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Deep Provisions in Regional Trade Agreements: How Multilateral-friendly?

AN OVERVIEW OF OECD FINDINGS

Iza Lejárraga

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Abstract

DEEP PROVISIONS IN REGIONAL TRADE AGREEMENTS: HOW MULTILATERAL-FRIENDLY?

An overview of OECD findings

Over the past decade, an increasing number of economies have resorted to regional trade agreements (RTAs) as a means to further the market-opening and rule-making agenda. In this context, this paper addresses the question as to whether and how selected elements of RTAs could be used as ‘stepping stones’ for multilateralisation in the future. The report synthesizes the OECD work on RTAs by examining regional provisions that deepen (WTO-plus) and expand (WTO-beyond) multilateral commitments across a broad range of policy areas. It finds that WTO-plus measures are becoming more widespread and similar over time, suggesting that there may be growing receptivity and preparedness to endorse higher levels of commitments. The report distils a set of attributes that may be able to render WTO-plus provisions more amenable to multilateralisation, either through a bottom-up (RTA-driven) or top-down (WTO-driven) approach. It considers the degree of convergence, homogeneity, discrimination, enforceability and economic impact of selected measures in RTAs, with a view to moving towards a shared understanding of multilateral-friendly practices that can be promoted in regional negotiations.

Key words: regional trade agreements, RTAs, preferential trade agreements, PTAs, multilateralising regionalism, multilateral trading system, World Trade Organization, WTO.

JEL Classification: F1, F10, F13, F14, F15

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Executive summary

Underlying the proliferation of RTAs has been, among other things a demand for deeper integration than was being achieved purely multilaterally. In this context, there has been interest in harnessing a process of “multilateralising regionalism”, by which selected deeper measures incorporated in RTAs could be diffused more widely and consistently across regional negotiations, and lead to convergence at the multilateral level.

That was the concept underlying a number of sector specific studies that this note draws upon. It should be stressed that the perspective is a largely “technical” one. In reality, the question of whether or how much of given RTAs can or should be “multilateralised” is an intensely political question. This note largely eschews that element as the interest of Members was driven by the more arm’s length concept of what was more “technically” conceivable.

Of course, even that important technical versus political distinction cannot and should not be pressed too far or taken too literally. Even a so-called “technical” feasibility is already venturing to some degree into the political. More importantly, the concept of a “technical” assessment should not be taken to imply some kind of judgement in the deeper sense of what is achievable.

If there is sufficient political will, things could be multilateralised that go well beyond the rough and ready benchmarks that we have tentatively set forward here. Indeed there have been, in the past, major efforts of liberalisation which have highly eroded margins of preference that would have been considered by some to be cast in stone. We emphasise therefore that we have applied a rather low threshold here, and it should certainly not be taken as some kind of firm statement of what is or is not feasible in the real political world.

This report therefore draws on OECD work which has examined certain (and by no means all) RTA provisions that deepen (WTO-plus) and expand (WTO-beyond) multilateral commitments. It looks at how existing and future RTAs could reveal elements that might be used as “stepping stones” towards multilateralisation in the future.

The emphasis is, indeed, on certain areas where more distinctive WTO-plus and WTO beyond features can be found. The paper does not spend much time significantly addressing more traditional border measures. This does not mean, and should not be taken to imply, that there is a view that liberalisation of border measures is any more inherently technically or politically difficult than the measures focused upon here. It is simply a consequence of the particular sectors selected to be studied by the Members and the obvious fact that border measures of this kind are, and have been, well-researched already in the literature.

This paper attempts to distil a set of attributes that can perhaps signal the multilateralisation potential of RTA measures. It develops a checklist to guide a preliminary assessment of various policy areas covered in the OECD work on RTAs. The checklist can be grouped into five broad considerations:

- **Representativeness:** Is the deep measure incorporated in a critical mass of RTAs? To what extent is it endorsed by a representative sample of WTO Members, including developing economies?

- **Homogeneity:** Is there a high degree of similarity among WTO-plus measures in RTAs, within and across different trading partners?
- **Level of discrimination:** Do the WTO-plus measures create discriminatory effects, between RTA parties and non-parties, and between domestic and foreign providers?
- **Level of enforceability, predictability and transparency:** Do WTO-plus measures create mandatory obligations that are enforceable via dispute settlement procedures? Do they generate greater transparency on the design and effects of deep measures on trade relations?
- **Economic gains and political economy conditions:** Do WTO-plus measures yield high economic returns, and what is the marginal gain from multilateralisation? What are the factors and political economy conditions that influence the likelihood of multilateralisation?

This is not construed as an exhaustive or definitive list, but rather as a starting point to discuss the relative degree of amenability of different deep RTA measures to multilateralisation, and to move towards a shared understanding of multilateral-friendly practices that can facilitate convergence.

Beyond that, we have also included a more generic section which, while not in and of itself, functioning as a benchmark for multilateralisation may be of some interest. It views a given RTA from a more systemic perspective in terms of positive measures that are potentially more systemically favourable to multilateral reinforcement.

The accent of modern RTAs is on services-related issues, where rules of origin are inherently more liberal, and where barriers to trade are embedded in domestic structures that cannot be easily tailored to specific foreign parties. As a result, to the extent that WTO-plus commitments lead to new reforms, they will often *de facto* (although not *de jure*) be applied on an MFN basis. This also suggests that there would be at least weaker technical obstacles to economies being able to extend multilaterally their WTO-plus commitments in services. A study on the political economy underlying services RTA negotiations of Chile, Japan, the European Unions and the United States finds support for their multilateral-friendliness.

Another building block identified in OECD work relates to e-commerce, where a study shows that most WTO-plus market access provisions are not restricted to RTA parties. Finally, the benefits conferred regionally by enhanced copyright-enforcement, pro-competitive practices, environment protection, anti-corruption sanctions and other rules examined in OECD work have an automatic MFN effect. More often than not, such rules apply to domestic and foreign parties alike, thereby guaranteeing national treatment as well. The OECD work also suggests that a legacy of RTAs is to create greater transparency on non-tariff measures, yielding dividends for all businesses and governments worldwide.

Of course, there are major areas in RTAs where the above features are not the case, most notably of course in the case of border measures in goods which are not already duty free. The discriminatory profile is most noticeable in agriculture, where OECD analyses report a significant margin of tariff preferences in RTAs.

Another finding that is significant is the **considerable degree of similarity identified in certain WTO-plus/-beyond measures across a critical mass of RTAs**. As expected, the degree of homogeneity is highest among RTAs negotiated by the same trading partner, but is also found to be reasonably high across different trading partners. Encouragingly, some studies report that WTO-plus measures in more recent RTAs are more similar, auguring greater convergence over time. In services, the coefficient of similarity of WTO-plus commitments for most OECD countries is close to 60%; across all reviewed RTAs (including non-OECD), the value is 0.49, pointing to a

high degree of commonality in the measures and subsectors that have been deepened. A study on investment similarly finds that the WTO-plus obligations and non-confirming measures across the sample of RTAs reviewed are largely similar. In the area of government procurement, there is a high similarity reported with respect to commitments related to central government, albeit less so in the case of local government measures, given differences in governance structures. In TBTs and SPS, it is posited that the high degree of homogeneity partly emanates from a process by which regional negotiations have legally inscribed the recommendations and guidelines issued by the WTO SPS and TBTs Committees, respectively. This may point to a process of “regionalism multilateralism,” whereby RTAs codify and lock in best practices emerging from discussions in WTO Committees. Even in areas where there are greater divergences in the WTO, such as e-commerce, the analysis reveals that in many instances WTO Members are reaching similar, albeit not identical, provisions in their respective RTAs. To some extent, there is a *de facto* convergence emerging through *de jure* rule making in RTAs. These homogenous obligations across a critical mass of RTAs of different trading partners could suggest at least a technical feasibility for multilateralisation.

The frequency of WTO-minus in RTAs is relatively low, but it nevertheless calls for scrutiny between multilateral and regional commitments. Another aspect that can technically complicate the potential multilateralisation process of WTO-plus commitments in RTAs stems from the fact that regional agreements have developed alternative architectures in some policy areas. These challenges are noteworthy in investment, services and competition policy. Addressing these differences – on scope, definition, scheduling style – should not be an insurmountable barrier, but calls for creative efforts and flexible approaches for mainstreaming regionalism into multilateralism. As economies negotiate with trading partners of different families of RTAs, hybrid approaches are already being forged in (mega)-regional platforms that could provide inspiration for the multilateralisation process.

Another key preoccupation relates to the **lesser degree of enforceability of WTO-plus/-beyond rules and commitments**. The WTO is obviously not responsible for compliance (except, of course, as regards compatibility of an RTA with the relevant provisions of the WTO itself) of market-opening and new disciplines that are being created “off campus” in regional fora. Any breaches of regional commitments will only be addressed through regional institutions, which can be weaker and asymmetric in the balance of power, particularly in bilateral partnerships. In several key areas, like on e-commerce or competition, many commitments are explicitly carved out from the dispute settlement mechanism procedure provided for under the RTA. Even when RTA measures are liable to a dispute settlement procedure, regional mechanisms may not be as effective in prodding compliance. To date, economies may have had strong incentives to implement their commitments so as to signal their credibility for subsequent partnerships. Moreover, one study shows that RTAs have effective “dispute avoidance” procedures through Committee exchanges. Yet, it is unclear if these ‘soft law’ procedures would deliver the same level of predictability if reforms were reversed. In this respect, the dispute settlement mechanism of the WTO may well be a key anchor for motivating the multilateralisation of WTO-plus measures and endowing them with the legitimacy and certainty they will need in the long run.

I. Introduction: Harvesting “multilateralising regionalism”

While the recent proliferation of RTAs has been accompanied by a debate on *building block* versus *stumbling blocks*, there is little doubt that both regionalism and multilateralism are here to stay, and it is therefore useful to find ways of enhancing their coherence and co-habitation. Regional agreements have advanced far and deep enough to assume that they will play a role in the global economy, and continue to exert important influences on the trade policy agenda of the 21st century. Greater co-ordination between regional and multilateral platforms would reduce transaction costs for business, ease the maze of regimes for policy-makers, and maximize the global welfare benefits that accrue to both instruments of globalisation.

One theme in the recent discussions on RTAs is the so-called “multilateralising regionalism” agenda, by which deeper measures that are widely incorporated into RTAs could be diffused more widely and consistently across regional negotiations, and ultimately be multilateralised. In a number of areas, RTAs can also be credited for making speedier headway on incomplete or unresolved issues in the WTO, such as measures on export restrictions or e-commerce. Finally, RTAs have made significant strides on deeper integration, generating new rules that are essential to modern trade and the efficiency of global production networks. At one level, it may seem surprising that WTO Members have taken up a range of issues at the regional level that they have not been prepared to adhere to under the WTO. On the other hand, it may be easier to address more complex disciplines and build trust around sensitive issues among a smaller set of economies. It may also be more palatable to open markets to a few trading partners. What remains to be seen is whether, once economies have taken the most painful reforms through RTAs, further expansion of international rules may face less resistance.

In this context, the work of the OECD is seeking to inform policy on how RTAs could become “stepping stones” towards a more robust and comprehensive global trading system. How could some successful outcomes in RTAs be leveraged to strengthen the WTO? By systematically examining and sharing regional experiences on certain “deeper” measures, it may be possible illuminate options and possibilities. After all, RTAs have been touted for their “laboratory effects,” providing platforms for the experimentation of new market-opening and rule-making processes. The current drive to consolidate, harmonize and expand existing RTAs may represent an opportunity to harness the accumulated experience from RTAs and consolidate good practices in the new mega-regional structures. From the TPP and Pacific Alliance to the COMESA-EAC-SADC Tripartite and CIS, many regions are in a new phase of consolidation and co-ordination of RTAs. There is a significant opportunity to address overlaps, duplications, and conflicts in existing rules that can complicate or corrode progress at the multilateral level. That would profit from a perspective that, at least consistently, asks how current regional strategies can be best synchronized with a wider multilateral agenda.

This report synthesizes the OECD work on RTAs by assessing the opportunities and risks of deep measures across over a dozen policy areas examined in this body of work. The objective of this review is to provide initial considerations of how technically feasible it might be to render RTAs more multilateral-friendly. The OECD has approached the analysis of RTAs from several angles, systematically examining the inventory of provisions that deepen (WTO-plus) and expand (WTO-beyond) multilateral commitments in key policy area, and in selected cases, going further to assess their implementation, economic impact, and political economy. Taken together, this supplies a rich basis for evaluating whether and how RTAs can be vehicles for multilateral convergence. As with any synthesis, several caveats are in order: it is important to note that OECD studies cover different periods and samples of RTAs, and hence comparability must be treated with caution; given the rapid and constant innovation in RTAs, not all recent practices may be captured in the conclusions. Because broader measures have been well trodden elsewhere in the literature there is not so much emphasis on them in this paper. For the purpose of this review, greater emphasis is

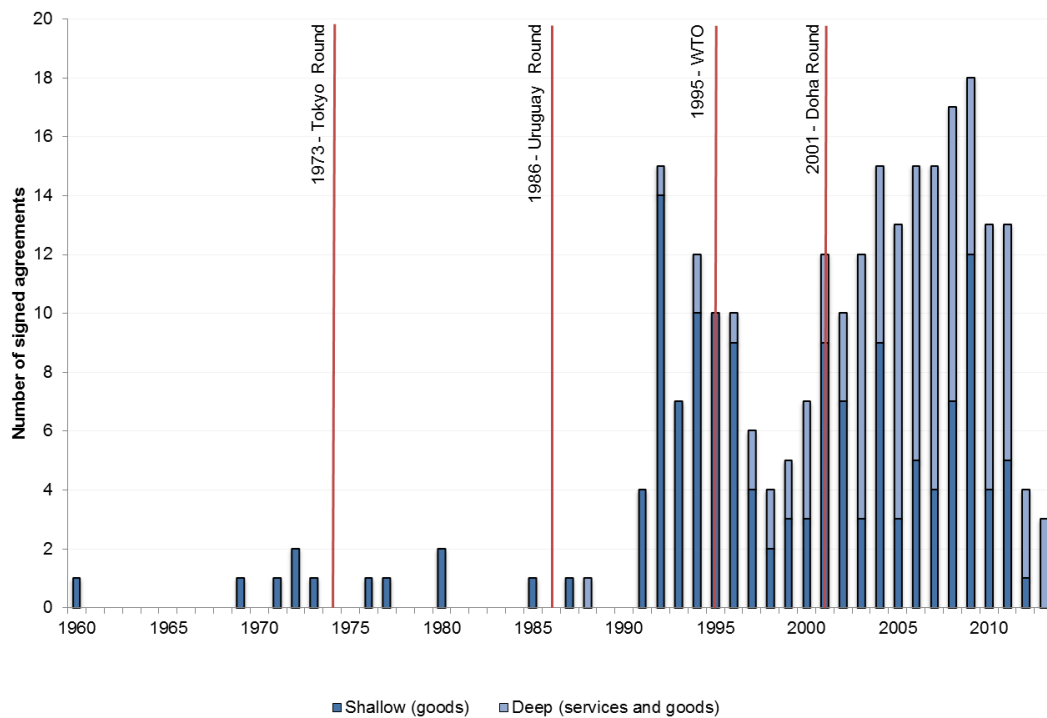
placed on the findings of more recent studies that are based on a large sample of RTAs, thereby suggesting greater relevance and generalizability. While more research would be needed to confirm findings, the analyses point to a set of emerging practices in RTAs that could be technically feasible at least for multilaterally-driven liberalisation and harmonious rule-making.

This paper is organised as follows. The next section provides a brief overview of the changing landscape of RTAs and its implications for the debate on regionalism-cum-multilateralism. Section III develops a checklist for potential multilateralisation candidates. Section IV evaluates RTAs in light of this checklist in order to identify technically possible candidate practices, Section V steps out of this perspective to briefly look at some specific provisions for non-parties in RTAs. The last section concludes.

II. State of affairs in regionalism: implications of a changing landscape

At the time of writing, more than 250 RTAs that have been notified to the WTO are in force, and just over 30 new trade agreements are under negotiation. With the exception of Mongolia, all WTO Members have notified participation in one or more RTAs; a WTO Member is party to an average of 13 RTAs, and some report being party to twenty or more agreements (WTO, 2011). Furthermore, it is estimated that there are at least 100 other active RTAs that have not been notified to the WTO and remain largely outside the purview of monitoring efforts. In addition, it should be noted that there are 2 857 Bilateral Investment Treaties (UNCTAD, 2013) that have developed disciplines for foreign investment flows in goods and services.

If the agreements that are currently under negotiation are successfully concluded, RTAs will cover all major Global Value Chains (GVCs) (OECD, 2014c). Some important commercial relationships (e.g. US-China, US-Brazil) will remain outside the coverage of regional partnerships. On the whole, however, if the Transatlantic Trade and Investment Partnership (TTIP), the Trans-Pacific Partnership (TPP) and other ongoing negotiations among major economies are successfully concluded, WTO Members will have concluded RTAs with most, if not all, of their major trading partners.

Figure 1. Number of RTAs in Force Notifies to the WTO¹

Source: OECD, based on WTO RTAs Database

Most economies consider that their RTAs are complementary to the multilateral system. Paradoxically, the rise of regionalism has gone hand-in-hand with the two last multilateral negotiations rounds under the WTO. The first upsurge of RTAs started in the last years of the Uruguay Round (UR) in 1992-94, on the eve of the creation of the WTO. NAFTA served as a powerful example of how a comprehensive package of “new issues” could be brought to the table in trade partnerships with both developed (Canada, United States) and developing (Mexico) economies. Similarly, the second explosion of RTAs accompanied the beginning of the Doha Round in 2001, and has continued unabated since then.

From shallow to deep: the prominence of services in RTAs

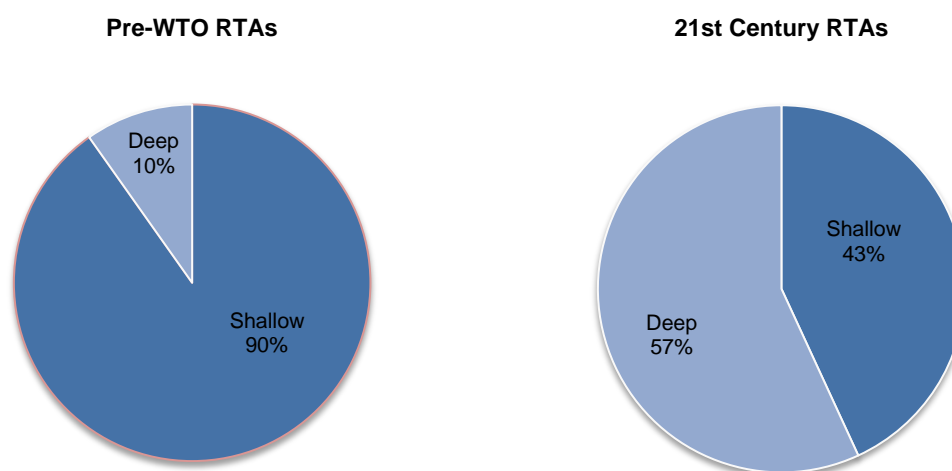
The new wave of RTAs has involved more (in some cases, much more) than dismantling border barriers for commodities – and focus increasingly on services, investment and domestic regulatory reform needed for markets to perform competitively. The proliferation of RTAs has been eclipsed by the prominence of services and investment-related issues in RTAs. Prior to the creation of the WTO, only 4 RTAs notified to the WTO covered services; as of January 2014, a total of 105 RTAs are notified under the General Agreement on Services Trade (GATS). The number of deep RTAs notified to the WTO with deep coverage has been growing more rapidly than those notified with a relatively shallow coverage. Many of those RTAs that initially only

1. RTAs in this paper include any free trade agreement, customs union, or economic integration in and co-operation arrangements among two or more sovereign nations, both within or across regions. It does not include the accession of an economy to an existing RTA (for instance, Bulgaria or Romania to the European Union), which is counted as a separate RTA in the WTO notification system. The numbers reported here also do not include notified RTAs that are now inactive.

covered goods are subsequently expanding their coverage to services. RTAs have dedicated chapters or sections (annexes) dedicated to specific services sectors, notably financial services and ICT, which have dedicated chapters in 44 and 36 RTAs, respectively. By contrast, a smaller number of RTAs have dedicated disciplines to deepen commitments and promote co-operation in professional services, transport (including air and maritime), audio-visual and cultural services, education, tourism and energy services. Since barriers to trade in services are for the most part embedded in behind-the border, domestic measures of a regulatory nature, these RTAs entail the negotiation of measures related to deep integration. In effect, the regulation of service markets is intricately linked to investment and competition policy, as well as the mobility of labour and capital, so that RTAs covering services also address these areas.

The pursuit of deeper integration is no longer circumscribed to a small number of trade partnerships, but has become considerably more widespread. Almost two thirds (57%) of RTAs signed since the beginning 2001 display “deep” coverage, as opposed to only 10% of RTAs that involved elements of deep integration prior to the WTO.² In the pre-WTO era, South-South trade ties among developing economies dominated regionalism, and these agreements were largely circumscribed to border protection of goods (i.e. shallow). NAFTA and a few other “deep” RTAs that ventures into new behind-the-border (i.e. deep) measures emerged as rare exceptions or novelties. The reverse is true in 21st century regionalism. Deep integration is no longer a North-North phenomenon, but it is equally prevalent in the RTAs signed by OECD countries and non-OECD economies, notably in a North-South context but also increasingly in a South-South partnership (see section below).

Figure 2. Share of Deep and Shallow RTAs



Source: OECD, based on OECD RTAs Website.

2. For the purpose of this analysis, RTAs that cover services and investment are counted as deep RTAs. These are the first two factors associated with deep integration in the literature (see Lawrence, 1996; Evans, 2004).

From proliferation to consolidation: the rise of mega-regionals

An open question is whether the proliferation of RTAs has reached its peak, and whether the next wave or regionalism will represent a drive towards the consolidation, deepening and expansion and new membership in existing RTAs, rather than a continued upsurge of new RTA. There does appear to be evidence for the former. The Free Trade Area of the Asia Pacific (FTAAP) is perhaps the most striking construct of this kind: aiming to amalgamate various ongoing regional negotiations, including ASEAN+3, ASEAN+6, and the TPP. The Alliance of the Pacific (*Alianza del Pacífico*) is trying to harmonize and deepen RTAs that are already in place among Latin American countries. In Africa, the Tripartite Free Trade Area is coalescing the three major RTAs – COMESA, EAC, and SADC – and resolving various problems from the overlapping memberships. In the CIS area countries are replacing dozens of RTAs with a broader, harmonized mega-agreement.

In the same vein, the negotiation of plurilaterals over specific issues off WTO campus has gained force. To a large extent, these plurilaterals on specific subjects are becoming possible due to the extensive experience acquired by participants through bilateral RTAs. The most important example is the Trade in Services Agreement (TISA), which can be seen as harnessing and building on regional negotiation on services in existing RTAs. There are a number of investment initiatives, such as the Inter Arab Investment draft Agreement, which brings together a network of 96 Bilateral Investment Treaties into a common and deeper framework. The negotiation of large mega-regional or regional plurilaterals is not an entirely novel phenomena (the Free Trade Area of the Americas, or the Multilateral Agreement on Investment), but there appears to be a significantly increased momentum. If successful, these deals will significantly consolidate, deepen and harmonize the accumulated experiences in RTAs.

For all its promises, the emergence of mega-regional brings a new set of questions to the dynamics of RTA formation. What is the best evolutionary path to pursue – in terms of sequencing membership and depth of the coverage – to achieve impactful agreements? Some initiatives have a broad membership with relatively shallow coverage (ASEAN, FTAAP), with the aim to progressively broaden and deepen the scope of commitments. Others are taking the reverse course, beginning with a deeper coverage among a narrow set of trading partners and subsequently inviting other economies to join (TPP, Pacific Alliance). It remains to be seen if one track or the other leads to a better final outcome in terms of the quality and comprehensiveness of the agreements, and which path may be more amenable creating building block effects for the multilateral regime.

On balance, it is fair to say that much depends on the qualitative features of regional agreements, and on their interface with the WTO system. Trade policies should help ensure that RTAs are stepping stones for multilateral trade. In this regard, the debate is shifting to a discussion on what constitutes “responsible” or “managed” regionalism, and how RTAs can be designed and applied in ways that mitigate any adverse effects to non-parties and enhance the evolving global trading system. It is in the interest of policy-makers to co-ordinate RTAs, rationalise overlap and economise resources from multiple negotiations. It is also in the interest of policy-makers to leverage regional negotiations as a platform for co-operation to advance the multilateral processes, so that their demands can be met under a more harmonized and unified umbrella.

The main burden of this paper is in fact elsewhere than on this macro architectural theme. It is on the more specific (and self-confessedly prosaic) question of identifying potential policy areas with RTAs that might be, technically at least, candidates for multilateralisation. However, it does touch on some architectural features that might be relevant to this question (see paragraph below).

III. Checklist for potential multilateralisation

This section develops a preliminary checklist of attributes that can signal whether emerging deeper measures could be more readily multilateralisable (Table 1). This checklist is not intended to be exhaustive or definitive, but seeks to initiate discussions on the multilateralisation impact of the stock of WTO-plus and WTO-beyond measures in RTAs, and towards a shared understanding of practices that may help them become or remain amenable to multilateralisation.

The checklist first assesses whether a given deeper measure has become a **sufficiently widespread practice** across existing RTAs, thereby suggesting an emerging (implicit) consensus that may facilitate multilateralisation. If a given deep measure is endorsed by a critical mass of WTO Members, including developing economies, it may be more likely to gain traction in a multilateral setting than if it constitutes an isolated practice or one that is only endorsed in RTAs of particular Members. Hence, it is useful to scan the diffusion of WTO-plus and WTO-beyond measures across a critical mass of RTAs, and see if there is a clear trend in more recent RTAs to consolidate the deep measures as an integral component of regional rules and commitments. In addition, it can be useful to consider the types of economies that have negotiated various deep measures in RTAs in order to evaluate if there is widespread interest and receptivity to address the issue at the multilateral level. If deeper obligations have only been negotiated by one or two major OECD countries, it may suggest there are at least reasons why this is not attractive to less developed economies which would need to be addressed.

Another important element to monitor is the **homogeneity of WTO-plus measures across RTAs**. Multilateral-friendly rules and commitments should not undermine the obligations that economies have undertaken at the multilateral level. Beyond the important point of ensuring no inconsistency with the WTO provisions, the degree of similarity of WTO-plus measures across RTAs of different trading partners is another important consideration. Where RTAs have adopted at least broadly similar WTO-plus commitments, this does suggest that, at least technically, convergence at the multilateral level could potentially be easier. Deep measures aligned with international standards in a given policy area can also be conducive to convergence; this is important in WTO-beyond measures not comprehensively disciplined in the WTO.

The third component that is crucially important to assess relates to **the level and impact of discrimination in the design and application of deeper measures** concerned. RTAs that introduce significant preferential margins or practices may disincentivise co-operation on these issues at a multilateral level, if it is perceived that multilateral negotiations will erode their preferences. This tension has long been present, and is well-known particularly as regards border measures. This can also occur in “behind the border” domains but the work this note draws on suggests that this is not always the case in all areas. Although regional commitments are considered to be *de jure* preferential by virtue of being inscribed in an RTA, their application does not always lead to actual discriminatory treatment. In effect, some measures share the characteristics of public goods in that they are non-excludable and non-exhaustible. Hence, they are inherently non-discriminatory. Where treatment is discriminatory, there are mechanisms in an RTA that can serve to mitigate or remove the trade-diverting effects. This is, of course, not to say that tension does not remain or that future evolution in other regulatory areas may in fact increase the tension still further. Nor is it to imply that even if this is the case that it is still not possible to multilateralise successfully. The post-war history of GATT – WTO has plenty of cases to show that it is in fact perfectly possible to do so.

Another set of issues that may promote the multilateralisation of measures is related to their **level of transparency, implementation and enforceability**. Deep measures that are mandatory and can be enforced are more likely to lead to reforms within economies that have implemented the RTA, and which, hence, subsequently might be more confident to undertake the reforms at the

multilateral level. Provisions that are couched in best-endeavour clauses, carved out of dispute settlement procedures, or granted excessive flexibility are useful ways to introducing new issues in trade RTAs, but often signal a hesitancy to endorsing them fully (due to capacity or other constraints) and which may make them less open to multilateralisation. Similarly, increasing the transparency of deep measures may sensitize non-Parties on their benefits and costs, leading to a review of their own regimes and greater adoption of RTAs. Indeed, transparency is a first step to sensitising economies to the benefit and costs of these issues and bringing them under negotiations.

Finally, the multilateralisability of selected measures may, at least in the near term, be affected by the **marginal economic gains and political will to expand existing RTA commitments**. It explores the additional economic dividends that economies may obtain from upgrading co-operation from a regional to a global scale. In some areas, the issues being addressed by deeper measures in an RTA cannot be internalized within parties to an RTA, and may require international co-operation. Moreover, the marginal costs of extending the benefits to non-parties may be low, particularly when the measure is weakly discriminatory, or when a trading partner has already extended the benefit to all its major trading partners via multiple RTAs. Further, it is useful to acknowledge that potential multilateralisation is in fact often driven more by political will than anything else. In this respect, it is useful to assess whether there are political economy drivers or constraints that may facilitate (or hinder) multilateralisation. The question then is whether the domestic factors are favourable to the negotiation or extension of such RTA commitments at the multilateral level, but this is essentially well beyond the scope of this note.

Table 1. Checklist of best practices for “multilateral-friendly” RTAs

Conditions	Questions for designing “multilateral-friendly” RTAs
<i>1. How widespread are the identified WTO-plus practices?</i>	
Critical mass of RTAs with WTO-plus	<ul style="list-style-type: none"> • Is the WTO-plus commitment endorsed by a critical mass of RTAs? • Is there a clear trend towards the consolidations of WTO-plus commitments in RTAs? • How representative are parties to deep RTAs of WTO members (developing economies)?
<i>2. How homogenous are WTO-plus practices across RTAs?</i>	
Homogeneity across RTAs	<ul style="list-style-type: none"> • Is there a high degree of similarity across RTAs, within and across trading partners?
<i>3. How discriminatory is the treatment granted under WTO-plus practices?</i>	
Non-discriminatory nature of provisions	<ul style="list-style-type: none"> • To what extent does the application of WTO-plus measures discriminate between foreign parties? • Does the deep measure discriminate between domestic and foreign operators?
<i>4. How predictable – enforceable and transparent – are WTO-plus and WTO-beyond measures?</i>	
Enforceability of WTO-plus obligations	<ul style="list-style-type: none"> • Do the WTO-plus create binding commitments enforceable by dispute settlement? • Are there other dispute-avoidance mechanisms?
Transparency of deep measures	<ul style="list-style-type: none"> • Does the RTA include strong provisions on transparency?
<i>5. What are the economic dividends of multilateralising WTO-plus provisions, and are there political costs?</i>	
Economic impact	<ul style="list-style-type: none"> • What is the economic impact of WTO-plus provisions on trade flows and patterns? • Does the RTA represent the optimal area for co-operation on the deep measures?
Political economy conditions	<ul style="list-style-type: none"> • Do political motivations for entering into RTAs facilitate multilateralisation? • What is the optimal area for co-operation on the given deep measure?

Source: OECD.

IV. Findings from OECD Work

As noted above, the work of the OECD seeks to inform policy on which RTA policy domain could, at least technically, be harnessed for more open and inclusive liberalisation, and how this achievement could be leveraged to strengthen the WTO regime: a “multilateralisability” assessment of various deeper measures. While some studies contain a large sample of RTAs, others have looked into a smaller number of agreements, so generalisations must be treated with caution. Nevertheless, these studies may provide useful indications on the multilateralisation feasibility and desirability of different measures.

1. Some WTO-plus issues widespread in RTAs

The level of dispersions of WTO-plus measures across RTAs can be a useful starting point for discussions on multilateralisation priorities. All studies show an upward trend in the uptake of the various WTO-plus and WTO-beyond measures reviewed. Some WTO-plus policy areas have become more widespread in 21st century RTAs. Services, investment and transparency emerge as the most widespread WTO-plus commitments endorsed in RTAs that have been signed since 2001. As figure 3 shows, over 90% of RTAs have WTO-plus in services, over 85% in investment, and almost 80% in transparency. The emphasis on investment (both for goods and services) attests to the increasing importance of securing market presence as opposed to only market access to trade. Some RTAs contain chapters on improving the overall business environment, which are broader than the protection-cum-promotion rules on investment covered in traditional FTAs and BITs.

Policy areas related to services and investment, as well as behind-the-border measures for goods, have also been deepened on a wide regional scale. In particular, 70% of RTAs signed since 2001 have chapters on competition policy, including disciplines on monopolies and exclusive services suppliers. Similarly, over 65% of RTAs have deepened obligations on intellectual property rights beyond TRIPS, and a number of agreements address barriers to innovation more broadly. Another clear agenda in the regionalism of the 21st century is improving technical standards, technical regulations, and conformity assessment procedures, as illustrated by over 60% of RTAs that deepen measures in TBTs and SPSs. It should be borne in mind, however, that most of the WTO-plus elements in these chapters relate to improvements on transparency, although certain agreements go beyond by including provisions on mutual recognition that do not exist in the WTO. Finally, 60% of modern RTAs include dedicated chapters and committees to co-operate on the movement of business persons, both for goods and services, including visa facilitation measures.

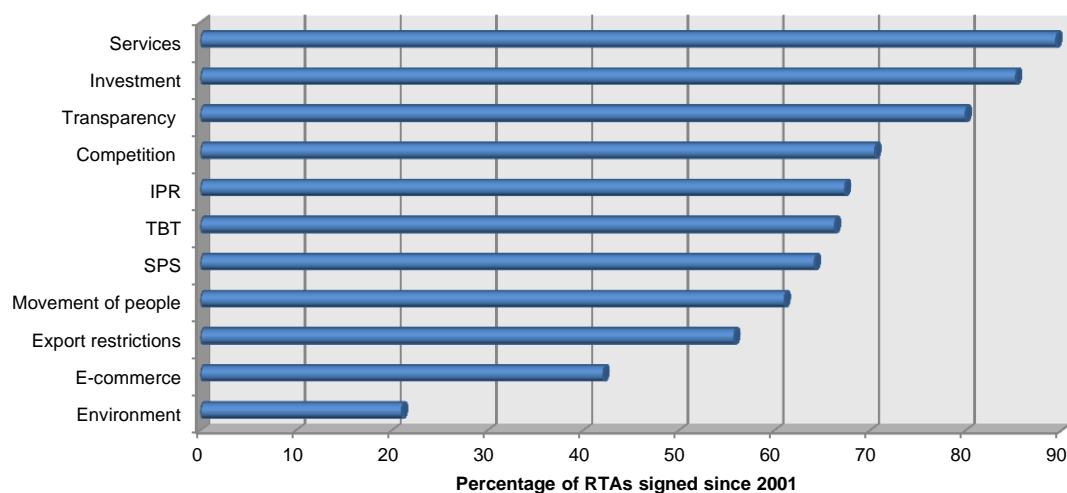
Another set of WTO-plus measures have been adopted in approximately half of 21st century RTAs (45-55% of total). First, there is a considerable interest in government procurement in over half of 21st Century RTAs, including by parties that are not members of the plurilateral agreements in the WTO. Indeed, it is remarkable that economies which are not members of the Government Procurement Agreement (GPA) in the WTO have undertaken commitments in RTAs that surpass the thresholds set in the GPA. Another area where over half of RTAs have deepened disciplines relates to export measures, notably in the area of export taxes, not generally a strong focus multilaterally. A considerable number (42%) of RTAs have enlarged the ambit of rules for digital trade, addressing unresolved issues and gaps under existing provisions for e-commerce. It is also worth noting that over 40% of RTAs have incorporated commitments on anti-corruption and anti-bribery, which do not have precedents in the WTO.

Less present in RTAs is coverage of trade and the environment, which has a stand-alone chapter in only one out of every five RTAs signed over the last decade. Although there has been a steady increase in the number of RTAs that incorporate measures on the environment, these are concentrated in the trade partnerships of specific economies, such as United States and the European Union, which have extended their political mandates for RTAs to include provisions for compliance with multilateral environmental agreements (MEAs). This is having an exemplary effect, as witnessed by the introduction of similar provisions in several RTAs that do not involve either the United States or the European Union. Still, the environment is significantly absent in most South-South RTAs.

Finally, there is a set of new areas that are emerging in recent agreements and negotiations. These involve deeper disciplines on state-owned enterprises, small and medium-sized enterprises, competitiveness, regulatory co-operation, consumer protection, and data protection. Some of these

issues have been dubbed as 21st century topics, although they are at an early phase, and it remains to be seen how widespread they will become in new RTAs.

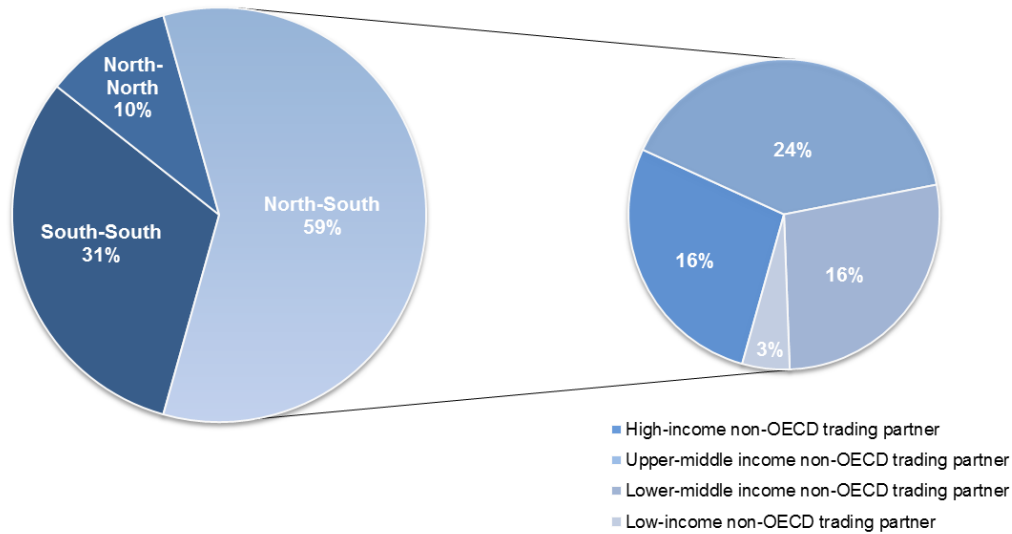
Figure 3. Number of RTAs with WTO-Plus Measures, by Policy Area³



Source: OECD compiled from tests of Regional Trade Agreements.

Another consideration for reflections on “regionalism multilateralisation” is the representativeness of economies that have endorsed WTO-plus commitments in RTAs. While the work of the OECD shows that the WTO-plus areas mentioned above are considerably widespread among OECD countries, it is important to consider the interests and receptivity of the WTO-plus agenda beyond the OECD area, given that developing economies, including least developed economies, comprise the vast majority of the WTO membership. Hence, for emerging WTO-plus practices to constitute veritable “stepping stones”, it is important to consider the extent to which RTAs have been shaped by trading partners from different income levels and regions.

3. Only RTAs with substantive coverage of WTO-plus measures are included (i.e. not just a provision, but having substantive coverage, such as a chapter or a section with a set of disciplines). This only includes obligations in the main text of the agreement; it should be noted that some areas, such as the environment, are sometimes covered in letters or memoranda annexed to the agreement.

Figure 4. Composition of RTAs

Source: OECD, based on WTO RTAs Database and other sources.

On the whole, the OECD studies show a spread in the uptake of WTO-plus measures by a hybrid group of economies. As global growth engines have shifted to emerging economies, the number of RTAs negotiated by OECD countries with non-OECD trading partners has doubled. Through these North-South partnerships, which now constitute two thirds of all RTAs (as opposed to one fourth in the pre-WTO period), deep practices have been transferred to a wide range of emerging, middle-income economies. These non-OECD economies that have signed North-South RTAs have in some cases incorporated the same measures in South-South RTAs with less developed economies. Economies such as Chile improve the template shaped in North-South with other South partners. In the Andean Community, some of the practices of US-Peru and US-Colombia have become models for the South-South accord. Hence, South-South initiatives can provide a powerful vehicle for emerging economies who have endorsed these practices with the OECD countries to champion them among their regional neighbours that are less developed. Hence, there are signs of a tangible propagation from North-South to South-South.

2. Homogeneity of certain WTO-plus practices across RTAs

A number of OECD studies also examine the degree of similarity of WTO-plus commitments and rules across different RTAs. The suggestion is that where a large number of trading partners share a common pool of similar WTO-plus measures in their RTAs, it is at least technically more feasible to envisage convergence could emerge at the multilateral level.

While there is some heterogeneity across WTO-plus elements, OECD studies largely identify a number of areas that display a high degree of similarity across WTO commitments, not just within the different RTAs of the same trading partner, but more notably, across the RTAs of major different trading partners. Moreover, in most policy areas studies note greater homogeneity among more recent RTAs, suggesting there is increasing convergence as best practices are consolidated and more Members become at ease with introducing them in their RTAs. The areas that display a considerable degree of similarity are services, investment, transparency, and e-commerce. Government procurement shows a mixed picture, with a high level of homogeneity across obligations related to central government, but variations when it comes to local governments,

reflecting the differences in governance structures in each economy (OECD, 2013a). The same is true for export measures, where WTO-plus quantitative measures tend to be more homogeneous while those relating to taxes display greater heterogeneity (OECD, 2012d). Since the latter is not comprehensively disciplined under the WTO, this may explain a greater experimentation and variation on how economies address the issue.

In the area of investment, the degree of similarity of commitments appears to be very high, and OECD analysis of the lists of commitments and non-conforming measures among the group of OECD's RTAs reviewed concludes that they are largely identical (OECD, 2007b). However, given that the sample is relatively small, more research would be needed to confirm this; in any case, there is a pool of trading partners that have similar WTO-plus interests. As for the case of services, OECD estimates a coefficient of similarity across WTO-plus commitments of around 60% (OECD, 2010c).⁴ In particular, Canada, the European Union, Australia, Chile and the United States have the highest shares of similar commitments among OECD economies, while EFTA countries (Norway and Switzerland) have the smallest shares with preferential bindings more heterogeneous in their RTAs (OECD 2010c).⁵ Beyond the OECD area, the coefficient of similarity across all RTAs reviewed in the study is 0.49, which is fairly high and indicates a potential for multilateralisation. There is a considerable degree of commonality found in the sub-sectors where the WTO-plus commitments are undertaken, and this can be the basis for improving offers under ongoing GATS negotiations.

Investment and services have developed alternate architectures and scheduling approaches to GATS and TRIMS. Regional disciplines on investment generally cover both goods and services, whereas under the WTO they are regulated separately, with investment in goods under TRIMS and investment under services in GATS. As noted above, this can make the technical translation of regionalism into multilateralism complicated. In services, some RTAs follow the GATS approach with regards to the scheduling of commitments (positive list), whereas others follow the NAFTA-type approach (negative list). Yet, both approaches co-exist in a large number of RTAs (hybrid), and in some instances, one party to an RTA uses a positive list while the other party uses a negative list. In practice, both approaches can inscribe the same level of liberalization, and this co-existence suggests it is possible to use both scheduling languages in the same RTA, thereby illustrating the possibility to forge flexible approaches that overcome such constraints. There are challenges in dealing with the heterogeneity of RTAs, but differences should not preclude efforts to harmonize RTAs. In the end, this is a matter of political will and negotiations.

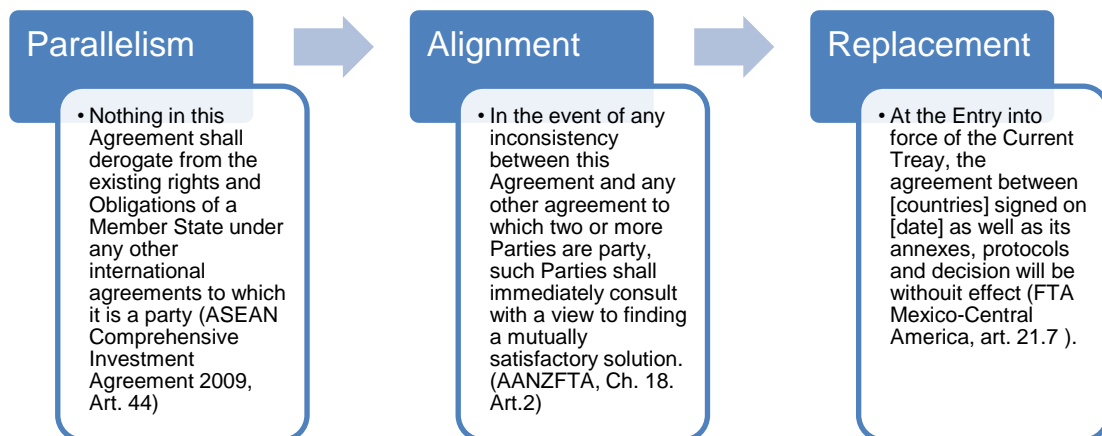
There is a question as to whether the emergence of mega-regionals will in fact address these differences and achieve still greater uniformity across RTAs. Yet, whether these mega-regional manage to harmonize regional commitments and rules depends very much on the steps they take, including with regards to the treatment of pre-existing RTAs. At least three approaches can be identified, which are illustrated in Figure 5. In the first approach, previous RTAs continue to co-exist in parallel with the new mega-regional, so that a plurilateral nests pre-existing agreements. This modality appears to be the easiest to operationalize across jurisdictions, since the legal

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4. The co-efficient of similarity for services commitments is calculated as a share of the number of sub-sectors with new or improved commitments. For each commitment, a ratio is calculated with a value of zero when only one RTA has the commitment and the number of RTAs with an improved commitment divided by the total number of RTAs otherwise. The co-efficient is the sum of these ratios as a percentage of all improved or new commitments.
 5. Since the early 2000, the EFTA FTAs are more comprehensive agreements, which generally contains, in addition to provisions on trade in goods and intellectual property, also substantive obligations regarding inter alia trade in services, investment, public procurement and sustainable development.

annulment of existing international treaties can be problematic. In effect, the majority of large RTAs have specific provisions for explicitly preserving the rights and obligations of parties in pre-existing RTAs. Yet, if there are differences between the plurilateral and the nested bilateral, the mega-regional will exacerbate the multiplicity of rules. Some argue that multiple rules increase trade costs, while others sustain that it simply provides more options for traders, who are free to choose between different regimes (including MFN), and can operate under the one that is most beneficial to them.

In other cases, there is a drive to harmonize and align pre-existing with mega-regionals. A number of RTAs subscribed by OECD countries embed the notion of “living agreement,” incorporating mechanisms so that RTAs can be updated with improved practices resulting from subsequent negotiations and address new issues that arise in the future. Hence, the procedures for periodic review and amendments. A good example of how periodic review can lead to an enhanced and harmonized agreement is the Chile-Mexico agreement, which was subscribed in 1991 as a relatively shallow agreement, then revised into a comprehensive FTA with deep coverage in 1999, and eventually worked towards an Association Agreement. Similarly, some agreements provide for procedures to resolve any inconsistency between existing agreements, although this does not appear as widespread as it could be. Indeed, while most RTAs concluded among WTO Members include a provision on how the RTA relates to WTO agreements, they are much more silent about the treatment of pre-existing RTAs. Finally, a less frequent scenario is when the new agreement merges or subsumes the existing bilaterals. Although this avenue is legally more complex, there are precedents of old bilaterals being suspended with the emergence of a new agreement: for example, the US-Canada FTA was suspended with NAFTA. More recently, the same framework was adopted between Mexico and Central America, which has a clause on the “Termination of Free Trade Agreements” between the Parties that renders ineffective pre-existing bilateral RTAs that Mexico had with countries of Central America.

Figure 5. Illustrations on Treatment of Pre-existing RTAs in Mega-Initiatives



Source: OECD.

3. Discriminatory or non-discriminatory character of certain WTO-plus practices in RTAs

One of the main findings in the OECD work is the extent to which there are significant areas in modern RTAs that are not essentially discriminatory. This stems from new-type RTAs, which

go beyond the traditional, and inherently discriminatory to measures, tariffs and quantitative border measures of a regulatory nature.

It remains to be seen whether there will be significant preferences emerging in the regulatory area – notably in the so-called mega-regionals. It is at least conceptually conceivable that one could still see significant discrimination emerge here. But, to this point at least the regulatory area does not appear to have so far emerged as constituting a major discriminatory element – aside from the MRA area in particular.

WTO-plus measures in services and investment issues often do not discriminate *de facto* between trading partners – for instance, the same foreign investment regime is often applied to all foreign investors. In such cases, WTO-plus commitments inscribed in an RTA may be *de jure* preferential, but do not result in better access for regional partners only. In many cases, the domestic reforms apply equally to domestic and foreign operators, thereby guaranteeing national treatment as well. Finally, in the area of rule-making, WTO-plus and WTO-beyond measures often do not represent a deviation from MFN principles. A higher degree of copyright protection, or stronger sanctions to combat corruption and bribery, are examples of such RTA measures that do not discriminate against non-RTA parties, and on the contrary, can benefit all exporters to these markets.

Another consideration is that improved commitments in RTAs do not necessarily reflect full *de facto* liberalisation in any case. One OECD study (2010c) examining the services schedules in 56 RTAs finds that on average economies have inscribed regional commitments in 72% of services sub-sectors (both for market access and national treatment). Out of these, 30% display commitments that are equal to GATS (WTO-equal) and 42% show improved commitments relative to those inscribed in GATS (WTO-plus). From these WTO-plus, 13 percentage points are attributed to improved commitments and 29 percentage points represent commitments in new sectors that are unbound at the WTO. Moreover, the majority of these new commitments correspond to full commitments. Hence, there is evidence that in a sample of RTAs covering OECD and emerging economies, RTAs have considerably deepened commitments and have achieved a high sectoral coverage. Yet, we cannot conclude from this analysis that this has *de facto* opened services markets, as the commitments may not reflect the applied regime. Most studies seem to suggest that these improved commitments in services and investment are locking in the applied regimes resulting from reforms that economies have already undertaken, be it unilaterally or through other types of bilateral arrangements. Hence, services and investment reforms are often undertaken unilaterally and are subsequently bound in regional agreements. RTAs are hence providing better predictability (avoiding policy reversals) and rules, but their market opening often reflects reflect unilateral – rather than preferential – liberalisation.

As noted above, there are exceptions to this, where services measures can be significantly discriminatory. In terms of the WTO-plus measures in RTAs, this especially concerns two areas: recognition of professional qualifications and movement of business persons. One of the areas where a limited number of RTAs are making significant strides is in fostering mutual recognition arrangements for professional services. The majority of RTAs call on regulatory bodies to facilitate the recognition of professional qualifications, but some go beyond and establish actual mutual recognition for certain professionals in certain sectors, such as legal services, engineering or nursing. These arrangements are discriminatory. Also, border barriers such as visas can also be granted in an easier way to temporary workers of specific economies. At the moment there is little evidence of deep liberalisation in most RTAs. Yet, if market access preferences were deepened in Mode 4 (movement of natural persons), they could create both significant preferences and perverse incentives to multilateralisation.

A key aspect of the extent to which RTAs commitments have discriminatory effects relates to the design of rules of origin. Rules of origin exist, after all, precisely to stop non-partners from gaining access to preferential treatment. More liberal rules of origin can play an important role in mitigating potential distortions introduced by preferential market access. Whereas in the case of goods rules of origin are crucial in determining the provenance of a product and, and can be extremely complicated, in services they tend to be less complex and more liberal. As a result, rules of origin in services are not viewed as creating a spaghetti bowl problems. Rules of origin (ROO) in services are applied on the supplier, rather than the product (service) per se, and hence there are no restrictions in terms of the origin of goods and services from which the supplier can procure the inputs. If the services provider is located in the economy, it is considered as originating in the economy and is eligible for preferential treatment. GATS Art. V discipline ROOs for juridical persons (enterprises) in services, stipulating that a services supplier from a non-party can benefit from RTAs through establishment in the economy. Accordingly, a judicial person who is constituted or organized under the laws of an economy and carries out substantive business activity in its territory can benefit from the advantages of any RTA signed by this economy. Concretely, this means that, once established, a foreign-owned company can provide services to other parties under the treatment granted in the RTA; there is no requirement on the firm's nationality, or nationality of people who control the firm. GATS Article V providing for liberal ROO can be an example of how WTO disciplines can limit the discriminatory impact of RTAs.

A typology of the different realms of ROO found in a sample of RTAs is contained in Table 2. The most liberal ROO found in RTAs are those which regard constitution or incorporation in the economy as a sufficient condition to benefit from the treatment granted under the RTAs, regardless of the economy in which substantive business operations are conducted, which can be in a territory of a third (non-Party) economy. Other RTAs have a so-called denial of benefits clause, which reserve the right to deny benefits on the basis of where substantive operations are conducted. Overall, ROO for judicial person in services are an example of how WTO disciplines can positively influence the design of RTAs, limiting their discriminatory impact. In the case of natural persons, there is no provision on ROO under GATS, so that the requirements depend on the criteria set and definition of natural person in domestic jurisdictions. These vary across economy and sectors, and can be more restrictive, sometimes conditioning eligibility to nationality or permanent residency requirements.

Table 2. Typology of Rules of Origin in Services

Natural Persons		
I	Definition requiring at least permanent residency	NAFTA “National means a natural person who is a citizen or permanent resident of a Party and any other natural person referred to in Annex”
II	Definition requiring at least permanent residency with substantially the same treatment as nationals	EFTA-SINGAPORE “ ‘natural person of a Party’ means a natural person who resides in the territory of that Party or elsewhere and who under the law of that Party: (i) is a national of that Party; or (ii) has the right of permanent residence in that Party and is accorded substantially the same treatment as nationals in respect of measures affecting trade in services.”
III	Definition requiring nationality	EU-CHILE “A ‘natural person’ means a national of one of the Member States or of Chile according to their respective legislation.”
Juridical Persons		
I	a. constitution or organisation of juridical persons in the economy of an RTA party; or b. ownership and control by natural or juridical persons of one of the parties	ANZCERTA <u>Definitions</u> Person of a Member State means: (b) a body corporate established under the law of that State; (c) an association comprising or controlled by: (i) persons described in one or both of sub-paragraphs (a) or (b); or (ii) persons described in one or both of sub-paragraphs (a) or (b) and persons so described in relation to the other Member State. <u>Denial of benefits</u> [...] a Member State may deny the benefits of this Protocol to persons of the other Member State providing a service if the Member State establishes that the service is indirectly provided by a person, not being a person of either Member State.
II	a. constitution or organisation of juridical persons in the economy of an RTA party; + b. substantive business operation in the economy of <i>one of the parties</i> if non-party ownership and control.	NEW ZEALAND-SINGAPORE FTA <u>Definitions</u> “legal person” means any legal entity duly constituted or otherwise organised under applicable law, whether for profit or otherwise, and whether privately-owned or governmentally-owned, including any corporation, trust, partnership, joint venture, sole proprietorship or association; <u>Extension of Benefits</u> A service supplier of a non-Party that is a legal person constituted under the laws of a Party shall be entitled to treatment granted under this Part provided that it engages in substantive business operations in the territory of one or both Parties.
III	a. constitution or organisation of juridical persons in the economy of an RTA party; + b. substantive business operation in the economy of the party of presence if non-party ownership and control (commercial or local). <i>Note that in some cases the benefit can be denied also on the basis of lack of diplomatic relations with the non party or for measures prohibiting transactions with the non party but in any case, if the juridical person is not party-owned and controlled, it has to undertake the substantive business operation (this also applies to category II).</i>	US-BAHRAIN FTA <u>Definitions of General Application</u> “enterprise of a Party” means an enterprise constituted or organized under the law of a Party; <u>Denial of Benefits</u> 1. A Party may deny the benefits of this Chapter to a service supplier of the other Party if the service is being supplied by an enterprise owned or controlled by persons of a non-Party, and the denying Party: (a) does not maintain diplomatic relations with the non-Party; or (b) adopts or maintains measures with respect to the non-Party or a person of the non-Party that prohibit transactions with the enterprise or that would be violated or circumvented if the benefits of this Chapter were accorded to the enterprise. 2. A Party may deny the benefits of this Chapter to a service supplier of the other Party if the service is being supplied by an enterprise that has no substantial business activities in the territory of the other Party and persons of a non-Party, or of the denying Party, own or control the enterprise.

4. Enforceability of WTO-plus provisions

The extent to which WTO-plus commitments are implemented and enforced by RTAs parties may be an indicator of potential for economies to multilateralise these obligations. WTO-plus measures that create substantive obligations which are enforceable via a dispute settlement procedure are likely to be riper for multilateralisation than best-effort engagements. Regional “deep” provisions which are couched in best-endeavour terms, embed excessive flexibilities, or are explicitly carved out of regional dispute settlement procedures may underlie capacity or other constraints that can inhibit their full implementation. As a result, there may be greater hesitancy on the part of economies to multilateralise weaker obligations, particularly if they have not already been implemented at the domestic level. That does not imply that best-endeavour provisions should be discouraged, as they can be effective for advancing the agenda. Indeed, many WTO-plus/-beyond measures are first introduced in an RTA on a best-endeavour basis, and later evolve into firmer, mandatory obligations in subsequent agreements. Nevertheless, WTO-plus commitments that are enforceable and implemented could be riper for multilateral discussions.

A few OECD studies examine either the implementation or the legal profile of deeper commitments in RTAs. In the absence of adequate information on the implementation of WTO-plus commitments in most policy areas, the level of enforceability can serve as a proxy to signal the likelihood of an economy to comply with the measure.⁶ First-order obligations which are enforceable by dispute settlement may signal that economies attach a greater importance to compliance with these obligations, and feel sufficiently at ease in their capacities to deliver on those commitments. Two metrics are used to assess the degree of enforceability of deep provisions: First, the legal language of the WTO-plus commitments, namely whether the provision is cast in best-endeavour or subsidiary obligations. The second aspect pertains to whether the obligation is liable to a dispute settlement arrangement. In some RTAs, specific obligations or policy areas are explicitly carved out from the dispute settlement procedures provided under the RTA, and sometimes those in other fora. Once again, this does not demerit the WTO-plus obligation, as it could be a good practice for addressing the more contentious issues that trading partners may wish to co-operate on.

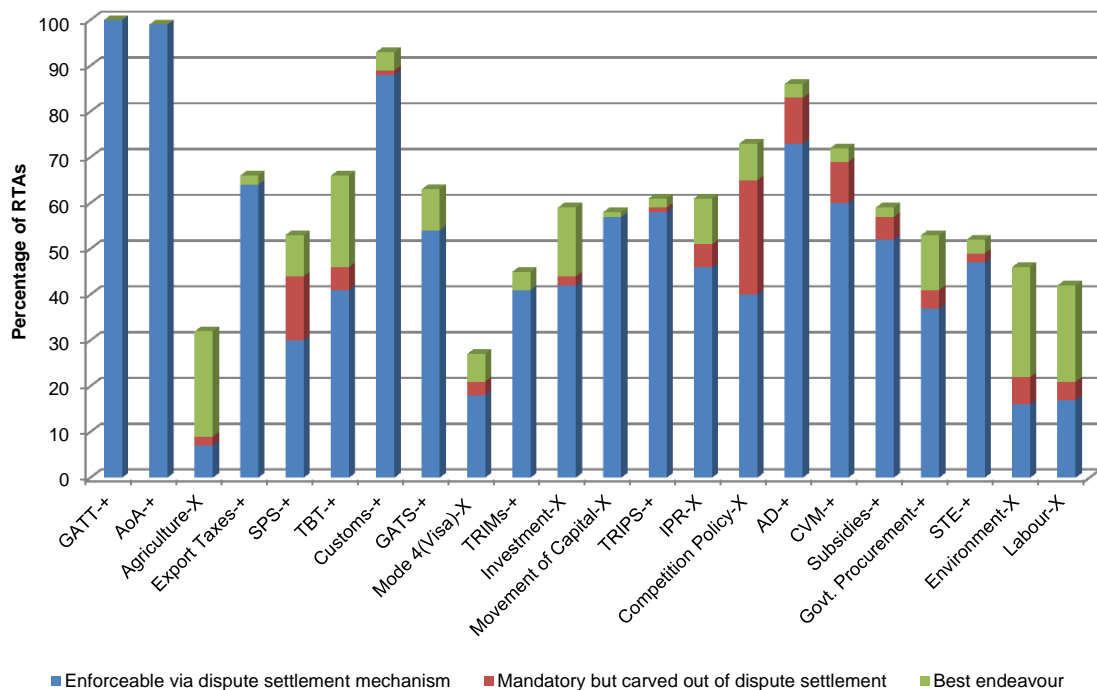
The level of enforceability of WTO-plus and WTO-beyond commitments across different policy areas is depicted in Figure 6. Encouragingly, it shows that a large stock of improved commitments and rules in RTAs create first-order, substantive obligations that are liable to a regional dispute settlement mechanism. In particular, 87% of WTO-plus commitments, and 40% of WTO-beyond obligations, are found to be legally enforceable through the corresponding RTA dispute settlement mechanism. Provisions that “deepen” WTO agreements are preponderantly in “hard law,” while new obligations that “broaden” the scope vary in their legal profile according to the policy area and composition of the RTA trading partners. A lower percentage of mandatory WTO-beyond commitments may reflect the greater divergences in the interest and preparedness of economies to embrace these issues in RTAs, as well as the capacity constraints. Institutional innovations require some experimentation and trial-and-error before they solidify. Currently, 50% of obligations under new issues (WTO-beyond) are best endeavour, while only 7.5% of obligations that deepen multilateral rules and commitments (WTO-plus) are in best-endeavour. Yet, there is a high degree of “hard law” commitments pertaining to the WTO-beyond measures on movement of

6. The degree of implementation of WTO-plus commitments is only assessed for a very limited number of measures and RTAs (see, for instance OECD 2013). In many cases, it is premature to examine the extent of implementation given that many RTAs are fairly recent and the obligations have phase-in periods or entail lengthy domestic reforms.

capital, investment, and intellectual property rights. On the other hand, WTO-beyond areas in agriculture, environment and labour largely comprise best-effort commitments.

Regardless of whether the stock of WTO-plus and WTO-beyond measures are mandatory, it is worth highlighting that these measures can only be enforced through the regional dispute settlement mechanisms. A question in this regard is whether regional dispute settlement mechanisms can match the effectiveness and legitimacy of WTO dispute settlement in upholding deep measures. With a few exceptions, RTA dispute procedures are used relatively infrequently and can have great asymmetric power. Until now, economies have had the incentive to comply with their regional commitments in order to sign new RTAs with their major trading partners. Moreover, OECD analysis shows that RTAs have effective dispute avoidance mechanisms through the role of Committees (OECD, 2012c).

Figure 6. Enforceability of WTO-plus and –beyond commitments



Source: OECD, computed from WTO RTA dataset (2011).

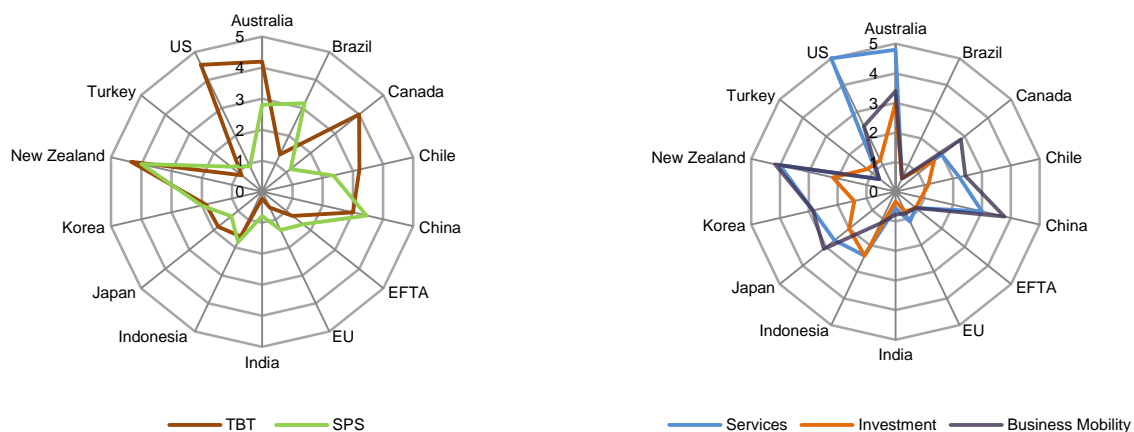
Transparency can be a lubricant for the multilateralisation of “deep measures.” The linkages between transparency and the advancement of trade negotiations have always been recognized, but acquire greater importance with the expansion of the agenda to behind-the-border measures, which can be less transparent. In effect, deeper forms of economic integration entail addressing more subtle measures and procedures which span multiple regulatory portfolios. When not only goods, but also capital and people (both supplier and consumers) cross borders, the informational intensity of trade increases. Indeed, market presence requires more information about the foreign market than (cross-border) market access. Without information on deep measures, their costs remain unknown to traders, consumers and governments, and hence, cannot be minimised through trade liberalisation. The implication is that increasing information is a necessary step to advancing multilateral negotiations. Moreover, many of these deep measures cannot simply be abolished, in the same way that a tariffs or

other quantitative barriers can, and hence the forms of addressing them focus more on procedural measures.

The OECD work in this area suggests that one of the legacies of modern RTAs may have been to inject greater levels of regulatory transparency on “deep measures” into the trading environment. Economies embarking in RTAs negotiations have not just sought to increase market access, but also, to enhance the level of transparency, predictability and trust. The studies coverings non-tariff measures across most sectors and areas examined – notably, TBT, SPS, export restrictions, government procurement, services, and investment – concur that a significant parcel of WTO-plus measures are not aimed at the removal of regulations per se, but rather, at enhancing their *ex ante* and *ex post* transparency and facilitating procedures to render them less restrictive and uncertain. Given that such regulations may reduce market imperfections, abolishing them may not lead to welfare enhancing (or trade enhancing) outcomes. This is not only confined to the availability of information, but also to promoting stakeholder participation – both domestic and foreign – in the design, application and co-ordination of those measures across various regulatory portfolios. Moreover, another set of transparency procedures is destined to making their application predictable and minimising expropriation risks (such as corruption, see Box 1).

Figure 7 shows that the average level of WTO-plus transparency requirements among OECD and other major economies that have been endorsed in their RTAs signed since 2001. The RTAs of the United States and Australia, which are among the most comprehensive in coverage of regulatory disciplines, display the highest levels of WTO-plus instruments across non-tariff measures. The averages of the RTAs of other trading partners mask the evolution towards a more widespread adoption of transparency mechanisms. There is a marked trend in the more recent agreements of several trading partners, notably those of the European Union, to include comprehensive WTO-plus transparency commitments (e.g. EU-Colombia-Peru). Moreover, economies choice of WTO-plus instrument is also motivated by their trade interests. For instance, Brazil has negotiated high levels of WTO-plus transparency for SPS issues, without going beyond multilateral transparency requirements for other types of measures. Similarly, India has deployed RTAs to strengthen transparency with respect to the movement of persons. It is also important to acknowledge that WTO-plus requirements can generate administrative costs, which may be a factor for some economies.

Figure 7. Average level of WTO-plus obligations in RTAs, selected measures



Source: OECD (2013b).

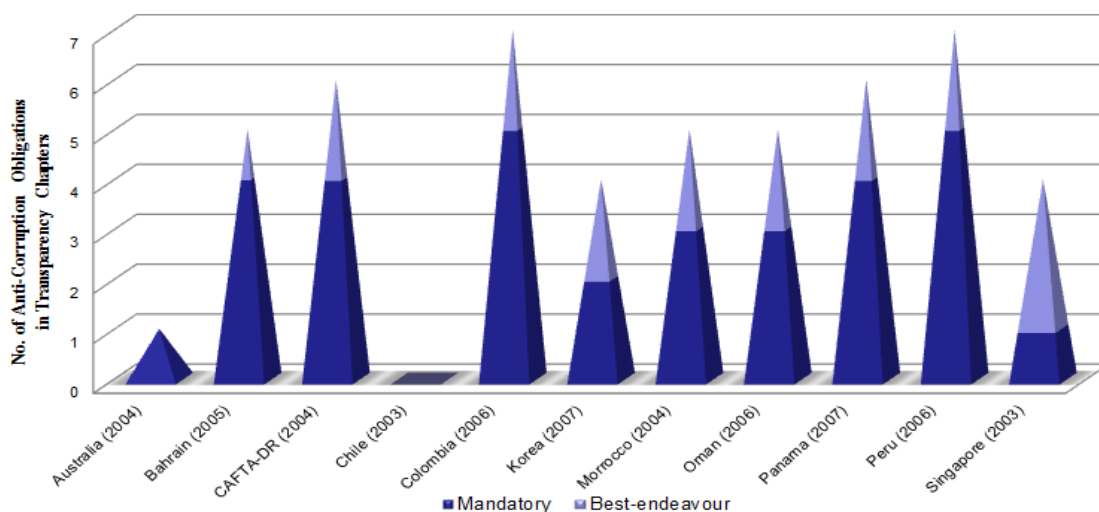
Box 1. WTO-Beyond: Anti-corruption

One of the most remarkable elements of transparency disciplines in RTAs is the incorporation of obligations to combat bribery and corruption. There is widespread recognition that problems of global corruption can impair the benefits of negotiated agreements. They distort resource allocations, undermine fair competition, and partly expropriate the gains from trading. The links between transparency and integrity are evident: reducing information asymmetries, and improving the application and accountability of measures, minimizes the opportunities for discretionary behaviour for personal gain and profit. Having mechanisms against bribery and corruption provides firms with greater confidence that they will be able to compete in foreign markets and that they will receive fair and consistent treatment from government officials and institutions. These measures do not have precedents under the agreement of the WTO (hence they are WTO-beyond).

The provisions of these RTAs obligate economies to adopt or maintain laws establishing corruption as a criminal offence. In furtherance of these obligations, economies commit to institute appropriate penalties and procedures to punish and enforce criminal measures associated with bribery and corruption. In addition, the provisions encourage the adoption of measures to protect those persons who report acts of corruption and bribery (known as “whistle-blower” rules). Finally, in the event that under the legal system of an economy, criminal responsibility is not applicable to enterprises, these provisions strive to ensure that enterprises be subject to effective, proportionate and dissuasive non-criminal sanctions, including monetary sanctions, for such offenses. Taken together, these set of obligations constitute the best practice set in international conventions of anti-corruption.

The evolution of anti-corruption illustrates how WTO-beyond measures are adopted and enhanced over time. The measure was first introduced in the RTAs of the United States and adopted by other economies. The first RTAs made minimal provisions (Australia and Chile), and were largely best-endeavor (Singapore). In a second iteration, the RTAs starting with Morocco and DR-CAFTA started to display significantly stronger commitments: for instance, each of these incorporated whistle-blower protection, first cast in hortatory language and later in the subsequent RTA with Korea, such obligation was rendered mandatory. In a similar vein, more recent RTAs introduced new measures providing for non-criminal sanctions for enterprises that cannot be punished criminally. These measures have emerged in the RTAs of Canada and other economies, being present in 40% of a sample of 120 RTAs signed since 2001.

Anti-corruption in Transparency Chapters: RTAs of the United States



Source: OECD (2013b).

5. What is the economic impact of WTO-plus measures?

The economic impact of various types of WTO-plus and WTO-beyond measures in RTAs, and the marginal benefits that would accrue to their multilateralisation, can be difficult to measure for those behind the border measures that are the kind which are larger focused on in this paper. Conventional analysis based on trade creation and trade diversion calculations are useful for analysing shallow RTAs focusing on border measures – that is, negative integration for goods – but fall short at measuring the effects of deep RTAs with positive integration. In the latter case, the standard analysis can only capture partial impacts, which may not be the most important part of the picture. In effect, many of the deep measures negotiated in RTAs are aimed at addressing market failures and creating public goods, rather than reducing trade barriers. To the extent that RTAs are successful in ameliorating a market failure or delivering a public good, the RTA will have positive externalities that will increase the productivity of both parties and non-parties to the RTA. For instance, transparency, environment, competition and many other policy areas generate positive externalities that increase the productivity of third parties. Improving institutions for investment and addressing expropriation risks, such as corruption, allows traders to fully appropriate the gains from trading. Conceptually, appraising the economic effects from deep measures on positive integration involves identifying what is the market failure addressed, and assessing if the RTA represents an optimal area for co-operation and collective action on that issue. The answer to the latter question, in turn, helps address the issue whether the marginal gains of reform would be significant through co-operation at a global (WTO) scale.

How impactful are measures related to positive and negative integration? This paper is not principally focused on this aspect, but there are a few elements that may be of some illustrative value at least. The work this note draws on undertakes two specific assessments: estimating the impact of tariff preferences (negative integration) and transparency commitments (positive integration).

In the area of agriculture, the trade weighted preference margins in a sample of RTAs involving Latin American partners is found to be relatively significant, well above preferential tariff margins for non-agricultural goods (OECD, 2014a; IADB-OECD, 2011a). In particular, North exports to South economies receive a 4.2% margin while South exports to North economies receive a margin of 15% in the sampled RTAs. An empirical analysis (OECD, 2012a) finds that the tariff preferences do matter for agricultural trade flows: trade flows are significantly increased both for pre-existing trade (intensive margin) and for new trade (extensive margin). Overall, a 1% reduction in the preferential tariff generates a 2% increase in trade relative to other suppliers, on average (OECD, 2012a). For South to South trade and South to North trade the elasticity is close to the overall average of 2, however it is much smaller at 1.34 for North to South trades. This implies that South economies are likely to benefit more in terms of increasing trade than do North economies. This is because their destination markets and products face relatively high MFN tariffs. While it is best not to generalise this result to all RTAs, previous studies on impacts of RTAs on trade tend to be consistent with these results (Simonovska and Waugh (2011); Broda and Weinstein, (2006); Kee et al. (2008) and Romalis, (2007)). When it comes to the extensive margin, assessed by the probability to export new agricultural products, the analyses shows weaker evidence: With preferential margins greater than 5% the probability for exporting new products is 1.5%. These impacts are strongest for the South-South agreements, even those without a positive preferential margin.

Box 2. Perceived effect of RTAs on Chile's fruit sector

How are RTA effects perceived by exporters – their primary beneficiaries? A case study of Chile's fruit export sector (OECD, 2012b) was used as a basis for understanding how RTAs are perceived by exporters and what their impacts might be on fruit exports. Chile's fruit sector was chosen for the study because Chile has over 22 RTAs and is one of the world's leading fruit exporters. Both an econometric analysis and a survey of exporters' perceptions of RTA efficacy were undertaken. Of course, these results should not be generalised across all agreements or even across sectors for Chile.

The econometric analysis of the impacts of tariff preferences on fruit trade found that a 1% decrease in the preferential tariff generates an increase in trade of approximately 5% compared to other suppliers. The mere presence of an agreement increases trade by about 68% and positive preferences further increase trade flows. The impact of the preferential margins on the probability to trade new products was however very weak: a margin of 10% or more increased the probability of trade in new products by only 3.5%. Thus, there may not be a substantial benefit from these preferential margins in opening new markets. Both of these results were in line with results from a survey of Chilean exporters.

How do exporters view the RTAs? Do they find they increase trade, profits or provide them with easier market access? The survey found that exporters overwhelmingly perceived RTAs as having brought trade benefits to the sector in general and to fruit exports in particular. Nearly 85% agreed that the RTAs increase trade flows in existing markets. However, only about 60% found these to open new markets. This response may reflect their market destination configuration. Nonetheless, the weaker impacts of RTAs on new markets support the econometric findings discussed above.

Interestingly, exporters found tariff preferences to have been more important in the past, but with multiple agreements they find that their preferences have been eroded. Nonetheless over 75% of exporters report utilising the preferences, even if these are not the determinant factor in export decisions. Rules of origin were not considered to be a problem for exporters except that certificates were not obtainable on the weekends. However, the processed fruit trade association noted that rules of origin were often a binding constraint for their exports due to inclusion of imported sugar content. Nearly 75% of exporters also perceived the RTAs to increase competitiveness in spite of preference erosion. Less than 60% found these agreements to increase profitability.

How are non-tariff measures, such as SPS or TBT, perceived to impact trade flows? Food safety regulations were considered to be justified even where stringent. RTAs were not considered as a means to relax regulations but rather to facilitate clarity on procedures and definitional matters. About two-thirds of the exporters found that RTAs were trade-facilitating because of the negotiation efforts by the Chilean food safety, plant and animal health authorities (SAG) to clarify and define procedures in fulfilling SPS requirements of the importing economy. In particular, RTAs were seen as accelerating authorisation processes linked to the more stringent risk analysis procedures of certain importers, notably the United States, Korea and China. Contacts among regulatory agencies through technical committees as well as ad hoc contacts have been important in resolving specific procedural issues.

While over 70% of the respondents believe that the government has been important actor in helping them access the benefits of the agreements, the trade associations were considered crucial in informing firms about the agreements and their benefits. These trade associations participate indirectly in the trade agreement negotiations through the "cuarto adjunto" or room next door. The strategy of the government of involving all players from the beginning of the negotiating process has been influential in the uptake of open markets trade policy in Chile, even if not all business demands are met.

Source: OECD (2012b).

An example of the benefits that accrue to negative integration comes from a study supplying early empirical evidence on the effects of transparency on trade flows (OECD, 2013c). While the abolition of barriers is associated with trade creation, the impact of public goods on trade is rarely estimated. A quantitative analysis in a large sample of over one hundred RTAs concludes that increasing the transparency of those measures has trade-boosting effects. The study finds that RTAs with strong transparency mechanisms appear to be more substantially trade promoting than those with less ambitious or no commitments on transparency. There is a positive empirical

relationship between transparency obligations and the level of trade. In particular, the marginal elasticity of a transparency provision in an RTAs is found to be 1.2% for non-agriculture, and 1.4% for agriculture.. This means that each additional transparency commitment negotiated in an RTA is associated with an increase in bilateral trade exceeding one per cent. Considering that comprehensive RTAs typically contain on average a dozen of such commitments, the expected increase in intra-regional trade would be of over 15 per cent. This effect accrues solely to reduced trade costs through improvements in transparency, without considering the extent of liberalization or reforms of such measures. Hence, these results suggest that economies can reasonably expect to gain from strengthening transparency procedures in their trade relations. Hence, addressing information asymmetries increases the levels of trade.

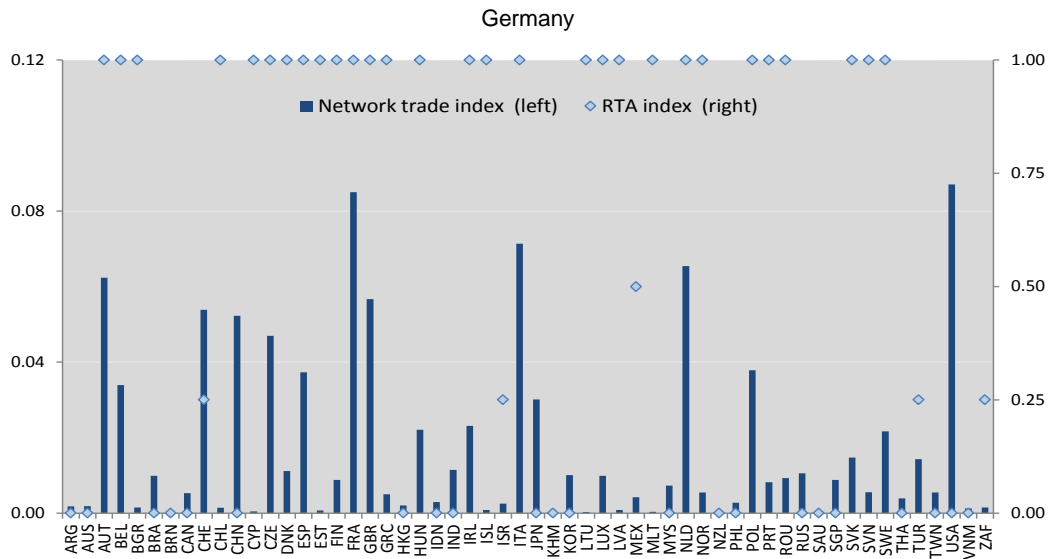
As noted, a critical element of assessing the gains of deep measures in multilateral vis-à-vis regionalism is assessing the optimal area of co-operation. One of the components of this analysis can relate to the extent to which RTAs match the diffusion of GVCs. A case study on GVCs provides evidence on the alignment between regional trade agreements and production networks, although results differ across regions. Where the “spaghetti bowl” of RTAs matches global production networks, it can be expected that RTAs are more likely to internalize negative externalities, and generate greater benefits. Yet, it is likely that in order to reap the full benefits of GVCs, deep provisions would cover the key vertical trade relationships in global trade. The analysis shows that the highest correlation coefficients exist for most European countries, some Asian economies, Canada, New Zealand and Mexico, reflecting how these economies benefit from RTAs signed with economies with which they trade the most. A different picture is observed for countries like Japan, India, China and Korea, characterised by rather low correlation values reflecting the limited number of RTAs they were involved in.

Figure 8 shows the results for three OECD countries: Germany, the United States, and Japan. The network trade index (NTI) measures the direction and intensity of economies’ network relations as suppliers and assemblers of intermediate inputs within global production networks, while the second Regional Trade Index (RTA index) provides a measure of the existence and depth of RTAs. It shows that Germany (as a representative European country) has largely all of its GVCs – except with the United States – covered by deep integration measures. The United States shows a mixed picture, given that its GVCs in the western hemisphere are covered in RTAs but those in Asia and Europe fall short of benefitting from RTA disciplines. Japan’s RTAs, by contrast, do not cover its major partners in GVCs in 2009. By 2009, Japan participated in only 11 RTAs, none of which were with its biggest trade partners. However, if ongoing negotiations in the TPP are concluded, it is likely that deep measures in RTAs will cover Japan’s main GVCs. The study, however, does not presume or determine the relationship of a causal relationship between RTAs and GVCs. It notes, however, that in some cases (e.g. China), the development of GVCs has coincided with the negotiation of RTAs with key trading partners.

Another angle that is explored in selected policy areas (services, transparency, and environment) of OECD work on RTAs relates to the domestic factors that may influence economies’ propensities to negotiate more or less WTO- or WTO-beyond commitment in RTAs. Even within the RTAs of a party, there is some variation in the level of ambition and enforceability applied in RTAs with different economies that are not explained by the level of development. Why do some economies display a higher pre-disposition to negotiate WTO-plus commitments and WTO-beyond rules than others? Apart from economic interests, there may be other considerations of a more political economy nature that may advance or hinder the adoption of a WTO-plus agenda by a wider set of economies. Similarly, the political economy, both internationally and domestically, can influence the extent to which these WTO-plus commitments are endorsed with a more preferential or multilateralisable strategic motivation in mind. Hence, these political economy factors can partially explain not just the ease at which certain WTO-plus commitments will be endorsed under a given configuration of trading partners in an RTA, but also, the likelihood with

which these kinds of WTO-plus commitments may ultimately lend themselves to bottom-up or top-down multilateralisation.

Figure 8. Network Trade Index and RTA Index for the United States, Germany and Japan^{7 8 9}



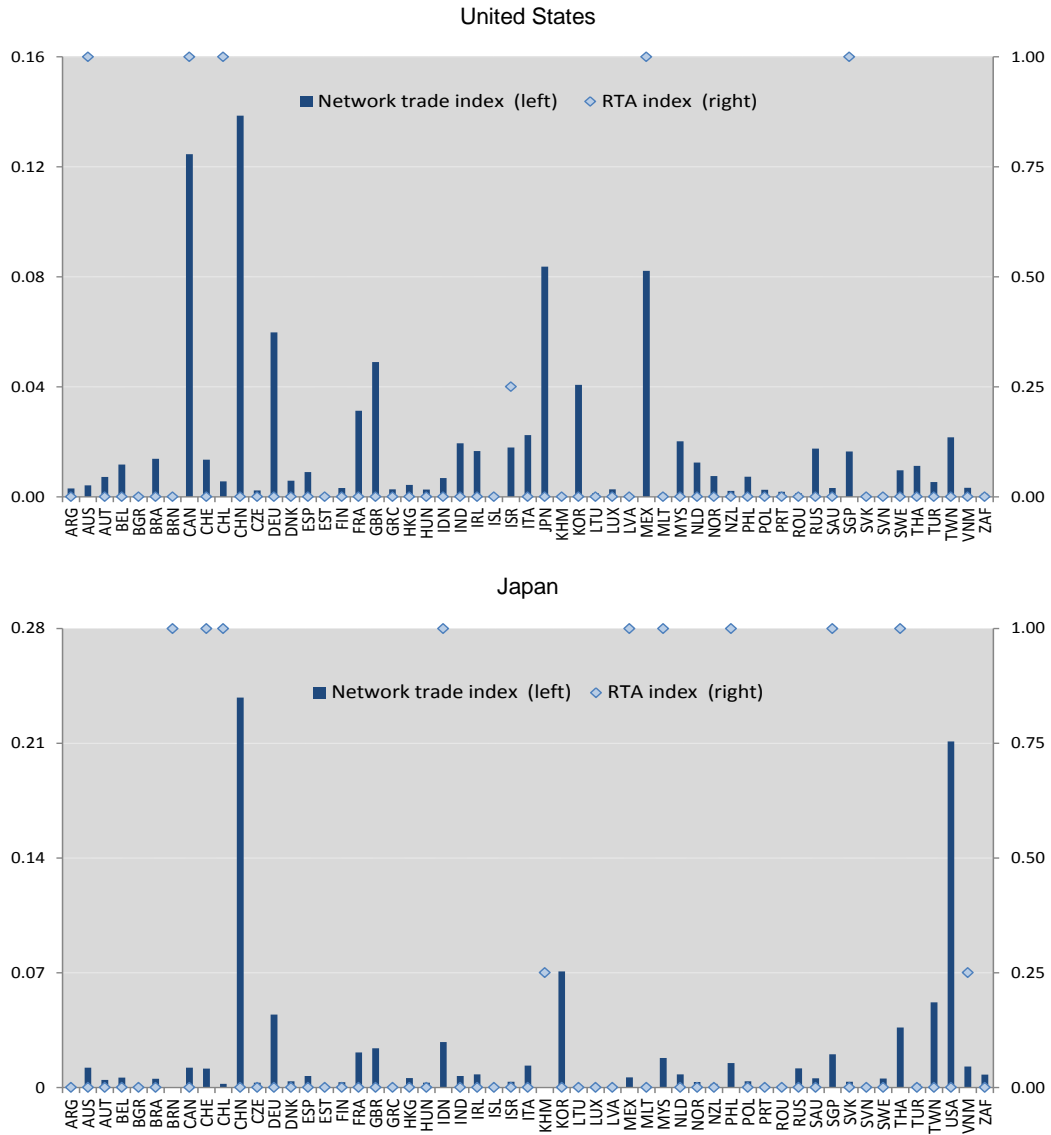
7. Note by Turkey:

The information in this document with reference to “Cyprus” relates to the southern part of the Island. There is no single authority representing both Turkish and Greek Cypriot people on the Island. Turkey recognises the Turkish Republic of Northern Cyprus (TRNC). Until a lasting and equitable solution is found within the context of the United Nations, Turkey shall preserve its position concerning the “Cyprus issue.”

8. Note by all the European Union Member States of the OECD and the European Union:

The Republic of Cyprus is recognised by all members of the United Nations with the exception of Turkey. The information in this document relates to the area under the effective control of the Government of the Republic of Cyprus.

9. The statistical data for Israel are supplied by and under the responsibility of the relevant Israeli authorities. The use of such data by the OECD is without prejudice to the status of the Golan Heights, East Jerusalem and Israeli settlements in the West Bank under the terms of international law.



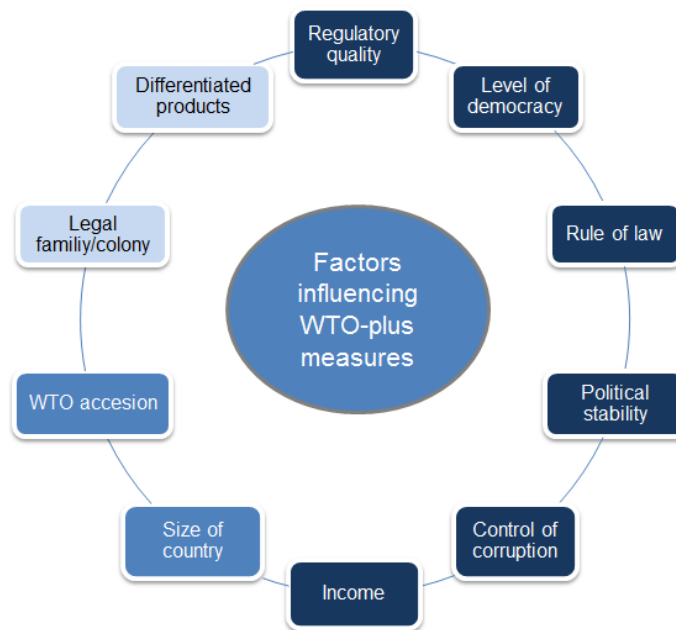
Source: OECD (2014c).

One study provides empirical evidence of the domestic determinants of WTO-plus commitments in transparency across all policy areas covered in over 120 agreements signed since 2001 (OECD, 2013c). The results suggest that economies that have relatively stronger institutional and governance capacity are more likely to embrace this agenda, which would seem to be consistent with a view that strengthening local governance and institutional capacities may facilitate a wider diffusion of transparency norms. It shows that institutional and good governance variables are significant determinants of the level of WTO-plus measures on transparency, controlling for the level of income. In particular, the regulatory quality of an economy is found to have a much larger effect than other significant variables related to governance. For instance, it is twice the magnitude of the elasticity for political stability or rule of law, which also emerge as significant. This may suggest an important link between domestic regulatory capacity and the ease at which economies are inclined to undertake deeper commitments both at regional and multilateral variables. Although this is tested only for WTO-plus transparency related commitments across the

agreement, given the regulatory intensity of deep measures, it may be more broadly important for all types of WTO-plus measures related to the deep agenda.

Another observation from this analysis that may be relevant is that if one member of an economy pair in an RTA acceded to the WTO post-1995, the RTA is more likely to include comprehensive WTO-plus coverage. Indeed, the process of acceding to the WTO entails a far-reaching exercise of transparency, often including domestic reforms that are WTO-plus. These accession efforts have positive spill-overs in subsequent efforts to negotiate comprehensive agreements. Hence, this points to synergies between economies efforts at the multilateral and regional levels.

Figure 9. Determinants of Higher WTO-plus Transparency Commitments in RTAs



Note: All variables were found to be statistically and positively significant; the variables are organized in different shares of blue according to the magnitude of coefficients, from the highest (dark blue) to the lowest (light blue).

Source: OECD (2013c).

Another study shows how the multilateral-friendliness of RTAs is also considerably influenced by the strategic motivations of economies that crafted it (OECD, 2011b). Some RTAs are deliberately designed with the multilateral system in mind, and are intended to set precedents for on-going or future negotiations. Others are more exclusively bilaterally focussed. In this context, the study performs a political economy analysis of the motivations that have helped to shape the RTAs of a selection of countries, namely Chile, Japan, the European Union and the United States. By developing and testing a series of hypotheses regarding international and domestic factors that influence regional negotiations, it explores the political economy issues underlying the negotiation of the RTAs of these countries in general, as well as the specific commitments and concessions that economies make on trade in services. In particular, it investigates the question of whether the services commitments that economies have made in their RTAs are indicative of the types of concessions they would be willing to multilateralise on either a *de facto* (by autonomously extending them to other parties) or *de jure* (by inscribing these commitments in their GATS schedules) basis. The study concludes that services provisions in the

RTAs reviewed do not necessarily create disincentives to multilateral bargaining on services, notably because these commitments offer little in the way of at least *de facto* preferential treatment.

The OECD work has also explored the domestic factors that influence the adoption of environmental provisions in RTAs (OECD, 2014b). A survey was conducted among OECD governments to explore economies' main objectives for the inclusion of environmental provisions in RTAs (OECD, 2014a). While the results cannot be considered as representing the views of all the OECD countries, they give an indication of the types of factors that are considered to be important. When asked what has prompted economies to introduce the environment in regional negotiations, most respondents considered that both NAFTA and WTO activity on trade and environment had set strong precedents triggering the inclusion of environmental provision in RTAs. Moreover, the 1992 Rio Declaration and subsequent United Nations agreements were also considered as important determinants.

Other factors, illustrated in Table 3, were identified to be drivers of these negotiations: First, most respondents indicated that civil society pressure had been fairly significant or highly significant. A majority also attached fairly high or high importance to the relative ease with which environmental issues could be addressed through RTAs compared with WTO negotiations, including faster progress, a higher level of public interest and greater opportunities for innovation. Private sector pressure was another factor considered to be fairly important by a majority of respondents. Half the respondents attached fairly high or high importance to the relative simplicity of political economy issues in RTAs compared with WTO negotiations, while half felt that this was not an important factor. Finally, consultations with OECD economies yielded that having a strong political mandate was considered of major importance in achieving a comprehensive inclusion of substantive environmental provisions in RTAs. In most cases this mandate is written into law or official policy statements; in others, however, endorsement from the Head of State may have had a similar effect.

Table 3. Factors influencing the adoption of environment in RTAs

Importance	No. of respondents			Score
	high	medium	low	
Civil society pressure (environmental NGOs etc.)	2	7	1	11
Issues can be pursued more easily in RTAs than in the WTO	3	3	4	9
Greater opportunities for innovation in RTAs	2	5	3	9
Faster progress with RTAs than in the WTO	2	4	4	8
Private sector pressure	1	6	3	8
Level of interest expressed by public & civil society is higher for RTAs	1	5	4	7
Political economy issues simpler than in the WTO	2	3	5	7

Note: score = (no. of high responses x 2) + (no. of medium responses).

Source: OECD (2014), based on response from the questionnaire to 31 OECD countries.

V. Specific provisions regarding non-parties to an RTA

1. RTA non-parties

Another practice distilled from OECD studies relate to specific provisions regarding non partners to a given RTA. These provisions are not “multilateralisable” as that has been dealt with elsewhere in the note but they are specifically oriented to a more outward-directed approach.

Moreover, they can lighten negotiating resources by allowing economies the possibility of obtaining more liberal and favourable treatment without the need of undergoing lengthy negotiations. Despite the potential benefits, the use of these mechanisms is not found to be widespread and varies considerably across agreements and policy areas. One of the devices that serves to extend the benefits of the most ambitious RTAs to more trading partners, and which can be highly liberalising, is a non-party (also referred to as a “third-party”) MFN clause. RTAs that incorporate such a clause automatically grant the “best” treatment negotiated in other RTAs with other non-Party RTAs to the original RTAs. If a party has signed (or will sign in the future) another RTA with more preferential treatment, the MFN provision with respect to “any non-party” implies that this more favourable treatment will be conferred to the parties of the initial RTA. It extends to all existing RTA partners any additional market access subsequently negotiated with another partner. If all RTAs were to include a MFN provision with respect to non-parties, the proliferation of RTAs would imply that progressively all partners in RTAs would benefit from most-favoured treatment. This type of provision has a potential for the expansion of commitments through MFN mechanisms. The more the network of RTAs expands, the more the parties of all RTAs can benefit from the “best” treatment available on a non-discriminatory basis. But in the final analysis this is, of course, a political rather than a technical matter.

The use of these MFN clauses is most frequent in investment chapters of RTAs, as well as in bilateral investment treaties (BITS). In services, they are found to be incorporated in about two-thirds of reviewed agreements. However, they remain relatively infrequent in other areas, like e-commerce, and are largely absent in others, such as government procurement. The absence of an MFN clause limits the multilateralisation potential of WTO-plus commitments, as it implies that RTA concessions remain within the RTA and are not extended to other, previous or later, partners. In variation to the non-party provision, there are other types of MFN clauses which are typified in Table 4. Notably, some RTAs embed a non-binding form of non-party MFN clause, whereby the extension of commitments is not automatic, but can be effected on the basis of requests or consultations. At the other end of the spectrum, some RTAs explicitly do not allow the extension of commitments in RTAs signed with other parties (past and/or future), thereby preventing multilateralisation.

Table 4. Typology of MFN Provisions in RTAs

Type of MFN	Potential for Multilateralisation
No MFN treatment in the RTA	Low. Commitments are not extended to other trading partners
Provision excluding extensions of MFN to other parties	Low. The provision stipulated that the benefits conferred in that RTA are not extended to other parties, preventing their propagation.
MFN treatment among parties to the RTA	Limited. The provision only ensures non-discrimination among parties to the agreement, but not with respect to third parties.
Non-binding non-party MFN treatment	Limited. The request for extension of commitments to third parties is subject to consultations and further negotiations.
Non-party MFN treatment confined to future RTAs	High. More favourable treatment in new agreements is automatically extended to parties of former agreements
Full non-party MFN treatment	Higher. More favourable treatment in any agreement, prior or future, is automatically extended to all other parties.

Source: OECD.

Another mechanism to bestow the benefits of WTO-plus measures of an RTA to non-parties is through the provision of an accession mechanism by which new members can join. Again, this is less a technical matter than it is political. Technically, for these clauses to be effective, they would need to provide general procedures and conditions on the terms of the accession. The vast majority of RTAs do not provide for clear, if any, accessions procedures. Some RTAs reflect that they are open to the accessions of new members, but do not make provision for any specific procedures: who can join and under what conditions. There is often the presumption that new members will want to join, and the details would then be negotiated, but it has proven difficult to attract new members in practice. Some RTAs are able to attract new economies during the negotiation process, such as is the case within the TPP (where new members have to obtain bilateral agreements from existing TPP 9). But, so far at least, existing RTAs rarely attract new membership after the treaty has been concluded. Another practice that is infrequent in RTAs is the provision for Observer Status, which may be able to open a pathway to eventual full membership. The importance of having clear protocols for accession in RTAs may increase with the current trend towards mega-regionals.

Finally, one common caveat that is worth highlighting in RTA accession provisions is that new membership is sometimes circumscribed to economies of the region, by the provisions of the treaty or by presumption. For instance, MERCOSUR's accession clause (Art 20 of the Treaty of Asunción) is limited to countries that are Members of the Latin American Integration Association (ALADI), which in turn, is restricted to Latin American countries under the Treaty of Montevideo. In addition, in some accession clauses the request for membership can only be made a number of years after the treaty has been in force (e.g. five years in the case of MERCOSUR). On the other hand, the NAFTA Accession Clause (Article 2204) does not have geographic restrictions for individual economies, or groups of economies. In a similar vein, the original P4 agreement between New Zealand, Brunei, Chile and Singapore envisaged in Article 20.6.1 accession by any APEC Economy or other State. Another promising example is the open clause envisioned in the Regional Comprehensive Economic Partnership (RCEP) where Article 6 of the Guiding Principles and Objectives for Negotiating provides that the RCEP agreement will contain an open accession clause to enable the participation of any ASEAN FTA partner that did not participate in the RCEP negotiations and any other external economic partners. Hence, accession is open to any economy.

2. Multilateral coherence

For RTAs to be “building blocks”, it need hardly be said that they be coherent with the commitments made under the WTO, as well as with the rules and procedures of the global trading system. This is not only circumscribed to the existing WTO agreements, but there is also the question as to how RTA's can integrate potential new obligations from ongoing negotiations as well as the recommendations of Committees and Working Groups across the WTO. Regional agreements that automatically incorporate existing and potential future WTO obligations, without the need of re-opening the RTA negotiations, and that discipline potential contradictions between the regional and multilateral fora, can help ensure coherence. In other cases, RTAs have provisions for amendment and updating of the RTA to reflect changes in the WTO, but these need to be negotiated and adhered to. Some RTAs include forum exclusion clauses can help prevent contraventions in the jurisprudence of multilateral and regional platforms, giving supremacy to the WTO Dispute Settlement Understanding. RTAs that encourage or require the use of relevant international standards can be considered to be multilateral-friendly, given that the WTO similarly promotes their adoption. This is particularly pertinent for WTO-beyond measures incorporated in RTAs, where there are no corresponding disciplines in WTO agreements, but future multilateral negotiations on the topic – if they were to be contemplated – would likely be aligned with international best practices. Table 5 illustrates some of the instruments that can help enhance RTA's coherence with the WTO system.

Among the policy areas reviewed in OECD work, the WTO-plus measures that display the strongest coherence through the use of these instruments are standards for goods and agriculture. Over three-fourths (77%) of RTAs signed since 2001 have an article on the Affirmation of the TBT Agreement, and (74%) register the same provision for the Affirmation of the SPS Agreements. These articles ensure the existing rights and obligations with respect to regional parties under the multilateral agreements. In addition, the preambles to the TBTs and SPS chapters in RTAs state that the objectives of RTA are to improve the implementation of the TBT and SPS Agreement under the WTO. Hence, WTO-plus measures are largely designed to operationalize WTO agreements, rather than to create a separate set of overlapping rules and obligations. Many RTAs have forum exclusion clauses for these policy areas, so that the WTO provides the sole interpretation and jurisprudence on these measures. In similar vein, most of these chapters include an obligation for economies to use international standards in the development of technical regulations.

One of the conclusions reached in OECD studies is that the level of coherence with RTAs is greater where WTO Committees are active. For instance, the Committees on TBT and SPS established in RTAs are sometimes explicitly charged with the obligation of following discussions in corresponding WTO Commitments and updating or amending the RTAs chapter with any decisions that emanate from WTO Committees. In this regard, the studies note a process of “regionalising multilateralism,” by which multilateral recommendations issued by WTO Committees become the basis for regional obligations. Another example is found in government procurement, where most WTO-plus templates followed in RTAs are modelled after the 2012 revised Government Procurement Act of the WTO, even while it was still under negotiation (OECD, 2013a). It may be noted that some RTAs do appear to display WTO-minus commitments that is lower degree of liberalisation than what is locked into the WTO. However, this is found in a very small share of the agreements. It may reflect that RTAs had advanced in the area before negotiations in the WTO were concluded, and the revised GPA was adopted.

Table 5. Illustrative Practices on Coherence with WTO Obligations

Instrument	Description
Objectives	The stated objective in the preamble to the RTAs chapter is to enhance and operationalize the implementation of WTO Agreements.
Affirmation of WTO Agreement	Article on Affirmation of corresponding WTO Agreement, by which RTA parties undertake to respect their existing rights and obligations under the WTO.
International Standards	Obligation that economies comply with existing international or regional standards (UN, OECD, regional such as APEC)
Periodic review and Amendment	Provision that the chapter of the RTA can be amended or updated with any development in the WTO, including decisions from a relevant Committee
Dynamic incorporation	Provisions that automatically incorporate changes and new agreements at the WTO (e.g. in pre-existing RTAs) without the need for re-negotiation.
Forum exclusion clause	Provision that states that once a matter is brought to an FTA or WTO panel, the same matter cannot be litigated another time in the other forum
Committees & Working groups	A core functions is to follow developments of WTO Committees and take steps necessary to facilitate implementation of its decisions.
Co-operation	Co-operation under the RTA is explicitly linked to the WTO by reference to a WTO obligation on technical assistance or a Committee decision.

Source: OECD.

Another area that appears of relevance for harmonization relates to competition policy between the WTO and RTAs. Finally, in the area of services, OECD analysis has also detected the phenomenon of WTO-minus, whereby some commitments are lower than those inscribed under GATS. Moreover, the alternative architectures that services and investment in RTAs have adopted may render the multilateralisation path more difficult to operationalize in practice. These differences should not represent barriers to multilateralisation, but it will require some amount of creativity to translate regionalism into multilateralism.

Table 6. Checklist of best practices for “multilateral-friendly” RTAs

	Agriculture	SPS	TBTs	Export Restrict.	Trade Facilitation	Services	Labour Mobility	E-commerce	Investment	Competition	Intellectual Property Rights	Government Procurement	Transparency	Anti-corruption	Environment
Critical Mass (OECD & non-OECD)	●	●	●	●	●	●	●	●	●	●	●	●	●	○	○
WTO coherence	●	●	●	●	●	●	●	●	●	○	●	●	●	○	●
International standards	●	●	●	NA	●	●	●	●	●	●	●	-	●	●	●
High degree of homogeneity	●	●	●	●	●	●	●	●	●	○	-	●	●	●	●
Non-discriminatory (non-excludable)	○	●	●	--	●	●	○	●	●	●	●	●	●	●	●
Liberal ROO or lack of ROO	○	●	●	NA	--	●	○	●	●	●	●	○	●	●	●
Third-party MFN or extension benefits	--	--	--	--	NA	●	○	●	●	NA	NA	○	NA	NA	NA
Mandatory (not best-endeavour)	●	●	●	●	●	●	●	●	●	●	●	●	●	●	○
Enforceable via regional dispute mechanism	●	○	○	○	●	●	○	○	●	○	○	○	●	●	○
Co-operation on implementation	--	●	●	--	●	--	○	--	--	--	--	--	●	●	●
Economic impact	●	--	--	--	--	--	●	--	●	--	--	--	●	--	●
Political economy	--	--	--	--	--	●	--	--	--	--	--	--	●	--	○

Note: ● High, ○ good and ○ limited potential for multilateralisation. “NA” denotes not applicable, and “--” not assessed in OECD work.

VI. Concluding remarks

There has never been a conclusive answer as to whether RTAs are building or stumbling blocks for the WTO at the most general level. At a more modest and technical level, the OECD work that this note draws upon does suggest that certain areas of WTO-plus and WTO-beyond measures in modern RTAs are in fact applied in a non-discriminatory manner, allowing greater market access and competition even for non-members. Moreover, they can create public goods which yield positive externalities that benefit businesses and governments worldwide. In addition, RTAs have developed alternative architecture to WTO agreements, which call for creative efforts and flexible approaches to mainstream regionalism into multilateralism.

Of course, there have been and remain, elements of RTAs that are inherently and resolutely preferential, albeit that they are not the primary focus of this note and the studies it is based upon. And even in the services area, MRAs represent an example of where preferences can indeed exist in “behind the border” areas. It is still to be seen whether, in the regulatory area more broadly, there will yet prove to be emergence of strong preference.

Beyond that, not all measures identified in this OECD work may be feasible, to multilateralise. When it comes to regulatory issues, there is not always a “one size fits all.” In other measures geography matters, and a regional approach may be appropriate. Yet, for many other policy areas there can be little doubt that the main economic advantages to participants in RTAs would be even greater if deeper integration were carried out more symmetrically and harmoniously on a wider scale. Some issues cannot be internalized within a small group of economies, and will require broader co-operation than the collective action represented by RTA parties. Other areas have network externalities, and the benefits that accrue to endorsing a particular standard will be multiplied as more Members of the WTO adopt such measures.

The main thrust of this note has been to look for “technically feasible” possibilities for multilateralisation. It has rested, essentially, on a rather simple premise: given that a wide array of WTO Member economies have already implemented these reforms with their key trading partners, the marginal cost of extending to other WTO Members on an MFN basis is low. Of course, it remains to be seen whether this “technical feasibility” (if correctly diagnosed) can in fact be turned into “political feasibility”. Indeed, it would be even more important to underline that, in the end, it is political feasibility that matters. While we have used the “technical feasibility” tool, it is not meant to be some kind of instrument for hard and fast separation of domains. There is in fact no reason to doubt that other domains than those examined here can also become subject to “multilateralisation” with the right kind of political will. “Technical feasibility” in this note is not meant to imply that everything else is not technically feasible. Rather the way to look at it is perhaps as down one end of a continuum.

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