19 on Foreign Investors: Evidence from the Second Round of a Global Pulse Survey*, WORLD BANK BLOGS (October 6, 2020), <https://blogs.worldbank.org/psd/impact-covid-19-foreign-investors-evidence-second-round-global-pulse-survey> .

⁷⁷⁷ H. Suzy Nikiema & Nyaguthii Maina, *The Risk of ISDS Claims Through National Investment Laws: Another “Damocles sword” Hanging Over Governments’ COVID-19 Related Measures?*, INTERNATIONAL INSTITUTE FOR SUSTAINABLE DEVELOPMENT (September 2020), <https://www.iisd.org/system/files/2020-09/isds-claims-investment-laws-en.pdf> [hereinafter Nikiema & Maina]; Kuhlmann et al. Hackathon 2020 *supra* note 5.

⁷⁷⁸ See Nikiema & Maina *supra* note 777.

⁷⁷⁹ Kuhlmann et al. Hackathon 2020, *supra* note 5.

provisions in international agreements and has bolstered calls for reform or abolition of ISDS,⁷⁸⁰ a trend that is already underway as evidenced by recent RTAs.

At the multilateral level, while the WTO does not contain detailed disciplines on investment, some of the WTO covered agreements govern certain aspects of foreign investment on the margins. The GATS recognizes the establishment of commercial presence as one of the modes of provision of services (Mode 3, which is the most common services mode) and sets out provisions concerning national treatment, market access, and MFN treatment conditioned on the commitments made by Members in different service sectors. The Agreement on Trade-Related Investment Measures (TRIMS Agreement) prohibits trade-restrictive or distorting investment measures which are inconsistent with the national treatment obligation (Article III of GATT) or prohibitions on quantitative restrictions (Article XI of GATT); such measures include, *inter alia*, local content requirements for goods and trade balancing requirements.⁷⁸¹

Outside of the WTO covered agreements, investment provisions have proliferated in the investment chapters of RTAs and separate bilateral investment treaties (BITs), with the former subject to reform as noted above.⁷⁸² A recent study covering 111 RTAs with investment chapters, which came into force between 1960 and 2017, identified five main categories of investment provisions, namely (i) definition and scope; (ii) investment liberalization; (iii) investment protection, (iv) social and regulatory goals; and (v) institutional aspects and dispute settlement, highlighting patterns in coverage of these categories.⁷⁸³ The study noted a modest temporal increase in the scope and depth of investment provisions.⁷⁸⁴ In particular, there has been a ‘tightening’ of the definitions of key terms such as investor and investment, an increased onus on liberalization through the inclusion of market access provisions for foreign investment, a continuation of the emphasis in BITs on investor protections, recognition of flexibilities for public policy considerations (with high prevalence of provisions aimed at protecting the environment), and strong dispute settlement provisions, including the availability of the ISDS mechanism in 77 per cent of the surveyed RTAs.⁷⁸⁵

Going forward, a key priority for policymakers and other stakeholders would be to balance investor protection with the ability of States to act in furtherance of public policy objectives, the so-called right to regulate. Such an equitable balance would be vital for States to effectively respond to crises and support the achievement of SDG 9 (Industry, Innovation, and Infrastructure). This balancing act could take many forms. For instance, the investment chapters of RTAs might include mention of specific considerations such as labour rights, environmental protection, gender equality, and so forth, allowing States to take necessary action to achieve public policy objectives in these areas without fearing potential claims from investors. Newer RTAs, such as the CETA and CPTPP, have expressly affirmed the right of the RTA Parties to regulate to fulfil legitimate policy goals in the

⁷⁸⁰ Lauge N. Skovgaard Poulsen & Geoffrey Gertz, *Reforming the Investment Treaty Regime: A ‘Backward-Looking’ Approach*, BROOKINGS (March 17, 2021), <https://www.brookings.edu/research/reforming-the-investment-treaty-regime/>.

⁷⁸¹ Legal Texts: The WTO Agreements, WTP, https://www.wto.org/english/docs_e/legal_e/ursum_e.htm#eAgreement.

⁷⁸² Jo-Ann Crawford and Barbara Kotschwar, *Investment*, in HANDBOOK OF DEEP TRADE AGREEMENTS 2020, *supra* note 145.

⁷⁸³ *Id.*

⁷⁸⁴ *Id.*

⁷⁸⁵ *Id.*

spheres of public health, consumer protection, and environmental protection.⁷⁸⁶ Domestically, a number of countries have also established investment screening mechanisms to protect strategic sectors,⁷⁸⁷ although these should also be designed with stakeholders' needs in mind. In terms of special provisions that could be vital for the management of future crises, the inclusion of a force majeure clause could be considered to provide an avenue to allow States to take effective action for crisis mitigation.⁷⁸⁸

The nature of the dispute settlement mechanisms available to investors is also likely to continue to receive focus. The fear that emergency State action in response to the crisis could result in ISDS claims could give further impetus to calls for reform.⁷⁸⁹ As noted, the backlash against the ISDS mechanism has led to changes in several newer RTAs. For instance, the CETA replaces ISDS with a standing tribunal to adjudicate investment disputes, with the possibility for appellate review.⁷⁹⁰ This could potentially pave the way for a future multilateral investment court, permanently replacing ISDS.⁷⁹¹ The USMCA also considerably reduces the scope of the ISDS mechanism, in comparison with its predecessor, the North American Free Trade Agreement, removing ISDS for US-Canada disputes and limiting ISDS for US-Mexico disputes to certain sectors only. USMCA also includes exhaustion of local remedies in some cases and the preclusion of indirect expropriation claims.⁷⁹²

Other investment reforms, including expedited mechanisms for frivolous claims, consolidation procedures, and exemptions for emergency State action taken during times of crisis,⁷⁹³ may also find place in future RTAs. While preserving policy space through these and other provisions, future RTAs will also have to consider how to balance the protection of investor rights during times of crisis, including through enhanced regulatory transparency and good governance reforms.⁷⁹⁴

⁷⁸⁶ See CETA, Article 8.9, *supra* note 150; CPTPP, Article 9.16, *supra* note 8.

⁷⁸⁷ Xinquan Tu & Siqi Li, *Lessons from the Pandemic for FDI Screening Practices*, in Baldwin & Evenett 2020, *supra* note 118.

⁷⁸⁸ Kuhlmann et al. Hackathon 2020, *supra* note 5.

⁷⁸⁹ See Nikiema & Maina *supra* note 777.

⁷⁹⁰ See CETA, Articles 8.27 & 8.28, *supra* note 150.

⁷⁹¹ See Sofia Baliño, *UN Negotiations to Reform Investor–State Arbitration Reach Critical Juncture*, IISD (April 30, 2021), <https://www.iisd.org/articles/un-negotiations-reform-investor-state-arbitration-reach-critical-juncture>; Anthea Roberts & Taylor St John, *UNCITRAL and ISDS Reform (Online): Crossing the Chasm*, EJIL:TALK! (February 17, 2021), <https://www.ejiltalk.org/uncitral-and-isds-reform-online-crossing-the-chasm/>, which record many stakeholders' interest in contentious proposals including fixed term adjudicators and appellate review.

⁷⁹² USMCA, Article 14.D.3 & Article 14.D.5, *supra* note 15; Gerardo Lozano Alarcón, Pedro Manzano, Carlos Matsui & Paula Duque, *USMCA Investor State Dispute Settlement Provisions: Key Differences for Mexico*, DLA PIPER (October 26, 2020), https://www.dlapiper.com/en/peru/insights/publications/2020/10/usmca-investor-state-dispute-settlement-provisions-key-differences-for-mexico/#_ftn2. Notably Canada is not subject to the ISDS provisions of the USMCA.

⁷⁹³ Kuhlmann et al. Hackathon 2020, *supra* note 5.

⁷⁹⁴ Brooke Skartvedt Guven, *Briefing Note: Investment Promotion and Facilitation for Sustainable Development*, COLUMBIA CENTER ON SUSTAINABLE INVESTMENT (July 2020), <https://ccsi.columbia.edu/sites/default/files/content/docs/publications/Briefing-Note-Investment-Promotion-and-Facilitation-for-Sustainable-Development-FINAL.pdf>; Kuhlmann et al. Hackathon 2020, *supra* note 5.

B. Labour Regulation

The inclusion of labour rights in trade agreements is becoming a priority for policymakers and other stakeholders.⁷⁹⁵ Increased inclusion of labour safeguards and commitments in RTAs can help achieve SDG 8 (Decent Work and Economic Growth), and labour provisions in RTAs track closely with ILO Conventions and human rights obligations. A number of RTAs also focus on the “race to the bottom” dimension of trade and labour safeguards, highlighting that seriously compromising labour rights and employee safety to boost export competitiveness and attract investments can cause issues for both workers and trading partners.⁷⁹⁶ Maintenance of minimum standards regarding workplace safety and worker health are especially important in times of crisis, where workers may often be subject to hazardous working conditions.

The ILO, established in 1919, deals with labour rights at the multilateral level and establishes standards that govern global work conditions.⁷⁹⁷ The ILO aims to “promote rights at work, encourage decent employment opportunities, enhance social protection and strengthen dialogue on work-related issues.”⁷⁹⁸ Despite links between international trade and labour rights, labour standards have been kept largely out of the ambit of the WTO, with the Singapore Declaration reaffirming the ILO as the competent body for international labour rights worldwide. In the absence of multilateral trade rules related to labour standards, many States, especially developed countries, have turned to RTAs to ensure both enhanced labour standards to advance human rights and a more equal playing field that prevents their RTA partners from reducing manufacturing costs through unfair wages and working conditions.⁷⁹⁹

Raess and Sari (2020) assess the existence and depth of labour provisions in RTAs entered into force between 1990 and 2017 and record a rise in labour provisions in RTAs since their first inclusion in these agreements in the late 1980s, with North-South RTAs leading in the inclusion of labour provisions and the US, EU, Canada, and New Zealand (since the 2000s) playing a major role in shaping the evolution of these provisions.⁸⁰⁰ In assessing the depth of these provisions, they categorize labour provisions into five groups, namely (i) aspirational provisions; (ii) substantive provisions; (iii) substantive provisions relating to investment; (iv) cooperation; and (v) institutional provisions, finding substantive, cooperative, and institutional provisions to be the most common comprehensive labour provisions.⁸⁰¹ They also found a general increase in enforceability, even though non-binding labour provisions continued to be the norm.⁸⁰²

Future RTAs, at least those driven by more advanced economies, will likely continue with the current trend of devoting substantial attention to labour provisions. Avenues for reform would include mainstreaming labour obligations in RTAs and preventing the dilution of such obligations for the promotion of trade and investment. For instance, the sustainable development chapter of

⁷⁹⁵ *Worker Rights Provisions in FTAs*, CONGRESSIONAL RESEARCH SERVICE (2020), <https://fas.org/sgp/crs/misc/IF10046.pdf>.

⁷⁹⁶ See Alvaro Santos, *The Lessons of TPP and the Future of Labour Chapters in Trade Agreements*, IILJ WORKING PAPER 2018/3 (2018).

⁷⁹⁷ About the ILO, INTERNATIONAL LABOUR ORG., <https://www.ilo.org/global/about-the-ilo/lang--en/index.htm>.

⁷⁹⁸ Id.

⁷⁹⁹ Damian Raess and Dora Sari, *Labour Market Regulations*, in HANDBOOK OF DEEP TRADE AGREEMENTS 2020, *supra* note 145.

⁸⁰⁰ Id.

⁸⁰¹ Id.

⁸⁰² Id.

the EU RTA with Viet Nam includes provisions in this regard.⁸⁰³ Enforceability is also an important consideration for future labour provisions, with labour commitments subject to binding, fast, and cost-effective dispute settlement provisions.⁸⁰⁴ The USMCA contained a notable innovation with regard to enforceability, with its Rapid Response Labour Mechanism, although the mechanism applied only to collective bargaining issues in Mexico, making it a somewhat limited and one-sided instrument.⁸⁰⁵

Further, cooperative and institutional provisions are also likely to gain in prominence. The Better Work Program, jointly undertaken by the ILO and the International Finance Corporation, provides a multilateral model of cooperation bringing together governments, factories, labour unions, and enterprises to help achieve the ILO core labour standards in the garments industry and improve working conditions and labour rights.⁸⁰⁶ Creation of funds to help developing countries implement stronger labour regulations and ensure effective monitoring would be a beneficial form of regional cooperation.⁸⁰⁷ Strong institutional provisions could also help with the effective implementation of RTA provisions and provide channels for dialogue with non-state entities, including labour unions.⁸⁰⁸ Such provisions are also found in the sustainable development chapters of recent EU RTAs.⁸⁰⁹ In addition to labour chapter reforms, it is important to note that other trade issues such as investment, rules of origin, and government procurement can affect labour rights.⁸¹⁰ Reform in such chapters should complement labour reform and prevent inconsistency. In addition, RTAs could include provisions focused on sectors wherein workers are most likely to be affected by crises.

C. Environmental Protection

Environment protection is an important component of building forward better and sustainably in the post-pandemic world. Ensuring adequate environmental protection is also necessary to prevent future global crises. Protecting the environment has manifold benefits for sustainable development and can help achieve SDG 6 (Clean Water and Sanitation), SDG 13 (Climate Action), SDG 14 (Life Below Water) and SDG 15 (Life on Land). While environment is largely a WTO-x issue, recent RTAs have recognized the linkages between environmental protection and inclusive economic growth.

The WTO incorporates environmental considerations to a greater degree than it does labour rights, but it does not establish binding obligations on environmental protection. The general exceptions under GATT Article XX allow Members to derogate from their WTO obligations to protect

⁸⁰³ See EU-Viet Nam RTA, Article 13.3, *supra* note 678.

⁸⁰⁴ James Harrison, Mirela Barbu, Liam Campling Franz Christian Ebert, Deborah Martens, Axel Marx, Jan Orbie, Ben Richardson and Adrian Smith, *Labour Standards Provisions in EU Free Trade Agreements: Reflections on the European Commission's Reform Agenda*, 18 *WORLD TRADE REVIEW* 635–657 (2019) [hereinafter Harrison et al. 2019].

⁸⁰⁵ USMCA, Annex 31-A & 31-B, *supra* note 265; See Alvaro Santos & Christopher Wilson, *Trade, Economy, and Work: A Shared Agenda for a Stronger Economic Future*, U.S.-MEXICO FORUM 2025, <https://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=3396&context=facpub>.

⁸⁰⁶ *The Programme*, BETTERWORK, <https://betterwork.org/about-us/the-programme/>.

⁸⁰⁷ Harrison et al 2019, *supra* note 804.

⁸⁰⁸ *Id.*

⁸⁰⁹ See e.g., EU-Viet Nam RTA, Chapter 13, *supra* note 678; EU-Singapore FTA, Chapter 12, *supra* note 678.

⁸¹⁰ Alvaro Santos, *The Lessons of TPP and the Future of Labour Chapters in Trade Agreements*, IILJ WORKING PAPER 2018/3 (2018).

human, animal, and plant life and health and conserve exhaustible resources, and there has been a growing body of case law in this area. Binding provisions for environmental protection have mainly developed outside of the WTO, and RTAs increasingly reflect international priorities in environmental protection, with a link to Multilateral Environmental Agreements (MEAs). Monteiro and Trachtman (2020) analysed environmental provisions in 295 RTAs entered into between 1956 and 2016 and identified four types of environmental provisions in addition to the WTO derived general exceptions clause, namely those setting out: (i) specific levels of environmental protection; (ii) political or legal mechanisms for enforcement of protection; (iii) acceptance of protection obligations of other international instruments; and (iv) maintenance of national status quo on environmental protection.⁸¹¹ They also analysed the depth of enforceability of the prevalent environmental provisions and found that 93 per cent of the assessed RTAs contained at least one provision on environmental protection.⁸¹² Their study further found an acceleration of the inclusion of environmental provisions between 2005 and 2010, which continued to increase, albeit at a slower pace, between 2011 and 2017.⁸¹³ Further, Morin and Nadeau (2017) highlighted innovative environmental provisions in RTAs, including (i) provisions that specifically address the trade and environment interplay (as seen in the EU-Central America RTA, New Zealand-Taiwan, Province of China RTA, China RTA, and the EU-Caribbean Forum (CARIFORUM) RTA), (ii) fairness and equity in environmental protection, including specific capacity building and technical assistance provisions (for instance, as found in EU-Colombia-Peru FTA and the Southern African Customs Union Agreement 2002); (iii) domestic environmental regulation (as seen in the US-Republic of Korea RTA and the New Zealand China RTA); and (iv) specific institution building provisions establishing specialized environmental organizations and requiring ratification of MEAs (as seen in the EU-Columbia-Peru RTA and the CARICOM Agreement 2001).⁸¹⁴

With regard to the prevalence of different types of environmental provisions, provisions balancing environmental protection with trade and investment concerns are the most common in RTAs, followed by enforcement mechanisms and provisions setting out environmental goals.⁸¹⁵ Increasingly, RTAs, like the EU-Viet Nam RTA, include provisions that prohibit diluting levels of national environmental protection to attract investment.⁸¹⁶ Some RTAs also include commitments focused on specific environmental issues including fisheries, sustainable resource management, and energy efficiency.⁸¹⁷ For instance, the EU's RTAs with Colombia and Peru include commitments on fisheries, while the EU Ukraine RTA has a large number of provisions on trade in energy, and the US Peru RTA includes provisions on forest resource management.⁸¹⁸ There is also an increase in reference to environmental obligations contained in MEAs and provisions for environmental cooperation through technical and financial assistance and capacity

⁸¹¹ José-Antonio Monteiro and Joel Trachtman, *Environmental Laws*, in HANDBOOK OF DEEP TRADE AGREEMENTS 2020, *supra* note 145 [Hereinafter Monteiro and Trachtman 2020].

⁸¹² *Id.*

⁸¹³ *Id.*

⁸¹⁴ Jean-Frédéric Morin & Rosalie Gauthier Nadeau, *Environmental Gems in Trade Agreements: Little-known Clauses for Progressive Trade Agreements*, CIGI PAPERS NO. 148 (October 2017).

⁸¹⁵ Monteiro and Trachtman 2020, *supra* note 811. *See also* José-Antonio Monteiro, *Typology of Environment-Related Provisions in Regional Trade Agreements*, WTO, WTO Working Paper ERSD-2016-13 (2016), https://www.wto.org/english/res_e/reser_e/ersd201613_e.pdf [hereinafter Monteiro 2016].

⁸¹⁶ EU-Viet Nam FTA, Article 13.3, *supra* note 678; Monteiro and Trachtman 2020, *supra* note 811.

⁸¹⁷ Monteiro and Trachtman 2020, *supra* note 811.

⁸¹⁸ Monteiro 2016, *supra* note 815.

building.⁸¹⁹ The EFTA's RTAs with China, and Montenegro, for example, includes provisions confirming adherence to international instruments including the Stockholm Declaration on the Human Environment, the Rio Declaration on Environment and Development, Agenda 21 on Environment and Development, and the Johannesburg Plan of Implementation on Sustainable Development.⁸²⁰ Environmental provisions are generally binding, although such provisions are sometimes excluded from the dispute settlement mechanism established under RTAs.⁸²¹ It is important to note that the USMCA subjects its environment chapter to the treaty's binding dispute settlement mechanism, a move that could strengthen enforceability of future RTAs.⁸²²

Future RTAs which aim to devote specific attention to environmental concerns may include provisions that prevent the dilution of environmental protection for the promotion of economic interests and preserve the rights of States to regulate on environment issues.⁸²³ RTAs can also go a step further by including specific commitments on environmental issues, either as standalone commitments or linked to MEA commitments.

Circularity is another topic that is rising in prominence in environmental debates. The pandemic has also amply demonstrated the need to transition to a resilient and sustainable economy, for which a move from a linear consumption model to a circular one is vital.⁸²⁴ Future RTAs may focus on provisions that promote circularity through additional tariff concessions for environmental goods and services, as seen in the examples of the Economic Cooperation Agreement between New Zealand and Taiwan, Province of China⁸²⁵ and the New Zealand-Singapore Closer Economic Partnership Agreement,⁸²⁶ as well as provisions to remove of obstacles on cross-border trade in used goods, as seen in the example of medical goods in the USMCA.⁸²⁷

Enforceability of environmental provisions is also an important consideration, and improved enforceability in agreements such as the USMCA signal a possible trend. Institutional provisions are also vital in environmental protection, and future RTAs may create committees for assessing harms caused to the environment by trade flows and for reviewing the implementation of environmental commitments.⁸²⁸ Such committees should ensure adequate representation and opportunities for dialogue with non-state actors.⁸²⁹ It is likely that ambitious environment

⁸¹⁹ Monteiro and Trachtman 2020, *supra* note 811. See also Monteiro 2016, *Id.*

⁸²⁰ See Monteiro, 2016, *supra* note 815.

⁸²¹ Monteiro and Trachtman 2020, *supra* note 811.

⁸²² USMCA, Article 24.32, *supra* note 15.

⁸²³ Christophe Bellmann and Colette van der Ven, *Greening Regional Trade Agreements on Non-Tariff Measures Through Technical Barriers to Trade and Regulatory Co-operation*, OECD TRADE AND ENVIRONMENT WORKING PAPERS, No. 2020/04 (2020) <https://doi.org/10.1787/dfc41618-en>; Shunta Yamaguchi, *Greening Regional Trade Agreements on Investment*, OECD TRADE AND ENVIRONMENT WORKING PAPERS, No. 2020/03 (2020), <https://doi.org/10.1787/4452a09d-en>.

⁸²⁴ Kuhlmann et al. Hackathon 2020, *supra* note 5.

⁸²⁵ Jean-Frédéric Morin and Rosalie Gauthier Nadeau, *Environmental Gems in Trade Agreements: Little-known Clauses for Progressive Trade Agreements*, CIGI PAPERS NO. 148 (October 2017).

⁸²⁶ New Zealand-Singapore CEPA, Annex 8.1, *supra* note 98.

⁸²⁷ Kuhlmann et al. Hackathon 2020, *supra* note 5.

⁸²⁸ Christophe Bellmann & Colette van der Ven, *Greening Regional Trade Agreements on Non-Tariff Measures Through Technical Barriers to Trade and Regulatory Co-operation*, OECD TRADE AND ENVIRONMENT WORKING PAPERS, No. 2020/04 (2020) <https://doi.org/10.1787/dfc41618-en>.

⁸²⁹ *Ibid.*

commitments will increasingly find place in future RTAs, as indicated by a rise in environmental provisions and the negotiation of instruments such as the Agreement on Climate Change, Trade, and Sustainability, by Costa Rica, Fiji, Iceland, New Zealand, Norway, and Switzerland.⁸³⁰

D. Small- and Medium-sized Enterprises (SMEs)

SMEs have been severely affected by the COVID-19 pandemic, both due to a fall in demand and revenue and a decrease in supply of workers due to infections and lockdowns.⁸³¹ These issues particularly impact SMEs, which are much less resilient compared with larger firms and multinational corporations.⁸³² Decreased availability of credit has also affected SMEs' ability to weather the crisis.⁸³³ This adverse impact on SMEs could trigger longer-term employment crises, since SMEs account for half of the world's employment,⁸³⁴ and a high concentration of jobs are at risk due to the crisis.⁸³⁵

There is a strong link between SME development and the achievement of SDGs. In particular, the promotion of SMEs can help achieve SDG 8 (Decent Work and Economic Growth) and SDG 9 (Industry, Innovation, and Infrastructure) and can even contribute towards the achievement of SDG 5 (Gender Equality), given the significant share of women-led SMEs.⁸³⁶

Despite their importance to global trade flows and economic and social development, SMEs have not traditionally been the focus of global trade provisions.⁸³⁷ A 2016 analysis of 270 RTAs in force and notified to the WTO showed that SMEs are mentioned in roughly half (136) of the analysed agreements; however, a much smaller subset of these RTAs went a step further to include specific provisions to level the playing field in favour of SMEs.⁸³⁸ While the trend to incorporate SMEs seems to be increasing with recent RTAs, several of which include chapters on SMEs (namely the USMCA and CPTPP), these do not typically contain binding commitments. The most common SME provisions are those calling for cooperation among parties on SMEs, followed by exemptions or reservations applying to SMEs.⁸³⁹ Other less common provisions include mandatory provisions to prevent economic harms to SMEs or various best-effort provisions.⁸⁴⁰ Recent RTAs that include SME chapters also include specific provisions on information sharing, cooperation, and the establishment of SME committees.⁸⁴¹

⁸³⁰ See New Zealand MoFT 2020, *supra* note 12.

⁸³¹ *COVID-19: SME Policy Responses*, OECD POLICY RESPONSES TO CORONAVIRUS (COVID-19), (July 15, 2020), <https://www.oecd.org/coronavirus/policy-responses/coronavirus-covid-19-sme-policy-responses-04440101/> [hereinafter OECD July 2020].

⁸³² *Id.*

⁸³³ *Id.*

⁸³⁴ *SME Finance*, Overview, THE WORLD BANK, <https://www.worldbank.org/en/topic/sme/finance> (last visited Jul. 13, 2020).

⁸³⁵ OECD July 2020, *supra* note 831.

⁸³⁶ Kuhlmann et al. Hackathon 2020, *supra* note 5.

⁸³⁷ *Id.*

⁸³⁸ José-Antonio Monteiro, *Provisions on Small and Medium-Sized Enterprises in Regional Trade Agreements*, WTO WORKING PAPER ERSD-2016-12, (2016).

⁸³⁹ *Id.*

⁸⁴⁰ *Id.*

⁸⁴¹ *Small and Medium-Sized Enterprises and Free Trade Agreements: The Canadian Approach*, GOVERNMENT OF CANADA, https://www.international.gc.ca/trade-commerce/sme-pme/sme_chapters-chapitre_consacre_pme.aspx?lang=eng.

The WTO covered agreements do not make specific provisions for SMEs to ensure their effective participation in international trade. However, several commitments under the TFA, including obligations on access to information, digitalization, and automation, as well as establishment of single window systems could help reduce compliance costs and significantly improve trading conditions for SMEs.⁸⁴² The WTO TFA also calls for specific consideration of the special needs of SMEs in its provisions on advance rulings and authorized operators.⁸⁴³

As the COVID-19 pandemic has highlighted, SMEs are particularly vulnerable to crises, and any attempt at crisis-proofing RTAs should take into account the specific obstacles faced by SMEs during times of crisis. It is important to note that tailored RTA provisions in the fields of trade facilitation, sanitary and phytosanitary measures, transparency, export restrictions, and digital trade could improve SME outcomes; complementary provisions in these areas are set out in Chapters II, III, IV, VI, and VII of this Handbook. For instance, the reduction of barriers to digital trade, harmonization of data protection laws, and capacity building could all help SMEs expand trade through the e-commerce sector.⁸⁴⁴

Other key areas of focus for future RTAs are access to information and financing. Improved avenues for access to information would be enormously beneficial during times of crisis.⁸⁴⁵ Access to finance is an important bottleneck for SMEs that has gone unaddressed at the international level. Improving access to finance is a significant area where parties could cooperate through the exchange of information and best practices and technical assistance;⁸⁴⁶ tailored services commitments could also be considered. Further, RTAs could also encourage SME development through institutional provisions. For instance, the establishment of RTA committees on SMEs could help monitor the implementation of treaty provisions beneficial to SMEs and could engage non-state stakeholders in dialogue to ensure greater access to their concerns.⁸⁴⁷ Finally, as is the case for many emerging issues, improving the enforceability of SME provisions will continue to be an important area for debate.

E. Gender

The COVID-19 pandemic serves as a stark example of the disproportionate effects of crises on vulnerable stakeholders and sectors of society. A 2020 WTO press note highlights the effects of the pandemic in “aggravating existing vulnerabilities” experienced by women and notes that the adverse effects will be particularly significant for women from developing and least developed countries.⁸⁴⁸ The pandemic has particularly affected industries including healthcare and retail, which have high female employment, increasing the exposure of women to the virus.⁸⁴⁹ Further, school closures and lockdowns have increased caretaking obligations and resulted in higher chances of domestic abuse and violence.⁸⁵⁰ The adverse impact on SMEs and the informal sector

⁸⁴² Kuhlmann et al. Hackathon 2020, *supra* note 5.

⁸⁴³ See TFA, Articles 3.9 (d) & 7.2(b) (ii), *supra* note 236.

⁸⁴⁴ Kuhlmann et al. Hackathon 2020, *supra* note 5.

⁸⁴⁵ *Id.*

⁸⁴⁶ *Id.*

⁸⁴⁷ *Id.*

⁸⁴⁸ *The Economic Impact of Covid-19 on Women in Vulnerable Sectors and Economies*, WTO, (August 2020), https://www.wto.org/english/news_e/news20_e/info_note_covid_05aug20_e.pdf.

⁸⁴⁹ *Id.*

⁸⁵⁰ *Id.*

also affects women, since these are notable avenues for women’s employment. Sectors such as textiles and apparel in which women work in larger proportions have also been severely affected by the economic impacts of the pandemic, leading to related declines in export revenues.⁸⁵¹ These instances of disproportionate impact reinforce the need for gender-specific and gender-sensitive trade provisions in future RTAs.

The WTO covered agreements do not include commitments specific to gender or account for the different effects of international trade on women’s rights and livelihoods. In 2017, the WTO Ministerial Conference addressed gender and trade issues, and 118 Members and Observers endorsed the Joint Declaration on Trade and Women’s Economic Empowerment calling for gender responsive trade policy.⁸⁵² RTAs also long followed the trend of treating trade as “gender neutral”; however, gender-specific language has slowly crept into RTA preambles and sustainable development chapters.⁸⁵³ Beginning in 2016, a new trend of gender chapters in RTAs emerged to specifically address the differential impacts of trade agreements on women.⁸⁵⁴ As of 2020, five RTAs include a separate gender chapter, namely, the Chile-Uruguay, Canada-Chile, Argentina-Chile, Chile-Brazil, and Canada-Israel FTAs,⁸⁵⁵ while 80 RTAs (including 69 notified at the WTO) contain express references to gender and women’s issues.⁸⁵⁶ For the most part, there are some common elements of RTA gender chapters: (i) affirmation of the need to eradicate discrimination against women; (ii) recognition and adherence to other international agreements on gender; (iii) cooperation on gender issues (iv) institutional provisions including the establishment of committees for cooperation and exchange of information; and (v) soft committee-based dispute resolution mechanisms to amicably resolve any issues.⁸⁵⁷

Future RTAs will likely follow this recent trend of including a separate gender chapter or enhanced gender-specific measures, and “gender-sensitive”⁸⁵⁸ trade agreements could include a number of features. For instance, RTA gender chapters could recognize and bind members to international instruments on gender issues, such as the UN Convention on the Elimination of All Forms of Discrimination Against Women, and the Beijing Declaration and Platform for Action on Gender Equality and Women’s Rights, to ensure their greater application. On the other hand, future RTAs might also go a step further in promoting gender rights, through the incorporation of minimum legal standards and gender-specific general exception provisions to allow Contracting Parties to derogate from their trade commitments to achieve gender objectives, or the development of minimum legal standards on gender issues.⁸⁵⁹ The effectiveness of such provisions would also depend upon a rise in enforceability of gender provisions.⁸⁶⁰ Among the RTAs with gender

⁸⁵¹ Id.

⁸⁵² José-Antonio Monteiro, *Gender-Related Provisions in Regional Trade Agreements*, WTO STAFF WORKING PAPER ERSD-2018-15, WTO, (2018), https://www.wto.org/english/res_e/reser_e/ersd201815_e.pdf.

⁸⁵³ Kuhlmann et al. Hackathon 2020, *supra* note 5.

⁸⁵⁴ Ibid.

⁸⁵⁵ *Women and Trade: The Role of Trade in Promoting Gender Equality*, WORLD BANK & WORLD TRADE ORG. (2020), https://www.wto.org/english/res_e/booksp_e/women_trade_pub2807_e.pdf.

⁸⁵⁶ Id.

⁸⁵⁷ Kuhlmann et al. Hackathon 2020, *supra* note 5.

⁸⁵⁸ Mia Mikic & Vanika Sharma, *Feminising WTO 2.0*, [hereinafter Mikic and Sharma 2020] in Baldwin & Evenett 2020, *supra* note 118.

⁸⁵⁹ *Mainstreaming Gender in FTAs*, INTERNATIONAL TRADE CENTRE (Jul. 2020), https://www.intracen.org/uploadedFiles/intracenorg/Content/Publications/ITC%20Mainstream%20Gender_FTA_20200707_web.pdf; See also, Kuhlmann et al. Hackathon 2020, *supra* note 5.

⁸⁶⁰ Mikic and Sharma 2020, *supra* note 858.

chapters, only the Canada-Israel FTA subjects the chapter to the treaty's dispute settlement mechanism. However, it is important to keep in mind that addressing gender and trade considerations could employ a combination of soft law and more binding commitments.⁸⁶¹

In step with minimum standards and binding obligations, another focus of gender sensitive policymaking could be the inclusion of cooperation and capacity building provisions.⁸⁶² Capacity building initiatives might include financial assistance and joint workshops, establishment of gender committees, and the development of best practices and standards including on the collection of sex-disaggregated data.⁸⁶³ Gender approaches through RTAs could also be integrated with national economic strategies and tailored to the sectors in which women work, linking with other aspects of an RTA such as rules-based chapters and goods and services market access commitments. Greater coverage of gender issues in RTAs through gender-specific provisions or standalone gender chapters could be a significant step in responding to crises and achieving SDG 5 (Gender Equality). In addition, RTAs and related programs could include focus on sectors in which women's work has been impacted by the pandemic and could be vulnerable to future crises.

F. The way forward

The five topics discussed above (and other WTO-x issues) will be particularly significant as countries respond to crisis and build forward better, and these issues will only rise in prominence in the coming years. A global crisis the scale of the COVID-19 pandemic should serve to strengthen existing calls for reform and shift focus to sustainable economic and social development, as vulnerabilities in the trading system and among stakeholders are brought to light. As highlighted throughout the Handbook, RTAs will likely be the preferred vehicle for broad-based reform in these areas given their rapid proliferation and the heightened difficulty in reaching multilateral consensus. As this chapter illustrates, each of the above-covered areas merits much more detailed attention to identify RTA options and possibilities for reform. As a living document, future versions of this Handbook could dedicate chapters to each of these issues in order to further mainstream them in the global trade dialogue.

⁸⁶¹ Clair Gammage and Mariam Momodu, *The Economic Empowerment of Women in Africa: Regional Approaches to Gender-Sensitive Trade Policies*, 1 AF. J. INT'L. ECON. L. (2020).

⁸⁶² Mikic and Sharma 2020, *supra* note 858.

⁸⁶³ *Women and Trade: The Role of Trade in Promoting Gender Equality*, WORLD BANK & WTO (2020), https://www.wto.org/english/res_e/booksp_e/women_trade_pub2807_e.pdf; See also Kuhlmann et al. Hackathon 2020, *supra* note 5.

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