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TBT PROVISIONS IN REGIONAL TRADE AGREEMENTS:  
TO WHAT EXTENT DO THEY GO BEYOND THE WTO TBT AGREEMENT?

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WTO

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## **TBT PROVISIONS IN REGIONAL TRADE AGREEMENTS: TO WHAT EXTENT DO THEY GO BEYOND THE WTO TBT AGREEMENT?**

Ana Cristina Molina<sup>\*α</sup>  
Vira Khoroshavina<sup>γ</sup>

**Abstract:** This paper investigates whether TBT provisions included in RTAs differ from those under the WTO TBT Agreement, and, if they do, whether they entail broader commitments. Our analysis covers 238 RTAs, of which 171 include at least one provision, and focuses on the provisions on technical regulations, conformity assessment procedures, transparency, dispute settlement, marking and labelling and sector-specific commitments. We find that all RTAs signed since 2010 systematically include TBT provisions and that the most frequent provisions are those referring to the TBT Agreement and transparency. Moreover, even if there are RTAs that include new or broader commitments than the TBT Agreement, our study shows that their number remains very limited. For instance, relatively few RTAs have included provisions to better implement WTO provisions in the area of transparency or provisions requiring the equivalence or harmonization of technical regulations among the parties or even the recognition of conformity assessment results. RTAs with a dispute settlement provision that applies exclusively to TBT issues are also very few. These RTAs give in general exclusive jurisdiction to the WTO DSM over TBT related disputes. Finally, also only a minority of RTAs include provisions on new issues such as marking and labelling or sector-specific provisions, typically for electric and electronic products, pharmaceuticals or vehicles.

**Keywords:** Regional Trade Agreements, non-tariff barriers, TBT.

**JEL classifications:** F13, F15

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## 1. INTRODUCTION

Technical barriers to trade (TBT) have been the object of considerable – and growing – attention over the past ten years. The interest is notably reflected in a surge in the number of specific trade concerns raised in the WTO TBT Committee since 2005 which rose from 128 to 453 in 2014<sup>1</sup>, as well as – as shown in this paper – in the systematic inclusion of TBT provisions in regional trade agreements (RTAs).<sup>2</sup>

The proliferation of RTAs has raised concerns about their potential effect on the multilateral system. One of the many debates has centred around TBT provisions included in RTAs, in particular whether they differ from the WTO TBT Agreement, and, if they do, whether they entail broader commitments. The literature on TBT provisions in RTAs is very scant. All the studies have focused on a relatively small sample of RTAs and concluded that most of their TBT provisions tend to converge with, and support, the multilateral trading system. For instance, Piermartini and Budetta conducted a first study in 2006 based on 73 RTAs. They found that among the 58 RTAs that contain TBT provisions, 30 make reference to the TBT Agreement and, in particular, 21 reaffirm their rights and obligations under the TBT Agreement. Based on the frequency of provisions, they also conclude that RTAs in their sample tend to favour the harmonization of standards and technical regulations over equivalence, as well as mutual recognition for conformity assessment procedures. They also examine TBT provisions related to transparency requirements, institutional frameworks and cooperation. Building on this seminal study, Lesser (2007) expanded the sample of RTAs to 82. A number of other studies focus only on the RTAs of a limited number of countries. For instance, L. Ti Ting (2012) analyses the coverage of TBT provisions in selected RTAs concluded by the EU, US, Australia and Singapore, (50 RTAs in total), and concludes also that these RTAs converge towards and complement the existing disciplines in the TBT Agreement.

Compared to previous studies, the present analysis differs in two major ways. First, it covers 238 RTAs. Second, it focuses on the evolution of the TBT provisions included in RTAs and on the differences (if any) with the TBT Agreement for the provisions regarding: technical regulations, conformity assessment procedures, transparency, dispute settlement, marking and labelling and sector-specific issues; the last two being topics that are either only briefly mentioned in the TBT Agreement or absent.

Although the examined TBT provisions in RTAs vary in their scope and depth depending on the issue, our analysis shows that the differences between TBT provisions in RTAs and the TBT Agreement are very limited, and that in many cases they have emerged only in recent years. We find that the most frequent TBT provisions in RTAs are those referring to the TBT Agreement and transparency, and that in general only a minority of RTAs include TBT provisions that go beyond the TBT Agreement. For instance, some RTAs have included provisions to better implement WTO provisions in the area of transparency or provisions requiring the equivalence or harmonization of technical regulations among the parties or even the recognition of conformity assessment results. Only a minority of RTAs also include provisions on new issues such as marking and labelling or sector-specific provisions, typically for electric and electronic products, pharmaceuticals or vehicles.

## 2. DATA

Our study reviews the TBT provisions contained in RTAs, taking as a benchmark the provisions in the TBT Agreement, and contrary to previous studies focus on the differences. The analysis covers 238 RTAs that is all RTAs in force and notified to the WTO as of December 2014, with a few exceptions;<sup>3</sup> and is based on the texts of these RTAs.<sup>4</sup> When available, protocols, annexes, side

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<sup>1</sup> This figure includes only new trade concerns (WTO Document G/TBT/36, 23 February 2015 and WTO TBT Information Management System, <http://tbtims.wto.org/Default.aspx?Lang=0>).

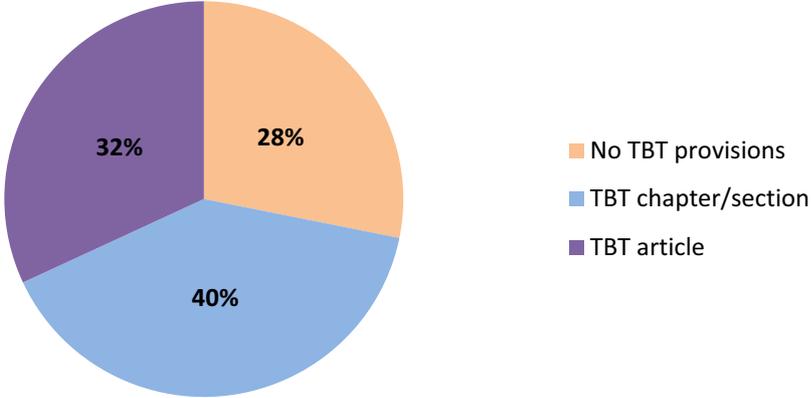
<sup>2</sup> Throughout this paper, we follow the WTO terminology and use the term RTAs to refer to reciprocal preferential trade agreements. Similarly we use the term TBT to refer to standards, technical regulations and conformity assessment procedures.

<sup>3</sup> In total there were 12 RTAs that were not included, because among other reasons, they have been superseded by subsequent RTAs, they have limited scope or because they involved a complex legal structure which could lead to misleading conclusions regarding the inclusion of TBT provisions, as well their scope and depth. This group of RTAs include: the Global System of Trade Preferences among Developing Countries (GSTP), the Latin American Integration Association (LAIA), Protocol on Trade Negotiations (PTN), EU – Overseas Countries and Territories (OCT), European Economic Area (EEA), and the Dominican Republic - Central America Free Trade Agreement.

<sup>4</sup> Annex 1 present the list of all RTAs included in the study.

letters, or any other legal instrument incorporated into the agreement after its signature have also been considered. Of these RTAs, 72 per cent (or 171 RTAs), contain TBT provisions (Figure 7.1), which can take the form of a chapter/section or an article. These RTAs will be the main focus of our study.

**Figure 1: RTAs with TBT provisions**



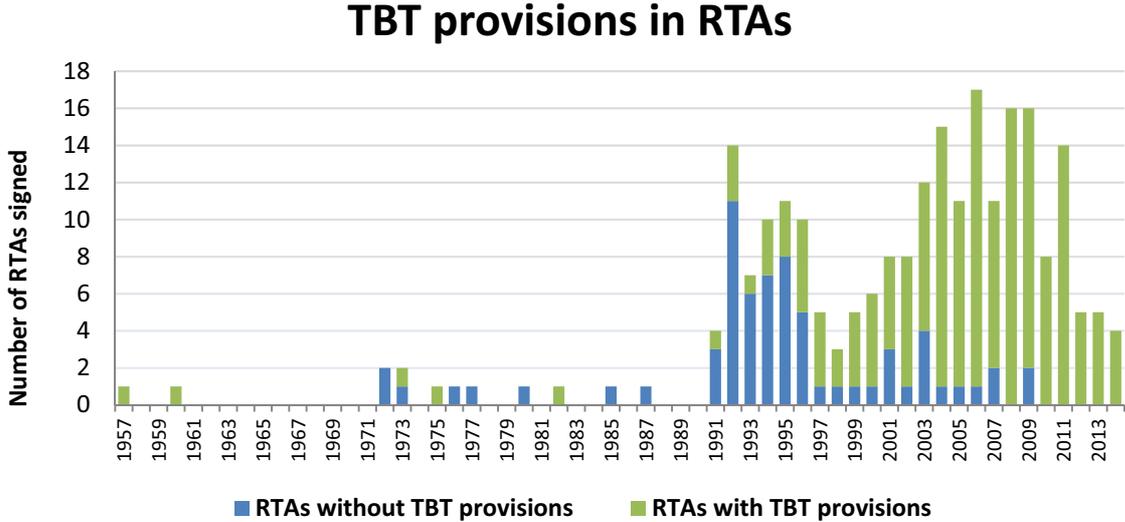
There are two limitations that must be borne in mind when interpreting the results of this study. First, our analysis does not allow us to assess the actual implementation of the TBT provisions under examination as our main source of information is the legal texts of the agreements. Second, our analysis does not take into account other types of agreements that may regulate TBT issues among the parties such as mutual recognition agreements or arrangements, unless they are part of the RTA.

**3. EVOLUTION OF TBT PROVISIONS IN RTAS**

With the increasing importance of TBT measures, the content of RTAs has also evolved over the years. Of the 238 RTAs included in this study, about 72 per cent contain provisions on TBTs. But it is only recently that the inclusion of TBT provisions has become almost systematic (Chart 2). Prior to the creation of the WTO in 1995, RTAs that included TBT provisions were rare and the content of these provisions was very limited in scope. It is only after the creation of the WTO and the entry into force of the WTO TBT Agreement that the inclusion of TBT provisions in RTAs increased significantly to become systematic after 2009.<sup>5</sup>

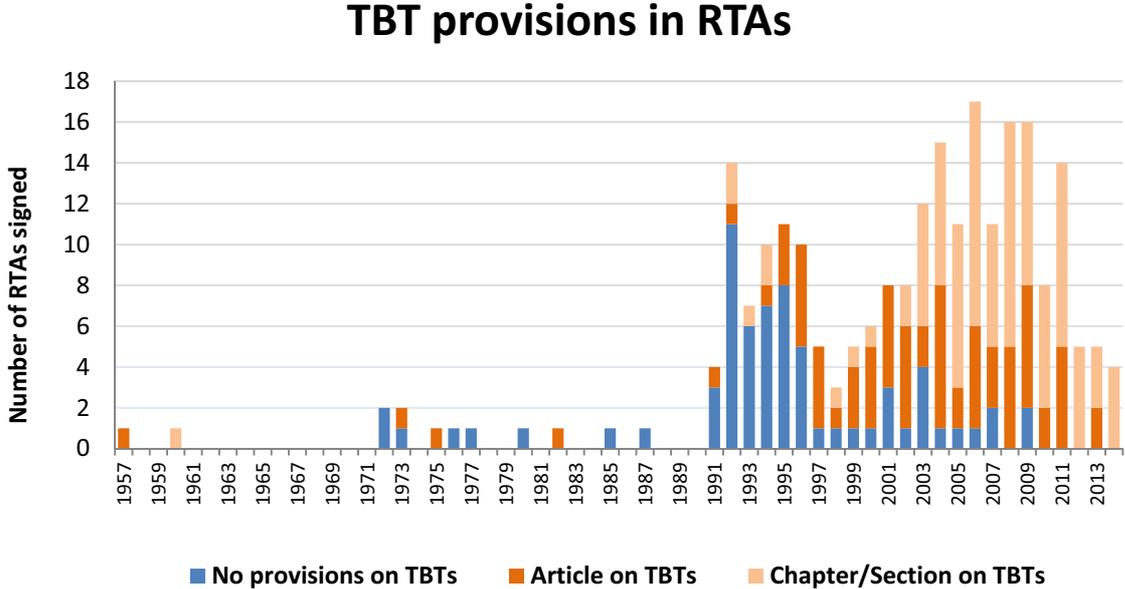
<sup>5</sup> Indeed, all the agreements (36 RTAs) signed after 2009 include provisions on TBTs.

**Figure 2: RTAs signed and in force with and without TBT provisions**



The structure and content of these provisions has also evolved. Until 2002, the vast majority of RTAs included single articles on TBT (Chart 3).<sup>6</sup> Since 2003, the trend has reversed with on average 72 per cent of the agreements signed each year with TBT provisions have these organised under a chapter/section, rather than single articles.<sup>7</sup> This dramatic evolution shows the increasing importance that countries have been attributing to TBT issues since 2003.

**Figure 3: RTAs signed and in force with and without TBT provisions**



TBT chapters or sections consist in general of a larger number of articles, which in certain cases can be more detailed than the provisions in the TBT Agreement. But they can also simply reproduce or mirror the provisions in the TBT Agreement. Therefore, the inclusion of a chapter on TBT should not be used as proxy to characterize the "depth" of TBT provisions in the agreement. As we will show later, depending on the issue, although language may differ and provisions may be more detailed than those in the TBT Agreement, there are only very few RTAs with commitments

<sup>6</sup> It is worth noting that single articles could consist on more than one provision/paragraph.

<sup>7</sup> It is worth noting that of the 95 RTAs with a TBT section or chapter, 76 have a chapter that refers exclusively to TBTs, as opposed to cases where one chapter groups TBT and SPS articles.

that go beyond the TBT Agreement and may have important implications for the trade relationships between the parties.

In terms of coverage, most of the chapters/sections or articles on RTAs include provisions applying to at least the same measures as the TBT Agreement, namely standards, technical regulations and conformity assessment procedures (Table 1). Overall, RTAs with this type of coverage account for 88 per cent (or 150 RTAs) of all RTAs. Of these agreements, 40 also cover metrology, with some of them also covering authorization procedures to sell a good in a market. These RTAs involve mainly Latin American countries, the US and the EU. Only 8 per cent of the RTAs with a TBT provision have a more limited coverage than that of the TBT Agreement, as they apply either only to technical regulations, conformity procedures, technical regulations and conformity assessment procedures or technical regulations and standards. Finally, in the definitions for standards and technical regulations used in RTAs, only a minority (6 RTAs) specify that they also cover services.<sup>8</sup>

**Table 1: RTAs with TBT provisions**

Provision covered	TBT Chapter/Section	TBT Article	Total	Percent
standards, technical regulations and conformity assessment procedures	66	44	110	64.3
standards, technical regulations, conformity assessment procedures and metrology	16	12	28	16.4
standards, technical regulations, conformity assessment procedures, metrology and authorization procedures	7	5	12	7.0
technical regulations and conformity assessment procedures	1	1	2	1.2
technical regulations and standards	0	8	8	4.7
conformity assessment procedures	3	0	3	1.8
technical regulations	1	0	1	0.6
not specified	1	6	7 <sup>a</sup>	4.1

a In one of these 7 RTAs, the parties specified that the TBT Agreement governs their trade relationship.  
 Note: When the coverage in the text of the RTA was not clearly indicated, the coverage was determined based on the reference to standards, technical regulations, conformity assessment, metrology or authorization procedures made in the provisions.

Source: Authors' calculations based on the information contained in the WTO RTA database

RTAs that do not include provisions on TBT include mainly agreements concluded by India, China and Japan during 2001-2009 and most RTAs signed during 1995-2000 by the former Commonwealth of Independent States (CIS). Older agreements (signed prior to 1995) with no provisions on TBT involved mainly agreements involving the CIS countries, as well as some RTAs involving the EU and the US.

#### 4. TBT PROVISIONS IN RTAs: SELECTED TOPICS

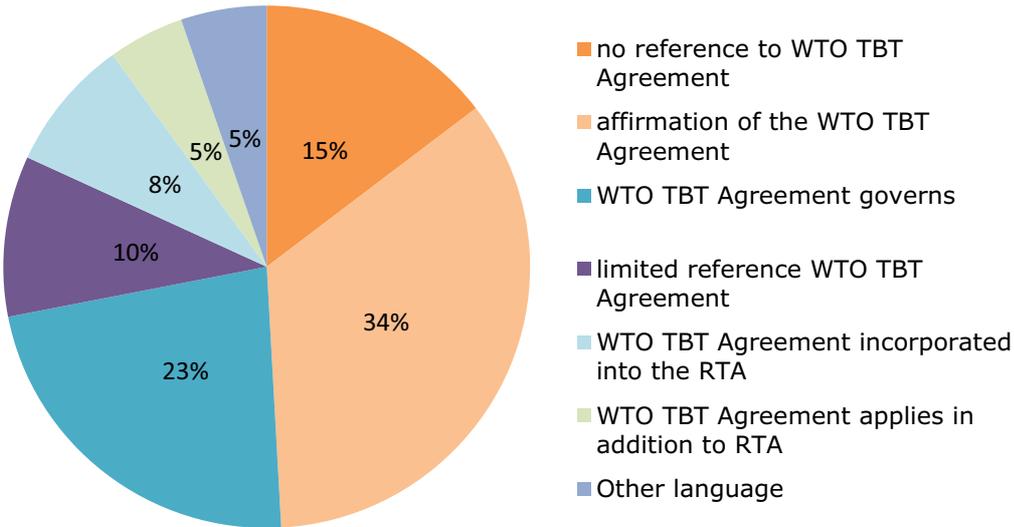
##### 4.1. Reference to the TBT Agreement in RTAs

Among the 171 RTAs with TBT provisions, the vast majority (85 per cent) refer to the TBT Agreement<sup>9</sup>, thus showing the willingness of the parties to not undermine the TBT Agreement, but rather complement it. This is the TBT provision with the highest frequency in RTAs, and although it tends to confirm the application of the TBT Agreement, the language used varies across agreements (Chart 4). The distinction is important as it can also give an indication on how detailed the other TBT provisions are in the agreement. Yet, it is important to note that even if an agreement does not explicitly refer to the TBT Agreement, WTO members continue to be bound by the latter.

<sup>8</sup> Chile - Central America, Panama - Central America, Mexico - Uruguay, Chile - Mexico, Colombia - Mexico and North American Free Trade Agreement (NAFTA).

<sup>9</sup> For RTAs with TBT provisions that make no reference to the WTO agreement, TBT provisions are organized in one article and do not include a chapter/section on RTAs, except for two cases (COMESA and EFTA).

**Figure 4: RTAs with TBT provisions and reference to the TBT Agreement**



The language most frequently used by the parties is to affirm their rights and obligations under the TBT Agreement (34 per cent of RTAs with TBT provisions). For another 23 per cent, the parties indicate specifically that TBT issues are to be governed by the TBT Agreement and in 8 per cent the TBT Agreement is incorporated into and made part of the RTA.<sup>10</sup> In 10 per cent of RTAs, the parties affirm, incorporate into or refer only to certain provisions of the TBT Agreement, such as notifications and consultations. In the remaining RTAs, the parties indicate that the TBT Agreement applies in addition to the RTA or use other language to indicate their commitment to apply the TBT Agreement.<sup>11</sup>

In a few cases the parties agree to use the TBT Agreement even when the RTA involves non-WTO members. For instance, in the agreement between EFTA and Serbia, the parties specify that TBT issues are governed by the TBT Agreement, which implies that even though Serbia is not a WTO Member yet, it is already bound by the principles set out in the TBT Agreement.<sup>12</sup> Similarly, in EU-Cameroon, the parties expand the rights and obligations under the TBT Agreement also to non-WTO members.<sup>13</sup> The role of this provision is probably to anticipate the potential accession of other countries which were not members of the WTO when the RTA was negotiated, such as Serbia or Montenegro, the latter becoming a WTO member in 2014.

The provision referring to the TBT Agreement has also evolved over time (Chart 5). All the agreements with TBT provisions signed since 2010 make reference to the TBT Agreement, which reflect countries' increasing awareness of preserving coherence between RTAs and the multilateral trading system. Here, the main strategies applied by the parties are to affirm their rights and obligations under the TBT Agreement, to incorporate the TBT Agreement into the RTA or to specify that the TBT Agreement governs any TBT issues between the parties.

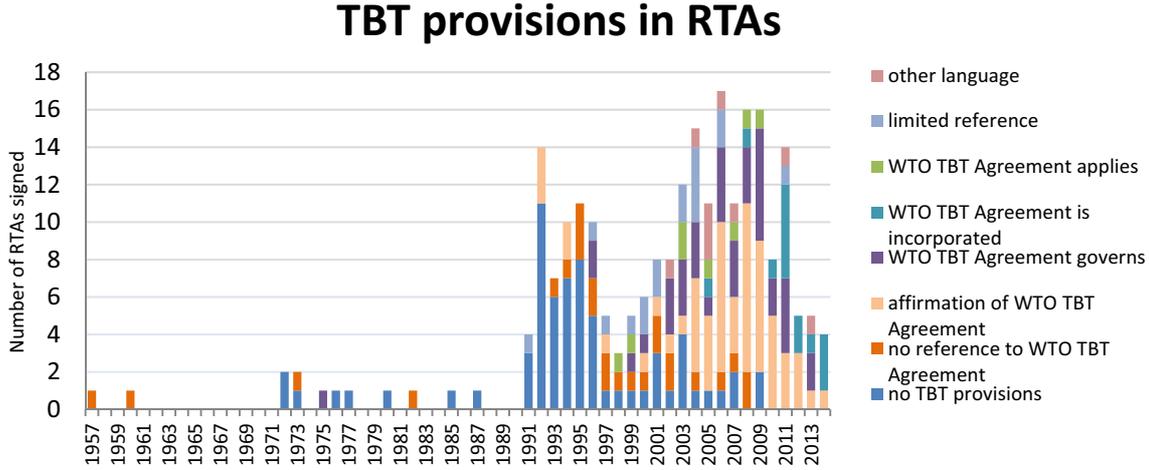
<sup>10</sup> Some of the agreements that incorporate the TBT Agreement into their text, also reaffirm the WTO TBT Agreement or indicate that TBT issues are governed by it.

<sup>11</sup> For instance, certain RTAs specify that the RTA should not affect the rights and obligations under the WTO TBT Agreement, or that the latter should guide the application of TBT measures.

<sup>12</sup> Article 13 of the Free Trade Agreement between the EFTA States and the Republic of Serbia.

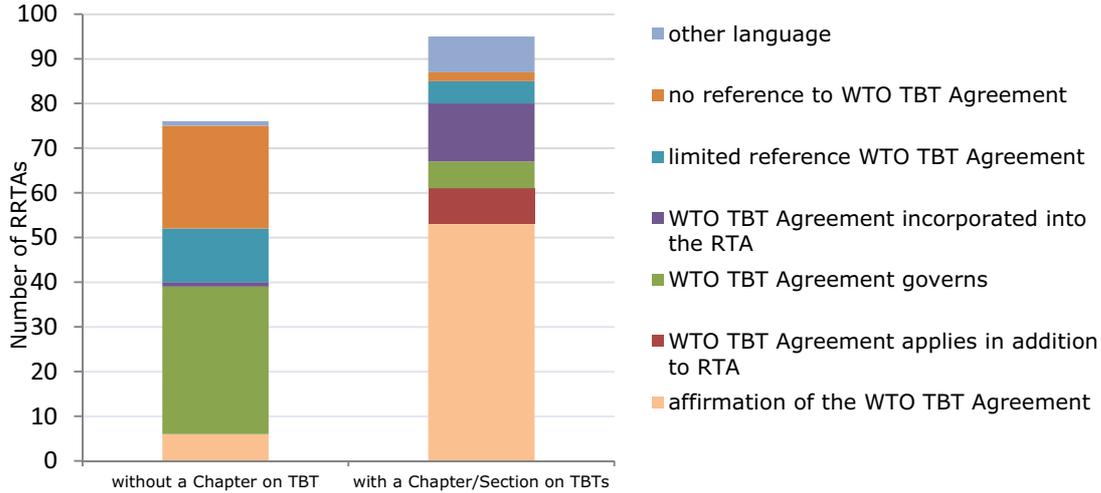
<sup>13</sup> Article 41 of Interim Agreement with a view to an Economic Partnership Agreement between the European Community and its member States, of the one part, and the Central Africa Party, of the other part (2009).

**Figure 5: Reference to the TBT Agreement over time**



The language used can usually provide an indication of the structure of the RTA, as well as of the template and level of detail of TBT provisions. In fact, all but two RTAs that include a Chapter on TBT (95 RTAs), make reference to the TBT Agreement. In more than half of the cases, the language used affirms the parties’ rights and obligations under the TBT Agreement (Chart 6). Of the 76 RTAs where provisions on TBT are organized under an article – in general with very few provisions – more than half (34 RTAs) indicate that their agreements are governed by the TBT Agreement<sup>14</sup> or re-affirm the TBT Agreement (6 RTAs). In addition, these RTAs include provisions under the same article referring mainly to cooperation in this area. This is the case for instance of most of the Agreements signed by EFTA members, and in general for agreements concluded by Turkey. Of the remaining agreements, 23 make no explicit reference to the TBT agreement (mainly EU agreements, e.g. EU-Algeria); and in 12 RTAs, reference is very limited. Finally, in one RTA, which was signed prior to 1995, the parties agree that the GATT Agreement on TBT<sup>15</sup> should guide the application of TBT measures.

**Figure 6: Reference to the TBT Agreement in RTAs**



It is therefore clear that in the vast majority of RTAs and in particular all the recent ones ("new-generation" agreements), there is a clear attitude towards reinforcing the commitments made under the TBT Agreement by including an explicit reference to it.

<sup>14</sup> Of these RTAs, one also incorporates the TBT Agreement in its text.

<sup>15</sup> This agreement, also known as the "Standards Code" – a plurilateral Tokyo Round Agreement (1979), was the basis for the WTO Agreement on TBT that was signed in 1995.

## 4.2. Technical regulations in RTAs: harmonization and equivalence

Technical regulations, as well as conformity assessment procedures can be complex and differ across markets, which can deter trade and/or impose significant costs for exporters. These effects can be even magnified as nowadays goods cross many borders before reaching final consumers and global value chains continue to proliferate. In order to mitigate these effects, governments can resort to harmonization and acceptance of equivalence of these rules. Both tools can act as catalysts for trade and are mentioned in the TBT Agreement and in some RTAs. In the following subsections and in the section on transparency below, we assess whether the commitments in RTAs with respect to the harmonization and equivalence of technical regulations and the harmonization and recognition of conformity assessment procedures differ from and are broader under the TBT Agreement.<sup>16</sup>

The TBT Agreement promotes regulatory harmonization by requiring that members use relevant international standards, guides or recommendations as a basis for their standards, technical regulations, conformity assessment procedures, except when such international standards are ineffective or inappropriate to achieve their legitimate goals (Articles 2.4, 5.4 and Annex 3, paragraph F of the TBT Agreement). Since harmonization requires a common legislative framework, which in practice may not be achievable or desirable for valid reasons, the TBT Agreement also encourages equivalence as a complementary approach to technical harmonization. In particular, WTO members are encouraged to accept as equivalent the technical regulations of other members, and shall ensure to accept when possible the results of conformity assessment conducted in the territory of other members (Articles 2.7 and 6.1).<sup>17</sup> Compared to these provisions, RTAs commitments with respect to technical regulations can differ from and go beyond the TBT Agreement in two major ways: a) by requiring that parties harmonize among them their technical regulations; and/or b) by requiring that the parties accept as equivalent the technical regulations of the other parties. In the following sections we review each case.

### ***Harmonization and compatibility among RTAs parties***

Provisions referring to the harmonization of technical regulations among the parties are not very common in RTAs, as they appear in about 21 per cent (51 of 238) of RTAs. These provisions vary in their wording and depth, and in some cases, notably agreements concluded by the EU, they specify that the harmonization of technical regulations is to be based on the regulations of one of the parties. This does not necessarily imply a negative effect on the process of harmonization at the multilateral level if the technical regulations or standards used as the benchmark for harmonization are based on international guidelines. However, if this is not the case, replicating another's country or region TBT rules could inevitably lead to rules fragmentation and the creation of different regimes.

We distinguish three different formulations used in these provisions. In the first, the parties *commit* to harmonize or align their respective technical regulations<sup>18</sup>; in the second group, the parties *commit when possible* to harmonize technical regulations among them<sup>19</sup>; and in the third group,

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<sup>16</sup> Provisions regarding standards are not reviewed in our study as our main interest is on TBT measures that are compulsory. Moreover, regarding standards, the TBT agreement is clear as it requires that parties use international standards as a basis to develop them.

<sup>17</sup> There are 58 RTAs and 48 RTAs, which refer to the use of international standards to develop their technical regulations and conformity assessment, respectively. Of the remaining agreements with TBT provisions (113 RTAs), 89 (or 99 in the case of conformity assessment procedures) refer to the TBT agreement, (by affirming it or incorporating it) so presumably, widely accepting that technical regulations and CAP are to be based on international standards. In both cases, only 24 do not refer to the TBT agreement per se, although they may refer in other sections of the agreement to the Agreement establishing the WTO. These agreements involved mainly the EU.

<sup>18</sup> EU-Georgia (2014), EU-Moldova (2014), EU-Ukraine (2014), EC – Cameroon (2009), EC - Bosnia and Herzegovina (2008), EU – Serbia (2008), EC – Montenegro (2007), EC – Albania (2006), EC - Former Yugoslav Republic of Macedonia (2001), East African Community (EAC) (1999), EC – Turkey (1995), Common Market for Eastern and Southern Africa (COMESA) (1993), Caribbean Community and Common Market (CARICOM) (1973) and EC Treaty (1957).

<sup>19</sup> EU – Korea (2010), Panama - Central America (2008), Honduras - El Salvador and Chinese Taipei (2007), Nicaragua and Chinese Taipei (2006), Guatemala - Chinese Taipei (2005), Panama and Chinese Taipei (2003), Korea– Chile (2003), EC-Chile (2002), Chile - Central America (1999), Chile – Mexico (1998), SADC (1996), Colombia – Mexico (1994), Colombia - Northern Triangle (1994) and NAFTA (1992). In the Agreement EC-Chile: the language is slightly different as the Parties make also reference to equivalence. They

the parties *are encouraged* to harmonize their technical regulations. The latter formulation is the most frequent as almost 10 per cent of all RTAs (or 23)<sup>20</sup> uses it, it is followed by the other two formulations, each appearing in 6 per cent of RTAs (or 14).

The first group of RTAs involve mainly those concluded in recent years by the EU with candidates or potential candidates for accession to the EU (e.g. EU-Georgia or EU-Moldova), and RTAs aiming to establish a customs union (e.g. EAC, COMESA<sup>21</sup>, CARICOM and EU-Turkey<sup>22</sup>). The RTAs concluded by the EU within this category account for almost half of the agreements the EU signed during the period 2000-2014<sup>23</sup> and require that the other party gradually achieve not only conformity/approximation with the EU's technical regulations, but also with its standards, metrology, accreditation and conformity assessment procedures. In the case of customs unions, the inclusion of such a provision is not surprising. In these, the parties agree to establish a common policy for technical regulations, but do not specify whether harmonization must follow international standards or regional standards, except for COMESA, which refers to African regional standards.

In the second group of RTAs, the parties commit to make their technical regulations compatible to the extent possible, while taking into account international standards. This type of provision could therefore reinforce the commitment by the parties to use international standards to develop their rules and reach a certain level of harmonization among them. This group mainly involves agreements by Latin American countries, in particular Chile, Mexico, and Central American countries, as well as Chinese Taipei. The language used in these RTAs is identical, or very similar, to that used in the NAFTA. As the oldest agreement within this group, the NAFTA probably inspired subsequent agreements to include a provision on compatibility. Only in one case, EU-Korea, are commitments relating to harmonization sector-specific and could be considered as more stringent, as the parties must demonstrate that it would be impossible for them to harmonize their technical regulations. Under this RTA, the parties agree to harmonize regulations in the automotive sector as listed in the agreement with the corresponding United Nations Economic Commission for Europe (UN ECE) Regulations or UN Global Technical Regulations within five years from the entry into force of the Agreement, unless a party demonstrates that these international regulations would be ineffective or inappropriate to achieve their legitimate objectives. This agreement also provides for the acceptance of equivalence of certain regulations in this sector (see section below).

In the third group of RTAs, the parties are encouraged to harmonize, reduce differences or cooperate through the harmonization of their respective technical regulations, using international standards, and in certain cases using the respective legislation of the other parties. RTAs that refer explicitly to international standards as a basis for the parties' bilateral harmonization involve

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agree to "work towards compatibility and/or equivalence of their respective technical regulations, standards and conformity assessment procedures".

<sup>20</sup> EU - Central America (2012), EU - Colombia and Peru (2012), EU - Papua New Guinea / Fiji (2009), EC - Côte d'Ivoire (2008), EC - CARIFORUM (2008), Central European Free Trade Agreement (CEFTA) (2006), Japan - Malaysia (2005), India - Singapore (2005), Thailand - New Zealand (2005), Thailand - Australia (2004), Mexico - Uruguay (2003), Southern African Customs Union (SACU) (2002), Singapore - Australia (2003), EC - Lebanon (2002), EC - Algeria (2002), EC - Egypt (2001), New Zealand - Singapore (2000), EC - Jordan (1997), EC - Palestinian Authority (1997), EC - Morocco (1996), EC - Tunisia (1995), Commonwealth of Independent States (CIS) FTA (1994), Australia - New Zealand (ANZCERTA) (1982). Compared to other Custom Unions, SACU uses a language that is less stringent: "member States shall strive to harmonize product standards and technical regulations within the Common Customs Area."

<sup>21</sup> Under COMESA, the Parties agree "to evolve and apply a common policy with regard to the standardisation and quality assurance of goods produced and traded within the Common Market" (Article 112), and to "adopt African regional standards and where these are unavailable, adopt suitable international standards for products traded in the Common Market" as well as to "apply the principle of reference to standards in their national regulations, so as to facilitate the harmonisation of their technical regulations" (Article 113).

<sup>22</sup> Except for the agreement with Turkey which was signed in 1995. It is worth noting that there are a number of legal instruments that complement the initial agreement and which make any assessment difficult. However, in the initial text, Turkey agrees to incorporate into its legislation the Community instruments relating to the removal of technical barriers to trade within the five years from the entry into force of the agreement. Based on this text and on decision N 2/97 of the EC-Turkey Association Council of 4 June 1997, this agreement has been classified in the first group.

<sup>23</sup> These RTAs (10 in total) are that those that the EU has with (year of signature in parenthesis): Georgia (2014), Moldova (2014), Ukraine (2014), Serbia (2008), Cameroon (2009), Bosnia and Herzegovina (2008), Montenegro (2007), Albania (2006), Macedonia (2001) and Turkey (1995). In the case of EU-Cameroon, the language differ from the one used in the other agreements. In this case, the RTA specifies that "the Central Africa Party undertakes to harmonise the standards and other measures within the scope of this Chapter at regional level within four years of this Agreement's entry into force".

mainly Singapore, Thailand, Australia and New Zealand and account for less than half of the RTAs in this group. For the remaining agreements, the parties are to promote harmonization using European Standards. These RTAs include the Central European Free Trade Agreement (CEFTA) and the EU's RTAs with countries outside the European continent. Under CEFTA, the parties are encouraged to harmonize their technical regulations, standards, and procedures for assessment of conformity with those in the EU. In other agreements such as EU-Algeria, EU-Jordan, EU-Morocco and EU-Tunisia, the parties are encouraged to promote the use ("shall cooperate in developing the use") of European technical regulations and conformity assessment procedures. There are also other agreements by the EU which include a general provision on the approximation of laws, under which parties agree to approximate their laws, on a best endeavours basis, in the areas covered by the agreement (e.g. EU-Egypt and EU-Lebanon).

Another interesting case in this group is EU-Central America, under which Central American countries commit to promote the development of regional technical regulations, but also to adopt within five years from entry into force of this Agreement, regional (i.e. Central America) technical regulations and conformity assessment procedures that are listed in the agreement and have been prepared in accordance with international standards. Once adopted, these rules shall replace national ones in order to facilitate trade between the parties.<sup>24</sup> Provided that these regulations and procedures are based on international standards, this type of provision will also facilitate trade with non-parties and contribute to the harmonization of rules at the multilateral level.

### ***Equivalence of technical regulations***

As mentioned before, members are encouraged under the TBT Agreement to accept as equivalent the technical regulations of other members, even if they differ from their own regulations, but as long as they achieve the same policy objectives (Article 2.7). About 17 per cent (or 41 RTAs) of RTAs explicitly replicate or mirror this commitment, and only 5 per cent (or 13 RTAs) adopt a more stringent formulation, thus going beyond the TBT Agreement. Under the latter, the parties agree to accept as equivalent the technical regulations of the other party when the same policy objectives are met.<sup>25</sup> These agreements mainly involve Chinese Taipei and Latin American countries, and are to a large extent the same as those that require the parties to make compatible their TBT measures in accordance to international guidelines (see previous section). Most of the agreements in this group also specify that the importing party must, in collaboration with the exporting party, demonstrate the equivalence of its technical regulations with respect to the parties' policy objectives.

In this group, two RTAs cover specific sectors: Singapore-Australia and EU-Korea. Singapore-Australia provides for the equivalence of technical regulations only for food products. Under this Agreement, the parties shall accept a *mandatory food standard requirement*<sup>26</sup> of the other party as equivalent, even if that requirement differs from its own, or from those used by other countries trading in the same food product, if the exporting party objectively demonstrates to the importing party that its food regulations achieve the purposes of the importing party's technical regulations for food products. Under EU-Korea, in addition to the commitments made with respect to harmonization (see previous section), the parties agree to accept as equivalent the vehicles and its parts that comply with the UN ECE technical regulations that are listed in the agreement.<sup>27</sup> In practice, this means that in order to export a car to Korea, EU manufacturers do not have to modify their products if they are produced according to EU regulations. Similarly, the EU will accept in its market automobiles produced in Korea in accordance to the UN ECE listed in the agreement.

Another provision in the area of equivalence that promotes transparency, but also consistency in the application of regulations refers to the reasons for not accepting a regulation as equivalent. In 20 per cent of RTAs (or 47 RTAs), the importing party must explain, in general upon request,<sup>28</sup> the reasons for not accepting as equivalent a technical regulation of the other party.

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<sup>24</sup> Articles 129 and 305 of the Agreement establishing an Association between the European Union and Central America.

<sup>25</sup> Korea-EU, Chile - Central America, Panama - Central America, Colombia - Northern Triangle, Chile - Peru, Honduras - El Salvador and Chinese Taipei, Nicaragua and Chinese Taipei, Guatemala - Chinese Taipei, Panama and Chinese Taipei, Southern African Development Community (SADC), Colombia - Mexico, North American Free Trade Agreement (NAFTA), European Free Trade Association (EFTA).

<sup>26</sup> Sectoral Annex on food products of the Agreement Australia-Singapore. The Agreement defines "food standard" as mandatory requirement.

<sup>27</sup> It is also worth noting that under this RTA Korea recognizes the United Nations Economic Commission for Europe (UN ECE) or EU standards as the relevant international standards for this sector.

<sup>28</sup> In only two cases, we found that such explanation must be provided systematically.

### 4.3. Conformity assessment procedures: harmonization and recognition

In order to assess the extent to which RTAs differ from the TBT Agreement in the area of conformity assessment procedures, we focus on the commitments made with respect to the harmonization of conformity assessment procedures; the acceptance of equivalence of the results of conformity assessment procedures; and the conclusion of mutual recognition agreements. In the TBT Agreement, such commitments are expressed in three main Articles. Under Article 5.4, members agree to use relevant international guidelines to develop their conformity assessment procedures, except when such guides are inappropriate to achieve the Members' legitimate goal.<sup>29</sup> Under Article 6.1., members must ensure when possible that the results of conformity assessments conducted in other countries are accepted as equivalent to their own procedures. Finally, under Article 6.3, members are encouraged to enter into negotiations for the conclusion of mutual recognition agreements for the results of conformity assessment procedures. Major differences between these provisions and those under an RTA would arise if under the RTAs the parties are *required* to a) harmonize their respective conformity assessment procedures with those of the other parties; b) (unconditionally) accept as equivalent the results of conformity assessments of the other parties; and c) to conclude a mutual recognition agreement. We review each case in the following sections.

#### ***Harmonization among RTAs parties***

Under the TBT Agreement, harmonization of conformity assessment procedures is promoted through the use of international guidelines or recommendations. RTAs differ from the TBT Agreement when they require that the parties harmonize their conformity assessment procedures. The analysis shows that only 6 per cent (or 14 RTAs)<sup>30</sup> of all RTAs provide for the harmonization of conformity assessment procedures among the parties. These RTAs are the same as those that require the harmonization of technical regulations, and refer mainly to the agreements concluded by the EU with candidate countries for EU accession.<sup>31</sup> In addition to these RTAs, the EAC, COMESA, EU-Turkey also contain provisions on the harmonization of conformity assessment procedures.<sup>32</sup>

Thirteen agreements (5 per cent of all RTAs) adopt a softer approach by stating that the parties shall make compatible or harmonize their conformity assessment procedures to the extent possible or practicable. These mainly involve Asian and Latin American countries, in particular Chile.<sup>33</sup> Of these RTAs, eight also provide for the harmonization of technical regulations when possible (see section on technical regulations).<sup>34</sup>

In 21 cases, the approach is even softer than in the other two groups as the parties are only encouraged to harmonize their conformity assessment procedures or agree to cooperate to promote their harmonization. The majority of these RTAs (19) are the same as those that promote the harmonization of technical regulations (section 4.2.1).<sup>35</sup>

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<sup>29</sup> Such exceptions must be explained upon request.

<sup>30</sup> Includes EU Treaty

<sup>31</sup> Georgia (2014), Moldova (2014), Ukraine (2014), Cameroon (2009), Bosnia and Herzegovina (2008), Serbia (2008), Montenegro (2007), Albania (2006) and Macedonia (2001). In the case of EC-Cameroon, the requirements refer to the harmonization of conformity assessment procedures among the Parties in the African region." Indeed Article 46 of this agreement indicates that "The Central Africa Party undertakes to harmonise the standards and other measures within the scope of this Chapter at regional level within four years of this Agreement's entry into force".

<sup>32</sup> We do not take into account the EU as it is the agreement with the deepest integration.

<sup>33</sup> Panama - Central America (2008), Pakistan - Malaysia (2007), Chile - Colombia (2006), Chile - Peru (2006), Thailand - New Zealand (2005), Thailand - Australia (2004), Korea - Chile (2003), EC - Chile (2002), Chile - Central America (1999), Chile - Mexico (1998), Colombia - Northern Triangle (1994), Colombia - Mexico (1994), North American Free Trade Agreement (NAFTA) (1992).

<sup>34</sup> Chile - Central America, Panama - Central America, Colombia - Northern Triangle, Korea - Chile, EC - Chile, Chile - Mexico, Colombia - Mexico and North American Free Trade Agreement (NAFTA).

<sup>35</sup> EU - Central America (2012), EU - Colombia and Peru (2012), EU - Papua New Guinea / Fiji (2009), EC - Côte d'Ivoire (2008), EC - CARIFORUM (2008), Central European Free Trade Agreement (CEFTA) (2006), Japan - Malaysia (2005), India - Singapore (2005), Mexico - Uruguay (2003), EC - Lebanon (2002), EC - Algeria (2002), EC - Egypt (2001), New Zealand - Singapore (2000), EC - Jordan (1997), EC - Palestinian Authority (1997), Southern African Development Community (SADC) (1996), EC - Morocco (1996), EC - Israel (1995), EC - Tunisia (1995), Commonwealth of Independent States (CIS) FTA (1994) and Australia - New Zealand (ANZCERTA) (1982).

## **Recognition of conformity assessment results**

Compared to Article 6.1 of the TBT Agreement, only 5 per cent (11) of all RTAs<sup>36</sup> include a provision that makes broader commitments.<sup>37</sup> In particular, the parties under these RTAs agree to mutually recognize the results of conformity assessment conducted in the territory of the other parties (i.e. mutual recognition).<sup>38</sup> In practice, this means that exports from the parties can be tested and certified without duplicative testing or certification by the other party, and vice versa. By eliminating the duplication of testing and certification, exporters not only reduce their costs but also reduce the time to export. All but four RTAs providing for the mutual recognition of results were signed after 2000 and involve mainly agreements in the Asia-Pacific region, in particular Japan and Singapore, and typically cover electric and electronic products which reflects the importance of this industry in the region.<sup>39</sup>

In the case, for instance, of Japan's agreements with Singapore (2002), the Philippines (2006), and Thailand (2007), the parties commit to accept the results of conformity assessment procedures for electrical products that are conducted by the registered/accredited conformity assessment bodies of the exporting party. In addition to electrical goods, the agreement between Japan and Singapore also covers telecommunications and radio equipment. These three agreements also include provisions on the registration or designation of conformity assessment bodies.<sup>40</sup>

In the case of Singapore, the TBT provisions in the RTAs with Korea, India, New Zealand and Australia provide for the mutual recognition of results for electrical and electronic products, telecommunications equipment, but also food products.<sup>41</sup> Under Singapore-New Zealand and Singapore-Korea, the parties agree to accept the results of conformity assessment procedures conducted by accredited (or designated) conformity assessment bodies for electric and electronic equipment. In the case of Singapore-India, mutual recognition applies also to telecommunications equipment. This RTA also provides for the conclusion of conformity assessment arrangements between the parties for food products so that the importing party recognises conformity assessment certificates issued by the conformity assessment body of the exporting party. Under Singapore-Australia, the parties also agree to conclude conformity assessment arrangements for food products in order to achieve the mutual recognition of conformity assessment results.<sup>42</sup> The Agreement makes also reference to the MRA between the two countries which covers medicinal products (its manufacturing process), electrical and electronic equipment, and telecommunications equipment.

Another example is the EFTA-Turkey RTA. Although the original text does not contain provisions in this regard, the agreement was modified in 2009 to add a protocol on Mutual Recognition of Conformity Assessment of Products in which the parties agree to mutually accept the results of conformity assessment procedures carried out by conformity assessment bodies notified or

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<sup>36</sup> Japan – Thailand (2007), Japan – Philippines (2006), Korea – Singapore (2005), India – Singapore (2005), Singapore – Australia (2003), Japan – Singapore (2002), New Zealand – Singapore (2000), Common Market for Eastern and Southern Africa (COMESA) (1993), ASEAN Free Trade Area (AFTA) (1992), EFTA – Turkey (1991), EC Treaty (1957). In the case of COMESA, the Parties agree to adopt common rules and procedures for the mutual recognition of each other's' national certification marks, as well as certification and laboratory accreditation schemes. They also agree to implement a harmonised scheme for the certification of goods and for the accreditation of laboratories used for the evaluation of goods produced and traded in the Common Market (Article 115). Parties must also encourage "inter-laboratory comparison testing and mutual recognition of each other's' accredited laboratories" (Article 117).

<sup>37</sup> Overall there are 41 RTAs that include provisions that explicitly refer to the recognition of conformity assessment results, but only these 11 make broader commitments.

<sup>38</sup> This commitment goes also beyond Article 6.3 of the TBT Agreement which encourages members to enter into negotiations with the aim to agree to mutually recognize their conformity assessment results. It is also worth noting that the fact that there are no provisions on equivalence in an agreement, it does not mean that there are no other legal instruments such as MRAs regulating the recognition of conformity assessment results.

<sup>39</sup> Date of signature in parenthesis: Japan – Thailand (2007); Japan – Philippines (2006); Singapore – Korea (2005); Singapore - India (2005); Singapore – Australia (2003); Singapore – Japan (2002); Singapore - New Zealand (2000); Common Market for Eastern and Southern Africa (COMESA) (1993); ASEAN Free Trade Area (AFTA) (1992); EFTA – Turkey (1991) and EC Treaty (1957).

<sup>40</sup> For instance in Japan-Thailand and Japan-Philippines, the importing country's relevant authority can designate or accredited the CABs located in the exporting country in accordance with the legislation of the importing country, instead of those of the exporting country. With this system the importing country does not need to learn laws and regulations of the other party.

<sup>41</sup> Singapore-Korea; Singapore-India; Singapore-Japan, Singapore-New Zealand

<sup>42</sup> Indeed, such arrangements must ensure that food products exported by a Party that meet the food standards of the exporting Party are accepted as equivalent by the importing Party.

accepted under the EEA Agreement, the EU-Swiss MRA or the EU-Turkey Customs Union. The other agreements (excluding the EU) that include a commitment on the recognition of conformity assessment results are COMESA and ASEAN.<sup>43</sup>

In addition to the RTAs that provide for the mutual recognition of results, 10 per cent of RTAs (23 RTAs) use a language that mirrors to a large extent the commitments made under Article 6.1 of the TBT Agreement, as the parties commit to recognize the results of conformity assessment procedures whenever possible or to the extent practicable.<sup>44</sup> Finally, in another 3 per cent (or 7 RTAs), the parties agree to "promote", "give positive consideration" or use their best endeavours to accept the results/tests of the other party.<sup>45</sup>

With respect to MRAs, 3 per cent of all RTAs (7 RTAs) provide for the conclusion of this type of agreement<sup>46</sup>, while 26 per cent of RTAs (or 61 RTAs) encourage the parties to conclude one. In addition, in 15 per cent of RTAs (or 35 RTAs), the parties need to explain the reasons, in general upon request, for not concluding an MRA.

Finally, we also found that about 19 per cent of RTAs (or 45 RTAs) specify that a party must explain, upon request, the reasons for not accepting the results of a conformity assessment conducted in the territory of the other party. Only in a very few cases, do the parties agree to explain these reasons systematically.<sup>47</sup> This provision which promotes transparency is not explicitly indicated in the TBT Agreement, whose provisions in this respect are more general. Indeed under the TBT Agreement WTO members must ensure that the results of conformity assessment are transmitted to the applicant *in a precise and complete manner* (Article 5.2.2) and that a procedure to review complaints regarding a conformity assessment procedure is in place (Article 5.2.8). The majority of the RTAs with this provision do not specify the parties' strategy with respect to the acceptance of conformity assessment results.<sup>48</sup>

#### 4.4. Transparency

Transparency is one of the key principles of the TBT Agreement, and also one of the more frequent types of TBT provisions found in RTAs. About half (121) of all RTAs contain at least one related provision. The main mechanism to enhance transparency under the TBT Agreement is its notification system, and in the case of RTAs some make explicit reference to this system and introduce new or more detailed provisions. In particular, we have identified five main types of provisions included in RTAs that, in addition to being more detailed, tend to complement and reinforce WTO Members' obligations under the TBT Agreement, thus enhancing transparency. Between 2 per cent and 21 per cent of all RTAs contain at least one of these provisions, and although there are not widely used yet and are relatively new in some cases, in principle they should be easy to "multilateralise". Below, we first present the WTO notification system and then describe these provisions.

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<sup>43</sup> In ASEAN Free Trade Agreement (goods, 2009) makes also reference to the MRA between the parties. Under the RTA, the parties shall accept the results of conformity assessment issued by conformity assessment bodies designated by other parties in accordance with the ASEAN Framework Agreement on Mutual Recognition Arrangements and the provisions of the respective ASEAN Sectoral Mutual Recognition Arrangements in all regulated areas.

<sup>44</sup> Switzerland- China (2013), New Zealand and Chinese Taipei (2013), Mexico - Central America (2011), EFTA - Montenegro (2011), Peru - Korea (2011), EFTA - Serbia (2009), Japan - Switzerland (2009), Panama - Central America (2008), Honduras - El Salvador and Chinese Taipei (2007), Nicaragua and Chinese Taipei (2006), Japan - Malaysia (2005), Guatemala - Chinese Taipei (2005), Thailand - New Zealand (2005), Thailand - Australia (2004), Panama and Chinese Taipei (2003), Korea - Chile (2003), Chile - Central America (1999), Chile - Mexico (1998), EC - Turkey (1995), Colombia - Northern Triangle (1994), Colombia - Mexico (1994), North American Free Trade Agreement (NAFTA) (1992) and European Free Trade Association (EFTA) (1960).

<sup>45</sup> Costa Rica - Singapore (2010), Peru - Mexico (2011), India - Malaysia (2011), ASEAN - Australia - New Zealand (2009), China - Singapore (2008), East African Community (EAC) (1999), Australia - New Zealand (ANZCERTA) (1982).

<sup>46</sup> EU-Ukraine (2014), India - Malaysia (2011), Korea - India (2009), Central European Free Trade Agreement (CEFTA) (2006), Russian Federation - Serbia (2000), Japan - Malaysia (2005), Canada - Chile (1996).

<sup>47</sup> Mexico - Central America (2011), Mexico- Peru (2011), and EC Treaty (1957).

<sup>48</sup> There are 33 RTAs that do not specify any commitment with respect to the acceptance of conformity assessment results.

## **WTO TBT notification system**

Under the TBT Agreement, WTO members must notify to the WTO Secretariat the draft technical regulations and conformity assessment procedures that may have a significant effect on trade and that are not in accordance with relevant international standards (Articles 2.9, 2.10, 3.2, 5.6, 5.7 and 7.2).<sup>49</sup> Notifications must take place at an early stage so that third parties can provide written comments and amendments to the legal text can still be made. The time to submit comments is not clearly specified in the TBT Agreement, but the TBT Committee recommends (at least) 60 days.<sup>50</sup> Moreover, the Member notifying must not only take third-party comments into account, but upon request also discuss them with the interested parties. In addition to the provisions on notifications, WTO Members are also required to publish technical regulations, conformity assessment procedures and standards (Annex 3, paragraphs J and O) and to allow for a reasonable period of time between the publication and the entry into force of the measure. According to the Doha Ministerial Decision on implementation-related issues<sup>51</sup> and the decisions of the TBT Committee<sup>52</sup>, in the case of technical regulations (Article 2.12), this transition period should be not less than 6 months, except when a measure needs to be implemented immediately or when this would be ineffective in fulfilling the legitimate objectives pursued. The TBT Committee further recommends that members should provide when possible a transition period of more than six months. Finally, members commit to establish enquiry points (Article 10.1) and a notification authority (Article 10.10).<sup>53</sup>

## **TBT notification system under RTAs**

Some RTAs include provisions on notifications based on those of the TBT Agreement, but in certain cases they have made them more detailed or even introduced some novelties. We have identified five main ways in which TBT provisions in RTAs differ from those under the TBT Agreement.

### *Provisions specifying the relationship between the notification under the TBT Agreement and the RTA*

Sixteen percent (39) of all RTAs indicate that a party must notify its proposed measure to the other parties *at the same time* as it notifies WTO Members.<sup>54</sup> The notification must be sent electronically to the other parties through the enquiry point established under the TBT Agreement. By including this provision, the parties ensure that WTO Members as well as their partners are informed at the same time, and that neither WTO Members nor RTAs partners are at a disadvantage. This type of provision is relatively new, as it is included in RTAs signed mainly after 2004 (34 RTAs) and involving mainly Chile, Peru and the US.<sup>55</sup> The rest either mirror the TBT agreement or do not make any particular reference. No RTA specifies that its parties must be notified before or after WTO Members.

### *Provisions specifying the type of measures that must be notified*

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<sup>49</sup> There are transparency and publication requirements for standards, too, but they are included in the TBT Agreement's Code of Good Practice (Annex 3).

<sup>50</sup> Decisions and recommendations adopted by the Committee on Technical Barriers to Trade, WTO Document G/TBT/1/Rev.12 of 21 January 2015.

<sup>51</sup> Doha Ministerial Decision on Implementation-related issues and concerns (paragraph 5.2), WTO Document, WT/MIN(01)/17, 20 November 2001.

<sup>52</sup> Decision and recommendations adopted by the Committee on Technical Barriers to Trade, WTO Document, G/TBT/1/Rev.12, 21 January 2015.

<sup>53</sup> Ibid.

<sup>54</sup> Korea – Australia (2014), New Zealand-Chinese Taipei (2013), Hong Kong, China – Chile (2012), Korea – Turkey (2012), EU – Colombia and Peru (2012), Mexico – Central America (2011), Japan – Peru (2011), Costa Rica – Peru (2011), Panama – Peru (2011), Peru – Mexico (2011), Peru – Korea (2011), Chile – Malaysia (2010), China – Costa Rica (2010), Hong Kong, China – New Zealand (2010), New Zealand – Malaysia (2009), Turkey – Chile (2009), Peru – China (2009), Canada – Colombia (2008), Australia – Chile (2008), Canada – Peru (2008), Peru – Singapore (2008), China – New Zealand (2008), Korea – US (2007), US – Panama (2007), Chile – Colombia (2006), Pakistan – China (2006), US – Colombia (2006), Chile – Peru (2006), Panama – Chile (2006), US – Peru (2006), US – Oman (2006), Chile – China (2005), US – Bahrain (2005), Trans-Pacific Strategic Economic Partnership (2005), Dominican Republic – Central America – United States Free Trade Agreement (CAFTA-DR) (2004), US – Morocco (2004), US – Australia (2004), US – Chile (2003), and Colombia – Northern Triangle (1994).

<sup>55</sup> In the case of NAFTA (not included in the 39), the notification to the other Parties shall take place no later than the notification made to non-governmental persons in general or the relevant sector in its territory. In Colombia-Mexico, the notification to the other parties must take place before its entry into force and not later than the notification made to its nationals.

In 5 per cent (13) of all RTAs<sup>56</sup>, the parties agree to notify all proposed measures (conformity assessment procedures or technical regulations), including those that match international standards. These RTAs involve mainly Colombia, Peru and the US. In general these provisions apply to both notifications of technical regulations and conformity assessment procedures, with some exceptions.

*Provisions specifying a deadline for comments on the drafts of proposed technical regulations and conformity assessment procedures*

In 21 per cent (51) of all RTAs, the parties agree that the time to submit comments must be at least 60 days, which reinforces the recommendation made by the TBT Committee. However, this provision could eventually have a discriminatory effect if the parties under an RTA apply this provision between them, but do not follow the recommendation of the Committee *vis-à-vis* third parties.

It is also worth noting that the beginning and end of the period for comments varies across the 51 RTAs, which could influence the effective period available to provide comments. We identify three groups. In the first group, the period for comment starts from the date the party notifies the measure to the other parties. This group consists of 42 RTAs<sup>57</sup> and includes all the RTAs with a provision on the timing for notifying WTO Members and RTA parties, except for one.<sup>58</sup> In the second group, the period for comment must be at least 60 days before the adoption of the measure or its entry into force. This is the case for 6 RTAs, including NAFTA<sup>59</sup>, EFTA<sup>60</sup> and agreements by Chinese Taipei. In the last group of RTAs (3 RTAs)<sup>61</sup>, the parties agree that the time to submit comments must be at least 60 days without specifying the beginning or end of the period for comments, unlike the other two groups.

Finally, in 22 of the 51 RTAs that specify the length of the period to submit comments, the RTA provides for the possibility of an extension of this period.

*Provision requiring the publication of the answers to comments from third parties*

There are 25 RTAs (or 11 per cent of all RTAs) that specify that the answers (or a summary) to significant comments have to be made available publically. Among these RTAs, the majority (18) specify that the answers must be published no later than the date of publication of the final version of the measure in question. The remaining RTAs specify that the answers are to be published no later than or at the same time than the publication of the measure. All 25 RTAs also specify that the period to submit comments must be at least 60 days (see point above).

Although less frequent, some RTAs include provisions that specify that the parties must explain the reasons for not accepting the comments.<sup>62</sup>

*Provisions specifying the period of time between the publication/adoption of a technical regulation and conformity assessment procedures and their entry into force.*

In the TBT Agreement, the time between the publication of all technical regulations and conformity assessment procedures that have been adopted and their entry into force is not clearly defined and is referred to as "a reasonable interval" (Articles 2.12 and 5.9). Yet, according to the Doha Ministerial Implementation Decision and the TBT Committee Decision, this period must be at least six months in the case of technical regulations. In general, RTAs do not provide for a more

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<sup>56</sup> EU - Colombia and Peru (2012), Peru - Panama (2011), Peru - Mexico (2011), Peru - Korea (2011), Canada - Colombia (2008), Canada - Peru (2008), US - Korea (2007), Peru - Singapore (2008), Chile - Colombia (2006), Chile - Peru (2006), US - Peru (2006), US - Colombia (2006) and NAFTA (1994).

<sup>57</sup> In two cases (Turkey- Chile and Singapore-Costa Rica), Parties shall allow for at least 60 days after it transmits the draft to the other Party, but provides allows for exceptions.

<sup>58</sup> The RTA that does not include such provision is Pakistan-China.

<sup>59</sup> The NAFTA indicates that "each Party proposing to adopt or modify a technical regulation shall at least 60 days prior to the adoption or modification of the measure, other than a law, publish a notice and notify in writing the other Parties of the proposed measure in such a manner as to enable interested persons to become acquainted with the proposed measure". In the case of perishable goods, it is 30 days (Article 909).

<sup>60</sup> In the case of EFTA, the provision refers only to CAP and for EU-Korea and NAFTA, the provision refers only to technical regulations.

<sup>61</sup> Mexico - Central America, China - Costa Rica, China - Singapore

<sup>62</sup> For example: China-New Zealand

stringent commitment in this respect. Only five agreements<sup>63</sup> specify the length of this transition period and all follow the Doha Ministerial and TBT Committee decisions. However, of these RTAs, four specify that this commitment applies to both technical regulations and conformity assessment procedures. There are also a minority of RTAs (10 RTAs), all signed after 2007, that provide for the possibility of extension of this transition period.<sup>64</sup>

#### *Other provisions*

In addition, 19 per cent (46) of all RTAs include specific provisions on the exchange of information; 36 of these RTAs further specify that a party has the obligation to respond to any enquiry from another party on standards, technical regulations and conformity assessment procedures. A further 34 RTAs also specify a deadline to provide the answers, for instance within 30 or 60 days (13 RTAs)<sup>65</sup>, or 60 days when possible (8), while other RTAs use more vague language such as "respond expeditiously" (2 RTAs) and "within a reasonable period" (11 RTAs).

#### **4.5. Resolution of TBT disputes**

All RTAs with TBT provisions also contain provisions on dispute settlement. Thus, RTA parties which are also WTO Members can in principle resort to either the dispute settlement mechanism (DSM) of the RTA or that of the WTO, provided that the disputed TBT issue is covered by both the RTA and the WTO. Such overlaps could undermine both the WTO and RTA DSMs if the parties have recourse to them simultaneously or subsequently and DSMs reach different rulings. To avoid a conflict of jurisdiction, the parties to an RTA can specify which DSM must apply. Such strategy can apply to all topics covered by an RTA or be specific to TBT related disputes.

We find that only a minority (22 RTAs) of these RTAs have a dispute settlement provision that applies exclusively to TBT issues<sup>66</sup> and gives (except for one case) in principle exclusive jurisdiction to the WTO DSM over TBT related disputes. The scope and formulation used in these provisions varies across RTAs. The wording can be more or less explicit and refer to the WTO DSM as the single mechanism to resolve TBT disputes or simply specify that the RTA DSM does not apply to TBT disputes, thus implying that for issues that are also covered by the TBT Agreement, the parties can have recourse only to the WTO DSM. As for the scope, the exclusion from the RTA DSM jurisdiction applies in general to all TBT provisions included in the agreement, except in a very few cases.

To express the exclusion of TBT issues from the application of the RTA DSM, in about half of the cases, the parties indicate that the Chapter on dispute settlement *shall not apply* to the provisions in the TBT Chapter. Therefore in order to resolve a disputes relating to TBT issues covered by both the RTA and the WTO Agreements, the parties can only have recourse to the WTO DSM. This is the strategy followed for instance by Japan: all except two of its notified RTAs, include this type of provision. In other agreements such as Korea-Australia or Panama-Singapore, the parties agree that they *shall not have recourse* to the RTA DSM in the case of TBT-related disputes, while in other agreements like Canada-Costa Rica or Honduras-El Salvador-Chinese Taipei, the parties are more explicit and indicate that they *shall have recourse* to the WTO DSM in the case of TBT issues. A few agreements (e.g. EFTA-Chile and EFTA-Mexico) indicate explicitly that the RTA DSM *shall not apply* to disputes related to the parties' rights and obligations under the TBT Agreement.

In two agreements (Chile-Australia and EFTA-Canada), the scope of the exclusion is more limited, as it applies only to disputes related to technical regulations. Therefore, all other TBT disputes covered by RTA shall be resolved under the general Chapter on dispute settlement, which in these

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<sup>63</sup> All involving Peru (Costa Rica – Peru, EU - Colombia and Peru, Panama – Peru and Peru – Singapore), except for one RTA (ASEAN FTA). In the case of the ASEAN FTA, the length of the transition period between publication and entry into force is specified only for technical regulations.

<sup>64</sup> EU - Central America (2012), EU - Colombia and Peru (2012), Costa Rica - Peru (2011), Panama – Peru (2011), Peru - Korea (2011), EU - Korea (2010), EFTA – Peru (2010), Peru – China (2009), Canada - Colombia (2008) and Canada – Peru (2008).

<sup>65</sup> In three cases, the language is best endeavour.

<sup>66</sup> Korea – Australia (2014), Japan – Peru (2011), India – Japan (2011), EFTA – Serbia (2009), Korea – India (2009), Japan – Switzerland (2009), Japan - Viet Nam (2008), Australia – Chile (2008), ASEAN – Japan (2008), EFTA – Canada (2008), Honduras - El Salvador and Chinese Taipei (2007), Chile – Japan (2007), Panama – Singapore (2006), Japan – Malaysia (2005), Japan – Mexico (2004), US – Australia (2004), EFTA – Chile (2003), Canada - Costa Rica (2001), EFTA – Mexico (2000), Israel – Mexico (2000), EU – Mexico (1997) and the Joint Committee Decision No 2/2000 of 26 June 2000 and NAFTA (1992).

cases provides for a choice of forum at the discretion of the complaining party for any issue covered by the RTA and WTO Agreement.

Finally, an interesting provision included only in one agreement – NAFTA – gives the responding party the right to request that a TBT dispute<sup>67</sup> be considered only under the NAFTA DSM.<sup>68</sup> If the complaining party has already initiated a dispute under the WTO's DSU, upon receipt of the responding request<sup>69</sup>, it shall withdraw from participation in these proceedings, and may initiate the dispute under the RTA DSM. Once the forum has been selected, it shall be used to the exclusion of the other.<sup>70</sup>

For the rest of the agreements with a TBT provision (149 RTAs), the general provisions on dispute settlement apply. About half of these agreements (79 RTAs) include a provision on the choice of forum, allowing an RTA party to select between the WTO DSM or the RTA DSM to resolve a dispute arising under both the RTA and the TBT Agreement, but once a party has initiated proceedings under one mechanism, the latter must be used at the exclusion of the other. These forums can therefore not be used simultaneously or subsequently, thus ensuring that no conflict arises between the RTA and WTO DSM. In general, the decision on the forum to use belongs to the complaining party; in very few cases agreements are silent in this regard or require consensus between the parties. Finally, the remaining agreements do not include a clear strategy to avoid a conflict of jurisdiction when a claim regarding the breach of an obligation under both the RTA and the WTO arises.<sup>71</sup>

## 5. TBT PROVISIONS IN RTAs: NEW TOPICS

We now turn to two topics – marking and labeling and sector-specific provisions – that have become more frequent in RTAs in recent years and that are not explicitly covered in the TBT Agreement.

### 5.1. Marking and labelling

Marking and labelling are mentioned only very briefly in the TBT Agreement<sup>72</sup> and despite the great benefits that simplification, harmonization or recognition in these two areas would bring, their reference in RTAs is relatively new and very limited.

Our analysis shows that only 4 per cent (9) of all RTAs include provisions on mandatory marking and labelling.<sup>73</sup> All were signed after 2009 and involve mainly agreements concluded by the EU and by Asian countries. The first agreement notified to the WTO to include provisions on marking and labelling was EU-Korea signed in 2010, which indeed is considered to be the most ambitious agreement the EU has signed so far.<sup>74</sup> Among the eight agreements signed subsequently, some mirror to a large extent this agreement. These provisions are not sector-specific, except in three cases where they are specific to textiles and clothing.

In all these agreements (except in China-Switzerland), the parties agree that they will endeavour to minimise their requirements for marking or labelling relevant to consumers, and to ensure that the requirement is not more trade restrictive than necessary. Five RTAs<sup>75</sup> include a provision that specifies that a party may determine the form of labelling or marking, but shall not require the

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<sup>67</sup> These are disputes arising under Chapter 9 (Standards-related measures) that: a) concern "a measure adopted or maintained by a Party to protect its human, animal or plant life or health or to protect its environment" and b) "raise factual issues concerning the environment, health, safety, or conservation, including directly related scientific matters".

<sup>68</sup> Article 2005(4) of the NAFTA. It is also worth that the agreement does not envisage the possibility that the complaining party reject the request of the responding party.

<sup>69</sup> The request should be submitted within 15 days of the initiation of the proceedings.

<sup>70</sup> Article 2005(6) of the NAFTA.

<sup>71</sup> A few RTAs in this group prohibit only simultaneous proceedings in both forums, but allow subsequent proceeding regarding the same measure in the other forum once the first proceeding has ended.

<sup>72</sup> "Marking and labelling are mentioned in the definitions of "standards" and "technical regulations" (Annex 1 of the TBT Agreement).

<sup>73</sup> EU-Georgia (2014), EU-Moldova (2014), EU-Ukraine (2014), Korea – Australia (2014), Switzerland-China (2013), EU - Central America (2012), EU - Colombia and Peru (2012), India – Malaysia (2011) and EU – Korea (2010).

<sup>74</sup> The EU-Korea Free Trade Agreement in practice (2011), European Commission-Trade, viewed at [http://trade.ec.europa.eu/doclib/docs/2011/october/tradoc\\_148303.pdf](http://trade.ec.europa.eu/doclib/docs/2011/october/tradoc_148303.pdf).

<sup>75</sup> EU - Central America, EU - Colombia and Peru, EU - Korea, EU-Ukraine, EU-Georgia.

approval, registration or certification of labels as a precondition for sale, unless there is a risk to human, animal or plant health or life, the environment or national safety. In certain RTAs<sup>76</sup>, the parties reserve their rights to require the information on a label or marks in a specific language, while other RTAs<sup>77</sup> specify that the parties shall permit information in other languages in addition to the language required in the country of destination. RTAs allowing for other languages on labels (except for one) also encourage the parties to accept labels that are non-permanent or removable rather than physically attached to the product if possible.<sup>78</sup>

Other provisions included in four RTAs<sup>79</sup> provide that when the registration and identification of economic operators are required, a party shall issue the identification number to the other party's economic operators without delays and on a non-discriminatory basis. In three cases<sup>80</sup>, the parties agree to promote harmonization or develop common labelling. Finally, only two RTAs (EU-Central America and India-Malaysia) also allow that labelling and corrections to labelling take place in the country of destination prior to the commercialisation of the goods. EU-Central America also allows the parties to establish requirements on the physical characteristics or design of a label when products can represent a risk to human, animal or plant health or life, the environment, or national safety.

In terms of coverage, the provisions on marking and labelling in these RTAs are not product specific, except in the case of Switzerland-China, EU-Central America and EU-Peru and Colombia. Provisions in these three agreements cover textiles and clothing, and in the latter two cases, they also cover footwear and include general provisions on marking and labelling. The inclusion of such provisions is not surprising given the importance of the textiles industry in Central America and China. The three agreements include provisions regarding the type of information required in the case of mandatory labels or marks. In the case of China-Switzerland, the information required is to be limited to the size, fibre content and care instructions of the product. The agreement also provides for notification obligations in case other information is required. In the case of the agreements by the EU, the tags must include information on fibre content, the country of origin, the safety instructions for specific use and care instructions for textiles and clothing, and for footwear, the main materials used, and safety instructions for specific use and country of origin. In EU-Peru and Colombia, the parties further agree to not establish: a) requirements regarding the physical characteristics or design of a label; b) an obligation to permanently label garments which, due to their size, makes this either difficult or diminishes their value; and c) for goods sold in pairs, an obligation to label both parts when these are of the same material and design.

## 5.2. TBT sector-specific provisions

Contrary to the TBT agreement, some RTAs include TBT provisions that are sector-specific.<sup>81</sup> The inclusion of these provisions is relatively new and only involves 12 per cent of all RTAs (or 28 RTAs).<sup>82</sup> Half of these agreements were signed after 2006 and more than two-thirds involved an Asian country, in particular Singapore (9 RTAs), Japan (4 RTAs), Korea (5 RTAs), China (2 RTAs) and Chinese Taipei (2 RTAs). Other RTAs also involved the EU, US, Chile and Mexico. The provisions in these RTAs vary in scope and depth but the majority tend to go beyond the commitments under the TBT Agreement. The provisions include commitments with respect to the mutual recognition of conformity assessment results, labelling and marking, equivalence of technical regulations, cooperation and the promotion of mutual recognition arrangements. These

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<sup>76</sup> EU - Korea, EU-Ukraine, EU-Moldova, EU-Georgia and Australia-Korea.

<sup>77</sup> EU - Central America, EU - Colombia and Peru, Australia-Korea.

<sup>78</sup> EU - Central America, EU - Colombia and Peru, Korea-Australia and EU - Korea.

<sup>79</sup> EU - Central America, EU - Colombia and Peru, EU - Korea, and India - Malaysia

<sup>80</sup> EC - Mexico; Colombia - Mexico and Australia - New Zealand (ANZCERTA).

<sup>81</sup> It is worth noting that within the framework of the NAMA NTB negotiations under the Doha Round sector-specific proposals (i.e. vertical proposals) aiming at improving the functioning of the TBT Agreement have been submitted. These proposals refer to the labelling of textiles, clothing, footwear and travel goods, as well as to trade in electronics, automotive products and chemicals (WTO Documents TN/MA/W/103/Rev.3, 6 December 2008 and TN/MA/W/103/Rev.3/Add.1, 21 April 2011).

<sup>82</sup> EU-Georgia (2014), EU-Moldova (2014), EU-Ukraine (2014), Singapore -Chinese Taipei (2013), New Zealand-Chinese Taipei (2013), Switzerland- China (2013), EU-Central America (2012), EU - Colombia and Peru (2012), Korea - Turkey (2012), India - Japan (2011), EU - Korea, (2010), Korea- India (2009), China - New Zealand (2008), Korea - US (2007), Japan - Thailand (2007), Japan - Philippines (2006), Chile - Peru (2006), Korea - Singapore (2005), Trans-Pacific Strategic Economic Partnership (2005), India - Singapore (2005), US - Singapore (2003), Singapore - Australia (2003), Japan - Singapore (2002), New Zealand - Singapore (2000), Canada - Chile (1996), Colombia - Mexico (1994), NAFTA (1992), EFTA - Turkey (1991) and the decision No. 3 of 2009 of the Joint Committee. In the case of EFTA-Turkey, the provisions in question applied to industrial goods.

provisions apply, depending on the RTA, to electrical, electronic, medical, pharmaceutical, automotive, textiles, clothing and food products, as well as telecommunication equipment and cosmetics, which reflect the importance that RTA parties grant to trade in these sectors. Provisions covering textiles and clothing refer to labelling and marking only, which were described in the section on marking and labelling, and therefore are not included in this section.

### ***Electrical, electronic and telecommunication products***

TBT provisions covering electrical and electronic products are the most common sector-specific provisions. They often refer to mutual recognition, cooperation and/or the affirmation of existing arrangements. In the case of mutual recognition, the parties agree to accept the results of conformity assessment procedures conducted in the territory of the other party. This is for instance the case of RTAs concluded by Singapore and Japan (see section on recognition of conformity assessment results).<sup>83</sup> In the case of Singapore-India and Singapore-Japan, this commitment also applies to telecommunication equipment.<sup>84</sup> Some of these agreements also include provisions regarding the procedures to register the conformity assessment bodies of the other party.<sup>85</sup>

EU-Korea also includes provisions covering electronics and referring to mutual recognition but instead of including commitments on the recognition of conformity assessment results, it includes commitments to facilitate and simplify conformity assessment procedures. In this RTA, the parties agree to gradually replace the third party certification/testing they required for electronic goods by a supplier self-declaration of conformity, which is the model promoted by the EU. This applies to certain products only and means that exporters would only need to present a declaration of conformity to enter the market of the other party to prove compliance with the applicable Korean or European requirements.

In addition to the provisions on mutual recognition, other countries have chosen to include provisions to enhance bilateral cooperation in the area of electrical and electronic equipment. This is for instance the case of a couple of RTAs by China (e.g. New Zealand-China and Switzerland-China). In New Zealand-China, the parties agree, inter alia, on the criteria that they must apply for assessing, accrediting, and recommending conformity assessment bodies. While in China-Switzerland, the parties concluded a side agreement on cooperation in the area of telecommunication, electromagnetic compatibility and electrical equipment. In Canada – Chile, the parties include provisions on transparency and establish a Committee on Telecommunications Standards. Moreover they agree to take the necessary steps to accept the results from conformity assessment conducted in the territory of the other party.

Other RTAs promote through consultations the conclusion of mutual recognition agreements (MRAs) or arrangements for conformity assessment in the area of telecommunication, electrical and electronic equipment (e.g. Korea-India), or make reference to their obligations under existing bilateral agreements (e.g. New Zealand-Chinese Taipei). Other RTAs go even further and incorporate existing agreements, for instance in Singapore-Chinese Taipei, the parties incorporate the MRA on Conformity Assessment they have between their standardization bodies, as well as their Agreement on Consumer Product Safety, and the APEC MRA for Conformity Assessment of Telecommunications Equipment, while in Singapore-Korea and Singapore-US, the parties agree to take steps to implement it.

### ***Pharmaceuticals and medical products***

All the TBT provisions covering pharmaceutical and medical products focus mainly on cooperation, transparency, and/or procedures to obtain a product registration certificate.

For instance, the EU-Korea agreement, in addition to its provisions on electronics, contains provisions to enhance cooperation and transparency regarding the pricing and reimbursement of pharmaceutical products and medical devices. It also establishes a working group on chemicals to promote cooperation. In Singapore-US, the parties agree to establish a working group on medical products to enhance cooperation, while in Colombia-Mexico, they agree to establish a sub-

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<sup>83</sup> Japan-Thailand, Japan-Philippines, Japan-Singapore, Singapore-New-Zealand, Singapore- Korea and Singapore-India,

<sup>84</sup> In the case of Singapore-Korea, there is also a provisions on telecommunications under which the Parties agree to take steps to implement Phase I and Phase II of the APEC Mutual Recognition Arrangement for Conformity Assessment of Telecommunication Equipment. The same applies to Singapore-US.

<sup>85</sup> For example: Japan-Philippines and Japan-Thailand.

committee for medicines, pharmaceuticals and medical equipment. The RTA between Colombia and Mexico also includes provisions regarding the administration and issuing of registration certificates.

In the case of Japan-India, in addition to provisions on cooperation in pharmaceuticals, the parties agree to grant to the application by the other party for registration and other approvals required for the release of a generic medicine into the market the same treatment as to applications made by its nationals. In the case of Singapore-India, the parties modify their RTA (2010) to include provisions on generic medicines, under which Singapore agrees to establish a system of registration for generic medicines produced in India to facilitate their authorization for supply in Singapore.

In Chile-Peru, the parties specify the time required to obtain registration certificates for pharmaceuticals, cosmetics, veterinary products and pesticides.

### **Automotive sector**

Our analysis shows that only two RTAs, Korea-EU and Korea-US, include TBT provisions for the automotive sector. Under Korea-EU, the parties agree to harmonize and accept as equivalent selected regulations listed in the agreement. Under Korea-US, the parties' commitments are less ambitious than those in Korea-EU, as the RTA focuses on cooperation. Under Korea-US, the parties agree to cooperate to harmonize motor vehicle standards and ensure that their technical regulations are not more trade-restrictive than necessary to achieve their legitimate objectives. The parties further establish an automotive working group to enhance cooperation and agree to notify the criteria it uses to accredit, approve, license, or otherwise recognize conformity assessment bodies with respect to motor vehicles, as well to cosmetics, household electrical appliances or any other product identified by the party.

### **Food Sector**

Only two agreements, Singapore-Australia and Singapore-India, include TBT provisions covering food products. In Singapore-Australia, the parties agree to recognize as equivalent the technical regulations on food of the other party even if they differ from their own, or from those used by other countries trading in the same food product, if the exporting party objectively demonstrates to the importing party that its regulation achieves the same objective. The agreement also provides for the conclusion of conformity assessment arrangements between their regulatory authorities for the purpose of ensuring that food products exported by a party meet the food standards of the exporting party that are accepted as equivalent by the importing party.

In addition to the provisions on telecommunication, electrical and electronic equipment and generic medicines, the RTA Singapore-India, includes provisions on transparency regarding food standards and technical regulations and encourage the conclusion of conformity assessment arrangements between their regulatory bodies with the view of reaching the acceptance of conformity assessment results.

### **Other sectors**

There are other agreements which include provisions on cooperation and/or on the establishment of working groups for a variety of sectors, as well as on conformity assessment procedures. This is for instance the case of Korea-Turkey, where the parties promote cooperation and are encouraged to negotiate agreements for the recognition of the results of conformity assessment procedures conducted in the other party in different areas, *including* pharmaceutical products, medical devices, electronics, motor vehicles and parts, and chemicals. The NAFTA specifies for instance the establishment of a number of subcommittees on land transportation standards, telecommunications standards, automotive standards, labelling of textiles and apparel goods and others as it considers necessary to, *inter alia*, promote standards compatibility. The Trans-Pacific Strategic Economic Partnership (4) (in an exchange of letters) includes cooperation in electrical safety and electromagnetic compatibility of electrical and electronic equipment; marketing beef; and shoe labelling.

There are also a few agreements recently concluded by the EU (i.e. with Georgia, Moldova, and Ukraine, all signed in 2014) that specify the sectors where approximation of TBT legislation with that of the EU is required. The sectors include vehicles, chemicals, cosmetics and medical devices. These RTAs further envisage the conclusion of agreements on conformity assessment and

acceptance of industrial products (ACAA) for these sectors. With an ACAA, trade in these sectors shall take place under the same conditions as those applying to trade between EU members.

## 6. CONCLUSIONS

The purpose of this study is to assess the extent to which TBT provisions contained in RTAs differ from the TBT Agreement and include broader commitments. Our analysis covers all RTAs – with few exceptions – currently in force and notified to the WTO. This represents 238 RTAs, of which 171 include at least one provision on TBT and focuses on seven types of provisions: provisions referring to the TBT Agreement; harmonization and equivalence of technical regulations; harmonization and recognition of conformity assessment procedures; transparency; dispute resolution; marking and labeling and sector-specific commitments.

The results reveal that the frequency and level of detail of TBT provisions in RTAs have increased significantly over time. All RTAs signed since 2010 systematically include TBT provisions. These are mostly organized in chapters and in general more detailed than those under a single article, thus reflecting the growing interest for and importance TBT issues have acquired in recent years.

However, the mere inclusion of TBT provisions, in particular in the form of a chapter, does not necessarily mean that these provisions are significantly different or broader than the TBT Agreement. In fact, our study shows that in general, for the type of provisions considered, only a minority of RTAs differ from the TBT Agreement by using more stringent wording and imposing broader commitments seeking to facilitate trade between the parties. This finding is reinforced by the fact that almost all RTAs with a TBT provision make reference to the TBT Agreement, thus showing the intention of the parties to preserve coherence between their RTAs and the multilateral system. Reference to the TBT Agreement varies across RTAs, but in general the parties affirm their right and obligations under the TBT Agreement or in some cases incorporate all or part of the TBT agreement in their RTAs.

Among the differences between RTAs and the TBT Agreement, we found that<sup>86</sup>:

- In addition to standards, technical regulations and conformity assessment procedures covered in the TBT Agreement, only 17 per cent of all RTAs also cover metrology. More importantly, only 7 per cent of all RTAs have a narrower coverage than the TBT Agreement as they do not cover all three measures.
- Only 6 per cent of all RTAs require the harmonization of technical regulations and conformity assessment procedures among the parties. These agreements involve mainly agreements concluded by the EU with candidates and potential candidates for EU membership, as well as agreements whose objective is to create a customs union. Besides their low frequency, this type of provision does not necessarily undermine the process of harmonization at the multilateral level as long as the technical regulations and conformity assessment used as the benchmark in the process of harmonization at the bilateral or regional level are based on international standards/guidelines. However, if this is not the case, harmonization at the bilateral or regional level could lead to rules fragmentation and different TBT regimes.
- Only 5 per cent of all RTAs require that a party recognizes as equivalent the technical regulations of the other party. In certain cases this obligation applies to specific sectors such as food or automotive. This provision goes beyond the WTO commitments and can potentially have a trade-enabling effect among parties but also distort trade with non-parties. But it is only found in RTAs involving Latin American countries, NAFTA and Korea-EU, the latter two being considered among the most ambitious RTAs currently in force.
- Only 5 per cent of all RTAs make broader commitments than the TBT Agreement with respect to the recognition of conformity assessment results. In these RTAs, the parties agree to mutually recognize the results of conformity assessments conducted in the territory of the other party. These agreements involve mainly Asia-Pacific countries and typically cover electrical and electronic equipment. This probably reflects the intention of those governments to specifically improve the operation of value chains among parties in Asia. Even fewer RTAs (3 per cent) provide for the conclusion of a mutual recognition agreement. These provisions certainly facilitate trade among the parties, but they could disadvantage exporters from non-parties if their conformity assessment results are not granted the same treatment.

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<sup>86</sup> These differences vary in their depth and potential effect on trade.

- Among the types of provisions examined, transparency and reference to the TBT Agreement are the most frequently referred to. Transparency is also the area in which RTAs go beyond the WTO the most frequently. Between 2 per cent and 21 per cent of RTAs contain a provision that reinforces the WTO TBT notification system, and because of their nature, these provisions could be the easiest to multilateralise. These provisions specify for instance deadlines to provide comments, or expand notification obligation to all TBT measures (including those that are in line with international guidelines), or provide for the publication of the replies to comments from the other party.
- Only a minority of RTAs include provisions in areas that are either not mentioned, or only very briefly, in the TBT agreement – we focus here on labelling and marking and provisions for specific sectors. Only 4 per cent RTAs include commitments in the area of labelling and marking. This is a recent phenomenon: all of these RTAs were signed after 2009 and involve mainly the EU, Latin American and Asian countries. Moreover, in one-third of these RTAs, these provisions are specific to textiles and clothing, thus reflecting the importance of the textiles industry for Asian, and more recently for certain Latin American countries. Other sector-specific provisions were found in 11 per cent of RTAs and deal with commitments referring to medical, pharmaceutical, automotive, and food products as well as cosmetics and telecommunications equipment. These RTAs involve mainly Asian countries and include commitments on conformity assessment results, equivalence of technical regulations, cooperation and the promotion of mutual recognition arrangements.
- In the area of dispute resolution, only 9 per cent of RTAs include a provision that is specific to TBT-related disputes and that treats TBT issues in a different way from other issues covered by the agreement. These RTAs, except for one case –NAFTA- give the WTO DSM exclusive jurisdiction over TBT-related disputes. In certain cases, this delegation only applies to disputes referring to technical regulations. In the case of NAFTA, upon the request of the responding party, standards-related disputes may be considered under the RTA DSM. In the rest of the RTAs with TBT provisions, TBT-related disputes are bound by the general provisions on dispute settlement. In more than half of these RTAs, the settlement of a dispute can take place either in the RTA forum or in the WTO forum at the discretion of the complaining party. But once the forum has been selected it shall be used at the exclusion of the other, which ensures that no conflict arises between the RTA and WTO DSM.

This survey of the treatment of TBT-related issues in RTAs shows that even if there are RTAs that include new or broader commitments than the TBT Agreement, their number remains very limited. Thus their impact (positive or negative) on the multilateral trading system as a whole is also presumably low. However, if these provisions, which in certain cases are relatively new, were to be systematically replicated in future RTAs, they could potentially influence the current practice in the issues studied. Topics for future research in this area include analyzing the effects on trade of the RTAs that provide for the mutual recognition of conformity assessment results or the impact of an RTA with TBT provisions on the number of specific trade concerns involving the RTA parties.

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