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Regulatory Provisions in Regional Trade Agreements :  
the “Singapore” Issues

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## **REGULATORY PROVISIONS IN REGIONAL TRADE AGREEMENTS<sup>1</sup>**

### **THE "SINGAPORE" ISSUES**

#### **EXECUTIVE SUMMARY**

Provisions in RTAs dealing with investment, competition, trade facilitation and government procurement commonly go beyond provisions in the WTO or, in the case of government procurement, adopt provisions substantially similar to those of the WTO Agreement, but include countries that are not parties to that Agreement. Moreover, in "going beyond", RTAs often do so in a way that allows considerable flexibility of application – allowing participating countries to scale their regional ambitions according to their particular circumstances.

Certain consequences of RTA activity in these four areas can be seen as contributing to the case for a strengthened multilateral framework. This applies particularly to the effect, which the patchwork of regional agreements can have on non-members of those agreements and on the process of dispute settlement. However, even where a multilateral framework established, RTAs and the provisions embodied in them would not go away. The question then arising is how any multilateral disciplines might impinge upon, and co-exist with, regional arrangements. This in turn bears upon the role of GATT Article XXIV and on the activities of the Trade Policy Review Body.

At the same time, regional approaches can complement the multilateral system and there are features of such approaches, which might usefully be drawn upon in seeking a stronger multilateral framework. This complementarity arises from the way RTAs tackle issues directly referred to in the Doha Declaration; their ambition in going beyond the WTO; their promotion – as in the areas of investment and trade facilitation – of convergence towards an implicit or explicit international standard; their provisions for flexibility of application, around commonly agreed rules and principles; or their harnessing of new technology.

Lessons can thus be drawn from regional experience. Care is needed, however, in seeking any overarching conclusions about best practice; not least because, in many cases, agreements reached at the regional level are made possible by the close affinities – political, economic and geographic – among the members.

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<sup>1</sup> This paper is based on ongoing work at the OECD. It draws particularly on studies by Michael Gestrin, Evdokia Moise, Hunter Nottage and Massimo Geloso-Grosso. The views,

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however, are those of the author and are not necessarily shared by members of the OECD.

## **INTRODUCTION: REGIONALISM AND THE MULTILATERAL TRADING SYSTEM**

There are three main frames of reference for the OECD Trade Committee's work on the relationship between regional trade agreements (RTAs)<sup>2</sup> and the multilateral trading system. The first is provided by the OECD 2001 Ministerial Communiqué, which observed that "WTO-consistent preferential trade agreements can complement but cannot substitute for coherent multilateral rules and progressive multilateral liberalisation". The second is the Declaration from the WTO Ministerial Conference in Doha, which highlights the importance of regionalism:

- through its recognition that regional trade agreements can play an important role in promoting the liberalisation and expansion of trade and in fostering development;
- through agreement to negotiations aimed at clarifying and improving disciplines and procedures under the existing WTO provisions applying to regional trade agreements;
- through agreement that in the work of the WTO Working Group on the Relationship between Trade and Investment account should be taken, as appropriate, of existing bilateral and regional arrangements on investment.

The third frame of reference is the ongoing momentum of regionalism itself. While the renewed momentum to multilateral trade liberalisation and rule making achieved at Doha will help reduce the risks of regionalism being pursued as an alternative course with attendant costs to third parties, RTAs will proceed - as they have in the past - to be negotiated in response to a range of economic, geo-political and security interests. Indeed, the percentage of world trade accounted for by preferential

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<sup>2</sup> For present purposes, the span of "regional trade agreements" is deliberately wide. It takes in a forum with essentially voluntary undertakings, traditional free trade areas, necessitating preferential rules of origin, customs unions with a common external tariff and an economic and monetary union entailing pooled sovereignty and deep integration going well beyond the confines of trade. While this approach widens the range of experience on which to draw it also calls for care in acknowledging the different circumstances in which that experience has been forged.

regional trade agreements is expected to grow from 43 % at present to 55 % by 2005 if all expected RTAs are realised.

Against this backdrop, it is timely to explore the nature of the complementarity between the rules-based multilateral trading system and RTAs. Consideration of the relationship between RTAs and the multilateral trading system involves several elements:

- Examination of the extent to which RTAs go beyond existing multilateral trade rules in the WTO;
- Examination of the extent to which RTAs reveal a consistency of approach, in particular in areas where WTO rules are yet to be developed, or indeed, where RTAs indicate that a range of different approaches have been taken on a particular issue. Do they create harmony or discord?
- Examination of the effects of RTAs on non-members. To what extent are they discriminatory?

## **"SINGAPORE" ISSUES IN REGIONAL TRADE AGREEMENTS**

The four issues addressed in this paper - investment, competition, trade facilitation and government procurement - are very different from one another. They differ in the nature of their impact on trade, in the nature of obligations arising, in the way they are treated in the WTO and in the extent to which countries may be prepared to contemplate strengthened multilateral disciplines. In addition, however, to their common genesis in the work programme embodied in the Ministerial Declaration of the WTO conference in Singapore in December 1996, these four issues share the identical provision in the Doha Ministerial Declaration that "negotiations will take place after the Fifth Session of the Ministerial Conference on the basis of a decision to be taken, by explicit consensus, at that session on modalities of negotiations". The communiqué from this year's OECD Ministerial Meeting records that OECD Members will work together on facilitating the negotiating process on

investment, competition, trade facilitation and transparency in government procurement. Finally, the "Singapore" issues also share in common the fact that each of them is assuming a growing importance in regional trade agreements.

It is generally acknowledged that the Uruguay Round of GATT talks went further than any previous rounds in placing investment issues on the multilateral trade agenda. Concurrently, the pace of developments with respect to the negotiation of rules on investment at the sub-multilateral level also accelerated during the early 1990s. This dual evolution of the international policy framework for international investment reflects the growing recognition of the role investment has come to play in international economic development and integration. Just as trade was perceived as one of the key drivers of global economic growth during the post-War decades, foreign investment has since the 1980s come to be perceived as an important 'new' mode of global economic linkage. Statistics indicating that flows of foreign direct investment began outstripping both global trade and GDP growth rates in the 1980s only reinforced the perception that it was time for the international policy framework to catch up with the new international economic landscape.

At the sub-multilateral level, investment issues have been addressed through RTAs, bilateral investment treaties (BITs) and a range of plurilateral arrangements specifically aimed at dealing with investment. Indeed, where investment protection is concerned RTAs are not typically the main vehicle for negotiating international investment rules. Rather, BITs constitute the most popular instrument in this regard. Whereas the number of BITs is estimated to have reached 1941 in 2000, an estimated 172 RTAs are currently in force and only a small (albeit growing) minority of these deal with investment issues. It is important to keep in perspective that these only represent one of several institutional settings at the sub-multilateral level in which investment-rule making has taken place.

There is widespread use of competition-related provisions in RTAs. They appear in trade agreements covering all parts of the globe and with memberships varying between, and

across, both developed and developing countries. This suggests a broad consensus on the value and appropriateness of having competition-related provisions in trading agreements, an idea which still remains subject to discussion at the multilateral level. It is important to highlight, however, that RTAs represent only one of several institutional settings addressing competition law and policy at the international level. For example, beyond regional and bilateral trade agreements, a plethora of co-operative competition arrangements to facilitate competition law enforcement exist at the multilateral, regional and bilateral levels. These include the United Nations Set of Multilaterally Agreed Principles and Rules for the Control of Restrictive Business Practices, a number of OECD Recommendations and various bilateral arrangements.

In the area trade facilitation too, RTAs represent one of several institutional settings at the international level. Mandatory or voluntary trade facilitation instruments elaborated by the World Customs Organisation (WCO), UNCTAD or the United Nations Economic Commission for Europe (UN-ECE) have strongly influenced regional initiatives. Comprehensive trade facilitation<sup>3</sup> endeavours seem to be at a relatively early stage within regional trade initiatives. With respect to the movement of goods in international trade, several older RTAs focus exclusively on lowering tariff barriers and do not contain any provisions to simplify and harmonise related procedures. RTAs, which take some steps towards facilitation commonly, aim at simplifying and harmonising certification procedures related to technical requirements and to sanitary and phytosanitary measures. There are very few RTAs in force that tackle more specifically import, export and border-crossing

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<sup>3</sup> Trade facilitation can be defined as *"the simplification and harmonisation of international trade procedures"*, understood as *"activities, practices and formalities involved in collecting, presenting, communicating and processing data required for the movement of goods in international trade"* (WTO homepage). In this sense it relates to a wide range of activities such as import and export procedures (e.g. procedures relating to customs, licensing, testing and certification, or quarantine); transport formalities; payments, insurance, and other financial requirements. Although this definition does not cover the facilitation of services movements, the liberalisation of transportation, financial and other services related to the movement of goods is essential in enabling goods trade facilitation to occur.

procedures in detail. In general, applicable procedures stay within the ambit of domestic regulation well after preferential tariff treatment has been established by means of an RTA.

However, the growing awareness of the costs generated by unduly burdensome, inefficient, duplicative or uncertain provisions has prompted increased attention to the issue of trade facilitation within more recent initiatives, even though this attention has not yet led to the formulation of formal engagements. An interesting example is the Asia-Pacific Economic Cooperation (APEC) forum: although Members' co-operation does not entail preferential provisions intended to facilitate trade between them, APEC Members have developed a set of principles on trade facilitation intended to be used on a voluntary basis and in a co-operative manner with the business sector. The principles are supplemented by illustrative examples of such initiatives that would contribute to putting them into practice. They are intended to encourage individual initiatives by APEC Members with a view to gradually suppressing procedural burdens and red tape, saving time and reducing costs for businesses, and more generally improving business conditions in the region.

In "new-generation" RTAs, such as the Japan-Singapore Economic Partnership Agreement (JSEPA), the Free Trade Area of the Americas (FTAA), or the Common Market for Eastern and Southern Africa (COMESA) trade facilitation is a major focus. Increasingly new generation RTAs adopt common approaches for risk management so as to facilitate the clearance of low-risk goods with minimal or no documentary verification and physical inspection; they elaborate differentiated, simplified procedures applicable to express shipments; they develop common data sets to be requested in the process of release and clearance. In COMESA, the adoption of a single Customs Document to replace the multitude of documents requested for customs clearance, warehousing, re-export and transit purposes (up to 32 in some participating countries) has enhanced intra-COMESA trade and contributed to reducing related costs by 25%. Moreover, one of the main factors stimulating facilitation initiatives in recent RTAs is the attention paid by negotiators to electronic commerce and the



increased use of information and communication technologies. Electronic data interchange is an essential feature both in the JSEPA and in the FTAA.

Awareness that economic development benefits can be derived from a transparent and competitive procurement system has prompted increased attention to the issue of public procurement in recent years. APEC provides an interesting example. Even though the intended co-operation does not entail preferential treatment between them, APEC Members have developed a set of non-binding principles intended to be used on a voluntary basis, taking into account the individual characteristics of Members' economies. The principles are supplemented by detailed illustrative examples of such initiatives that would contribute to putting them into practice. They are intended to provide a basis to help APEC Members in the course of achieving liberalisation of government procurement markets. In addition, in the Euro-Mediterranean Partnership, several bilateral Agreements provide for the opening up of public procurement markets between the Members as part of a general free trade program.

In a number of recently signed RTAs government procurement is a major focus, with a whole chapter dedicated to the issue. This includes the EU-Mexico FTA as well as initiatives in the Pacific Rim region, such as the agreement between New Zealand and Singapore on a Closer Economic Partnership (CEP) and the Japan-Singapore Economic Partnership Agreement (JSEPA). These agreements contain extensive provisions dealing with transparency and various aspects of procurement procedures. Growing attention to government procurement at the regional level reflects the recognition that foreign suppliers of goods and services require not only market access in the sense of non-discriminatory treatment; in order to compete effectively they also require transparent, predictable and fair procedures. These happen also to be the features that are needed as part of the ongoing modernisation and reform of procurement rules and systems at the national level.

## **Going beyond the WTO**

For all of the "Singapore" issues there is evidence of provisions in RTAs going beyond provisions in the WTO, though the nature of that "going beyond" differs from issue to issue. The Annex to this paper contains a brief description of WTO provisions relevant to the "Singapore" issues.

### ***Investment***

Even the most modest rules on investment found in RTAs usually go beyond provisions found in the WTO in that they usually contain some sort of provisions on the right of establishment, something that does not exist in any WTO agreement. The issues of establishment and the free investment of capital were a particular emphasis of early efforts at introducing rules on investment at the regional level.

- One of the most comprehensive examples of this approach was the *Treaty Establishing the European Community* (1957) (revised by the Treaty of Amsterdam which entered into force on 1 May 1999). The EC Treaty addresses investment primarily through provisions on freedom of establishment and free movement of capital. Article 52 of the original treaty prohibits restrictions on the freedom of establishment of nationals of a member State in the territory of another member State and on the setting up of agencies, branches or subsidiaries by nationals of any member State established in the territory of any member State. Since the end of the transitional period on 31 December 1969, Article 52 has been directly applicable in the sense that it can be invoked by individuals before the national courts of member States. EC Treaty rules on freedom of establishment are not only addressed to the member States but also require the adoption of measures by the Community institutions with respect to a wide range

of matters specified in Articles 54 and 57 in order to facilitate the implementation of the freedom of establishment. Pursuant to these provisions, directives have been adopted *inter alia* with respect to standards in specific sectors, company law, government procurement, and the mutual recognition and acceptance of diplomas, certificates and other evidence of formal qualifications.

- Agreements involving countries that have historically restricted capital movements have also tended to emphasise establishment and capital movement issues but much less comprehensively than the EC Treaties. For example, the *Europe Agreements* concluded in the early and mid-1990s between the European Community and Central and Eastern European countries, also focus primarily upon establishment issues by providing for national treatment with regard to the establishment and operation of companies and nationals.
- The *Treaty Establishing the Caribbean Community (CARICOM)* (1973), as amended by a Protocol adopted in July 1997, prohibits the introduction by member States of any new restrictions relating to the right of establishment of nationals of other member States (Article 35b). Member States are also required to remove restrictions on the right of establishment of nationals of other member States, including restrictions on the setting up of agencies, branches or subsidiaries by nationals of a member State in the territory of another member State (Article 35c).
- Likewise, the Treaty Establishing the African Economic Community (1991) and the Treaty Establishing the Common Market for Eastern and Southern Africa (COMESA) (1993) include among their objectives the removal of obstacles to the free movement of capital and the right of residence and establishment. Finally, the Revised Treaty of the Economic Community of West African States

(ECOWAS) (1993) includes among its objectives the establishment of a common market involving, inter alia, the removal of obstacles to the free movement of persons, goods, services and capital and obstacles to the right of residence and establishment (Article 3(2)).

A number of RTAs have gone beyond issues relating to establishment and the free flow of capital by building on treatment and protection principles of bilateral investment treaties. For example, the *North American Free Trade Agreement* (NAFTA) (1994) contains generic provisions on investment in Chapter 11. "Investment" is defined in Article 1139 through a broad list of assets along with a negative list of certain claims to money, including claims arising from commercial transactions, which are not considered to be investments. Each Party is required to accord the better of national treatment and MFN treatment to investors of another Party, and to investments of investors of another Party, with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments (Articles 1102-1104).

A number of more recent RTAs (and proposed RTAs), especially those involving NAFTA signatories, have been broadly modelled after the NAFTA with respect to investment rules. This is the case, for example, in the Canada-Chile Free Trade Agreement (1997), the Mexico-Singapore Free Trade Agreement (2000) and in the draft text for the Free Trade Area of the Americas. A structure and content broadly similar to that found in the NAFTA investment provisions is also reflected in the Vaduz Convention, the revised Convention of the European Free Trade Association (EFTA) (2001). Likewise, elements of the investment chapter of the Japan-Singapore Economic Partnership Agreement are very similar to those found in the NAFTA, and like NAFTA, the agreement includes investor-state provisions. One interesting point to note is that some recent bilateral RTAs do not cover investment for the stated reason that a BIT already exists between the signatories. This is the case for example in the Canada-Costa Rica Free Trade Agreement (CCRFTA) (2000).

Other RTAs have sought to incorporate BIT-like provisions on investment but have eschewed the strict enforcement standards (e.g. binding dispute settlement mechanisms) and the levels of protection and liberalisation found in agreements like the NAFTA. In the context of APEC, norms of a legally non-binding nature relating to the admission, treatment and protection of foreign investment have been adopted in the *APEC Non-Binding Investment Principles* (1994).

Finally, it should be noted that several regional agreements aim at fostering co-operation between firms of member States by establishing a special legal regime for the formation of a regional form of business enterprise. For example, the *Uniform Code on Andean Multinational Enterprises* established by Decision 292 of the Commission of the Cartagena Agreement provides for the formation of Andean Multinational Enterprises. One of the conditions for the creation of such an enterprise is that capital contributions by national investors of two or more member countries must make up more than 60 per cent of the capital of the enterprise. Among the privileges which the Decision requires member countries to grant to such enterprises are national treatment with respect to government procurement, export incentives and taxation, the right to participate in economic sectors reserved for national companies, the right to open branches in any member country, and the right of free transfer of funds related to investments. Likewise, the *Basic Agreement on the Association of South East Asian Nations (ASEAN) Industrial Cooperation Scheme* (AICO Scheme) was concluded by members of ASEAN in 1996 to promote joint manufacturing industrial activities between ASEAN-based companies.

### ***Competition***

Given the embryonic and somewhat indirect nature of competition-related disciplines in the WTO, most RTAs almost by definition expand upon the WTO disciplines. A qualification applies however where RTAs no longer permit the application of anti-dumping remedies where they can only be said to differ from, rather than expand upon, the WTO provisions.

Amongst the RTAs dealing with competition policy a broad distinction can be drawn on the basis of the extent of co-ordination of competition standards and rules that they envisage. In this regard, it is possible to distinguish between those trade agreements that contain general obligations to take action against anti-competitive business conduct (for example a requirement to adopt a domestic competition law without setting out the specific provisions the law should contain) and others that call for more extensive co-ordination of specific competition standards and rules (such as setting out common competition laws and procedures). Clear categorisation along these lines, however, is limited to the extent that the RTAs examined below fall along a spectrum of convergence on competition policy between these poles. Furthermore, while RTAs which have supranational elements and institutions necessarily entail co-ordination of competition rules, a number of RTAs which are not supranational in character have also achieved co-ordination. Despite such difficulties in categorisation, by contrasting those that contain general obligations to take action against anti-competitive conduct with those that call for co-ordination of competition rules, this section provides a framework for identifying two broad approaches to competition policy in RTAs.

***General Obligations against Anti-competitive Conduct.*** An example of this approach is the NAFTA, which under Chapter 15, entitled "Competition Policy, Monopolies and State Enterprises", requires member countries to "adopt or maintain measures to proscribe anticompetitive business conduct and to take appropriate action with respect thereto", without however prescribing specific competition rules. In connection with this obligation, Mexico enacted a comprehensive modern competition law in 1993. A similar provision exists in both the Canada-Chile FTA and the Mexico-Chile FTA. The Japan-Singapore Economic Partnership Agreement provides that each party shall take measures, which it considers appropriate against anti-competitive activities. Similarly, the EU-Mexico FTA, focuses on ensuring the implementation and enforcement of the parties' *respective* competition laws in a

manner recalling the side agreements on environment and labour standards embedded in NAFTA.

The chapter on competition policy (Chapter XI) of the recently signed Canada-Costa Rica FTA adopts a comparable approach. It includes an obligation on the Parties to adopt or maintain legal measures to proscribe the carrying out of anti-competitive business activities including, in a non-exhaustive list, cartels, abuse of dominance and anti-competitive mergers (Chapter XI, XI.2, para 3(a)-(c)). The FTA is noteworthy as it is a concrete embodiment of many of the concepts that the WTO Working Group on the Interaction between Trade and Competition Policy has been mandated to focus on following the Doha Ministerial Declaration. For example, the framework includes a commitment to the principle of *transparency*, with each Party to ensure that measures adopted or maintained to proscribe anticompetitive activities "are published or otherwise publicly available" (Chapter XI, XI.2, para 4(a)). Furthermore any exclusions or special authorisations from competition disciplines that a Party may have established shall also "be transparent and should be periodically assessed by each Party to determine if they are necessary" (Chapter XI, XI.2, para 3). The FTA also contains commitments to *non-discrimination*, as measures taken to proscribe anti-competitive activities should be applied on a non-discriminatory basis (Chapter XI, XI.2, para 2); and *procedural fairness*, as judicial and quasi-judicial proceedings should be fair and equitable with an appeal or review process to any final decision (Chapter XI, XI.2, para 6). Finally, the Chapter also includes explicit agreement that it is in the Parties "common interest to work together in technical assistance initiatives related to competition policy" (Chapter XI, XI.5).

***Co-ordination of Specific Competition Rules.*** In contrast to these broad initiatives containing general obligations to take action against anti-competitive business conduct, co-ordination of specific competition standards and rules has occurred in a variety of other RTAs. This is particularly the case with respect to the highly advanced regional system of

competition rules found in the European Union (EU), a majority of EU trading agreements with third countries and a variety of sub-regional groupings in Africa and Latin America.

The EU has supranational competition rules, which are linked by the *Treaty Establishing the European Community (1957)* (EC Treaty) to the fundamental objective of establishing a common market. The EC Treaty rules in the field of competition cover *inter alia* agreements or concerted practices between undertakings (Article 81), abuses of dominance by undertakings (Article 82) as well competition distorting state aid in the form of subsidies (Article 87). The EU also has associated rules, since their adoption in 1989, regarding concentrations, which meet certain sales thresholds, which are designed to reach transactions that may affect trade between EU Member States. Notably, co-ordination of these specific rules is ensured by the principle of primacy of EC competition law over national competition law. At the same time, however, its Member States still have separate and distinct national competition laws and national competition authorities, which may differ substantially from one another.

The EU is also at the centre of a web of trade agreements with non-member countries, which call for adoption, and co-ordination of specific competition standards and rules, although the extent of such co-ordination varies with the degree of economic integration contemplated by the various agreements. A prominent example is the Agreement of the European Economic Area (EEA), concluded by the EU with most countries of the EFTA, whereby all practices liable to impinge on trade and competition among the EEA participants are subject to rules that are closely related to the EC competition law. Somewhat analogous are the Europe Agreements, concluded with countries in Central and Eastern Europe. While the Stabilisation and Association Agreements which the EU has concluded with certain countries in South East Europe also include provisions closely related to those of the Europe Agreements, they go beyond them in two important respects. Firstly, in addition to legislative approximation they explicitly refer to law enforcement; and secondly, they set strict temporal deadlines for progress in approximation and enforcement.



The recent Euro-Mediterranean Association Agreements also introduce a number of specific competition provisions similar to those in the EC Treaty relating to collusive behaviour, the abuse of a dominant market position and competition-distorting state aid. While these provisions have yet to be implemented, they are significant to the extent that they involve trading relations with a number of Middle-Eastern and North African countries at considerably different levels of development, with different motivations and incentives compared to those of the Central and Eastern European or EFTA states.

Co-ordination of competition standards and rules within RTAs is not confined to those concluded by the EU. Notably, competition law and policy is starting to be addressed more extensively in African sub-regional agreements, with the Treaty Establishing the Common Market for Eastern and Southern Africa prohibiting, in Article 55, "any agreement between undertakings or concerted practices which has as its objective or effect the prevention, restriction or distortion of competition within the Common Market" (subject to a proviso for the granting of exemptions by the COMESA Council). Furthermore, COMESA contemplates formulating and implementing a regional competition policy which will harmonise existing national competition policies, or introduce them where they were absent, in the context of a transition to a full customs union<sup>4</sup>. Other examples of RTAs which have adopted or are developing specific co-ordinated competition rules are the Mercado Común del Sur / Southern Common Market Agreement (MERCOSUR), the Andean Community and EFTA.

***Mechanisms for consultation, co-operation and enforcement.*** Consultation and co-operation mechanisms concerning the application of measures against anti-competitive conduct, such as procedures for notification, exchange of information and enforcement of competition rules, are provided for in most RTAs. This is one area, in particular, where RTAs should be read in conjunction with other co-operative anti-trust arrangements that the

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<sup>4</sup> J. Musonda, "Enhanced Technical Assistance and Co-operation: Priorities for the Effective Implementation of Competition Policy in Africa – the Case of COMESA", Paper presented at the WTO Regional Workshop on Competition Policy, Economic Development and the

parties may have in place. It is also an area where lessons learnt from such co-operative arrangements have been incorporated into subsequent RTAs. For example, the concept of “positive comity” whereby a party may request that another party initiate enforcement action which is seen as adversely affecting its interests, has been incorporated in a number of RTAs following its initial introduction in a 1991 bilateral co-operation arrangement between the EU and the USA (Agreement Between the Government of the United States of America and the Commission of the European Communities Regarding the Application of their Competition Laws).

There is a significant difference, however, between RTAs, which are limited to consultation, and co-operation between national competition authorities and those that provide for elements of supranationality. The latter often assign a key role to supranational institutions in the enforcement of competition rules while the former rely primarily on non-institutionalised procedures. The EC Treaty provides the most far-reaching example where enforcement of international competition rules has been assigned to a supranational institution as the application of EC competition law is primarily the responsibility of the EC Commission. Nonetheless, it should be noted that certain EC competition laws and rules can be applied by national courts and by national competition authorities – an aspect that has gained increasing importance in recent years as the EC Commission is encouraging a more decentralised application of EC competition law. The Andean Community institutions also have supranational powers, as the Board of the Cartagena Agreement is assigned the responsibility to investigate alleged anti-competitive infringements, and its subsequent orders have direct legal effect in member countries. On a lesser scale, the MERCOSUR Technical Committee on Competition Policy and the Commerce Commission may issue orders for the enforcement of its provisions, which must then be implemented by national agencies of the member countries.

An example of an RTA with considerable jurisdictional reach yet which is not reliant upon independent supranational institutions is the Australia-New Zealand Closer Economic Relations Trade Agreement (ANZCERTA). Under this RTA, each country's competition authority and courts have a unique model of "overlapping jurisdiction" - whereby complaints relating to the misuse of substantial market power may be filed and heard in either jurisdiction and valid and enforceable subpoenas and remedial orders issued in the other country. These are buttressed by a separate bilateral enforcement agreement providing for extensive investigatory assistance, the exchange of information (subject to rules of confidentiality) and co-ordinated enforcement.

NAFTA and the Canada-Chile FTA adopt a different approach, which does not rely on supranational institutions for enforcement. Furthermore, detailed procedures for co-operation are not set out and recourse to dispute settlement is excluded. Rather, general consultation and co-operation requirements call on the parties to consult on the effectiveness of their national competition laws and to co-operate on the enforcement of those laws via mutual legal assistance, notification, consultation and the exchange of information.

Under the JSEPA, Japan and Singapore will consider extending co-operation to co-ordinated enforcement activities. As Singapore does not have a comprehensive competition law or authority, this RTA provides an example of the potential for such co-operation with countries which do not have comprehensive competition regimes or institutions.

The WTO Agreements also provide for co-operation and consultation obligations with respect to competition-related provisions. RTAs that set out requirements for consultation and co-operation with respect to their competition provisions tend nonetheless to be more extensive than those in the WTO. This is particularly the case where the co-operation obligations cover a broader number of disciplines and where they extend to the direct enforcement of competition rules including investigations of complaints, hearings and judgements. With respect to the latter, while the WTO dispute settlement mechanism provides an international

institution for the enforcement of breaches of WTO competition-related provisions it is limited to these provisions, and the provisions themselves have been developed in a piecemeal manner.

*The relationship of competition policy rules to the application of trade remedies.* Some RTAs prohibit the use of antidumping measures between the signatories. A key example is ANZCERTA, which has phased out, since 1 July 1990, the application of antidumping remedies in bilateral trade relations between Australia and New Zealand in parallel with the amendment of domestic competition laws to make their misuse of substantial market power prohibitions fully applicable to anti-competitive transactions occurring within the region. Similarly, and matching their non-application within the EU, the EEA precludes the application of anti-dumping measures, countervailing measures and measures against illicit commercial practices in the relations between the Contracting Parties. Under MERCOSUR, although the use of anti-dumping duties remains possible in internal trade, it is envisaged that these measures will be gradually eliminated in parallel with ongoing progress to harmonise competition policy.

The Canada-Chile FTA also prohibits anti-dumping actions between the two parties. The agreement is significant in this regard as it is the first to prohibit anti-dumping measures between the parties while only addressing competition policy in general terms elsewhere in the RTA.

### ***Trade Facilitation***

Trade facilitation provisions in RTAs frequently go beyond, and complement, provisions in the WTO. They do so by promoting transparency, by harmonising and simplifying procedures and by fostering the use of new technology. In doing so, they are influenced by existing multilateral instruments, such as the WCO Kyoto Convention or Arusha Declaration,

or the UN/EDIFACT initiative, to which they have usefully given concrete, practical expression.

***Rules on transparency and due process.*** Transparency and due process are essential facilitating measures in most RTAs, especially in order to prevent persisting differences in implementation from jeopardising facilitation. The terms of these provisions parallel quite closely corresponding WTO provisions, such as GATT Article X, to which several RTAs refer explicitly. RTAs also promote transparency through the collection and dissemination of all relevant information through centralised inquiry points, publications and display on-line. ASEAN has established a Customs website, including information on ASEAN countries' practices for handling complaints and appeals from the trading community. Although still under negotiation, the FTAA already makes available on-line information on customs procedures, laws, regulations, guidelines and administrative rulings, namely through the publication of a *Hemispheric Guide on Customs Procedures*.

Consistency and predictability may be seen as corollaries of the principles of transparency and due process. In several RTAs they are not stated explicitly but only implied as objectives to be achieved through the implementation of other principles. In the APEC framework the principle is not limited to advocating the predictability necessary for informed business choices, but stresses the importance of uniform application and the restriction of discretionary interpretation and implementation for promoting integrity and combating corruption in customs services. Reference is made to the Arusha Declaration of the World Customs Organisation with respect to the management of operations and personnel in customs. The principle also recommends the introduction of commitments to the public with respect to target maximum processing times or other service standards.

***Harmonisation of procedures and formalities.*** Full harmonisation of procedures and formalities is still limited in RTAs. It would be more appropriate to talk of convergence of the modes of operation of concerned administrations. Such convergence draws both on the

momentum of regional integration and on the elaboration of best practices for customs and border procedures world-wide. RTAs commonly refer to relevant WTO provisions, such as GATT Article VII, but the most important reference is the WCO Kyoto Convention on the simplification and harmonisation of customs procedures. RTAs offer useful opportunities for testing those practices in reality. COMESA has introduced a series of measures, including the adoption of a single Customs Document, the installation of harmonised customs management systems based on ASYCUDA and Eurotrace, the development of an Advance Cargo Information System, or the progressive implementation of a common Carrier's License and harmonised Road Transit Charges.

Customs-related provisions in RTAs often provide for the development of a common understanding among concerned administrations on the daily management of applicable requirements and procedures in tariff classification, valuation procedures, clearance documentation and data transmission and storage. In NAFTA, the Customs administrations of the three countries decided to establish a "Trilateral Heads of Customs Conference" during the negotiations and implementation phase, in order to co-operatively address issues related to the conduct of business between them. One of these issues was the requirement of NAFTA Article 906 for enhancing the compatibility of standards and conformity assessment related measures and procedures so as to facilitate trade.

In ANZCERTA a *Memorandum of Understanding Regarding Mutual assistance between Customs Agencies* provides for co-operation to harmonise customs procedures and policies "to the maximum extent practicable". This entails *inter alia* closer alignment of national level tariff structures involving a minimum of national subdivisions and of national legal notes relating to tariffs, formats and phraseology; consultations on interpretations; or elaborating common bases for valuation. MERCOSUR has established a series of agreements ensuring co-operation between customs authorities, including the 1999 Asunción Programme on measures for simplifying foreign trade procedures and border procedures, setting goals relating to the streamlining of administrative procedures.

Alternatively, where the level of regulatory confidence is high, RTAs may provide for mutual recognition of formalities carried out by the competent authorities of the other parties. In the event of goods being imported or entering in transit, the EFTA agreement provides for mutual recognition of inspections carried out and of documents certifying compliance with the requirements of the importing country or equivalent requirements of the exporting country. ASEAN countries have concluded an agreement for the recognition of commercial vehicle inspection certificates for goods vehicles used for transit transport.

*Simplification and avoidance of unnecessary restrictiveness.* In a number of established RTAs simplification is limited to measures specifically related to products of preferential origin, such as customs fees or marking. The NAFTA Agreement provides that any measure relating to country-of-origin marking adopted and implemented by the Parties shall be designed so as to minimise the difficulties, costs and inconveniences that the measure may cause. Furthermore, although some merchandise processing fees are still applicable to imports and exports between NAFTA countries, customs user fees are no longer allowed for originating goods.

Other RTAs widen the scope of simplification to cover border inspections and formalities. APEC principles indicate that the streamlining of applicable rules and procedures in order to avoid unnecessary trade restrictiveness may be achieved by minimising documentation and procedural requirements and instituting one-stop-shopping services, expediting customs clearance, or gradually reducing the frequency of conformity assessment controls to match good compliance records. The ASEAN Framework Agreement on the Facilitation of Goods in Transit encourages joint customs inspection for goods in transit.

EFTA provides that border inspections and formalities must be carried out with the minimum delay necessary and be centralised at one place only to the extent possible. Parties are expected to promote the use of simplified procedures and data processing and transmission techniques. For instance, they are to allow for the different involved authorities to delegate

their inspection powers to a service (preferably the customs service), which will carry out inspection on their behalf.

***Modernisation and the use of new technology.*** RTA provisions increasingly acknowledge that technological developments may render inefficient procedures that used to be well adapted to prevailing circumstances. APEC principles call for the regular updating of applicable rules and requirements to match changed circumstances, and for maintaining the efficiency of procedures through the introduction of modern techniques and new technology. Examples of such technology are advanced risk management and systematic cargo-profiling techniques which curtail the physical examination of shipments; or computerisation, electronic data interchange (EDI) and internet technology which provide an environment for paperless trading, including the use of secure on-line technology to facilitate certification procedures. Authorities should ensure the interoperability and/or interconnectivity of such technologies.

NAFTA countries are also in the process of developing a concept of trade automation (North American Trade Automation Prototype or NATAP) that implies introducing standardised trade data elements, harmonising customs clearance procedures and promoting the electronic transmission of standard commercial data using UN/EDIFACT MESSAGES and advance processing by governments. NATAP will use advanced technologies such as the internet for the transmission and receipt of data and Intelligent Transportation System transponder technologies to electronically identify conveyances.

New technologies are central in RTA endeavours to achieve a "paperless" clearance environment. Australian and New Zealand Customs have developed a common format to expedite cargo clearance, accessible either from clients' own facilities, via community data networks or via facilities in Customs premises. In the framework of the JSEPA it is aimed to establish a paperless trading system allowing the electronic transfer of all trade-related information and documents (including invoices, bills of lading etc.) between importers and



exporters in Japan and Singapore. A joint Committee on Paperless Trading will work to implement such a system by 2004 and ensure that electronic trade-related information exchanged between enterprises is used as supporting documentation by the trade regulatory bodies of the Parties.

### ***Government Procurement***

In the area of government procurement, "going beyond" refers to the extent to which provisions applied at the regional level extend beyond those applied in the WTO Agreement on Government Procurement (GPA) – a plurilateral agreement applied by 27 of the WTO's 144 Members.<sup>5</sup> There are two ways in which RTAs appear to have gone beyond the WTO Agreement. First, some RTAs have gone beyond the WTO by adopting obligations substantially similar to the GPA, but *including countries that are not parties to the GPA*. Developing economies are increasingly entering into bilateral or regional procurement agreements whether or not they are parties to the GPA, as witnessed, for example, by the Group of Three Accord (Colombia, Mexico, Venezuela) and other bilateral agreements concluded by Mexico, such as the Mexico-Bolivia FTA and the Mexico-Costa Rica FTA. Likewise NAFTA and more recently the EU-Mexico FTA show that it is possible to bring countries at different levels of economic development together in a liberalising agreement on public procurement. With the prospect of possible negotiations on transparency aspects of procurement, increased attention to government procurement at the regional level can have a positive effect in that countries not parties to the GPA can gain experience in meeting transparency requirements agreed to at the regional level.

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<sup>5</sup> Parties to the GPA comprise Austria, Belgium, Canada, Denmark, European Communities, Finland, France, Germany, Greece, Hong Kong China, Iceland, Ireland, Israel, Italy, Japan, Korea, Liechtenstein, Luxembourg, Netherlands, Norway, Portugal, Singapore, Spain, Sweden, Switzerland, United Kingdom, and the United States.

Second, some RTAs – as part of a process of deep integration – have gone beyond the GPA by enlarging the scope of commitments or by allowing for the provision of additional information.

- ***Scope and coverage.*** Some RTAs have expanded the procurement coverage, others have widened the scope by covering more entities, and yet others have reduced the thresholds of procurement contracts covered. In the EU, extended coverage includes purchases of products, works and services, by railway operators, entities active in the field of energy other than electricity and telecommunications providers. The coverage includes all entities, at the State, regional and local level, whether or not they are listed in annexes to the Directives. NAFTA expands upon the obligations of the GPA by adopting lower thresholds and a negative list approach to the coverage of services procured by the listed entities. Consequently, all services are covered unless specifically exempted. The Australia – New Zealand Government Procurement Agreement (under ANZCERTA), with some exceptions, covers all goods, services and construction activities. The scope of application extends also to entities as all contracting entities unless specifically exempted (a negative list approach) are covered. A similar approach was adopted by New Zealand and Singapore in the CEP.
- ***Non-discriminatory treatment.*** Non-discriminatory treatment, *among Members*, at all stages of procurement is an integral part of the provisions contained in agreements concluded in the Americas, such as NAFTA and the other agreements signed by Mexico. This includes qualification of suppliers, selection procedures, receipt and opening of tenders, and objective award criteria. As in the case of the GPA, these agreements also include explicit prohibition of so-called offsets, policies such as the imposition of conditions that encourage local development or improve a party's balance-of-payments account by such methods as local-content requirements, licensing of technology, or investment. But, unlike the GPA where a developing country may at the time of accession

negotiate conditions for the use of offsets, in these agreements the prohibition applies equally for all countries.

- **Transparency.** RTAs promote transparency through the collection and dissemination of all relevant information through electronic means. For instance, the EU has recently introduced a new Directive on the mandatory use of standard forms for the publication of contract notices. The aim is to simplify the implementation of the advertising rules while adapting them to the electronic means developed as part of the information system on public procurement, launched several years ago by the Commission in collaboration with the Member States. Moreover, the possible use of the common procurement vocabulary (CPV) will contribute to enhance transparency in the EU market. As part of the ongoing ASEAN integration initiatives, Member States recently signed the E-ASEAN Framework Agreement, which calls for the promotion of the use of electronic means in Members' procurement of goods and services.

#### **Harmonisation or Discord?**

At Doha, former WTO Director General Mike Moore referred to the risk of an *à la carte* approach in RTAs in areas such as investment and competition being a recipe for confusion. What seems to emerge from this study is in fact a nuanced picture.

While there is indeed a marked proliferation of investment agreements at the bilateral and regional level, with associated concerns about treaty congestion, there is an apparent convergence of investment provisions toward what might be described as an implicit international standard. This convergence is taking place through two channels. The first channel is through 'side-BITs'. A number of regional and plurilateral agreements exist which, instead of directly incorporating the full range of investment protection and dispute settlement provisions typically found in bilateral investment treaties, envisage the conclusion

of such bilateral treaties between the parties, as 'side-BITs'. Although not part of the RTAs themselves, these 'side-BITs' are explicitly recognised as contributing to the wider process of liberalisation between the parties. An example of this approach is the Cotonou Agreement between the European Union and the ACP Countries. This agreement sets forth general principles regarding the treatment of foreign investment, such as the requirement to accord fair and equitable treatment, and envisages that more specific regulation of policies on foreign investment will be dealt with through the negotiation of bilateral agreements between the Contracting Parties. What this suggests is that the perceived role of BITs is shifting beyond the protection of FDI from developed to developing countries to complementing broader and deeper liberalisation initiatives.

The second channel is through RTAs that closely resemble or build upon NAFTA investment provisions. Indeed, just as most BITs are based upon model BITs, the NAFTA investment provisions have in many instances become a sort of 'model RTA investment chapter'. The trend therefore seems to be towards a more consistent treatment of investment in RTAs, both in terms of the tendency of RTAs to include rules on investment (or side-BITs) and in terms of their content.

But the proliferation of investment agreements has a downside. The patchwork approach has given rise to a considerable increase in the case load of various dispute settlement mechanisms. This increase is natural insofar as more international instruments either have dedicated dispute settlement mechanisms or make explicit provision for use of existing facilities (e.g. ICSID, UNCITRAL). With the rapid proliferation of BITs, for example, the number of disputes brought to ICSID (one of the most commonly referred to dispute settlement facilities in BITs and RTAs) has increased significantly. For example, between 1972 and 1999, 69 disputes were registered with ICSID, for an average of two and a half per year. Between January 2000 and February 2002, 29 disputes have been registered, an average of about 13 per year. The WTO dispute settlement mechanism has likewise experienced heavy traffic, adding to concerns over the current architecture of the WTO Dispute Settlement

Understanding. Given concerns over the existing dispute settlement mechanisms at the WTO and the accelerated use of the various dispute settlement mechanisms for investment, this is an area where considerable work is required in the context of any eventual consideration for negotiating comprehensive investment disciplines at the WTO.

RTAs, as noted earlier, represent only one of several institutional settings addressing competition law and policy at the international level - as witnessed by the plethora of cooperative competition arrangements at the multilateral, regional and bilateral levels. And at the regional level itself, RTAs are highly disparate in the extent of integration on competition-related matters that they seek, particularly the extent to which they seek co-ordination of competition standards and rules. RTAs calling for closer harmonisation of specific competition standards and rules, such as in the EU, contrast with those setting out more general obligations to take action against anti-competitive business conduct, sometimes limited to an obligation to adopt and enforce competition laws, as reflected in the NAFTA.

Different approaches to competition-related matters among regional agreements may also present a challenge to wider harmonisation. As noted earlier, the Canada-Chile FTA provides for the reciprocal elimination of anti-dumping actions related to trade with the other country. However, the approach to the interface between anti-dumping and competition adopted in the Canada-Chile FTA diverges considerably from that of the NAFTA, which, while containing similarly broad competition policy provisions, maintains the parties' rights to apply anti-dumping or countervailing measures (Article 1902). What direction the Free Trade Area of the Americas initiative will follow, and whether it will adopt a model similar to the Canada-Chile FTA or that of the NAFTA, has not yet been determined but will likely need to accommodate a number of country specific considerations, including the fact that less than half the countries in the region currently have competition laws.

As noted earlier, while often falling short of full harmonisation, RTA provisions on trade facilitation help foster convergence of modes of operation within regional groupings.

Moreover, to the extent that they draw on international agreements related to trade facilitation, regional initiatives also serve to foster moves towards wider harmonisation. This is illustrated, for example, by APEC's reference to the Arusha Declaration of the World Customs Organisation and by the frequent reference of RTAs to the Kyoto Convention on the simplification and harmonisation of customs procedures.

In the area of government procurement, RTAs, while on occasion going beyond to GPA, are broadly speaking modelled upon the GPA. EFTA reaffirms the commitments under the GPA, to which all EFTA States are parties. And in many cases, RTAs, such as NAFTA, replicate much of what can be found in the WTO Agreement. To that extent, RTAs may be seen as facilitating a measure of harmonisation internationally. This role can be further promoted to the extent that some agreements may, in turn, be adopted as models. For example, NAFTA seems to have influenced other RTAs concluded in its periphery, such as the Group of Three Accord and several bilateral agreements signed by Mexico with other Latin American counterparts. Indeed, the relevant provisions of these agreements are in many respects similar to the procurement provisions in the NAFTA, although they contain a number of reservations and in some cases the applicability varies among the countries. Some RTAs, such as the CEP and the upcoming US-Singapore FTA, explicitly make reference to the APEC principles, which in turn are complementary to the GPA.

This is not to deny, however, that RTAs may lead to a proliferation of dispute settlement fora. Providing the opportunity for suppliers to challenge the consistency of the conduct of a procurement with the agreement in a timely manner is an important element of many RTAs. This is not, however, a well-researched area.

### **The Effects on Third Parties**

The effect on non-members of RTA provisions on investment, competition and trade facilitation, like the question of harmonisation, needs to be addressed with care.

In the case of BITs and NAFTA-based RTAs third party investors typically enjoy the same rights as investors based in the RTA area when they have a substantial presence in one member and, through this presence, make an investment in another signatory to the RTA. Therefore, for example, a Japanese affiliate based in Canada making an investment in the United States or Mexico enjoys the same rights under the NAFTA as a Canadian-based firm making a similar investment. To the extent that BITs and RTA investment provisions have increasingly come to reflect similar (high) standards, the spread of such agreements results in the de facto plurilateralisation of investment rules. For example, the provisions of NAFTA concerning performance requirements apply to both investments of investors of a Party and investments of an investor of a non-Party. Similarly, Article 73(b) of the EC Treaty provides for the prohibition as of 1 January 1994 of restrictions on movements of capital and payments between member states and between the member states and third countries. And in APEC, principles of a general nature state that Member economies will ensure transparency with respect to laws, regulations and policies affecting foreign investment; extend MFN treatment to investors from any economy with respect to the establishment, expansion and operation of their investments; and accord national treatment to foreign investors in relation to the establishment, expansion, operation and protection of foreign investment, with exceptions as provided for in domestic laws, regulations and policies.

Some agreements may even contain provisions preventing non-members from gaining *more favourable* treatment than members. For example, in August 1994, Member States of the MERCOSUR adopted a *Protocol on Promotion and Protection of Investments from States not Parties to MERCOSUR*. The signatories to the Protocol undertake not to accord to investments of investors of third countries more favourable treatment than that provided for in the Protocol.

This is not to deny, however, that RTAs can lead to investment diversion, whether through the attraction of growth opportunities in a dynamic market, through investment protection provisions within the RTA or because of rules of origin where these are highly restrictive.

This is an empirical question for which evidence is in short supply. It is nevertheless widely acknowledged that current WTO provisions concerning the review of RTAs do not cover investment issues in the way they cover trade, even though RTAs increasingly cover investment. This has given rise to calls for bolstering rules concerning the review and oversight of RTAs. Logic might suggest that any such change should also consider incorporating into Article XXIV and GATS Article V conditions regarding investment provisions in RTAs. There is surprisingly little empirical research on the investment diversion effects of RTAs, even though the potential significance of this issue has been raised with respect to specific agreements.

Moreover, there is a particular risk that a patchwork approach to investment provisions might marginalise developing and least developed countries. Many developing countries and the least developed countries in particular, remain outside the international framework for investment and they tend to receive a disproportionately small share of FDI (70 per cent of FDI to non-OECD countries goes to ten countries). However, a number of regional initiatives have had a clear north-south orientation. Examples include the Euro-Med agreements and the proposed Free Trade Area of the Americas. Two questions remain unanswered however. First, are the interests of developing countries better served through these regional initiatives than through what could be achieved at the multilateral level? Second, given that the least developed countries have largely been excluded from the patchwork framework, how might an eventual multilateral framework at the WTO address this problem?

In the area of competition, as with that of investment, there is provision for RTAs to adopt the principle of non-discrimination. For example, as noted earlier, the Canada-Costa Rica FTA contains a commitment that measures taken to proscribe anti-competitive activities should be applied on a non-discriminatory basis. This is not to deny, however, that a risk of discrimination is inherent in agreements at the regional level. To cite another example, the Free Trade Agreement between Mexico, Colombia and Venezuela (the "G3 Agreement") requires state-owned monopolies to act on the basis of commercial considerations in



operations in their own territories and not to use their monopoly positions to engage in anti-competitive practices in a non-monopolised market in such a way as to affect enterprises *in other member States*.

The use of competition measures in lieu of anti-dumping measures in intra-regional trade, where anti-dumping measures would still apply to third parties, has been raised by certain WTO Members as risking potential distortions in the international trading system where both regimes are based on different criteria and conditions<sup>6</sup>. Certainly it is an area where it has been suggested that the relationship between "competition policy and RTAs should be explored"<sup>7</sup>

Measures of simplification of international trade procedures undertaken at the regional level rarely have a preferential effect. Exceptions to this observation arise in three areas:

- Usually RTAs provide for lower or no customs fees in favour of preferential partners. APEC principles, (adopted in the context of an agreement not entailing regional preferences, and being in any case voluntary in nature) provide that rules and procedures should not discriminate between like products or services or economic entities in like circumstances, for instance with respect to fees charged for import or export related governmental services.

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<sup>6</sup> See WTO (2000), "Synopsis of 'Systemic' Issues Related to RTAs", WTO Committee on Regional Trade Agreements, 2 March 2000, WT/REG/W/37 at p 7.

<sup>7</sup> Japanese contribution in the WTO Committee on Regional Trade Agreements, see "Note of the Meetings of 27 November and 45 December 1997", WTO Committee on Regional Trade Agreements, 13 January 1998, WT/REG/M/15 at para 29. See also the contribution by Canada which concluded that the consequences under GATT Article XXVI(5) of parties to a RTA doing away with anti-dumping remedies and adopting a different mechanism to deal with price discrimination "was not clear, and this deserved more consideration... (as) there might be a link between the two elements that would need to be further explored", para 26. Most recently, the Joint Study Group for the JSEPA acknowledged that "whilst non-application of AD... could have a significant positive demonstration effect, there were differing interpretations regarding its consistency with the WTO MFN obligation" and thus suggested that it remain a subject for "further negotiations", see JSEPA Joint Study Report, paras 48 – 49.

- RTAs may provide for simplified or cheaper marking requirements for preferential partners.
- Facilitation in the area of conformity assessment is implemented mainly through mutual recognition agreements covering the testing and assessment procedures and/or bodies of the participating countries. Such recognition is preferential.

Apart from these provisions, it is impracticable, if not outright WTO-illegal, to distinguish between streamlined procedures for RTA-originating goods and more burdensome procedures for third-party goods. Trade facilitation provisions within regional agreements have thus a more generally positive effect on all traders operating in the region, and not only to traders from the countries participating in the RTA. Some RTAs even explicitly refer to "*common approaches towards the world outside the area covered by the agreement*" (ANZCERTA).

Procurement-related provisions in most RTAs are of a preferential nature; as with the GPA, non-discriminatory treatment of foreign suppliers of goods and services applies among members of the agreement. The extent to which this may involve discrimination against third parties is not, however, well documented. And not all regional initiatives are preferential. For example, the EC Directives seek to ensure that public contracts throughout the Community are open to firms from all members *and non-members* on equal terms. APEC principles call for procurement laws, regulations and practices not to be adopted so as to afford discrimination against the goods and services of any particular country. Moreover, even where provisions are preferential, regional agreements may help foster the practice of transparency more widely and so, eventually, yield more far-ranging benefits.

## **DRAWING LESSONS**

It emerges from this brief survey that provisions in RTAs dealing with investment, competition, trade facilitation and government procurement commonly go beyond provisions in the WTO. Moreover, they do so in a way that allows considerable flexibility of application.

- One of the attractive features of negotiating investment rules at the sub-multilateral level is the flexibility that countries with historically similar approaches to investment issues can bring to the process of negotiation - allowing them to scale their regional ambitions according to particular development objectives and local circumstances and sensitivities.
- Flexibility is also a feature of the treatment of competition at the regional level, as witnessed for example by the decentralised application of EC competition law.
- Although harmonisation is high on the agenda in some RTAs, trade facilitation mostly rests on common principles that are then tailored to the specific circumstances of each participating country. The possibility of quick and significant progress in the area of trade facilitation is influenced by the relative level of development of participating countries. This is clearly linked to differences in the quality of infrastructure, and scope for extended automation and financing of new facilitation projects, but also to the different priorities that may be attributed to the simplification of trade procedures at different stages of development. This has led several RTAs to introduce common principles that are then tailored to the specific circumstances of each participating country, rather than impose common rules and procedures on every aspect of facilitation. For instance COMESA Members are expected to undertake the implementation of facilitation measures based on a “variable geometry” approach in accordance with their level of economic and technological development and adapted to their local circumstances. Differing national implementation practices allow some of the participants

to go beyond the lowest common denominator, while technical assistance helps ensure that others do not get left too far behind”.

- An interesting example of flexibility in the area of government procurement arises in the RTA signed by the EU and Mexico. Procurement contracts are covered over *lower* NAFTA thresholds for contracts being awarded in Mexico but coincide with *higher* GPA thresholds for contracts being awarded in the EU. This has been done to facilitate the tender procedure through a transparent and widely-known rule identical for all tenderers within each of the Members.

Given agreement at Doha that negotiations in each of the "Singapore" issues will take place after the Fifth Ministerial Conference (on the basis of a decision at that conference on negotiating modalities), what lessons might be drawn from experience at the regional level?

Certain consequences of RTA activity in the areas of investment, competition, trade facilitation and government procurement can be seen as contributing to the case for a strengthened multilateral framework. This applies particularly to the effects, potential and real, which the patchwork of regional agreements can have on non-members of those agreements and on the process of dispute settlement. It needs to be acknowledged, however, that even were a multilateral framework to be established, RTAs, and the provisions embodied in them would not disappear. The question then arising is how any strengthened disciplines at the multilateral level might impinge upon, and co-exist with, regional arrangements. This in turn bears on the question of Article XXIV, referred to earlier, and on the activities of the Trade Policy Review Body.

At the same time, there are also features of regional approaches which might usefully be drawn upon in seeking a stronger multilateral framework, whether through:

- their tackling of issues specifically referred to in the Doha declaration, as with the Canada-Costa Rica agreement's treatment of competition, Mexico-Costa Rica's approach to defining investment (excluding financial transactions for speculative purposes), or the wide range of RTA experience in dealing with transparency and procedural aspects of government procurement;
- their ambition in going beyond provisions in the WTO or, as in the case of government procurement, in providing countries not parties to the GPA with experience in meeting transparency requirements;
- their promotion – as in the areas of investment and trade facilitation – of convergence towards an implicit or explicit international standard;
- their provisions for flexibility of application, around commonly agreed rules and principles;
- and their harnessing of new technology, graphically demonstrated in the area of trade facilitation where RTAs seem to be a proven laboratory for testing ideas.

Nevertheless, while lessons might be drawn, for careful and selective application, it is unlikely that an analysis of RTA provisions will lead to overarching conclusions about best practice; this for three reasons.

First, because reviews of RTA experience- and this is certainly the case here – are likely to be about *provisions* rather than the practical effects of actual *implementation*, the latter being extremely difficult to assess.

Second, because neither the WTO nor the RTAs are standing still. Regional trade agreements are expanding and evolving, including in response to other RTAs (e.g., as is the case with recent changes to EFTA to reflect the bilateral agreements between Switzerland and the EU) and multilateral rules and market access continue to develop and expand. Indeed, multilateral and

regional initiatives also enjoy a symbiotic relationship, with RTAs drawing on agreed provisions from the multilateral system and the multilateral system picking up regional initiatives.

And third, because in many cases agreements reached at the regional level are made possible by the close affinities among the members. The circumstances in which regional agreements are reached differ significantly from those applying in the WTO, as well as differing from one agreement to another. The ability, and motivation, of RTAs to design and implement, provisions which go beyond what might be possible, or desired, in the WTO depends on a complex set of factors including the number of members, their geographic proximity, the degree of economic, political and regulatory homogeneity among them, the length of time the agreement has been in operation and the strength of the underlying political and strategic motivations for co-operation. The extent of deep integration in the EU means that any comparison between the EU and the WTO has to be made with extreme care. The diversity of the institutional arrangements being considered does not mean that comparisons cannot be made but any comparison needs to take full account of differing contexts.

Implicit in much of the above is the fact that all RTAs are driven in large measure by geo-political considerations. Their role in the trading system - though important for trade policy - will always be seen by the participating governments in the broader context of the political and strategic objectives, which the agreements seek to serve.

## **ANNEX: WTO PROVISIONS RELATING TO THE "SINGAPORE" ISSUES**

### ***Investment***

Foreign investment issues are dealt with in several WTO Agreements. The General Agreement on Trade in Services (GATS), the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs) and the plurilateral Agreement on Government Procurement include provisions relating to the entry and treatment of foreign enterprises and the protection of certain property rights. The Agreement on Trade-Related Investment Measures (TRIMs) and the Agreement on Subsidies and Countervailing Measures (ASCM) circumscribe the ability of WTO members to apply certain kinds of measures to attract investment or influence the operations of foreign investors.

**The GATS.** Of all the agreements in the WTO, the GATS deals most directly with investment issues. It does so by defining four modes of supply covered by the agreement, one of which, mode three, consists of the provision of services through an established presence in a foreign territory. General obligations are contained in Parts I and II of the agreement. The most important of these are articles I and II. Article I, on scope and definition, stipulates that the GATS applies to measures by members affecting trade in services, defined as including any service in any sector delivered via any of the four modes, with the exception of those supplied in the exercise of government functions. Article II codifies the unconditional most-favoured-nation treatment principle, making it one of the agreement's core general obligations. Under the MFN rule, members of the GATS are committed to treating services and service providers from one member in the same way as services and service providers from any other member. Unlike the GATT, the GATS do not enshrine the right to national treatment.

**TRIMs.** The Agreement on Trade-Related Investment Measures recognises that certain investment measures restrict and distort trade. It provides that no WTO Member shall apply

any TRIM inconsistent with Articles III (national treatment) and XI (prohibition of quantitative restrictions) of the GATT. To this end, an illustrative list of TRIMs agreed to be inconsistent with these articles is appended to the agreement. The list includes measures which require particular levels of local procurement by an enterprise ("local content requirements") or which restrict the volume or value of imports that an enterprise can purchase or use to an amount related to the level of products it exports ("trade balancing requirements").

**TRIPs.** The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs) builds upon the existing framework of intellectual property conventions (i.e. the Berne Convention, 1971, the Paris Convention, 1967 and the Washington Treaty on Intellectual Property in Respect of Integrated Circuits, 1989, among others). The agreement includes national treatment, MFN and substantive standards for the protection of specific categories of intellectual property, domestic enforcement procedures and international dispute settlement. The importance of the agreement in the context of investment relates to the increasingly important share of MNE assets accounted for by intangible assets, such as brands, patents, trademarks, etc. Furthermore, virtually all modern investment agreements which lay down standards for the promotion and protection of foreign investment include intellectual property within the definition of investment.

**Agreement on Government Procurement.** The plurilateral Agreement on Government Procurement requires not only that there be no discrimination against foreign products, but also no discrimination against foreign suppliers and, in particular, no discrimination against locally established suppliers on the basis of their degree of foreign affiliation or ownership. Another investment related aspect of this Agreement is the provision in Article XVI that procuring entities shall not, in the qualification and selection of suppliers, products or services, or in the evaluation of tenders and award of contracts, impose, seek or consider offsets, defined as "...measures used to encourage local development or improve the balance-



of-payments accounts by means of domestic content, licensing of technology, investment requirements, counter-trade or similar requirements”.

**Agreement on Subsidies and Countervailing Measures.** The Agreement on Subsidies and Countervailing Measures (ASCM) defines the concept of “subsidy” and establishes disciplines on the provision of subsidies. The relevance of the ASCM to investment issues is that a number of investment incentives fall under the definition of a subsidy and are either prohibited or are subject to the disciplines of the ASCM if they cause “adverse effects”. Subsidies contingent upon the exportation of goods produced are prohibited. Adverse effects are defined in terms of distortions to the trade flows of subsidised goods.

### ***Competition***

The Doha Ministerial Declaration augmented the role of competition policy in the WTO by not only recognising the case for a multilateral framework to enhance the contribution of competition policy to international trade and development but also by agreeing that negotiations to that end will take place after the 5<sup>th</sup> Ministerial Conference, subject to agreement on the modalities of negotiation. In the two year interim, the WTO Working Group on the Interaction between Trade and Competition Policy has been asked to focus on clarification of certain core principles, including transparency, non-discrimination, procedural fairness and provisions on hardcore cartels; modalities for voluntary co-operation; and support for the progressive reinforcement of competition institutions in developing countries through capacity building.

While the Doha Ministerial Declaration is an important development, competition-policy is not a *new* issue in the context of the WTO. Nonetheless, it has not yet been systematically developed.

Historically, the 1947 Havana Charter, and the International Trade Organisation that it contemplated, envisaged multilateral regulation and review of restrictive business practices.

In particular Chapter V of the Charter, entitled “Restrictive Business Practices”, contained a number of articles “to prevent, on the part of private or commercial public enterprises, business practices affecting international trade which restrain competition, limit access to markets or foster monopolistic control”.

Chapter V was not, however, included in the original GATT (1947). Rather a diluted Decision on Arrangements for Consultations on Restrictive Business Practices was eventually adopted in 1960 by the GATT Contracting Parties. This Decision, recognised “that the activities of international cartels and trusts may hamper the expansion of world trade and... thereby frustrate the benefits of tariff reductions and of the removal of quantitative restrictions or otherwise interfere with the objectives of the General Agreement” and further “that international co-operation is needed to deal effectively with harmful restrictive practices in international trade”. Nonetheless, the Contracting Parties recorded that at the time it would not be practicable to undertake any form of control of such practices, nor to provide for investigations. Thus, the 1960 Decision is limited to recommending that Contracting Parties enter into consultations in the event of harmful restrictive practices in international trade on either a bilateral or multilateral basis.

Beyond the 1960 Decision, competition-related provisions have been incorporated in the GATT and the subsequent WTO Agreements in a piecemeal manner. A number of reviews of these provisions has already been undertaken by the OECD,<sup>8</sup> the WTO<sup>9</sup> and academia.<sup>10</sup> What follows, therefore, is a selective summary highlighting core provisions in the various agreements.

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<sup>8</sup> OECD (1999) *Trade and Competition: Policies for Tomorrow*, Chapter 4: “Competition Elements in International Trade Agreements”. OECD (1994) “Competition Elements in International Instruments”, Background Document for a Joint Roundtable of the Trade and Competition Law and Policy Committees held on 15 April 1994, 21 March 1994, COM/DAFFE/CLP/TD(94)35; see also the Note of Discussions held at the Roundtable, COM/DAFFE/CLP/TD(94)76.

<sup>9</sup> WTO Annual Report 1997, Special Topic: Trade and Competition Policy, Volume 1, World Trade Organisation, 1997 [Hereinafter WTO Annual Report 1997].

Article XVII of GATT 1994 (State Trading Enterprises), concerning state trading enterprises and other enterprises that benefit from exclusive or special privileges, is significant. The article recognises that such enterprises may be operated in a manner creating serious obstacles to trade and notes the importance of negotiations, on a reciprocal and mutually advantageous basis, to reduce such obstacles.

In the services area, GATS Article VIII (Monopolies and Exclusive Service Suppliers) sets out an obligation for WTO Members to ensure that such monopolies and exclusive service suppliers do not act in a manner which is inconsistent with their obligations under Article II (Most-Favoured-Nation Treatment) and specific scheduled commitments. In addition, Article IX of GATS (Business Practices) recognises that anti-competitive business practices of services suppliers “may restrain competition and thereby trade in services”. As regards basic telecommunications services, an additional Reference Paper on Regulatory Principles contains a commitment to adopt appropriate measures to prevent anti-competitive practices by major suppliers.

In the area of trade-related intellectual property rights, Article 8.2 of the TRIPs Agreement (Principles) allows a Member to take appropriate measures in order to prevent the abuse of IPRs by right-holders or practices which unreasonably restrain trade or adversely affect the transfer of technology, provided that they are consistent with the other provisions of the TRIPS Agreement. Article 40.2 (Control of Anti-Competitive Practices in Contractual Licenses) authorises Members to specify in their legislation licensing practices or conditions that may, in particular cases, constitute an abuse of IPRs having an adverse effect on competition in the relevant market. Finally, Article 31 (Other Use Without Authorization of the Right Holder) recognises anti-competitive practices as one of the grounds for compulsory licensing.

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See for example, EU Petersmann, “International Competition Rules for Governments and for Private Business”, *Journal of World Trade*, 1996, 30:3, at 5.

Under the Agreement on Safeguards, Article 11.3 (Prohibition and Elimination of Certain Measures) obliges WTO Members not to encourage or support the adoption of non-governmental measures equivalent to voluntary export restraints, orderly marketing arrangements, or other governmental arrangements prohibited under Article 11.1 of that agreement.

With respect to trade-related investment measures, competition-related provisions are limited to Article 9 of the TRIMs Agreement (Review by the Council for Trade in Goods) which mandates the Council for Trade in Goods to consider whether the agreement should be complemented with provisions on investment and competition policy.

Elements of competition policy are arguably also found in the Agreement on Technical Barriers to Trade, the Agreement on the Application of Sanitary and Phytosanitary Measures, the Agreement on Preshipment Inspection, the Agreement on Government Procurement and the Agreement on Trade in Civil Aircraft. Also of potential relevance, are the more general rules of the WTO relating to non-discrimination and transparency, the consultation and co-operation arrangements under each of the main WTO Agreements and the WTO dispute settlement mechanism.

Another GATT 1994 provision, which could be seen to relate to competition policy, is Article VI (Anti-dumping and Countervailing Duties) and the accompanying Agreement on the Application of Article VI (Anti-dumping Agreement). These allow for anti-dumping duties in cases where dumping has been determined to occur. Furthermore, the concept of non-violation nullification and impairment, based on Article XXIII of GATT 1994 may provide a basis to challenge denials of market access that fundamentally undermine bargained concessions. It has been argued that it is not precluded that restrictive business practices could be a factor in such situations.

Finally, competition related issues are frequently raised in the context of Trade Policy Reviews and have been studied extensively by the WTO Working Group on the Interaction

between Trade and Competition Policy since its establishment at the 1996 Singapore Ministerial Conference. As mentioned, the recent Doha Ministerial Declaration has renewed the WTO Working Group's mandate calling for clarification of various issues at the trade and competition interface between now and the 5<sup>th</sup> Ministerial Conference.

### ***Trade Facilitation***

Specific provisions related to the simplification and harmonisation of trade procedures, including transparency and predictability requirements, are already contained in the WTO legal framework, such as in GATT Articles V, VII, VIII and X, the Agreements on Customs Valuation, Import Licensing, Preshipment Inspection, Rules of Origin, TBT and SPS. Among them only the Agreement on Customs Valuation contains specific provisions on customs and border-crossing procedures. So far there exists no comprehensive agreement on trade facilitation as such.

**Transparency of trade regulations and due process.** GATT 1994 Article X requires Members to publish promptly all laws, regulations, judicial decisions and administrative rulings affecting imports and exports, and all bilateral agreements affecting international trade policy, so as to enable traders to become acquainted with them. Such laws, regulations, and rulings should be administered in a uniform, impartial and reasonable manner. Measures imposing new or more burdensome requirements, restrictions or prohibitions on imports, or on the transfer of payments have to be published before enforcement. Judicial, arbitral or administrative tribunals or procedures have to be available in order to review and correct administrative action related to customs matters. Obligations set forth in GATT Article X are reaffirmed in the Customs Valuation Agreement and the Import Licensing Agreement. Under the General Agreement on Trade in Services (GATS), a general transparency requirement applies to all regulations “of general application” with respect to trade in services.

**Harmonisation of procedures and formalities.** GATT Article VII lays down the main principles governing the valuation of imports for assessment of duties or other charges (not

including internal taxes), in order to enable traders to estimate, with a reasonable degree of certainty, the value of imported products for customs purposes. The assessment should be based on the “actual value” of the imported products or of like products (defined as the price at which the products are sold or offered for sale in the ordinary course of trade under fully competitive conditions) and not on the value of corresponding national merchandise or on arbitrary or fictitious values. The methods of determination should be stable and should be given sufficient publicity.

More detailed rules for valuing imports for customs purposes are contained in the Agreement on Customs Valuation, which aims at providing greater uniformity and certainty in implementation. The agreement pursues this objective by establishing specific definitions, rules, procedural requirements and, in particular, a limited number of applicable valuation methods and conditions as to when a specific valuation method is to be applied. The Agreement provides for the establishment of an adequate legal and judicial framework to ensure the right of appeal of importers and calls for customs authorities to release goods to importers with the posting of a guarantee in cases where further investigation is required.

The Agreement on Preshipment Inspection (PSI) governs the use by government authorities of private agents to conduct quantity, quality and price inspection of imports. The Agreement does not encourage PSI but harmonises the world-wide use of PSI services by requiring, when PSI entities are employed, that pre-shipment inspection activities are carried out in an objective and non-discriminatory manner and offer sufficient guarantees of uniform, fair and due process. The implementation of these provisions is of course the responsibility of the Members using these private services.

**Simplification and avoidance of unnecessary restrictiveness:** *Traffic in transit.* GATT 1994 Article V requires freedom of transit for traffic in transit through the territory of Members and MFN treatment with respect to all charges, regulations and formalities. Traffic

in transit shall be exempt from customs and transit duties or any unnecessary delays or restrictions other than for failure to comply with customs regulations.

*Import and export formalities.* GATT 1994 Article VIII calls for minimising the incidence and complexity of fees and formalities connected with import and export, keeping such fees and charges proportional to the government services rendered, and decreasing and simplifying related documentation requirements. The Agreement on Import Licensing Procedures further establishes disciplines to ensure that import licensing procedures are administered in a neutral and non-discriminatory manner. The Agreement sets up time limits for the publication of information concerning licensing procedures and for the processing of licence applications.

*Marks of origin.* GATT 1994 Article IX establishes MFN treatment with respect to marking requirements and calls for the burden stemming from such requirements to be reduced to the minimum necessary for consumer protection. This means *inter alia* allowing marks of origin to be affixed if possible at the time of importation and doing so without damaging the product, reducing its value or increasing its cost.

*Trade in services.* MFN treatment applies to all trade in services between WTO members, regardless of whether specific commitments have been undertaken. With respect to those sectors for which a WTO Member has made specific commitments in its schedule, the GATS introduces a series of important obligations, including the administration of measures in a reasonable, objective and impartial manner; the availability of administrative and judicial procedures for the review of administrative decisions affecting trade in services; and the existence of objective and transparent criteria to support qualification requirements, such as competence and the ability to supply the service.

Several service sectors provide opportunities and means for facilitating trade, including all types of transport services, telecommunications services (among which *Electronic Data Interchange*), financial services and distribution services. A number of WTO Members have specific commitments in several of these areas.

*Trade-related aspects of intellectual property rights.* The TRIPS Agreement establishes minimum standards for intellectual property rights protection and enforcement. It contains a series of specific provisions on *Special Requirements Related to Border Measures*, relating to measures by which intellectual property rights holders can obtain the assistance of customs authorities in suspending the release of counterfeit or pirated goods into free circulation. The provisions contain safeguards aimed at avoiding the creation of barriers to legitimate trade and against the abuse of IP enforcement procedures.

**Ongoing work.** In December 1996 the Singapore Ministerial Declaration (paragraph 21) directed the Council for Trade in Goods *“to undertake exploratory and analytical work, drawing on the work of other relevant organisations, on the simplification of trade procedures in order to assess the scope for WTO rules in this area”*. Work has focused to date mainly on customs and border-crossing procedures. A Symposium on Trade Facilitation was held in 1998 to explore the main concerns of traders when moving goods across borders, including excessive documentation requirements; insufficient use of information-technology; lack of transparency; unclear import and export requirements; and lack of co-operation among customs authorities. Additional meetings were held *inter alia* on import and export procedures and requirements, on transport and transit of consignments and payments, on electronic facilities and on technical co-operation and development issues.

In November 2001 the Doha Ministerial Conference called for negotiations on trade facilitation after the 2003 WTO Ministerial and subject to agreement on the modalities of negotiation. Until then, *“... the Council for Trade in Goods shall review and as appropriate, clarify and improve relevant aspects of Articles V, VIII and X of the GATT 1994 and identify the trade facilitation needs and priorities of Members, in particular developing and least-developed countries.”*



## ***Government Procurement***

As with investment and services trade, government procurement was traditionally a sector excluded from the scope of the multilateral trade rules. In the GATT, government procurement was explicitly excluded from the key national treatment obligation and, more recently, public procurement has also been carved out of main commitments of the GATS<sup>11</sup>. A growing awareness of the trade-restrictive effects of discriminatory procurement policies resulted in a first effort to bring government procurement under internationally agreed trade rules in the Tokyo Round. This resulted in the first Agreement on Government Procurement (GPA), also called the GATT Government Procurement Code, to which adhesion for Contracting Parties was optional rather than mandatory. The Agreement is intended to allow Members to implement stringent procurement procedures and requirements in an open, transparent and non-discriminatory manner. The limited initial scope of the GPA reflected the tentative steps with which the process of multilateral trade liberalisation advanced into the procurement field. Its scope was confined to procurement of goods, it was subject to quite high monetary thresholds, and it extended only to contracting entities expressly listed in the annexes. This “positive list” approach resulted from the negotiation of individual commitments among participating countries.

The Uruguay Round resulted in a substantial expansion of the scope of the GPA. The Agreement now covers procurement of services and construction in addition to goods, monetary thresholds have been lowered, and sub-central authorities now fall within the scope of the GPA. The WTO reports that the GPA applied annually to a total value of contracts of

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<sup>11</sup> Article III of the basic GATT reads as follows at paragraph 8(a): “The provisions of this Article shall not apply to laws, regulations or requirements governing the procurement by governmental agencies of products purchased for governmental purposes and not with a view to commercial resale or with a view to use in the production of goods for commercial sale.” An analogous exclusion of government procurement is set forth in Article XIII of the GATS. GATS Article XIII:2 does, however, provide for negotiations on the government procurement of services.

around US \$30 billion in 1990-1994. It also reports that the value of procurement that is opened up to international competition is estimated to have increased by ten times under the revised GPA.

Even though the GPA is essentially a market access agreement because it has lowered trade barriers in the procurement field, the bulk of the text of the Agreement is concerned with various aspects of procurement proceedings. The Agreement provides for a framework of common procurement procedures, transparency at all stages of the procurement process and the opportunity for aggrieved private bidders to challenge procurement decisions and obtain redress in the event of inconsistencies with the rules of the Agreement. This reflects the recognition that to give meaning to the provisions on market access it is also necessary to ensure that the procurement systems are transparent, fair, objective and accountable.

Although the scope of procurement covered by the GPA has expanded after the Uruguay Round, it remains a plurilateral agreement mainly among developed economies<sup>12</sup>, with benefits accruing to Members. Moreover, the scope of application depends, in addition to monetary thresholds, on a “scheduling” system where each party lists its covered entities. All procurement of goods is in principle covered, unless specified otherwise in the Annexes. Thus, a negative list approach is used for procurement of non-defence related goods by scheduled entities. On the other hand, with respect to services and construction services, only those specified in positive lists are covered, although some countries use a negative list approach.

As is the case with other WTO Agreements, the GPA is not static. It contains a mechanism for periodic review and negotiations with the aim of improving the Agreement<sup>13</sup>. The goal of these negotiations, currently underway, is the expansion of the coverage of the GPA, the

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<sup>12</sup> Parties to the GPA comprise Austria, Belgium, Canada, Denmark, European Communities, Finland, France, Germany, Greece, Hong Kong China, Iceland, Ireland, Israel, Italy, Japan, Korea, Liechtenstein, Luxembourg, Netherlands, Netherlands with respect to Aruba, Norway, Portugal, Singapore, Spain, Sweden, Switzerland, United Kingdom, and the United States.

elimination of discriminatory measures and practices, which distort open procurement and the simplification and improvement of the GPA, in particular adoption of advances in the area of information technology. An important consideration underlying this review mechanism is the desire to make the Agreement more accessible to non-members and to promote the expansion of its membership.

In addition to promoting accession to the GPA, WTO Members have been exploring a possible multilateral agreement on transparency in government procurement. A Working Group on Transparency in Government Procurement, established after the 1996 WTO Ministerial meeting in Singapore, has been gathering information on national practices and was charged with developing elements of an agreement on transparency in government procurement. At the Ministerial meeting in Doha, WTO Members agreed that -subject to consensus on modalities - negotiations will take place after the Fifth Ministerial meeting, but limited to the transparency aspects, therefore not restricting the scope for countries to give preferences to domestic supplies and suppliers. This highlights the benefits to national economies expected to accrue from transparent public procurement procedures, irrespective of other factors that may impinge on market access. WTO Members also stressed the importance of enhanced technical assistance and capacity building in this area and the need to take into account participants' development priorities.

In the WTO, government procurement is also discussed in the context of the GATS negotiations. Although the initial GATS agreement excluded public procurement of services, Member countries agreed to begin multilateral negotiations on government procurement in services within two years from the date of entry into force of the WTO. These discussions are being pursued in the context of the overall GATS negotiations currently underway, under the so-called “Built-in Agenda”.

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<sup>13</sup> GPA Article XXIV(7)(b).

## GLOSSARY

**Andean Community:** Bolivia, Colombia, Ecuador, Peru and Venezuela.

**ANZCERTA**      **Australia-New Zealand Closer Economic Relations Trade Agreement:** Australia and New Zealand

**ANZGPA**      **Australia-New Zealand Government Procurement Agreement**

**APEC**      **Asia Pacific Economic Co-operation Forum:** Australia; Brunei Darussalam; Canada; Chile; China; Hong Kong, China; Indonesia; Japan; Korea; Malaysia; Mexico; New Zealand; Papua New Guinea; Peru; the Philippines; Russia; Singapore; Chinese Taipei; Thailand; United States; Vietnam.

**ASEAN**      **Association of Southeast Asian Nations:** Brunei Darussalam, Cambodia, Indonesia, Laos, Malaysia, Myanmar, Philippines, Singapore, Thailand, Vietnam.

**ASYCUDA**      **Automated System of Customs Data** (elaborated by UNCTAD)

**BITs**      **Bilateral Investment Treaties**

**CACM**      **Central American Common Market:** Guatemala, El Salvador and Nicaragua.

**CARICOM**      **Caribbean Community:** Antigua and Barbuda, the Bahamas, Barbados, Belize, Dominica, Grenada, Guyana, Haiti, Jamaica, St Kitts and Nevis, St Lucia, St Vincent and the Grenadines, Republic of Suriname and Trinidad and Tobago. The Bahamas does not participate in the common market and Haiti is not yet a full member.

**CCRFTA**      **Canada-Costa Rica Free Trade Agreement**

**CEFTA**      **Central European Free Trade Agreement:** Bulgaria, Czech Republic, Hungary, Poland, Romania, Slovakia, Slovenia.

**CEP**      **New Zealand and Singapore Closer Economic Partnership**

<b>COMESA</b>	<b>Common Market for Eastern and Southern Africa:</b> Angola, Burundi, Comoros, Democratic Republic of Congo, Djibouti, Egypt, Eritrea, Ethiopia, Kenya, Madagascar, Malawi, Mauritius, Namibia, Rwanda, Seychelles, Sudan, Swaziland, Zambia, Zimbabwe.
<b>EC</b>	<b>European Community</b>
<b>ECOWAS</b>	<b>Economic Community of West African States</b>
<b>EEA</b>	<b>Agreement on the European Economic Area:</b> Austria, Belgium, Denmark, Finland, France, Germany, Greece, Iceland, Ireland, Italy, Liechtenstein, Luxembourg, the Netherlands, Norway, Portugal, United Kingdom, Spain, Sweden.
<b>EFTA</b>	<b>European Free Trade Association:</b> Iceland, Liechtenstein, Norway and Switzerland.
<b>EU</b>	<b>European Union:</b> Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, United Kingdom, Spain, Sweden.
<b>Euro-Med</b>	(Euro-Mediterranean Association Agreements) (First-generation): The EU has concluded these with Cyprus, Malta, Turkey.
<b>Euro-Med</b>	(Euro-Mediterranean Association Agreements): The EU has concluded these with Tunisia, Israel, Morocco and the Palestinian Authority.
<b>Euro-Med</b>	(Euro-Mediterranean Co-operation Agreements): The EU has concluded these with Algeria, Egypt, Jordan, Lebanon and Syria.
<b>FTAA</b>	<b>Free Trade Area of the Americas:</b> Antigua and Barbuda, Argentina, Bahamas, Barbados, Belize, Bolivia, Brazil, Canada, Chile, Colombia, Costa Rica, Dominica, Dominican Republic, Ecuador, El Salvador, Grenada, Guatemala, Guyana, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, St Lucia, St Kitts and Nevis, St Vincent and Grenadines, Suriname, Trinidad and Tobago, Uruguay, United States, Venezuela.
<b>GATT</b>	<b>General Agreement on Tariffs and Trade</b>
<b>Group of Three Accord:</b> Colombia, Mexico, Venezuela	
<b>ICSID</b>	<b>International Centre for Settlement of Investment Disputes</b>
<b>JSEPA</b>	<b>Japan-Singapore Economic Partnership Agreement</b>

<b>MERCOSUR</b>	<b>Mercado Común del Sur / <i>Southern Common Market Agreement</i>:</b> Argentina, Brazil, Paraguay and Uruguay.
<b>NAFTA</b>	<b>North American Free Trade Agreement:</b> Canada, Mexico, United States.
<b>NATAP</b>	<b>North American Trade Automation Prototype</b>
<b>OECD</b>	<b>Organisation for Economic Cooperation and Development</b>
<b>RTA</b>	<b>Regional Trade Agreement</b>
<b>UN</b>	<b>United Nations</b>
<b>UNCITRAL</b>	<b>United Nations Commission on International Trade Law</b>
<b>UNCTAD</b>	<b>United Nations Conference on Trade and Development</b>
<b>UN-ECE</b>	<b>United Nations Economic Commission for Europe</b>
<b>UN/EDIFACT</b>	<b>United Nations Directories for Electronic Data Interchange for Administration, Commerce and Transport</b>
<b>WCO</b>	<b>World Customs Organisation</b>
<b>WTO</b>	<b>World Trade Organisation</b>